IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "G", MUMBAI

Before Shri J. Sudhakar Reddy, Accountant Member
and Smt. Asha Vijayraghavan, Judicial Member.

I.T.A. Nos 255, 256 & 257/Mum/2010.
Assessment years : 2003-04, 2004-05 & 2005-06.

Guruprerna Enterprises, B-103/104, Vrindavan, Rambaug Road, Borivali (W), Mumbai – 400092. PAN AAFFG 1556N	**Vs.**	Asstt. Commissioner of Income-tax, Central Circle-29, Mumbai.
Appellant.		Respondent.

I.T.A. Nos.544, 545/Mum/2010 & 4836/Mum/2009.
Assessment years : 2003-04, 2004-05 & 2007-08.

Asstt. Commissioner of Income-tax, Central Circle-29, Mumbai.	**Vs.**	Guruprerna Enterprises, Mumbai.
Appellant.		Respondent.

C.O. No. 54/Mum/2010
(In ITA No. 4836/Mum/2009)
Assessment Year : 2007-08.

Guruprerna Enterprises, Mumbai.	**Vs.**	Asstt. Commissioner of Income-tax, Central Cir.29, Mumbai.
Cross Objector		Respondent

Assessee by : Shri Sashi Tulsiyan.
Department by : Shri Pavan Ved.

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O R D E R

Per J. Sudhakar Reddy, A.M. :

In this group there are three appeals filed by the Revenue for the assessment years 2003-04, 2004-05 and 2007-08. The assessee has also filed three appeals for the assessment years 2003-04, 2004-05 and 2005-06. The assessee also filed the cross objection for the assessment year 2007-08. In all there are cross appeals for assessment years 2003-04 and 2004-05 and an assessee's appeal for the assessment year 2005-06, a Revenue appeal for assessment year 2007-08.

2. The learned counsel for the assessee submitted that he may be permitted to withdraw the cross objection filed in departmental appeal in ITA No. 4836/Mum/2009. The learned DR had no objection to this withdrawal. Thus the C.O. No. 54/Mum/2010 is dismissed as withdrawn.

Now we consider the other six appeals.

3. **Facts in brief:**

The assessee is a partnership firm and is in the business of a builder and developer. A search u/s 132(1) of the Income-tax Act, 1961 was conducted on 05-01-2007 at the business and residential premises of one Shri Gurinder Singh Bawa, and his family members and also various family concerns, including the office premises of the company M/s Gunjyot Properties and M/s Bawa Developers P. Ltd. During the course of the search, a copy of the agreement dated 24-03-2003 pertaining to a joint venture between M/s Gunjyot Properties Pvt. Ltd., Shri Umesh Gandhi and assessee M/s Guruprerna Enterpriese was seized. As the assessee is a co-developer along with Gunjyot Properties P. Ltd. in the project called ELCO Arcade/ELCO Mall and Residency situated in Bandra, a survey u/s

133A of the I.T. Act, 1961 was carried out on05-01-2007, at the business premises of the assessee at B-103/104, Vrindavan, Rambaug Road, Borivali West, Mumbai. Consequent to the survey proceedings, Mr. Mansukhbhai Sureja, Senior Partner in the firm vide his statement recorded u/s 131 of the I.T. Act, 1961 dated 13-02-2007 offered an amount of Rs. 5.00 Crores being undisclosed cash receipts on sale of shops in the Project Elco Mall and Residency, a joint venture between assessee M/s Guruprerna Enterprises, Umesh Gandhi and M/s Gunjyot Properties. As the Assessing Officer was of the view that the income of the assessee needs to be reassessed, proceedings u/s 153C of the I.T. Act, 1961 were initiated. Notice u/s 153C of the I.T. Act, 1961 dated 31-01-2008 was issued and served on the assessee, calling for submission of return of income for the assessment year 2001-02 to assessment year 2007-08 as per the provisions of the I.T. Act. In response, returns of income for these years were filed on 07-10-2008 declaring Nil income.

4. The AO completed the assessment u/s 143(3) read with section 153C of the Act on 31-12-2008, for assessment year 2003-04 determining the income at Rs.63,76,130/-, inter alia, making an addition of Rs.63,77,128/- under the head "Income from other sources", by applying section 68. For the assessment year 2004-05 the assessee filed a Nil return of income and the AO determined the income at Rs.1,09,00,000/-. During this year an addition has been made u/s 68 under the head "Income from other sources". Similarly, for the assessment year 2005-06 the assessee filed a Nil return of income and the AO assessed the income at Rs.5,28,51,124/-. Aggrieved, the assessee carried the matter in appeal. The first appellate authority by way of his common order dated 09-11-2009 for all the three assessment years i.e. assessment years 2003-04, 2004-05 and 2005-06 had granted part relief. Both the parties being aggrieved of this order, have filed appeals before us.

5. For the assessment year 2007-08, the assessee again filed a Nil return of income and the AO made an addition of Rs.5 crores on the basis of a declaration made by the assessee on 03-04-2007. On appeal, the first appellate authority held that this amount of Rs.5 crores can be brought to tax in the assessment year 2009-10 as the assessee is following project completion method of accounting. Aggrieved, the Revenue is in appeal.

6. We first take up the assessee's appeal in ITA Nos. 255, 256 and 257/Mum/2010 for the assessment years 2003-04 to 2005-06.

7. During the assessment years 2003-04 and 2004-05, the assessee raised unsecured loans. The AO issued summons to various parties, for verifying the loans. On the basis of such verification, he came to a conclusion that an amount of Rs.63,77,128/- in respect of 26 parties for the assessment year 2003-04 and Rs.1,09,00,000/- in respect of 29 parties for the assessment year 2004-05, are not genuine loans. He made an addition u/s 68. Further he disallowed interest on these loans for the assessment years 2003-04 and 2004-04 as well as for the assessment year 2005-06.

8. In appeal, the first appellate authority admitted fresh evidences from the assessee for these cash credits and forwarded the material to the AO for submission of the remand report. The assessee had pleaded that he was unable to get cooperation from the lenders for the reason that these were very old loans, and that repayment was done in most of the cases and in such circumstances there was a delay in obtaining the evidences. The AO gave him remand report and the first appellate authority considered the remand report of the AO dated 14-09-2006. On jurisdictional issue the first appellate authority rejected the contentions of the assessee on the validity of assessment framed u/s 143(3) read with section 153C. He held that the joint venture agreement between

the assessee and Bawa Group of concerns was seized during the course of search and that this shows that the assessee was also part of the agreement in the business of the said group. The first appellate authority further pointed out that in the survey operations at the premises of the assessee, additional income of Rs.5 crores was offered to tax. On the issue of addition u/s 68, the first appellate authority categorized the same into two types. In the first category of cash credits, the CIT(Appeals) observed that the assessee had filed relevant documentation and the AO has not given any finding as to the lack of credit worthiness of the party. He held that the AO disbelieved these credits, on the sole ground that the lenders, did not respond to the summons served on them. In the second category, the CIT(Appeals) listed out cases where summons could neither be issued, for want of full addresses and cases where summons were returned unserved feom the addresses given by the assessee. The first appellate authority accepted the genuineness of credits in cases of 10 parties for the assessment year 2003-04 and further 8 parties for the next assessment year. He granted part relief. Further aggrieved, the assessee is in appeal on the following grounds for assessment year 2003-04:

1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in upholding the validity of the reopening of the assessment u/s 153C of the I.T. Act even though the relevant pre-conditions for exercising the jurisdiction by the Assessing Officer were not satisfied in the case of the appellant.

2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in confirming the addition of unsecured loan from various parties amounting to Rs.42,27,128/- as income from other sources.

3. In doing so, the Ld. CIT(A) erred in not considering the fact that all the loan – creditors are tax payers and it has been held in various judgments by the courts that once the assessee gives all the

documentary evidence and lender are tax payers, the onus on the asseseeu/s 68 gets discharged.

4. The Ld. CIT(A) also erred in not considering the fact that assessee is not required to prove the Source of the source for proving genuineness of the cash credit u/s 68 of the Income-tax Act.

5. While confirming the addition, ld. CIT(A) erred in not considering the various documentary evidences produced before him.

6. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in confirming the proportionate disallowance of Interest Expenses pertaining to the addition of loan u/s 68 which has been confirmed by the Ld. CIT(A).

9. The learned counsel for the assessee, Mr. Sashi Tulsiyan, vehemently contended that the assessment order framed u/s 153C read with section 143(3) is bad in law as no material whatsoever, belonging to the assessee, has been seized from the premises of M/s Gurvinder Singh Bawa and his family concerns, evidencing existence of undisclosed income. He read section 153C and drew the attention of the Bench specifically to the word "belong or belongs to person other than the person referred to in section 153A" and argued that none of the materials seized in the search in the Bawa group, belongs to the assessee. He pointed out that the only document found, was a joint venture agreement dated 24-03-2003, and submitted that the agreement does not belong to the assessee and it belongs to M/s Gunjyot Properties P. Ltd. Under these circumstances, he submits that the assessment is bad in law. He relied on the judgment of Hon'ble Gujarat High Court in the case of Vijaybhai N. Chandrani vs. ACIT reported in (2010) 36 DTR (Guj.) 225. He further relied on the decision of the Ahmedabad Bench of the Tribunal in the case of Meghmani Organics Ltd. vs. DCIT 36 DTR (Ahd.) 187.

10. In the second part of his submission, Mr. Sashi Tulsian submitted that section 153C mandates that the assessment against a person proceeded against u/s

153C, shall be assessed or reassessed in accordance with the provisions of section 153A. Referring to section 153A second proviso, the learned counsel submitted that the assessments which are pending on the date of initiation of the search u/s 132 or making of requisition u/s 132A shall abate. He vehemently contended that no incriminating material belonging to the assessee has been found during the course of search and in such circumstances no income can be assessed u/s 153A. As regards disclosure of cash receipts amounting to Rs.5 crores is concerned, the learned counsel submitted that it relates to a period subsequent to these assessment years. He vehemently contended that, there is no material seized from the premises of Guruvinder Singh Bawa and his family concerns, which evidenced existence of undisclosed income and that under such circumstances reopening of assessment u/s 153A is bad in law. He pointed out that while making additions u/s 68, and making disallowance of interest income, the AO has not referred to any seized material. He pointed out that the first appellate authority has asked for the remand report from the AO on the objections raised by the assessee regarding the validity of assessments and that the AO has not replied or commented on the validity.

11. The learned counsel for the assessee pointed out that for the assessment years in question the assessments have become time barred as no scrutiny proceedings were initiated. He submitted that the assessment proceedings have become final as on the date of search and in such circumstances there is no question of abatement of proceedings for assessment.

12. The learned counsel relied on the following case laws :

1. KGR Exports vs. JCIT, Central Circle, ITA No. 494/V/2007 .
2. LMJ International vs. DCIT 119 TTJ 214 (Cal.).
3. P. Srinivas Naik vs. ACIT 114 TTJ 856 (Beng.)

4. Anil Kumar Bhatia vs. ACIT ITA No. 2660 to 2665/Del/2009, order dated 01-01-2010.

5. Anil P. Khemani vs. DCIT, ITA No. 2855 to 2860/Mum/2008, order dated 23-02-2010.

He reiterated his contentions that u/s 153C, only pending assessments abate and completed assessments remain unaffected, unless the Revenue discover and seizes any material justifying the reopening of the assessment. As no material is found, the assessee claimed that the proceedings u/s 153C have to be declared illegal and bad in law.

13. On merits of the case, Mr. Sashi Tulsian filed voluminous paper book running into 568 pages. He submitted that for the assessment years 2003-04 and 2004-05, the addition towards cash credits were made mainly for the reason that the lenders did not present themselves before the AO for confirmation of the credits. The assessee, he submitted, filed confirmation letters in all the cases. He pointed out that the deficiency in addresses in certain cases was made good by the assessee in the course of appellate proceedings. He submitted that the assessee has furnished confirmatory letters from the parties, Permanent Accountant Nos., copy of Income Tax returns of each of the parties for the relevant assessment years, copy of bank accounts in respect of all the lenders as well as the balance sheet and Profit & Loss account of these parties. He vehemently contended that due to elapse of time and also due to the fact that the assessee had repaid most of the loans with interest, it had lot of difficulty in getting the cooperation of the creditors and despite such difficulties, the assessee had furnished all necessary information, to the extent possible. He filed copies of the confirmatory letters, Permanent Account Nos., copies of income-tax returns for the relevant years, copies of the Bank accounts as well as balance sheet and profit & loss account in the paper book to prove his point. On a query from the Bench, he submitted that tax at source has

been deducted in most of the cases and the returns filed. He submitted that wherever interest was less than Rs.5000/-, no TDS was deducted but the declaration in Form No. 15G has been filed. A chart of the same is filed. He submitted that when the creditors are regular tax payers and details of the same are furnished, the assessee has discharged the onus that lay on him to prove the genuineness of the credits. He submitted that the assessee was under no obligation to prove the source of the source. He relied on the following case laws :

1) Sarogi Credit Corporation vs. CIT 103 ITR344.

2) DCIT vs. Rohini Builders 256 ITR 360 (Guj.)

3) CIT vs. Orissa Corporation 159 ITR 78 (SC).

4) CIT vs. U.M. Shah, Proprietor, Shrenik Tading Co. 90 ITR 396.

5) Addl.CIT vs. Bahri Bros. P. Ltd. 154 ITR 244.

6) S. Hastimal vs. CIT 49 ITR 273

7) Oriental Trading Co. Ltd. vs. CIT 723 (Bom.)

8) Umacharan Shaw & Bros. vs. CIT 37 ITR 271.

14. He summarized by submitting that the assessee has provided evidence to prove the identity of the creditors, genuineness of the transactions and the credit worthiness of the lenders. He pointed out that in the remand report the AO only tried to highlight that the lenders were housewives and HUFs and the income earned by the parties was meager. He disputed these findings and argued that the loans were fully established to be genuine.

15. Coming to the other grounds, he submitted that the interest on these loans added u/s 68 was consequentially disallowed and the decision in this matter is consequential to the decision taken in the earlier grounds of appeal.

16. The learned Dr. Mr. Pavan Ved, relied on the order of the AO as well as the order of the CIT(Appeals). In his brief submissions, he argued that the assessment is valid on the reasons given by the CIT(Appeals) in his order. He relied at para 44 of the CIT(Appeals)' order, wherein the CIT(Appeals) has held that section 153C speaks of the assessment of income of "any other person" where the AO is satisfied that money, bullion, jewellery or other valuable article or things or books of account or documents seized or requisitioned to belongs or belongs to a person other than the person referred to in section 153A, and when tested on this wording the joint venture agreement between the assessee and the Bawa group of concerns was seized, which shows that the assessee was also part of the agreement and, therefore, it was detected that the assessee was "any other person" whose case was required to be taken up for assessment or reassessment. The first appellate authority had further held that once the provisions of section 153C are attracted, initiation of proceedings against the other person is mandatory. The first appellate authority further referred to the fact that when the senior partner was questioned, he admitted to having sales transactions in cash and ultimately to having additional income of Rs.5 crores based on these documents. On the issue of cash credits, he relied on the order of the first appellate authority. On a query from the Bench as to whether he would be citing any case laws, the learned DR did not cite any case laws but relied only on the orders of the revenue authorities.

17. Rival contentions heard. On a careful consideration of the facts and circumstances of the case, a perusal of the papers on record and the orders of the authorities below as well as the case laws cited, we hold as follows.

18. The undisputed fact is that during the course of search operation on premises of Mr. Gurinder Singh Bawa and its concerns, a joint venture agreement entered into between M/s Gunjyot Properties P. Ltd., Mr. Umesh Gandhi and M/s

Guruprerna Enterprises (assessee) was seized. This is a disclosed documents. It is also undisputed fact that no incriminating material or evidences indicating unaccounted income, transactions or assets relating to the assessee were found. The issue now is whether the initiation of proceedings u/s 153C is bad in law. The first limb of the argument is based on the judgment of the Hon'ble Gujarat High Court in the case of M/s Vijay Bhai N. Chandrani vs. ACIT 38 DTR 225 wherein the Hon'ble High Court has held as follows :

> "Sec. 153B lays down the time limit for completion of assessment under s. 153A. Sec. 153C which is similarly worded to s. 158BD, provides that where the Assessing Officer is satisfied that any money, bullion, jewellery or other valuable article or hing or books of account or documents seized or requisitioned **belongs or belong to a person other than the person referred to in s. 153A** he shall proceed against such other person and issue such other person notice and assess or reassess income of such other person. However, there is a distinction between the two provision in as much as under s. 153C notice can be issued only where the money, bullion, jewellery or other valuable article or thing or books of account or document seized or requisitioned belong to such other person whereas under s. 158BD if the Assessing Officer is satisfied that any undisclosed income belong to any person, other than the person with respect to whom search was made under sec. 132 or whose books of accounts or other documents or assets were requisitioned under s. 132A, he shall proceed against such other person under s. 158BC. Thus a condition precedent for issuing notice under s. 153C and assessing or reassessing income of such other person, is that the money, bullion, jewellery or other valuable article or thing or books of account or documents seized or requisitioned should be belong to such person. If the said requirement is not satisfied, resort cannot be had to the provisions of s. 153C. The documents in question, namely, the three loose papers recovered during the search proceedings do not belong to the petitioner. It may be that there is a reference to the petitioner in as much as his name is reflected in the list under the heading 'Samutkarsh member details' and certain details are given under different columns against the name of the petitioner along with other members, however, it is nobody's case that the said documents belong to the petitioner. It is not even the case of Revenue that the said three documents are in the handwriting of the petitioner. In the circumstances, when the condition precedent for issuance of notice is not fulfilled, any

section taken under s. 153C stands vitiated. For the foregoing reasons, the petition succeeds and is accordingly allowed."

19. On the second limb of his argument, that when no incriminating material is found, the AO does not get jurisdiction to re-open assessments which do not abate. The learned counsel placed reliance on the judgment in the case of Meghmani Organics Ltd. DCIT, 36 DTR 187, wherein the Ahmedabad Bench of the Tribunal, held as follows :

"The AO assumes jurisdiction for framing assessment under s. 153C where the AO is satisfied that any money, bullion, jewellery or other valuable articles or things or books of account or documents seized or requisitioned belongs or belongs to a person other than the person in whose case search is conducted under s. 132(1). Therefore, for initiating action under s. 153C for framing assessment under s. 153A, the prerequisite is the satisfaction of the AO that the money etc. and documents etc. belongs to a person other than the person searched under s. 132. The AO in the assessment order has categorically held that pp. 87 to 91 of Annex. A-4 seized from LK are his own handwritten estimate for the proposed work of the assessee. Therefore, though these documents may refer to the work proposed on behalf of the assessee, the same cannot be considered as "documents belonging to the assessee". If a person makes some jotting/notes etc. for his own purpose and which has no nexus to hold that it belongs to other person and also does not contain a material which reveals any income therein, cannot be used so as to initiate action under s. 153C. Similarly, pp. 84 to 86 of Annex. A-4 seized from the residence of LK are records maintained by LK for his own purpose. The sais documents do not belong to the assessee though it may refer to the work carried on behalf of the assessee. If the assessee has engaged the services of a professional and if the professional maintains his own record for the purpose of rendering his services, the documents cannot be said to be belong to such other person. LK was engaged by the assessee and he was expected to verify the bills raised by dependent contractors so as to certify that the bills raised are in accordance with the terms of contract and also contain deductions for materials supplied by the assessee. This being the documents maintained by LK for his personal purpose, though may be referable to the assessee, cannot be considered as "belonging to the assessee". It is also admitted by the AO that the seized documents do not reveal any specific undisclosed income. It is also admitted fact the none of

> the assessments in the present appeals were pending on the date of initiation of action under s. 153C i.e. on 14th April, 2006. Though the appeals before the CIT(A) or Tribunal were pending, the same do not come within the parameters of second proviso to s. 153C s those assessments shall not abate. Only the assessments or reassessments which are pending before the AO on the date of initiation of search shall abate."

Reliance was also placed on the decision of the Tribunal, Visakhapatnam Bench, in the case of KGR Exports vs. JCIT in ITA No. 494/V/2007, wherein the Tribunal held as under :

> "Since section 153A overrides provisions of section 147 of and 148 can it be the intention of the legislature to give enormous powers on the Assessing Officer for opening a completed assessment time and again? In our opinion, the legal restrictions and conditions prescribed for reopening the assessment still applies to the cases reopened u/s 153A. The intention of the legislature could not have been otherwise lest it should lead to unnecessary harassment upon the assessee's. Though the completed assessments can be reopened under Section 153, the issues which have already been concluded in the earlier assessments should not be subject matter of reassessment unless some incriminating material concerning those issues were found during the course of search. Otherwise, in the concluded assessments which have been reopened u/s 153A, the assessing officer should restrict himself with the additions arising out of the incriminating materials found during the course of search.

Reliance was also placed on the decision of Kolkata Bench of the Tribunal in the case of LMJ International Ltd. vs. DCIT 119 TTJ 214 wherein the Tribunal held as under :

> "Where nothing incriminating is found in the course of search relating to any assessment years, the assessments for such years cannot be disturbed; items of regular assessment cannot be added back in the proceeding under s. 153C when no indiscriminating documents were found in respect of the disallowed amounts in the search proceedings".

In the case of P. Srinivas Naik vs. ACIT 114 TTJ, the Bangalore of the ITAT held as under :

> "The books of account or document do not belong to the assessee, as these were seized from the premises of R. It is nowhere stated hat these books of account or documents showed that all the transactions belonging to the assessee. Such books of account or documents contained the transactions relating to the group concerns of R. No valuable belonging to the assessee has been seized during the course of search. The terms belonging implied something more that the idea of casual association. It involves the notion of continuity and indicates one more or less intimate connection with the person over a period of time. The books of account or documents seized during the course of search have a close association with the group. It does not record the transaction carried out by the assessee. Documents or books of account found during the course of search and seizure cannot be termed, to be indicating any limited interest of the ownership of the assessee in such books of account or documents. The language used in s. 153C is materially different from the language used under s. 158BD. As per s. 158BD, if any undisclosed income related to other person, then action against such other person can be taken provided such undisclosed income is referable in the document seized during the course of search. However, s. 153C says that if valuable or books of account or documents belonging to other persons are seized then action under s. 153C can be taken against that person. In the instant case, books of account or documents do not belong to the assessee and, therefore, the Assessing Officer was not justified in initiating action under s. 153A rws. 153C.

In the case of Anil Kumar Bhatia vs. ACIT in ITA No. 2660 to 2665/Del/2009, order dated 01-01-200, the Delhi Bench of the Tribunal held as follows:

> "We are of the considered view that since for all the assessment years in consideration, processing returns u/s 143(1)()(a) stood completed, for returns filed in due course before search, and no material being found in search thereafter, no addition can be made for agricultural income, gifts, unexplained deposit as stated in chart (supra)."

20. In the case on hand, what was found was a joint venture agreement in which the assessee is a party. The assessee has certain rights and duties as per terms and conditions of this agreement. It cannot be said that the agreement does not belong to him. In our humble opinion, the joint venture agreement belongs to all three parties. As the agreement which is seized also belongs to the assessee, in our

opinion, the judgment of the Hon'ble Gujart High Court in the case of Vijay Bhai N. Chandrani (supra) and in the case of Meghmani Organics Ltd. (supra) do not apply. In fact in the case of Vijay Bhai Chandrani, what was seized were, three loose papers wherein there is certain reference to the assessee in that case. Under those circumstances the Hon'ble Court held that it nobody's case that the said documents belong to the petitioner. Similarly in the case of Meghmani Organic Ltd., what was seized was a hand written estimate for the proposed work of the assessee. It was found that when a person makes some jottings/notes, for his own purpose and which has no nexus to hold that it belongs to a other person, action u/s 153C cannot be attracted. In the case on hand, a legal document belonging to all three parties was seized. Hence, in view of our above discussion, we dismiss the argument of the assessee that invoking the provisions of section 153C in this case is bad in law for the reason that no document or material belonging to the assessee was found during the course of search.

21. We now come to the second contention of abatement. The undisputed fact is that the dates are a follows :

Asstt.Year	Date of filing Return.	Date on which Notice u/s 143(2) Should be issued.	Date on which assessment becomes time barred.
2003-04	31-10-2003	31-10-2004	31-03-2006
2004-05	29-10-2004	31-10-2005	31-12-2006
2005-06	28-09-2005	31-10-2006	31-12-2007

For all the three years notice u/s 143(2) have not been issued. In the case of Anilkumar Bhati (supra) the case was decided in favour of the assessee.

Neverthless in the case of Shivnath Rai Harnarain (India) Ltd. vs. CIT 304 ITR (AT) 271 (Del.), the Delhi Bench of the Tribunal held as follows :

> " Held, dismissing the appeals, (i) that there is no requirement for an assessment made under section 153A of the Act to be based on any material seized in the course of search. Further, since under the second proviso to section 153A pending assessment or reassessment proceedings in relation to any assessment year falling within the period of six assessment years referred to in section 153A(b) of the Act shall come to an end, the Assessing Officer gets jurisdiction for six assessment years referred to in section 153A(b) of the Act for making an assessment or reassessment. Further, no income, which was already subjected to assessment under section 143(3) or under section 143(3)/147 of the Act completed prior to search in respect of six assessment years referred to in section 153A(b) of the Act and in the second proviso to section 153A, had been included in the assessment framed under section 153A of the Act. Hence, the Assessing Officer was perfectly justified in framing the assessment under section 153A of the Act for the assessment years under consideration."

22. In the case of M/s Shyamlata Kaushik 114 TTJ 940, the Delhi G-Bench of the Tribunal held as follows :

> "The contention of the assessee was that there was no seized material based on which the assessment was completed by the AO in the case of the assessee and, therefore, the assessment framed should be held to be null and void. It was also submitted that the provisions of s. 153A cannot be invoked to make an assessment or reassessment of income just because a search had taken place in the case of an assessee. This contention of the assessee cannot be accepted. There is no requirement for an assessment made under s. 153A being based on any material seized in the course of search. Further under the second proviso to s. 153A pending assessment or reassessment proceedings in relation to any assessment year falling within the period of six assessment years referred to in s. 153A(b) shall abate. Thus the AO gets jurisdiction for six assessment years referred to in s. 153A(b) for making an assessment or reassessment. It is not the complaint of the assessee that any income, which is already subjected to assessment under s. 143(3) or under s. 148 completed prior to the search in respect of six assessment years referred to in s.

153A(b) and in the second proviso to s. 153A, has also been included in the assessment framed under s. 153A. In such circumstances the plea of the assessee cannot be accepted."

There is no detailed discussion on the provision in this order.

The Ahmedabad Bench of the Tribunal in the cse of Meghmani Organic (supra) considered these decisions of the Delhi Bench and distinguished the same.

23. The learned Accountant Member, who was a party to the decision of the Delhi Bench of the Tribunal in the case of Shivnath Rai Harnarain (India) Ltd. 117 ITD 74 has, in the case of M/s Viraj Forgins Ltd. vs. DCIT in ITA No. 1948/M/2008 and in the case of M/s Viraj Impoexpo Ltd. vs. DCIT in ITA No. 1949/M/2008 F-Bench, order dated 22-01-2010 has distinguished the decision in the case of Shivnath Rai Harnarain (India) Ltd.(supra) and at para 4.2 and 4.3 held as follows :

"4.2 We have perused the records and considered the rival contentions carefully. The legal dispute raised in this ground is whether issues considered and decided in the regular assessment can be re-considered in an assessment proceedings initiated under section 153A. In case of search, the AO under section 153A is empowered to issue notices to the searched person requiring him to furnish the return of income in respect of each assessment year falling within the six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted or requisition is made. Further the second proviso to section 153A also provides that assessment or re-assessment relating to any assessment year falling within the period of six assessment years referred to above pending on the date of initiation of search under section 132 or making of requisition under section 132A as the case may be shall abate. Normally, the assessments which are pending in appeal or in revision cannot be said to be complete and therefore assessment/re-assessment pending in appeal/revision could also to be considered as pending on the date of search but the CBDT in the circular No.7 of 2003 dated 5.9.2003 has clarified that appeal, revision or rectification proceedings pending on the date of initiation of search under section 132 will not abate. In other words, only the

assessments pending before the Assessing Officer for completion shall abate. In this case there is no dispute that on the date of search, the assessment in the case of assessee had already been completed by the AO and in terms of the circular of the CBDT, the regular assessment made in case of the assessee will not abate. Therefore in our view the points/ issues decided in the assessment cannot be re-considered in the proceedings under section 153A unless there is some fresh material found during the course of search in relation to such points/ issues.

4.3 In this case the claim of deduction under section 80HHC had already been decided by the Tribunal in the appeal against regular assessment for A.Y.2001-02 and no fresh material had been found during the course of search in relation to allowability of deduction under section 80HHC. Therefore we agree with the submission of the Learned AR that the claim of deduction under section 80HHC cannot be considered afresh in the proceedings under section 153A. The Learned DR has relied on the decision of the Tribunal in case of Shivnathrai Harnarayan India (Pvt) Ltd. (supra) but the said case in our view is distinguishable. In that case, the Tribunal held that any assessment or reassessment proceedings initiated by the AO which are pending on the date of initiation of search, the same shall abate and AO cannot proceed with such pending assessment. Thus as per the decision of the Tribunal, only the assessment/ reassessment proceedings pending before AO shall abate. The issue whether the assessment already complited by AO and pending in appeal or revision will also abate was not before the Tribunal."

In view of these decisions of the coordinate Benchs,, we have to necessarily hold that only the assessments pending before the AO for completion shall abate and that under section 153A the issues decided in the assessment cannot be reconsidered and readjudicate, unless there is some fresh material found during the course of search in relation to such points. As in this case, the undisputed fact is that, there is no incriminating material found or seized in the search, the ground of the assessee has to be accepted by respectfully following the order of the C0ordinate Bench. Though on the legal issue, we have decided in favour of the assessee, as the case was heard at length on merits we adjudicate the same.

24. On merits the entire additions are not based on any material found during the course of search. In fact no material except a joint venture agreement was found during the course of search. It was only an assessment based on, the return of income, the documents attached with it and the books of account produced by the assessee. In these assessment proceedings the AO examined the cash credits and made an addition. In all the cases of cash credits, the undisputed fact is that the assessee has received all the loans through banking channels by way of crossed cheques and that interest has been paid to these parties and that the loans were repaid through banking channels by way of crossed cheques. The other undisputed fact is that the assessee has filed confirmation letters from each and every creditor. The assessee has also furnished permanent account number of each and every creditor and has also filed copies of the income-tax returns of the relevant assessment years of the creditors. The bank account copy of each of the lender/ creditor was filed. Before us the assessee filed voluminous paper book running into 568 pages wherein copies of all the above documents were enclosed.

25. We list out the documents furnished before us. For the assessment year 2003-04, the following are the persons on whom summons issued by the Department remain unserved :

1) Vaishali B. Joshi.
2) Aruna N. thakar.
3) Indumatid D. Gohil.
4) Jyoti Sunil Shah.
5) Sahdev Devrajbhai Patel.

6) Kokilaben K. Mehta.

7) Manish R. Vira.

In all these cases the assessee has filed copies of:

a) Confirmation letter.

b) Permanent Account No.

c) Income-tax return.

d) Bank statement.

e) Balance sheet/profit & loss account

f) Address.

In the case of following persons the assessee furnished the addresses before the CIT(Appeals):

1) Kamlesh R. Kothari.

2) Hashmukh Rasiklal Mehta.

3) Jyotsna R. Doshi.

4) M/s Rajni B. Doshi, HUF.

5) Mr. Rajni B. Doshi.

6) P.R. Diamonds.

7) Surekhaben Kothari.

8) Harendra N. Doshi.

In this case also before us the assessee furnished copies of:

a) Confirmation letter.

b) Permanent Account No.

c) Income-tax return.

d) Bank statement.

e) Balance sheet/profit & loss account

From the following persons, no reply was received by the Revenue:

1) Devabhai M. Patel.
2) Ishwar U. Desai.
3) Naran Habhu Waghela.
4) Dilip N Patwa.
5) Ratnasingh B Jadeja.
6) Chandan Gosar.
7) Nikesh Ratanshi Bharti.
8) Kajal Nanji Prasad.
9) Amit Dilip Patel.
10) Mamta A. Gosar.

In all these cases also the assessee has filed before us copies of :

a) Confirmation letter.

b) Permanent Account No.

c) Income-tax return.

d) Bank statement.

e) Balance sheet/profit & loss account.

26. Similarly, for assessment year 2004-05, the assessee has filed copies of documents listed for the assessment year 2003-04, to prove the genuineness, identity and creditworthiness of the lender. To avoid repetition, we do not list out the names of the lenders and the list of documents filed.

27. The AO made the assessments on the ground that the summons issued were returned unserved in certain cases and on the ground that no reply is received and that no addresses of lenders were provided in certain other cases. When evidence is produced before the CIT(Appeals), a remand report was called for and the first

appellate authority without examining the credits item-wise has confirmed the credits in Annexure 'B' of the AO's remand report on the ground that the capacity of lenders is in doubt. He also observed that the movement of the money in and out of bank accounts are highly unusual in many cases and sources of the deposits are not properly explained. He held that the decision cited by the assessee lay down general ratios and that the addition sustained by him is a result of examination and investigation.

28. Now we examine the case laws on the issue :

In the case of Sarogi Credit vs. CIT 103 ITR 344, the Hon'ble Patna High Court held as follows :

> " Once the identity of the third party is established before the Income-tax Officer and order such evidence are prima facie placed before him pointing to the fact that the entry is not fictitious, the initial burden lying on the assessee can be said to have been duly discharged by him. It will not, therefore, be for the assessee to explain further as to how or in which circumstances the third party obtained the money or how or why he came to make an advance of the money as a loan to the assessee. Once such identity is established and the creditors, s in the present case, have pledged their oath that they have advanced the amounts in question to the assessee, the burden immediately shifts on to the department to show as to why the assessee's case could not be accepted and as to why it must be held that the entry, though purporting to be in the name of a third party, still represented the income of the assessee from a suppressed source. And, in order to arrive at such conclusion, even the department has to be in possession of sufficient and adequate materials."

29. The Gujarat High court in the case of DCIT vs. Rohini Builders reported in 256 ITR 360 (Guj) observed as under :

> "On further appeal to the Tribunal the Tribunal held that the phraseology of section 68 of the Income-tax Act, 1961, was clear, that the legislature has laid down that in the absence of a satisfactory explanation, the unexplained cash credit may be charged to income-tax as the income of the assessee of

that previous year, that the legislative mandate is not in terms of the words "shall be charged to income-tax as the income of the assessee of that previous year", that the un-satisfactoriness of the explanation does not and need not automatically result in deeming the amount credited in the books as income of the assessee. The Tribunal found that the assessee had discharged the initial onus which lay on it in terms of section 68 by proving the identity of the creditors by giving their complete addresses, GIR numbers/permanent account numbers and the copies of assessment orders wherever readily available, that it had also proved the capacity of the creditors by showing that the amounts were received by the assessee by account payee cheques drawn from bank accounts of the creditors and the assess4ee was not expected to prove the genuineness of the cash deposited in the bank accounts of those creditors because under law the assessee can be asked to prove the source of the credits in its books of account but not the source of the source. Thus taking into consideration the totality of the facts and circumstances of the case, and, in particular the fact that the Assessing Officer has not disallowed the interest claimed/paid in relation to these credits in the assessment year under consideration or even in the subsequent years, and tax had been deducted at source out of the interest paid/credited to the creditors, the Tribunal held that the Department authorities were not justified in making the addition of Rs.12,85,000."

30. Reliance was placed on the decision of Supreme Court in the case of CIT vs. Orissa Corporation reported in 159 ITR 78 (SC). The Apex Court has held as under:

"That in this case the respondent had given the names and addresses of the alleged creditors. It was in the knowledge of the Revenue that the said creditors were income-tax assesses. Their index numbers were in the file of the Revenue. The Revenue, apart from issuing notice under section 131 at the instance of the respondent, did not pursue the matter further. The Revenue did not examine the source of income of the said alleged creditors to find out whether they are creditworthy. There was no effort made to pursue the so-called alleged creditors. In those circumstances, the respondent could not do anything further. In the premises, if the Tribunal came to the conclusion that the Respondent had discharged the burden that lay on it, than it could not be said that such a conclusion was unreasonable or perverse or based on no evidence.

31. The Bombay High court in the case of CIT vs. U.M. shah, Proprietor, Shrenik Trading Co. reported in 90 ITR 396 held as follows :

> "It is not for the party to have produce the witnesses without a summons. The Income-tax Officer did summon afresh the parties concerned. They received the summons but did not appear. The assessee could not be blamed for all this."

32. The Patna High Court in the case of Adl. CIT vs. Bahri Bros. P. Ltd. reported in 154 ITR 244, held as follows :

> "The lenders advanced loan by means of account payee cheques in favour of the assessee from their bank accounts. The assessee encashed the cheques through his banker (Canara bank Ltd.) and the assessee gave the cheque numbers and all the details along with the certificate of the bank were also produced by the assessee. The assessee also submitted that the brokerage amount was also paid by account payee cheque, vide banker's certificate dated April 24, 1963. The assessee further submitted that the creditors were genuine persons and they had telephones and their names appear in the Calcutta Telephone Directory also. The assessee further submitted that the loans in questions were repaid by the assessee by account payee cheques drawn on Canara Bank Limited and the same was encashed through their bank account.
>
> It is true that the letter of request sent by the assessee to the creditors for confirmation of the loan came back with postal remark "addressee left"/ It seems this was on account of the lapse of time as the loans in question were taken in 963 and the assessment proceedings started in 1969."

33. The Madras High court in the case of S. Hastimal vs. CIT 49 ITR 273 held as follows :

> "The assessee had been able to point out the source for the sum of Rs.15,000/- and his explanation could not be rejected by the mere disability of the department to find out whether G was V's agent. There was no evidence to hold that the sum of Rs.15,000/- was income from undisclosed sources. But the sum of Rs.10,000 represented income from undisclosed sources.

> After the lapse of the decade, an assessee should not be place upon the rck and called upon to explain not merely the origin and source of the capital contribution but the origin of origin and source of source as well. The difficulty on the part of any assessee to explain a transaction which took place before a decade has to be born in mind by the department and should under no circumstance be under estimated or taken advantage of by them."

34. The Hon'ble Bombay High court in the case of Orient Trading Company Ltd. vs. CIT (1963) 49 ITR 723 (Bom.) held that where the amount was received by the assessee by account payee cheques drawn from the bank account of the creditors, the assessee is not expected to prove the genuineness of the cash deposited in the bank accounts of those creditors because under the law the assessee can be asked to prove the source of credits in its books of accounts but not the source of the source.

35. Applying the ratios of these decisions to the facts of this case, we find that the undisputed fact is that the assessee has proved the identity of the persons as well as the genuineness of the transactions. All the lenders are income-tax assesses who are having permanent account number. They have also filed their returns of income. When it is so, the AO could have with little effort, enquired from his counter parts and found out the addresses of the parties. The assessee in this case has done all that he could to provide documentary evidences, in support of his claim that the credits are genuine. In the case of Vaishali B. Joshi, the amount is shown as a loan in his balance sheet. Even in the bank account the amount has been given by way of two cheques. Similar is the case in the case of Arun N. Thakkar. Many other credits are identical. When a lender gives money by way of crossed cheques, reflects the same in his balance sheet and filed the balance sheets along with the returns of income with the Income-tax Department, the conclusion that the assessee is not able to explain the source of fund of the lender properly, is

not correct. The Hon'ble Supreme Court in the case of Umachand Shaw and Bros. vs. CIT 37 ITR 271 observes as follows.

> " That there was no material on which the Income-tax Officer or the Appellate Tribunal could come to the conclusion that the firm was not genuine; there were many surmises and conjectures, and the conclusions was the result of suspicion which could not take place of proof."

36. In the case of Sarogi Credit Corporation, the Hon'ble Patna High Court and in the case of Rohini Builders, the Hon'ble Gujarat High Court have held that it is not for the assessee to prove the source of the source. The assessee was expected to prove the genuineness of the credits in his books of account only. In our humble opinion, on a perusal of the profit & loss account and balance sheet as well as the returns of income of the lenders, copies of which have been filed before us, we are of the considered opinion that the assessee has proved that the lenders have capacity. Thus in our opinion, all the three criteria i.e. identity of the person, the genuineness of the transaction as well as the capacity of the lenders are proved and in such circumstances, no addition can be made u/s 68. The addition cannot be made by making an observation that the loans do not appear to be genuine. The AO could not gather any evidence to contradict the submissions made by the assessee. The issue is whether the assessee has discharged the Burden of Proof that is on it. In this case, the answer is Yes. What else can the assessee do. The onus shifts to Revenue on submission of the documents and the Revenue has not discharged the same. There is no material to support the addition. Thus on these factual matrix, we uphold the contentions of the assessee that, it has done every thing possible to prove the genuineness of these transactions and that the departmental authorities have not found any falsity in the evidences and that the addition has been made and sustained only on the basis of surmises, conjectures and suspicion.

37. In the result, the additions made by the AO u/s 68 as confirmed by the CIT(Appeals) are hereby deleted, for both the asstt. Years.

38. Thus the additions made u/s 68 for the assessment year 2003-04 and for the assessment year 2004-05 as upheld by the CIT(Appeals) are hereby deleted. Consequently, the grounds of the assessee to allow interest expenses pertaining to these loans for both assessment years 2003-04 and 2004-05 as well as for the assessment year 2005-06 are allowed.

39. In the result, all the three appeals of the assessee are allowed.

37. We now come to the departmental appeal in ITA Nos. 544 & 545/Mum/2010 for the assessment years 2003-04 and 2004-05.

40. The grounds of appeal are common and read as follows :

Grounds for assessment year : 2003-04:

1. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs.20,50,000/- in aggregate in respect of 10 persons from whom the assessee has taken unsecured loan.
2. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in holding that despite the assessee had filed evidence such as confirmation, PAN, copy of bank account etc. the A.O. has not brought on record any new findings other than stating that no reply from parties were received.
3. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in overlooking the fact that the assessee has failed to file any evidence including confirmation, PAN, copy of bank account in respect of above 10 persons.
4. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in not appreciating the fact that the capacity, identity and genuineness of transaction in respect of above 10 persons from whom the assessee had taken unsecured loan remains unproved.

Grounds for assessment year 2004-05:

1 Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs.31,25,000/- in aggregate in respect of 8 persons from whom the assessee has taken unsecured loan.

2 Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in holding that despite the assessee had filed evidence such as confirmation, PAN, copy of bank account etc. the A.O. has not brought on record any new findings other than stating that no reply from parties were received.
3 Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in overlooking the fact that the assessee has failed to file any evidence including confirmation, PAN, copy of bank account in respect of above 8 persons.
4 Whether oon the facts and circumstances of the case and in law, the Ld. CIT(A) erred in not appreciating the fact that the capacity, identity and genuineness of transaction in respect of above 8 persons from whom the assessee had taken unsecured loan remains unproved.

41. These appeals are filed by the Revenue against the additions deleted by the CIT(Appeals), in respect of additions made u/s 68. At para 3.3.2 at page 9, the CIT(Appeals) held as follows :

> "3.3.2 I now come to the cases which do not feature in Annexure 'B'. As I presume and as mentioned in the remand report, these are the depositors upon whom summons were served but no reply was filed by these parties. In these cases, I find the state of affairs to be on a different footing. So far as this category is concerned, as mentioned by the appellant, the confirmation copy, the computation of income, the PAN and the bank statements have been filed. Unlike in the other two categories, on the loans advanced by the parties in this category, in the assessment as well as in remand proceedings, the Assessing Officer has not brought out any specific adverse feature from these details and documents submitted. Here, the only inability of the appellant was non-production of the parties or non-submission of the new addresses. As I see, without anything specific, this is not sufficient to prove that the genuineness or the creditworthiness of the parties are questionable. In this respect, the decision of the Hon'ble Supreme Court in the case CIT Vs. Orissa Corporation P. Ltd. 159 ITR 78 and of the Hon'ble Bombay High Court in the case of CIT, Bombay City-II Vs. U.M. Shah, Proprietor, Shrenik Trading Company 90 ITR 396 bears special mention. As may be seen, in essence, in the former decision, the Hon'ble Supreme Court has held that an addition on account of cash credit cannot be justified without

examination of creditworthiness of the lender or mere non-appearance in compliance to summons cannot justify an addition on the ground of non submission alone when it is in the knowledge of the Revenue that names and addresses of the creditors and their index numbers are there. In similar vein, in the latter case, the Hon'ble Bombay High Court has held that if the parties have received the summons and not appeared and the Income-tax Officer had not brought on record any evidence to show that the assessee's explanation was untrue, an addition of income as undisclosed sources cannot be justified. Tested on these touchstones, I see that in this category the addition has been made on only the non-submission of reply to summons without any specific adverse finding on the details and documents submitted by the appellant. In this light, the addition in respect of this category of depositors is not justified. Accordingly, the Assessing Officer is directed to delete the additions made in respect of these parties."

42. We have discussed the issue of cash credits and the nature of evidence filed by the assessee while disposing of the assessee's appeals for the assessment years 2003-04 and 2004-05. Consistent with the view taken therein, we uphold the order of the CIT(Appeals) and dismiss both these appeals of the Revenue.

43. ITA No. 4836/Mum/2009.

This is an appeal filed by the Revenue directed against the order of the CIT(Appeals) dated 02-06-2009 for the assessment year 2007-08 on the following grounds :

1. On the facts and circumstances of the case the Ld. CIT(A) was right in deleting the addition holding that the assessee has not actually received any cash receipts and the declaration made by the partner of the firm was towards total sale receipts and not towards income for the year.
2. On the facts and circumstances of the case the CIT(A) was right in deleting the addition holding that the project completion method was applicable to the on account receipts of Rs. 5 Crores even though the assessee had not accounted the said receipts in the regular books of accounts.
3. On facts and circumstances of the case the CIT(A) was right in law, in holding that the addition of Rs. 5 crores was made against the principles of accounting even though the assessee itself had failed to follow the

norms of accounting standards regarding disclosure of receipts as per the AS-7 and as per section 145 of the I.T. Act, 1961.

44. The business premises of the assessee was surveyed u/s 133A of the Act on 05-01-2007. In the course of the survey, Mr. Mansukhbhai Sureja, partner of the assessee firm, had admitted that there were cash sale receipts amounting to Rs.5 Crores in addition to cheque sale receipts amounting to Rs.10.50 crores. The partners had offered to account the cash sale receipts in the books and to pay the tax on the same. The undisputed fact is that the assessee follows project completion method of accounting. The assessee in his return for the assessment year 2006-07, did not offer the income to tax. On being questioned, the assessee responded that the declaration of Rs.5 crores is towards regular sales in the project and not as profits of Rs.5 crores for the assessment year 2007-08. He also pleaded that the declaration is not based on the evidence found. The AO rejected this argument. At para 7 and 8, wherein he held as follows :

> "7. The argument of the assessee that the declaration of Rs. 5 Crore was towards regular sales and not as profit for the A.Y. 2007-08 is not acceptable and is rejected for the reasons mentioned hereunder. First being the statement of shri Mansukhbhai Sureja recorded u/s 131 on 05/01/2007 during the survey, the relevant portion is already reproduced above, in the statement Mr. Sureja has categorically accepted to pay advance tax on the said Rs. 5 Crores terming it as the income for the year. The argument of the assessee that the same is towards regular sales in the project is not entirely correct as the said amount was mnot recorded in the regular books of account maintained by the assessee at the time of survey and hence not earned in the regular circumstances of the business. It is evident for the fact that Mr. Mansukhbhai Sureja has accepted in his statement that the said amount was not recorded in the regular books of account and therefore the argument of the assessee that the said Rs. 5 Crore was on account of regular sales in the project is rejected.
>
> 8. Also the argument of the assessee that the said amount of Rs. 5 Crore is not taxable in the current year as the assessee is following project completion method is not acceptable. It is important to note here that the

> claim of assessee for applying project completion method can be applied to financial results drawn in respect of transactions recorded regularly in the books of account and not otherwise. Project completion method is to be applied to all the income and expenditures which are recorded in the books of account through out the period in which the project is under way, however the cash receipts of Rs. 5 Crore were not recorded in the books of account and therefore the method of project completion can not be applied to it and such receipts can be brought to tax on receipt basis only."

He made an addition of Rs. 5 crores.

45. On appeal, the first appellate authority deleted the addition by observing that the assessee is constantly following the project completion method for offering its income and that part of its sale receipts cannot be taxed on receipt basis without any specific findings. Aggrieved, the Revenue is in appeal.

46. The learned DR, Mr. Pavan Ved, relied on the order of the AO and submitted that as per the declaration of the assessee the amount should be brought to tax during the current assessment year. He pointed out that the assessee has stated so in the course of survey and he should not be allowed to retract from the same.

47. The learned counsel for the assessee, on the other hand, submitted that the assessee was following project completion method of accounting and the entire amount was treated as sale receipt and offered to tax on the completion of the project during the assessment year 2009-10. He filed a copy of the profit & loss account for the assessment year 2009-10 showing the gross income of Rs. 5 crores as additional sales. He further argued that there was no actual cash receipt by the assessee and the declaration made by the partner was only towards total sale receipts and not towards income of the year. He submitted that the partner has offered the amount as cash sales and not as net income. He submitted that the assessee has not retracted from his statement and has offered the amount to tax on

the consistent method of accounting followed by him. He submitted that the sale receipts both recorded in the books of account and the sale receipts which are received outside the books of account, are to be treated in the same manner and the income arising therefrom is to be assessed based on the consistent method of accounting followed by the assessee as approved by the Department. He submitted that the AO was wrong in relying on selected portion of the Annexure given by the partner of the assessee firm in reply to a query and that the CIT(Appeals) had rightly held that the entire reply and the context in which the reply was given is to be considered. He relied on the following case laws :

a) Mehta Parikh & Co. vs. CIT 30 ITR 14 (Cal.)

b) Taradevi Goenka vs. CIT 122 ITR 14 (Cal.).

c) Mohanlal M. Patel vs. DCIT 90 TTJ 57 (ITAT,Mumbai).

d) Ramanlal & Chordia vs. ACIT 87 TTJ (ITAT, Pune).

48. The learned counsel further supported the order of the CIT(Appeals) by submitting that admissions made at the time of survey, which are not supported by documentary evidences collected during the course of survey, do not have any evidentiary value and the departmental authorities have been advised against obtaining such admissions in Circular dated 10-03-2003. Thus he submitted that the mere statement, without any documentary evidence, cannot be the basis of addition.

49. The learned counsel further submitted that it is wrong on the part of the Department to state that the assessee is not following accounting Standard 7 as per section 145 of the Act. He submitted that AS-7 does not apply to the assessee as the statement applies only to construction contracts. Further he submitted that the project completion method followed by the assessee has been accepted by the Revenue, even in assessment orders passed u/s 153C read with section 153A read

with section 143(3). On law, he submits that the issue is covered in his favour directly by the decision of the Pune Bench of the Tribunal in the case of Dhanvarsha Builders & Developers (P) Ltd. vs. DCIT 102 ITD 375 (Pune). He also relied on the decision of the Calcutta Bench of the Tribunal in the case of South Calcutta Promoters Ltd. vs. ITO, in ITA No. 2216 & 2217/Kol/2003 wherein it is held that the amount received in advance money received by the assessee against booking of flats, is not assessable as income in its hands. He further referred to the decision of Hon'ble Supreme Court in the case of CIT vs. A. Krishnaswamy Mudliar 53 ITR 122, for the proposition that business income and income from other sources shall be only computed in accordance with the method of accounting regularly employed by the assessee.

50. Rival contentions heard. On a careful consideration of the facts and circumstances of the case, a perusal of the papers on record and the orders of the authorities below as well as the case laws cited, we hold as follows.

51. The undisputed fact is that no incriminating material was found during the course of survey. The entire addition is based on Answer to Question No.8, 9 and . 10 which read as follows :

> Q.No.8 How many shops and flats you have sold out and what is the cash element in the said sale proceeds?
>
> A.No.8 8 Flats consisting area of 10560 sq.ft. and 59 shops consisting of 7128 Sq.ft. have been sold. The total proceeds received so far are Rs.10,50,98,301/- which are the receipts by cheque and cash element is Rs. 5 Crores.
>
> Q.No.9 Have you accounted for the cash proceeds?
>
> A.No.9 No. I have not accounted in the regular books of account. The total receipts on sale of flats and shops will be shown on completion basis as we are following work completion method. Rs. 5.00 Crore unaccounted cash

receipts. I am declaring for current year's income and I shall pay due tax in the form of advance tax within a short span of time.

Q. No.10. Where have you invested the unaccounted cash generated?

A.No.10. The cash is lying in hand in different forms like investments in different assets, details of which will be submitted in due course. I will ensure that the cash is brought to regular books of account pursuant to out offering to show the same as our income as above.

52. It is also not disputed that the assessee has in fact increased the sales figures declared by him with the amount of Rs. 5 crores and has disclosed the same in the profit & loss account for the financial year ended 31st March, 2009. On this factual matrix, we are of the considered opinion that the order of the first appellate authority has to be upheld.

53. The first appellate authority at pages 4, 5 and 6 of its order held as follows :

"As may be noted from the contents of the answers, while giving his version on the receipts in question, Shri Mansukhbhai Sureja has not only admitted to the receipts on sale of flats, he has also referred to the fact that the receipts will be shown on completion basis as the appellant firm is following the work completion method. Seen in this context, I find that the Assessing Officer is not fair in relying only on the last sentence in Shri Sureja's answer to question No.9 to the total exclusion of the rest of the answers to question No. 8 & 9. As may be seen, the Assessing Officer has taken cognizance of only that part of the declaration by which Rs. 5 Crore has been offered, but he has chosen not to take into reckoning the method of offering of the income by the appellant, which also forms integral part of the statement. This tantamount to selective interpretation of statement which is against norms of jurisprudence and judicial evolution of law. In this respect, some judicial decisions bear recall. In the decision in the case of Mehta Parikh & Co. vs. CIT, Bombay 30 ITR 181, the Hon'ble Supreme Court has held that there is no justification for accepting explanation given by the appellant in part. Similarly, in the decision in the case Taradevi Goenka Vs. CIT 122 ITR 14 also, the Hon'ble Calcutta High Court has held that there is no justification to accept explanation offered by the appellant only in part. In this respect, on the issue of acceptability of a statement, the Hon'ble ITAT Mumbai in the case Mohanlal M. Patel vs. DCIT 90 TTJ 57 has

categorically held that statement has to be accepted as a whole. Similar views have been echoed by ITAT, Pune in the case, Ramanlal & Chordia vs. ACIT 87 TTJ. Further, I also find that the selective interpretation of the statement will lead to a situation where income in the case will have to be taxed in defiance of established accounting principles. This is so because the addition in the case is based only on the statement of Shri Mansukhbai Sureja and not on discovery of any other document or valuable found in course of the survey and accordingly, the Assessing Officer has not been able to link the part of the statement relied upon by him to any specific documents, assets or valuable. Seen in this background, in absence of any other material, the appellant's statement that the proceeds would be offered on project completion method cannot be ignored because that is the method the appellant has been following to account for the income and anything to the contrary would be against accounting principles regularly employed by it. Further I also note that the questions No. 8 & 9 have also been ignored by the Assessing Officer in that he has not reckoned that the chain of answers has flowed from the contexts of the questions only. As may be noted, the questions were on the number of sale of shops and flats and the method of accounting for the cash proceeds and it is in the backdrop of these questions that Mr. Sureja disclosed the facts of the total receipts received, the cash element for the proceeds and the method of accounting to be followed by the appellant in accounting for the cash receipts. Seen against this backdrop, I find that the Assessing Officer has failed to interlink all these facts flowing together from the specific questions into a whole while giving his decision. As a result, his interpretation of the statement has turned lopsided. In this respect I find that vide its letter dtd. 3.4.2007, the appellant had reiterated this position to the DDIT (Inv) Unit 1(3), Mumbai. This has also been ignored by the Assessing Officer without any specific finding. The Assessing Officer has also held that since the cash receipts were not recorded in the books of account, the method of project completion cannot be applied. This is also misplaced in the totality of the facts and circumstances of the case. In this respect, I find the appellant's reliance on the decision quoted by it as apt and appropriate. Further, the Assessisng Officer's finding in this respect is also not based on any other documents or facts brought on record. When the appellant is consistently following the Project Completion Method for offering its income, part of its sale proceeds cannot be taxed on receipt basis without any specific findings. The Assessing Officer's argument that the co-developer has offered the income is also not relevant to the appellant's case in that each assessee has its own method of offering income and one cannot be used as a standard for another.

> The Assessing Officer has also observed that the receipt in question has not been earned in relevant circumstances of the business. This also misplaced and not backed up by any specific findings in that survey operation did not lead to detection of any evidence which would point to the fact that the receipt was anything other than sale proceeds or that the sum was utilized for personal purposes for making any investment. I also find that the appellant has backed itself with the statement in that it has offered the income from the receipt in the assessment year 2009-10. Significantly, as pointed out by the appellant, I further note that the work-in-progress in assessment years 2003-04 and 2004-05 has been accepted and the assessment has been completed in accordance with the system of accounting followed by the appellant with only certain adjustments made in the work-in-progress by way of disallowances. Clued into the foregoing, I find that considering the statement of Shri Mansukhbhai Sureja in its totality, the facts of the case, principles of accounting and subsequent conduct of the appellant, the addition made by the Assessing Officer is incorrect. It is deleted and grounds of appeal are allowed."

We agree with these findings. The statement should be read as a whole, specifically when there is no material whatsoever found during the course of survey or subsequently to prove the fact that the assessee has cash receipts. When the assessee states that he would ensure that the cash would be brought to regular books of account, pursuant to the offer, it means that the sale amount of flats and shops would be increased by the said Rs.5 crores. Once it is taken as the sales figure, the method of accounting regularly followed by the assessee for a number of years and which has been accepted by the Revenue even in search assessments u/s 153A read with section 143(3) as well as in the subsequent assessment years, has to be necessarily followed and the income computed only in accordance with that method of accounting. In the case on hand the assessee is following project completion method and the income from the extra sale receipt, has to be computed only in accordance with that method of accounting.

54. The Hon'ble Gujarat High Court in the case of CIT vs. President Industries 258 ITR 654 (Guj) held as under :

> " Having perused the assessment order made by the Assessing Officer, the order made by the Commissioner of Income-tax (Appeals) and the Income-tax Appellate Tribunal, we are satisfied that the Tribunal was justified in rejecting the application under section 256(1). It cannot be matter of an argument that the amount of sales by itself cannot represent the income of the assessee who has not disclosed the sales. The sales only represented the price received by the seller of the goods for the acquisition of which it has already incurred the cost. It is the realization of excess over the cost incurred that only forms part of the profit included in the consideration of sales. Therefore, unless there is a finding to the effect that investment by way of incurring the cost in acquiring the goods which have been sold has been made by the assessee and that has also not been disclosed. In the absence of such finding of fact the question whether the entire sum of undisclosed sale proceeds can be treated as income of the relevant assessment year answers by itself in the negative. The record goes to show that there is no finding nor any material has been referred about the suppression of investment in acquiring the goods which have been found subject of undisclosed sales."

This judgment applies to the case on hand.

55. The Ahmedabad C-Bench of the Tribunal in the case of Abhishek Corporation vs. DCIT reported in 63 TTJ (Ahd) 651, held as follows :

> "Even though it is established from seized documents that assessee was receiving premium/'on money' on booking of flats belonging to third parties, entire receipts of 'on money'/premium cannot be treated as undisclosed income of assessee; only net profit rate can be applied on unaccounted sales/receipts for making addition."

56. The Pune Bench of the Tribunal in the case of Dhanvarsha Builders & Developers (P) Ltd. vs. DCIT 102 ITD 375 had held that the concept of income is a legal concept and the amount of real income has to be arrived at after considering various other aspects, such as expenditure and year of taxability and such matters cannot be ignored in making assessment even if a confessionary statement is made. It is further held that conduct of search and seizure operations in a particular year, does not lead to an inference that undisclosed income detected as

a consequence thereof has to be taxed in the assessment year relevant to the previous year in which the search was conducted. The Bench held that the accounting of profits has to be made on the basis of the method of accounting followed by the assessee.

57. In view of the above discussion, we agree with the finding of the first appellate authority and upheld his order.

58. In the result, the appeal filed by the Revenue is dismissed.

59. In the result, all the appeals filed by the assessee are allowed, all the appeals filed by the Revenue and the cross objection filed by the assessee are dismissed.

Order pronounced in the open court on 7th Jan.,2011.

Sd/-	Sd/-
(Asha Vijayraghavan)	(J. Sudhakar Reddy)
Judicial Member.	Accountant Member

Mumbai,
Dated: 7th January, 2011.
Wakode

Copy to :
Appellant
Respondent
C.I.T.
CIT(A)
DR, G-Bench

(True copy)

By Order

Asstt. Registrar,
ITAT, Mumbai Benches,
Mumbai.