

Astt. Cit Vs. Omprakash and Co.

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Court : Mumbai

Decided On : Mar-25-2003

Reported in : (2004)87TTJ(Mumbai)183

Appeal No. : ITA Nos. 1143 & 2943/Mum/1997 A.Y. 1992-93 & 1993-94 25 March 2003

Appellant : Astt. Cit

Respondent : Omprakash and Co.

Judgement :

ORDER

Beharilal, A.M.

The departmental appeal for the assessment year 1992-93 has been directed against the order of the Commissioner (Appeals)-XVII, Bombay, dated 16-11-1995. The departmental appeal and the cross-appeal by the assessee for the assessment year 1993-94 have been directed against the order of the Commissioner (Appeals) Central IV, Mumbai, dated 17-2-1997. One consolidated order is being passed for the sake of brevity and convenience; as the issues involved in these appeals are common.

2. The assessee is a partnership-firm engaged in the wholesale business of dry fruit and business in real estate comprising of construction of buildings of residential flats, office premises, shops, godowns, row houses, etc. which are sold

to prospective buyers. For both the divisions of business the assessee maintains one set of account books. For the construction division, the assessee has adopted estimation of profit on work-in-progress and on that basis profit is estimated every year showing as a profit in P&L; a/c and when project is completed, balance result is shown in the year of completion. This method is being followed by the assessee consistently for the last many years and the same is being accepted by the department. There was a search action in the residential and business premises of the assessee under section 132 of the Act on the 25th and 26th of October, 1994. During the course of search certain loose papers were seized pertaining to 'Kukreja Group' including 'Mehul Note' book A-2' containing 'two written pages' Nos. 1 and 2, which was seized from the residential premises of Mr. Kukreja. Further, a consequential search under section 132 was conducted in the premises of finance broker Shri Paras Ram Rohera from where certain documents were seized including diaries A-53 and A-54.

3. For the assessment year 1992-93, the department took up the following grounds of appeal :

'(i) On the facts and in the circumstances of the case and in law, the learned Commissioner (Appeals) erred in deleting the addition of Rs. 41,91,000 made on account of inflated expenses of CIDCO project.

(ii) On the facts and in the circumstances of the case and in law, the learned Commissioner (Appeals) erred in deleting the addition of Rs. 28,61,122 made as unexplained investment in the Abhishek project.

(iii) Alternatively, the learned Commissioner (Appeals) ought to have restored the matter back to the assessing officer for fresh adjudication as the fact remains that the additions are based on documents seized from assessee's premises and the assessee could not explain satisfactorily the contents of the same.'

4. The assessing officer observed that during the year under consideration, the assessee was having the following projects in hand

(i) Abhishek project at Versova

(ii) Krishna project at New Bombay

(iii) CIDCO mass housing project

(iv) Pali Hill project

The first two projects were undertaken by the assessee as a builder. In these projects the assessee-firm would develop the area, construct flats and would sell them. The third project was taken up by the assessee as a contractor to CIDCO. In this project the assessee was to build flats and hand over them to CIDCO. For this, the assessee was to get price as per contract and any escalation thereon. The fourth project was built by the assessee for residential purposes of partners and the expenditure would be debited to partners' capital account when the project would be completed. During the course of search certain loose papers were seized from the office of the assessee at Sampada, Vashi as per file No. A-3. In this file papers Nos. 1 to 6 and papers Nos. 8, 9, 11, 13, 19, 21 to 26 were containing information regarding various projects handled by the group companies. According to the assessing officer, these papers were containing information like name of the project, area, value, stages of implementation of project and the details of engineer, architect involved in the project. The assessing officer further found that pp. 1, 2 and 3 were having the heading 'details of experience in respect of work carried out by the firm'. These papers were containing the details of the name of the work, year of work, name of architect, value of work and built-up area. In these papers, the name of the CIDCO project was not mentioned but the details of Abhishek project were given. The assessing officer further noticed that pp. 5, 6 and 7 were having the heading 'Experience in civil work in last five years'. These papers were containing similar details. Pages 8, 9, 11, 13 14 are having heading 'details of works carried out in the last three years and balance work in hand'. This set is having details of 16 projects under the head 'Ganga Developers' and 19 projects under the head 'Kukreja Constructions Company'. These papers also contained details of project name, built-up area in sq. meters, total value and progress of the work financial yearwise. In these papers CIDCO mass housing scheme and Abhishek/Krishna/Govinda Gopala have been mentioned and the details of these projects have been given.

5. The assessing officer wanted to determine income of the assessee on the basis of these seized papers. However, the assessee explained that these seized papers were prepared by Mr. S.S. Gulati, an employee with the group companies, for his future employment opportunities. Mr. Gulati also filed an affidavit to confirm the contention of the assessee. In his statement recorded on 28-3-1995, Mr. Gulati stated that he was involved only in two projects of Kukreja group and he was not aware about the details of other projects. He stated that he had prepared only one set of paper, i.e., 9, 11, 13, 14 and did not know who had prepared the other papers. He also stated that the figures mentioned in these papers were guesswork and the cost of construction was taken keeping in mind the high quality finish. The assessing officer, however, was not satisfied with the explanation given by Mr. Gulati and observed that Mr. Gulati was an engineer and was involved in the construction activity day in and day out. He could not have made wild guesses and could not have brought these figures from thin air. The assessing officer has further stated that these papers were supposed to be submitted to prospective employers and Mr. Gulati must be expecting further questions out of these statements. If these statements were guesses he could never substantiate these statements in any interview. Thus, the assessing officer came to the conclusion that the statement of Shri Gulati cannot be relied upon because his statement was not the statement of an independent person as he was the employee of the assessee-firm who can be easily influenced by the employer. Further, the assessing officer has stated that the papers prepared were too elaborate to be presented during interview. Mr. Gulati also could not explain how he gave the data of other buildings. The assessing officer has also stated that even if Shri Gulati had prepared such papers for the interview he would not include projects of which he had not worked, as such inclusion would be factually incorrect which would mislead his prospective employers. Thus, according to the assessing officer, the explanation of seized papers prepared by Shri Gulati was merely an afterthought on the part of the assessee. Thus, the assessing officer rejected the explanation of Mr. Gulati and held that the seized papers were showing factual position of the affairs of the assessee's business. The assessing officer -has further stated that the assessee was not maintaining any stock records of material purchased and its use in project. According to him, without project-wise stock recorded, it would not

be possible to show which purchase was used for which project and whether the material was used in the work of the same project or not. The assessing officer has further stated that the assessee was not maintaining any stock register and opening and closing stock of materials was not known. Thus, according to him, the assessee's records were not complete with reference to arrival and use of materials and thus, the same were not reliable.

6. The assessing officer has also observed that -the assessee-firm gets commencement certificate up to the approved level, the assessee gets amended approval and continues to work. Though the partial occupation is granted by the BMC, the assessee declares the project still in progress and work-in-progress is only shown. The monies received from flat purchases is shown as advance against flats sold and they are not credited to the sale proceeds. This gives assessee the benefit of postponing his tax liabilities and adjust the taxable income as per his convenience. Another advantage the assessee gets is that as he shows work-in-progress only and offers certain percentage of profits for taxation thus, the taxable profits are conveniently reduced. Thus, according to the assessing officer most of the assessee's projects are shown to be work-in-progress even though the possession is given to the flat owners and full value of consideration is received from them.

7. After going through the books of account maintained for CIDCO's mass housing scheme and also the year-wise details the assessing officer found that the total cost debited in this project upto assessment year 1994-95 is Rs. 8,33,70,407 and sale proceeds received from CIDCO amounts to Rs. 8,10,55,601. The assessing officer also went through the seized papers and noticed that the project cost as per contract of the CIDCO was Rs. 641 lakhs which is correctly reflected in the seized papers. The date of commencement of project, i.e., 8-4-1990 is also correct as the work orders is dated 5-4-1990 and 31-3-1993, is the date of completion of the contract work. Thus, according to the assessing officer the seized papers are showing the correct picture. The assessing officer further referred to p. 6 and noticed that the cost of the work is mentioned at Rs. 592 lakhs. Time-limit as per CIDCO tender is two years, which is also correctly reflected in these papers. On this page balance work shown is nil. Thus, the assessing officer has stated that as

the project was completed on 31-5-1993, there was no work pending as per the seized papers.

8. The assessing officer also went through the seized paper No. 9 and noticed that the value of the work shown is 756.38 lakhs. On page No. 4, the contract price is mentioned at Rs. 641 lakhs as per the contract with CIDCO. On page No. 6 the expenditure made by the assessee-firm is mentioned at Rs. 592 lakhs. The assessing officer, thus, noticed that there is a difference between the figures mentioned in different pages. He also observed that these papers and figures are not guess-work but the actual and correct data of the project and the figures given in the return are independent of the reality and are given with the sole objective of reducing tax liability. The assessing officer has further stated that progress of work as per page No. 9 in assessment years 1991-92 and 1992-93 is Rs. 276.54 lakhs and Rs. 231.23 lakhs, respectively, whereas, progress of work as per this page is nil. On page No. 6 total cost of work is 592 lakhs. This figure gives the total expenditure on the project while page No. 9 gives the details of expenditure in assessment years 1991-92 and 1992-93. The assessing officer thus, observed that out of 592 lakhs spent on CIDCO project Rs. 276.54 lakhs have been expended in assessment year 1991-92 and Rs. 231,23 lakhs in assessment year 1992-93, and the remaining amount of Rs. 84.23 has been spent in assessment year 1990-91. The assessing officer, therefore, found the difference in the actual position and as per books as follows :

Year

As per seized papers

As per books

1990-91

Rs. 84.23 lakhs

Rs. 13.28 lakhs

1991-92

Rs. 276.54 lakhs

Rs. 318.45 lakhs

1992-93

Rs, 231.23 lakhs

Rs. 280.29 lakhs

1993-94

Nil

Rs. 101.21 lakhs

Rs. 529.00 lakhs

Rs. 833.23 lakhs

The figure of Rs. 529 lakhs, has been wrongly taken in place of actual total of Rs. 592 lakhs. Thus, 'according to the assessing officer, there is inflation of Rs. 304.23 lakhs (correct figure is Rs. 241.23 lakhs) on the whole project. The assessing officer, therefore, came to the conclusion that inflation cost for the assessment year 1992-93 is Rs. 41.91 lakhs. Accordingly the assessing officer made the addition of Rs. 41.91 lakhs in the assessment year 1992-93 being the expenses debited to the project of this year.

9. After going through the seized papers the assessing officer also found that Abhishek project details were given in two different sets and these sets of details belong to the different buildings. The details on page Nos. 2, 4 and 6 pertain to building No. 'B' and the area of this building upto 7th floor is 65,000 sq. ft. He found that the area of 65,000 sq. feet tallies with the approved area for 'B' building upto 7th floor. The cost mentioned is Rs. 260.2 lakhs. Page No. 2 also gives the similar details which tally with the details as per approved plan. The assessing officer further noticed that page No. 6 is having heading 'experience in civil work in last 5 years'. This page also gives the work details up to 1992 in case of Abhishek

project. The work completed upto 1992, Rs. 233.1 lakhs while work up to 1993 up to 1993, is 260.2 lakhs. Pages 9, 11 and 13 speak of another building, i.e., C&C; buildings. The area mentioned in p. 9 is 2,323 sq. meters i.e. 25,000 sq. feet. Page 24 also states the details of built-up area of the same building and the cost of the building is given as 200 lakhs. Thus, according to the assessing officer, the two sets of papers refer to two different building of the same project. But he noticed that there was difference in area and cost from one paper to another. The assessing officer mentioned the details of Abhishek project as per return for assessment year 1992-93 as follows

Work in progress

4,04,40,592

Cost

36,51,878

Estimated profit

7,30,375

Closing work in progress

4,48,22,846

But as per the seized paper 9, the expenditure during the assessment year 1992-93 is given as Rs. 65.13 lakhs. Thus, according to the assessing officer, there is a suppression of Rs. 28,61,122 for the year under consideration. The assessing officer, therefore, treated this amount of Rs. 28,61,122 as the unexplained investment in the project for the assessment year 1992-93

10. The learned Commissioner (Appeals) in his order has observed that the twin additions made by the assessing officer of Rs. 41,91,000 in respect of CIDCO project and Rs. 28,61,122 in respect of Abhishek project lead to a some what curious position. The assessing officer has made the addition in respect of CIDCO project on the ground that the assessee has inflated the cost of this project, at the

same time, the assessing officer has made the addition in respect of Abhishek project on the ground that the assessee has suppressed the actual cost of the project. In other words, according to the assessing officer, the cost shown in the books of account in respect of CIDCO project is higher than the cost actually incurred by a sum of Rs. 41,91,000 and at the same time, the cost shown by the assessee in respect of Abhishek project in the books of account is lower than the cost actually incurred by a sum of Rs. 28,61,122. As both these projects belong to the assessee itself and period of assessment is also the same, there should not ordinarily be inflation of cost as well as suppression of cost simultaneously for the simple reason that the same objective could have been achieved by the assessee to a large extent by recording the actual cost in respect of both the projects. The learned Commissioner (Appeals) has further stated that no reason has been given in the assessment order as well as in the subsequent report of the assessing officer called for by the Commissioner (Appeals) as to why at all the assessee would resort to such a self-defeating manipulation of accounts. Thus, the learned Commissioner (Appeals) observed that on the facts and circumstances of the case, it is highly unlikely that the assessee would first go about inflation of the cost of construction in one project and thereafter, neutralize the effect of the same by suppressing the cost of construction in respect of other project. Thus the second addition of Rs. 28,61,122 in effect goes to reduce the first addition of Rs. 41,01,000. The learned Commissioner (Appeals) has further stated that the assessing officer has made these two additions separately without convincing himself with the question as to why there should be such a contradiction. The learned Commissioner (Appeals) thus, observed that neither of the two additions have adequate basis to sustain themselves. The assessing officer has made specific charges for the addition to the declared results based entirely on his own interpretation of the seized documents. For this purpose the assessing officer has given the findings that the Explanation of the assessee in relation to the nature of these seized pages are not acceptable, He has, therefore, assumed that the seized documents contain the record of true state of affairs of the assessee as contra distinguished from the record of the business activity reflected in the assessee's books of account. The learned Commissioner (Appeals) further observed that the additions made by the assessing officer are otherwise not

supported or corroborated by any other evidence or material. The assessing officer however has made some adverse remarks against the books of account and other records kept by the assessee in his assessment order and what according to the assessing officer, is the 'modus operandi' of the assessee. The learned Commissioner (Appeals) has thus stated that the same cannot, however, be categorised as material in support of the additions made by the assessing officer, because there is no nexus between such adverse remarks in the assessment order and the impugned additions. According to the learned Commissioner (Appeals) this aspect has been admitted by the assessing officer himself in his subsequent report dated 15-9-1996.

11. Regarding the adverse observation of the assessing officer that the Abhishek project was completed in stages but the assessee has shown the same as incomplete presumably with the view to postpone its tax liability, the learned Commissioner (Appeals) has stated that allegation of the assessing officer assumes that the various authorities who have the powers to grant commencement certificate were ready to oblige the assessee in this behalf. According to the Commissioner (Appeals), the projects in question were huge projects and the assessee could not complete them within one year or two. As the projects have run-over several years, the final profit or loss to the assessee had naturally to be postponed to an assessment subsequent to the impugned assessment year. Thus, according to the Commissioner (Appeals), these are normal facts of the assessee's business and no motives can be ascribed to the assessee merely because at the end of the previous year in question these projects were still ongoing.

12. Regarding the observations of the assessing officer that the books of account of the assessee were defective, the learned Commissioner (Appeals) has stated that the assessee has disputed this and stated that every bill bears the name of the project. The assessing officer has also alleged that the assessee could conveniently transfer the material purchased for one project to another project and in the absence of project-wise stock register, this could not be checked. In this connection, the learned Commissioner (Appeals) has stated that the assessing officer had not made any efforts to spell out as to why the assessee would resort

to any such practice at all. As long as the projects in question belonged to the assessee on his own profit or loss basis, what was there for the assessee to gain by debiting the cost of one project to another. The learned Commissioner (Appeals) has further stated that the subsequent report of the assessing officer is also silent about this. Regarding the various seized papers, the learned Commissioner (Appeals) has stated that these seized papers contain considerable amount of wrong facts and same cannot be assumed to record the true state of affairs. The learned Commissioner (Appeals), therefore, held that no addition can be made to the income declared by the assessee-firm entirely on the basis of these seized documents alone, without being any other material or evidence.

13. Regarding the seized papers, the learned Commissioner (Appeals) has observed that the order of the assessing officer abounds in several misreading of the actual contents of the seized documents and that even if it is presumed for the time being that the addition to be assessee's declared income can be justified on the basis of the facts recorded in these documents, it is seen that the impugned addition of Rs. 41,91,000 does not flow from the contents of these seized documents. The learned Commissioner (Appeals) has pointed out that there is serious discrepancy and misrepresentation of facts in the chart as prepared by the assessing officer on the top of p. 7 inasmuch as, the particulars given do not represent entirely the CIDCO mass housing project belonging to the assessee-firm. The learned Commissioner (Appeals) referred to the seized documents page Nos. 4, 6, 9, 11 and 13 and has stated that seized papers 4 and 6 pertain to the assessee's project at sector 26, Vashi, whereas the seized page Nos. 9, 11 and 13 pertain to some other project at sector 8B, CBD Belapur. Thus, these two projects are not one and the same. Vashi project belonged to the assessee and Belapur project had been awarded to sister concern M/s Ganga Developers. Thus, according to the Commissioner (Appeals), the entire case made out by the assessing officer for the addition of Rs. 41,91,000 gets demolished. The learned Commissioner (Appeals) has further observed that the assessing officer has worked out the addition on the basis of his assumption that out of the three amounts of Rs. 641 lakhs, Rs. 592 lakhs and Rs. 756.38 lakhs, the sum of Rs. 592 lakhs alone represents cost of the entire project, which according to the assessing officer was carried out during the period 5-4-1990 to 31-5-1993. According to the

Commissioner (Appeals) there is no support in the seized documents to the contention that out of the three amounts, the sum of Rs. 592 lakhs represents the cost of works. Secondly, page No. 6, from where this figure has been picked up by the assessing officer first mentions 'two years' and thereafter '1990' and '1993'. According to the assessee the work on this project commenced in April, 1990 and has been completed only during the financial year 1994-95. Thirdly, while working out the addition, the assessing officer has completely ignored the heading given on each of these seized papers.

14. Regarding the addition in respect of Abhishek project, the learned Commissioner (Appeals) has observed that the entire addition is based on various permutation and combinations made by the assessing officer, which are not true. The Commissioner (Appeals) has further stated that the assessing officer has altogether excluded A-Block and C-Block of Abhishek building as they did not fit in his scheme of things. Thus, according to him the entire excuse is on the face of it, very artificial. The Commissioner (Appeals) has stated that there is no support in the description given in the seized papers to the arguments of the assessing officer that seized page Nos. 2, 4 and 6 pertain to the entire B-building up to 7th floor, whereas documents 9, 11, 13 pertained to C-1 building only. The assessing officer has excluded the area of A-building and C-building altogether. Secondly, for the purpose of B-building, the assessing officer has taken into consideration the area of G + 7 floor only. This is done in the face of the fact that it is clearly mentioned in the 'remarks' at seized page No. 4 'G + 7 floor'. The assessee pointed to the Commissioner (Appeals) that even the working of area as given at pp. 8 and 9 of the assessment order was not correct because the area of each floor already included service area and, therefore, there was no justification for the assessing officer to add service area once again. Thus, the learned Commissioner (Appeals) has observed that even after all these permutations and combinations, the fact remains that the assessing officer has worked out the area of C-1 building at 21,905 sq. feet, whereas as per the seized paper Nos. 9, 11 and 13 the area mentioned is 25,004 sq. feet. The learned Commissioner (Appeals) has further pointed out that there is a very serious discrepancy and misrepresentation in the amount of additions worked out by the assessing officer. All through he has been labouring to prove that the seized page Nos. 9, 11 and 13 pertain to C-1 building

only. However, for the purpose of making the additions he has taken into consideration the amount as mentioned in seized page No. 9 only and amount mentioned in seized page Nos. 2, 4 and 6 has altogether been ignored. According to the chart prepared by the assessing officer, the cost of 65,000 sq. ft. during 1990-91 to 1992-93 amounted to Rs. 260.2 lakhs, which gives a rate of Rs. 400 per sq. feet whereas the assessing officer has assumed the cost of 2,500 sq. feet in C-1 building to be Rs. 178.87 lakhs resulting into a cost of Rs. 715.50 per. sq. ft. According to the Commissioner (Appeals) there cannot be so much difference in the cost of construction between B building and C building and this fact has not been taken into consideration by the assessing officer. The learned Commissioner (Appeals) has also pointed out that while making the addition, the assessing officer has completely ignored the heading given on the seized pages on which he has relied. According to him the heading given to seized page Nos. 1, 2 and 3 is as under

'M/s Omprakash & Co.

Details of experience in respect of works carried out by the firm'

The heading given on seized page No. 4 is as under :

'Details of assignments in hand M/s Omprakash & Co.'

Seized page Nos. 5 and 6 have the following heading

'(Experience in civil works in last 5 years upto,31-3-1993)

1988-89

1989-90

1990-91

1991-92

1992-93'

The heading given on pp. 9, 11 and 13 is as under :

'Ganga Developers

Details of works carried out in the last three years and balance work in hand'

According to the Commissioner (Appeals) these headings have been completely ignored by the assessing officer. The assessing officer has also totally ignored the fact that while seized documents No 1, 2, 3 and 4 mentioned the name of the assessee and seized documents 9, 11 and 13 mention the name of another sister-concern, M/s Ganga. Developers. The learned Commissioner (Appeals), therefore, contended that both the additions of Rs. 41,91,000 and Rs. 28,61,122 have been made without any reasonable basis and cogent material. The learned Commissioner (Appeals) deleted the additions considering them Prima facie artificial and fanciful.

15. At the time of hearing the learned departmental Representative contended that CIDCO mass project was not taken up by the assessee but by the sister-concern. He, therefore, argued that CIDCO project does not belong to the assessee, therefore, this issue may be restored back to the file of the assessing officer for reconsideration of the same in the hands of the sister-concern. The learned Departmental Representative invited our attention to p. 9 of the compilation filed by the assessee and contended that the project CIDCO belonged to Ganga Developers. So far as Abhishek project is concerned the learned Departmental Representative relied on the order of the assessing officer. The learned counsel for the assessee however contended that the assessee's main office is at Chembur and the seized papers were found from the site of the building. These papers were found from the table drawer of Mr. S.S. Gulati, an, employee with the group companies. He further brought to our notice that the assessee made a disclosure of Rs. 1 crore during the course of search. He argued that the assessee was not asked any question regarding these papers during the course of search. The assessee was asked to explain these papers only in February, 1995. The learned counsel invited our attention to the affidavit filed by Shri S.S. Gulati dated 7-2-1995 (compilation pp. 161 & 162), wherein Mr. Gulati has clearly mentioned that the details were prepared on ad hoc basis and were away from the truth to impress the would be employer. He further explained that these details were found

and seized by the Income Tax department during the course of search on 25-10-1994, from Vashi office. The learned counsel contended that the statement of Shri Gulati was recorded on 28-3-1995, but the copy of this statement was never supplied to the assessee. He explained that the addition has been made on the basis of seized pp. 5, 6, 7, 8, 9, 11, 13 and 14 but these papers do not belong to the assessee. He also invited our attention to the remand report dated 15-9-1995, called for by the learned Commissioner (Appeals). The learned counsel argued that the profit for every year has been disclosed on the basis of work-in-progress but the final profit has been computed after completion of the project. The learned counsel also argued that so far as Abhishek project is concerned it consists of number of buildings. He explained that the department never made any addition in the earlier years and even for subsequent years the department has not made any addition. The addition has been made only in the year under consideration. So far as the contention of the Departmental Representative regarding the ownership of the CIDCO project is concerned, the learned counsel brought to our notice that the project CIDCO belong to the assessee as it is evident from the seized papers which have been signed by the partners (compilation pp. 1, 2, and 3). The learned Departmental Representative also agreed with the learned counsel. Similarly, the learned counsel also pointed out that the project 'Abhishek' also belong to the assessee (compilation p. 4). It was, thus, contended that there was no material at all with the assessing officer to hold that the seized papers were showing factual position of the affairs, of the assessee's business when the contents of these types written papers were most of the time proved to be incorrect and far away from true state of affairs. The learned counsel, thus, contended that the observations of the assessing officer are baseless and are entirely based upon his own imagination. The learned counsel also placed reliance on the findings of the Commissioner (Appeals).

16. We have carefully considered the submissions made by the rival parties. We have also gone through the various documents produced before us during the course of hearing. The assessing officer has made the additions of Rs. 41,91,000 and Rs. 28,61,122 to the income declared by the assessee in respect of CIDCO mass housing project and Abhishek project, respectively. On 25-10-1994, action under section 132 of the Act was taken against the assessee-group and during the

course of search operation certain discriminating papers were seized from different premises of the assessee-group. From assessee's office at Sampada, Vashi, file A-3 containing loose papers was seized. As we have mentioned above., the assessing officer has made the additions on the basis of these seized papers. These papers were found from the site of the building. These papers were in fact found from the table drawer of Mr. S.S. Gulati. During the course of search, it was explained that the seized papers were prepared by Mr. S.S. Gulati, one of the employees of the group concerns. It was also explained that Mr. Gulati prepared these papers on ad hoc and estimated basis. Mr. Gulati was looking for a job and he wanted to show to the prospective employers that he had adequate experience and exposure in the construction activity. The statement of Mr. S.S. Gulati was recorded on 28-3-1995. Mr. Gulati also filed an affidavit wherein, he has confirmed that the details were prepared on ad hoc basis and were away from the truth and were simply to impress the would-be employer. Thus, the papers were seized from the table drawer of Mr. S.S. Gulati. Mr. Gulati had also admitted that the papers belonged to him and the same had been written by him. Therefore, the additions made on the basis of these papers in the hands of the assessee are not justified unless it is proved that the papers were written by one of the partners of the firm and these papers pertain to the accounts of the projects of the assessee. In accordance with section 132(4A), if any document is found in the course of search, then by legal fiction a presumption has to be drawn that such document belongs to the person from whose possession or control, it was found and the contents of such documents are true, but this presumption is rebuttable. The presumption could be said to arise when it is established that the article or thing is found in the possession or control of any person in the course of search. Since in section 132(4A) the words 'may be presumed' have been employed it is clear that the making of the presumption in such cases depends upon the particular facts-of the case and the officer or the authority cannot be justified to make such presumption in all cases without judicious application of mind to the facts of the particular case. Even if such a presumption is made, the same is rebuttable and the person is free to lead evidence to rebut such presumption. The authority or the court has to consider the evidence and the facts judicially. Since section 132(4A) raises a rebuttable presumption, it would be open to the assessing officer to record a

finding that the contents of the books of account, etc. are not true. In the present case, the papers had been seized from the office of the assessee but the same were found in the table drawer of Mr. S.S. Gulati, who was one of the employees of the assessee-group of concerns. The assessee explained that these papers belonged to Mr. S.S. Gulati and Mr. Gulati also accepted in his statement recorded subsequent to the search that these papers belonged to him. Mr. Gulati also filed affidavit to confirm that the papers seized were written by him and these were rough estimates. Now these documents were found during the course of search from the office of the assessee, therefore, a presumption under section 132(4A) can be drawn that these papers belonged to the assessee and the contents of these papers were also true but the assessee had rebutted this presumption by explaining the actual facts that these papers did not belong to it and they had been written by Mr. Gulati for his own purpose. Mr. Gulati had also accepted the ownership of these papers and he had also explained the contents of these papers. This fact is further supported that such papers were seized from the table drawer of Mr. Gulati. The department did not record any statement regarding these papers during the course of search perhaps with the view that these papers had nothing to do with the actual facts of this case. The assessee also made a disclosure of Rs. 1 crore during the course of search and the search party might have not found it necessary to cause any further enquiries regarding these papers after the disclosure. Keeping in view the facts of this case, we do not find any justification on the part of the assessing officer to make such presumption under section 132(4A) in this case. It appears that the assessing officer has resorted to the provision of section 132(4A) without judicious application of his mind to the facts of this case. The seized papers do not belong to the assessee. These papers have also not been written by the partners of the firm and moreover, the assessee has discharged the onus of proving the actual ownership of these papers. Therefore, in our opinion, these papers cannot be used against the assessee. In the case of Addl. CIT v. Thahrayamal Balchand , the Hon'ble High Court held that the amount of evidence which would rebut such a presumption in a given case is not subject to any rigid rule. The direct evidence and a mere statement of the assessee may be enough in some cases, while in certain cases circumstantial evidence may justify raising of the presumption. In the present case there is a

direct evidence that the seized papers do not belong to the assessee, as they have not been written by any of the partners in their own hand. Further, they have proved that the papers belong to Mr. Gulati as Mr. Gulati has admitted in his statement that said papers belong to him. Under the circumstances, we do not find any justification for making - the additions in the case of the assessee, which are based on these papers.

17. Even on merits the additions made are not justified. The assessing officer has made the addition in respect of CIDCO project on the ground that the assessee has inflated the cost of this project. At the same time the assessing officer has made the addition in respect of Abhishek project on the ground that the assessee has suppressed the actual cost of the project. Thus, according to the assessing officer, the cost shown in the books of account in respect of CIDCO project is higher than the cost actually incurred by a sum of Rs. 41,91,000 and at the same time the cost shown by the assessee in respect of Abhishek project in the books of account is lower than the cost actually incurred by a sum of Rs. 28,61,122. Both these projects belong to the assessee and the period of assessment is also the same, Thus, there cannot be simultaneously inflation of cost in one project and suppression of cost in the other project. The inflation of cost in one project and suppression of cost in the other project would neutralize each other and the net effect would amount to NIL- The assessing officer has not given any reason in his assessment order for such a futile exercise by the assessee. In this case, the second addition of Rs. 28,61,122 in effect, would reduce the first addition of Rs. 41,91,000. The learned Commissioner (Appeals) has rightly pointed out that why at all the assessee would resort to such a self-defeating manipulation of accounts. It appears that the assessing officer has made these additions without any application of his judicious mind.

18. The assessing officer has made these additions on the basis of his own presumptions and interpretation of the seized documents. The assessee filed full details of the documents at the time of assessment proceedings as well as at the time of remand report called for by the Commissioner (Appeals). The assessee is maintaining regular books of account. The profit from each project is being disclosed on the basis of work-in-progress and the final profit is shown at the time

of completion of the project. The assessee pointed out various discrepancies in the seized pages and the assessing officer did not give any reply to these glaring discrepancies pointed out by the assessee even in his remand report. The learned Commissioner (Appeals) has also pointed out that there are serious discrepancies and misrepresentation of facts in the chart prepared by the assessing officer. The particulars given do not represent entirely the CIDCO mass housing project belonging to the assessee-firm. According to the Commissioner (Appeals), the seized page No. 4 and 6 pertain to the assessee-project at sector 26, Vashi, but the seized page Nos. 9, 11, 13 pertain to some other project at sector 8B, CBD Belapur. Thus, these two projects are not one and the same. The assessee explained that the Vashi project belonged to it whereas the Belapur project had been awarded to a sister-concern M/s Ganga Developers. Thus, the assessing officer has made this addition without verifying the correct facts of the case and in a highly routine manner. It has also been correctly pointed out by the learned Commissioner (Appeals) that the assessing officer has not made any efforts to go through the various details and explanations filed by the assessee and has made the additions on the basis of certain presumption and his own interpretations of the seized papers. The assessing officer has also not given any importance to the headings given on the seized papers. Section 132 is a self-contained code in the Income Tax Act, and the additions if any, have to be made as per the procedure laid down in that section. The seized paper has to be read as a whole and before making the addition the assessee has to be given a reasonable opportunity. The additions made on the basis of certain entries in the seized papers, which are in favour of the department and ignoring the other entries on the same seized papers, which are in favour of the assessee are bad in law. In the present case the assessing officer has made the addition on the basis of certain papers seized during the course of search by picking up certain figures and ignoring the others at his own convenience, which in our opinion, is highly unjustified. So far as the Abhishek project is concerned the department had not made any additions in the earlier years and even for subsequent years the addition had not been made. In view of the discussion above, we do not find any infirmity with the findings of the learned Commissioner (Appeals) and the same are upheld. These grounds of appeal are, therefore, decided in favour of the assessee.

19. So far as ground No. 3 is concerned we do not find any force in the arguments of the learned Departmental Representative. In the original assessment, the assessing officer made the addition after going through the various seized documents. The assessee made detailed submissions and furnished supporting material in respect of the second part of the assessment order in which specific addition to the declared income has been made. The assessee has also filed detailed paper book and written submissions before the learned Commissioner (Appeals). The paper book and written submissions made by the assessee were forwarded to the assessing officer by the learned Commissioner (Appeals) and the assessing officer was asked to furnish his report with comments on the submissions made by the assessee. Thereafter, the assessing officer granted several hearings to the assessee during the course of which the assessee once again, made detailed submissions and furnished various documents. The assessing officer submitted his remand report on 15-9-1995, to the learned Commissioner (Appeals). Thus, the assessing officer got second opportunity to go through the various documents seized during the course of search and made the detailed enquiries. As the assessing officer has already made thorough enquiries before making the additions, therefore, we do not find any reason for restoring back this issue to the file of the assessing officer for fresh adjudication. The assessee submitted its detailed explanation at the time of original assessment. The assessee also explained each and every seized paper to the assessing officer when the learned Commissioner (Appeals) called for the remand report. Restoring this case back to the file of the assessing officer would only put the assessee again on trial for an indefinite period for no fault on its part. Keeping in view the principles of natural justice, we do not find any force in the arguments of the learned Departmental Representative and, therefore, his request for setting aside this case to the file of the assessing officer is rejected.

20. For the assessment year 1993-94, the department and the assessee have filed cross appeals against the order of the Commissioner (Appeals) Central IV, Mumbai, dated 17-2-1997. The grounds of appeal taken up by the department read as under :

'On the facts and in the circumstances of the case and in law, the learned Commissioner (Appeals) has erred in :

(i)(a) restricting to Rs. 8,30,000 the addition of Rs. 13,80,000 on account of annual letting value of the premises used by the partners for their residence;

(b) failing to appreciate the fact that the assessing officer has correctly estimated the annual letting value of the property at Rs. 13,80,000 in view of its prime location and the maintenance expenses such as electricity charges borne by the firm;

(ii)(a) deleting the addition of Rs. 72 lakhs made under section 69D of the Income Tax Act on account of Hundi loans taken by the assessee otherwise than through account payee cheques;

(b) ignoring the fact that the entries appearing in the seized documents bear all the characteristics of Hundi transaction;

(iii) deleting the addition of Rs. 13,42,000 made on account of additional profit on enhanced work-in-progress due to undisclosed cost of construction.'

21. The department has also filed the additional ground of appeal which reads as under :

'On the facts and in the circumstances of the case and in law, the learned Commissioner (Appeals) having held that the entries made in the seized documents (Mehul note book) represent cash credits in the books of the assessee, ought to have upheld the addition of Rs. 72 lakh under section 68 of the Income Tax Act as the actual source of such cash credits routed through finance broker Shri Paras Ram Rohera. remains unexplained.'

22. The assessee has taken up the following grounds of appeal :

'1. Under the circumstances and in view of the said facts the learned Commissioner (Appeals) has erred in retaining the addition of Rs. 6,91,677 on account of occupation of bungalow for their residential purposes at Pali Hill. The appellant prays that the addition made is unjustified and may kindly be deleted

from the total income.

2. The learned Commissioner (Appeals) erred in sustaining the addition of interest and enhancing it from Rs. 2,68,750 to Rs. 5,29,433 without justification and appellant prays that the entire addition be deleted from the total income.'

23. The assessee has also filed the following additional grounds of appeal

(i) The learned Commissioner (Appeals) erred in holding that the appellant-firm has taken loans through or from Paras Ram C. Rohera, finance broker, in cash in violation of the provisions of section 269SS of the Income Tax Act.

It is submitted that these remarks were made without appreciating the facts and provisions of section 269SS of the Income Tax Act and, therefore, they should be expunged.

(ii) The learned Commissioner (Appeals) erred in enhancing the assessment by directing the assessing officer to make the addition on account of alleged brokerage that would have been paid by the appellant for arranging the cash loans through Shri Paras Ram Rohera, which is calculated by the assessing officer at Rs. 70,290.'

24. The first ground of appeal taken up by the department is regarding the restriction to Rs. 8,30,000 the addition of Rs. 13,80,000 on account of annual letting value of the premises used by the partners for their residence. The assessee has also filed the cross-appeal on the ground that the learned Commissioner (Appeals) has erroneously retained the addition of Rs. 6,91,677 on account of occupation of bungalow for the residential purposes of the partners at Pali Hill. The assessing officer in his order has observed that the capital asset of the firm 'Pali Hill project' is being utilized by the partners of the 'Kukreja family'. The assessing officer has stated that the bungalow is situated in a prestigious locality 'Pali Hill' and opposite to Dilip Kumar's bungalow. The assessing officer also observed that since the property is being used for residential purposes of the partners of joint family, therefore, the provisions of sections 22 and 23(1) (a) of the Income Tax Act are attracted. Taking into account the fact that the said property is

a bungalow and is a very spacious property located in a prestigious locality and taking into account the fact that the quality of construction was very superior and also the fact that the electricity charges pertaining to the said property are borne by the firm, he estimated the rental value of the property at Rs. 1,15,000 per month. He, therefore, assessed the income from house property at Rs. 11,50,000 after giving deduction of 1/6th for repairs amounting to Rs. 2,30,000 from the gross annual value of Rs. 13,80,000.

25. The learned Commissioner (Appeals) observed that the provisions of section 22 and sections 23(1) (a) are applicable in the given facts and circumstances of the case and that section 23(2) is not applicable. According to her section 22 levies income-tax on bona fide annual value of property of which the assessee is the owner. Section 23(2) only stipulates that in case the owner occupies the property for his self-residence the annual letting value will be taken at Nil. The learned Commissioner (Appeals) has further stated that the ownership of the property 'Pali Hill project' vests with the firm M/s Om Prakash & Co., and the said property has admittedly not been transferred to the partners. Thus, according to the learned Commissioner (Appeals), the annual letting value in respect of the 'Pali Hill project' cannot be taken at Nil figure since the said project in the form of a residential bungalow is not utilized by the firm for its self-resident. The learned Commissioner (Appeals) has observed that the structure is of superior quality. The bungalow is located in posh locality and the value of the land on which it is constructed has substantially risen. Taking into consideration the above facts, the learned Commissioner (Appeals) has held that the annual letting value should be adopted after taking into account a reasonable return on the investment made. She, therefore, adopted the annual rateable value @ 14 per cent on the total investment made till 31-3-1993, which according to her, the assessee has stated at Rs. 59,17,786. On this basis she worked out the annual letting value at Rs. 8,30,000 instead of Rs. 13,80,000 adopted by the assessing officer.

26. The learned counsel for the assessee contended that the assessee is a builder and the bungalow has been partly occupied by the partners and partly used for business. According to him firm and partners are the same. Therefore, the property occupied by the partners infact, has been used for the purpose of the

business and, therefore, the annual letting value should be taken at Nil. He argued that the property is in the name of the firm and the same has been shown as work-in-progress. According to him the value of work-in-progress was to the tune of Rs. 69,70,786 and the partners' credit balance was Rs. 64,60,191. The learned counsel argued that under the provisions of section 23(2)(a) the annual letting value should be taken at Nil. The learned counsel also brought to our notice that in fact the house property was partially used for business purposes and partially used for residential purposes by the partners of the firm. In view of these facts, there was no addition on account of deemed rent under sections 22 and 23 of the Act in the past for the last several years. He pointed out that the addition has been made for the first time in the year 1993-94 though the status of the property remained the same as in the earlier years. The learned counsel also contended that the assessing officer is not justified in determining the annual letting value on estimated basis. To support his contention he relied on the decision of the Calcutta High Court in the case of CIT v. Satya Co. Ltd. (1994) 75 Taxman 193 (Cal), wherein the Hon'ble High Court has held that the annual letting value for determining the income from house property has to be strictly computed as provided in section 23(1) since it is a fictional or deemed value. The court has consistently taken the view that for the purpose of section 23 the revenue is bound to fix the annual letting value based on the municipal valuation unless the same is lower than the actual rent received in respect of the period falling after 1-4-1976, when the section was amended. The Hon'ble High Court further laid down that there can be no scope or justification whatsoever for making addition of any notional interest for determining the annual letting value. There is no mandate of law whereby the assessing officer could convert the depression in the rate of rent into money value by assuming the market rate of interest on the deposits as the further rent received by way of benefit of interest-free deposits. That being so the act of the assessing officer in presuming such notional interest as integral part of the rent was ultra vires the provisions of section 23(1) and was, therefore, unauthorized. In the alternative, the learned counsel contended that if the income is to be determined it should be determined by the municipal value. He placed his reliance on the decision of the Tribunal in the case of Income Tax Officer v. Chem Mech. (P) Ltd. . The learned Departmental Representative contended that proper

opportunity was given by the Commissioner (Appeals) before adopting the annual letting value. He further contended that the assessee has not produced any evidence to support its contention that the firm's partners were staying in the property for the benefit of the assessee's business. It is not proved whether any benefit has accrued to the firm for giving the property to the partners. The learned departmental Representative also argued that the assessing officer is empowered to estimate the annual letting value on the basis of location of the property, the report of the approved valuer and return on the value of property, etc. To support his contentions he relied on the decision of the Gujarat High Court in the case of *Bipinbhai Vadilal Family Trust No. 1 v. CIT* : [1994]208ITR1005(Guj) . The learned departmental Representative also referred to the case of *CIT v. Dewan Chand Dholan Dass* : [1981]132ITR790(Delhi) , wherein the Hon'ble High Court has laid down that the expression 'occupation of the owner for the purpose of his own residence' in section 23(2) of the Income Tax Act, 1961, refers only to a human owner and not a fictional entity. A firm cannot physically reside and so cannot claim the benefit of the provisions, which is available to an assessable entity only. It is difficult to contemplate residence by some of the partners or even all of them as self-residence by the owner of the firm. In the context of section 23(2), the dichotomy between the firm and its partners, who are independent assessable entities for the purpose of Income Tax Act, should be given effect to. The nature of the relief under section 23(2) is such that it is not available in the case of firm just as it is not available in the case of a company. Regarding the contention of the learned counsel that the firm has actually been benefited by the occupation of the property by its partners as it has helped in the smooth running of the business of the assessee, the learned departmental Representative contended that the assessee had not brought any facts on record to prove that the assessee had actually been benefited by the occupation of the property/by the partners. To support his contention, the learned departmental Representative relied on the Full Bench decision of the Delhi High Court in the case of *CIT v. Modi Industries Ltd.* (1994) 210 ITR 1 (Delhi) wherein the Hon'ble High Court held that the term 'occupy' appearing in section 22 of the Income Tax Act, 1961, refers to occupation directly by the assessee or through an employee or agent but such occupation by the employee, etc., must be subservient to and necessary for the performance of

the duties in connection with the business of the assessee. The learned departmental Representative however, agreed that the annual value of the property may be determined by taking 8.5 per cent on the total investment made in the property as per the Bombay Rent Control Act.

27. We have carefully considered the submissions made by the rival parties. The assessee has constructed a house property at Pali Hill and is the owner of the same. According to the assessee the construction of the property was not yet fully completed. The assessee received partial occupation certificate from the BMC in respect of the house property during the year under consideration. It is submitted by the assessee that the house property was partially used for the purpose of the business of the assessee-firm and partially used for the residence of its partners. The assessing officer made an addition of Rs. 11,50,000 to the income of the assessee-firm as income from house property on account of 'Pali Hill project'. The assessing officer has estimated the reasonable expected monthly rent of the house property at Rs. 1,15,000 per month. After allowing the statutory allowance in respect of repairs at Rs. 2,30,000 being 1/6th of the estimated gross rent determined at Rs. 13,80,000, the assessing officer has treated the remaining amount of Rs. 11,50,000 as income from house property. The learned Commissioner (Appeals), however, adopted the annual rateable value @ 14 per cent on the total investment of Rs. 59,17,786 as on 31-3-1993, and determined the annual letting value at Rs. 8,30,000 instead of Rs. 13,80,000 adopted by the assessing officer. She therefore, retained the addition of Rs. 6,91,667 after allowing 1/6th for repairs on Rs. 8,30,000. The learned counsel, however, strongly objected to the determination of the annual letting value on the basis of estimation. He argued that the property is self-occupied as the firm and its partners are not separate entities. Thus, the house is in occupation of the owner for the purpose of its own residence, therefore, the benefit of section 23(2)(a) of the Act, should not be denied to the assessee. In the alternative, he argued that even if the income from the house property is to be determined, the same has to be determined by taking into consideration the rateable value determined by the Bombay Municipal Corporation, the copy of the certificate obtained from the BMC was produced before the assessing officer at the time of assessment (compilation p. 1). The learned Departmental Representative, however, supported the findings of the tax

authorities as we have discussed earlier.

28. The first main point for consideration is whether the assessee is entitled to the benefits of the provisions of section 23(2)(a) of the Act. The Hon'ble Delhi High Court in the case of CIT v. Modi Industries Ind. (supra), has held that when the house property is occupied as residence by the employees or its directors, etc., if concerned with the promotions of the business of the assessee- company, whether on payment of rent or otherwise, to enable them to discharge their functions efficiently and letting out the property is subservient and incidental to the main business of the assessee, such an occupation amounts to an occupation and user of the property by the assessee itself for the purposes of its business, even though no business is actually conducted in such premises. Income from such property is not assessable as income from house property. In the present case, the assessee has not brought on record any evidence to support the contention that the property was in fact occupied by the partners of the firm for the promotion of the business of the assessee and to discharge their functions efficiently. Thus, the assessee has not proved that the letting out of the property was subservient and incidental to the main business of the assessee. Therefore, the assessee-firm cannot be considered to be in occupation and user of the property itself for the purpose of its business. The Delhi High Court in the case Dewan Chand Dholan Dass (supra), has however, laid down that where a firm owned a house property a portion of which was occupied by its partners for their personal residence and the other portion was used by the firm for its business, the firm was not entitled to any deduction under section 23(2) of the Income Tax Act, 1961, which provides for a deduction in case of occupation' of the owner for purpose of his own residence. The facts of the present case are similar to the facts of the above case decided by the Delhi High Court, therefore, the assessee is not entitled to the benefit of section 23(2)(a) of the Act.

29. Now the next important issue is regarding the determination of the annual value of the property. In the case of Mrs. Sheila Kaushish v. CIT : [1981]131ITR435(SC) , the Hon'ble Apex Court held that the annual letting value of the building according to the definition given in section 23(1) must be held to be standard rent determinable under the provisions of the Rent Control Act and not

the actual rent received by the landlord from the tenant. In the case of CIT v. Sampathammal Chordia (1999) 105 Taxman 128 (Mad), the Madras High Court held that it is only in the case of buildings situated in places where there is a prohibition against the charging of rent in excess of the standard rent that the standard rent determined in accordance with the Rent Control Act can be adopted as annual value. It cannot always be assumed that the figure adopted by the local authorities for the purpose of levy of property tax as the annual value will always correspond to the standard rent determinable under the Rent Control Act, which is in force in that area. Further, the submission that the actual rent received can never be regarded as the amount which the landlord can reasonably be expected to receive from his property for purpose of section 23(1) (a) cannot be accepted. In the case of CIT v. Bhaskar Mitter (1994) 73 Taxman 437 (Cal), the High Court held that there is a unity of the Municipal Act and the Income Tax Act on the question of annual value and such annual value cannot exceed the standard or fair rent under the Rent Control Act and may in a given case be even lower than the standard or fair rent. In case, where the annual municipal value is available, that itself would be the annual letting value under the Act. In the case of CIT v. Satya and Co. (supra), the Calcutta High Court held that for the purpose of section 22, and read with section 23, the revenue is bound to fix the annual letting value based on the municipal valuation unless the same is lower than the actual rent received in respect of the period falling after 1-4-1976, when the section was amended. Punjab and Haryana High Court in the case of Tilak Raj v. CIT (1989) 178 ITR 327 (P&H;), held that for determining the annual letting value of a self-occupied property, it is not the open market rent, which is to be considered but the standard rent as fixed under any Rent Control Act.

30. The Mumbai Bench of Tribunal, in its order in the case of Chem Mech (P) Ltd. (supra) after going through the various court cases and also the amendment to section 23 of the Act, with effect from 1-4-1996, came to the conclusion that the annual letting value has to be determined on the basis of (i) standard rent determined in accordance with Rent Control Act (ii) annual municipal value if available that itself would be annual letting value under the Act and if the actual rent received or receivable is more than the standard rent or the annual municipal value, then the actual rent is to be taken as annual value of the property. In the

present case, the standard rent in Bombay is to be fixed at 8.5 per cent on the total ' investment as per the Bombay Rent Control Act. The total investment made in the property-as on 31-3-1993, was to the tune of Rs. 59,17,786. Therefore, the standard rent would be Rs. 59,17,786 x 17/200 Rs. 5,03,012 for 12 months. Annual rateable value as determined by the Bombay Municipal Corporation is Rs. 89,425. The assessee has not received any actual rent during the year under consideration. Now, the standard rent under

the Bombay Rent Control Act for the year under consideration would be Rs. 5,03,012. The municipal valuation would be Rs. 89,425. The actual rent received during the year is Nil. The highest of these figures is the standard rent as per Bombay Rent Control Act. Therefore, we direct the assessing officer to adopt the fair rental value of this property for the year under consideration at Rs. 5,03,012 and accordingly determine the rental income. During the course of hearing, it was also brought to our notice that the assessee has also paid municipal taxes of Rs. 54,106, but the assessing officer has not considered this amount for deduction while computing the income from the house property. The assessing officer is, therefore, directed to verify the contention of the assessee and allow the deduction if the contention of the assessee is found correct. Similarly, the learned counsel for the assessee brought to our notice that 1/3rd of the property is occupied by the assessee for it business purpose. The assessing officer is directed to verify the contention of the assessee and if the same is found correct, 1/3rd of the income so determined should be excluded from the property income. The assessing officer would, thus, recompute the income from house property as per our aforesaid directions.

31. The second ground of appeal taken up by the department is regarding the addition of Rs. 72,00,000 made by the assessing officer under section 69D of the Act on account of Hundi loans taken by the assessee otherwise than through account-payee cheques. The learned Commissioner (Appeals) deleted the addition. The addition of Rs, 72,00,000 under section 69D is based on documents seized during the course of search conducted at the premises of the assessee and Paras Ram Rohera. One note book s 'Mehul note book ' was seized from the residential premises of the assessee. This note book had two written pages.

According to the assessing officer p. 1 of the said note book gives details of transactions with a person 'Paras Ram Rohira Bros' and p. 2 gives details of some of the transactions in the name of 'Mr. Madnani'. At the premises of Paras Ram Rohira, two diaries were seized, i.e., A-53 and A-54. These diaries contain details of transactions in the name of a number of parties, including that of M/s Om Prakash & Co. It is stated by the assessing officer, that during the course of search Shri Paras Ram Rohira was questioned about the entries in the diaries. Shri Paras Ram Rohira admitted that these diaries had been written in his own handwriting and instead writing the details in numbers, the amounts were entered by putting a '+' sign. He further stated that each '+' sign stands for Rs. 5,000. Based on this information, the details of the amounts pertaining to 'Om Prakash & Co.' had been worked out. According to the AQ, the details so worked out were compared with the details recorded in the name of 'Paras Ram Rohira Bros.' in the Mehul note book and it was found that if the amount written in the Mehul note book is multiplied by '1000', the total amounts tallied in both the accounts on a day to day basis. It is stated that another diary titled Scholar Beautiful Sunday No. A-51 was also seized from the premises of Shri Paras Ram Rohira, which gave details of the loans advanced by means of cheques to various concerns, including 'Kukreja Enterprises', a sister-concern of the assessee-firm. The transactions noted in this diary were found to be repeated in the books of account of M/s Kukreja Enterprises. The assessing officer also found that transactions recorded in A-53 and A-54 which were written in coded language and which recorded cash transactions with the assessee were not found to be recorded in the books of M/s Om Prakash & Co. The assessee, however, had denied the Mehul note book A-2 found from its premises at the time of search itself as not belonging to it. The assessee stated that the said note book had been kept by somebody who visited its place. The assessee also denied any cash transaction with Paras Ram Rohira. According to the assessing officer the material found at the time of search and the statement of Shri Paras Ram Rohira regarding decoding clearly revealed that cash loans were taken from Shri Paras Ram Rohira and in the case of the assessee only the act and fact of cash loans was material, therefore, the extracts of the diaries were from the seized diaries and xerox copies could not be given to the assessee as the entries pertaining to other parties also existed. The assessing

officer also found that the period/tenure of principal amount was quarterly, the renewal too was on a quarterly basis and the cash loans were only against the name of 'Om Prakash & Co.' The assessing officer, therefore, came to the conclusion that in substance, the nature of the loans had all the characteristics of a 'Hundi' and it was against the security of a name 'Om Prakash & Co.' and the only thing missing was the 'Document of Hundi'. The assessing officer had also observed that obviously for a cash loan- (maintained in coded documents), the probability and possibility of maintaining a 'Duly stamped legal document' would be NIL. He had further observed that there were 'Hundis' in the possession of Paras Ram for loans taken by cheques by 'Kukreja Group'. Thus, he treated the cash loans recorded in the seized documents as 'Hundi loans' and applied the provisions of section 69D and made an addition of Rs. 47 lakhs under section 69D. The assessing officer made another addition of Rs. 25 lakhs in respect of cash loans taken from Madnani, which appeared at p. 3 of the Mehul note book. He found that the periodicity of the loans taken too gave it the character of a Hundi Loan. Thus, a total addition of Rs. 72 lakhs was made under section 69D against which the assessee filed appeal before the Commissioner (Appeals).

32. The learned Commissioner (Appeals) has observed that 'Mehul note book' is not a 'dumb' document. It is document which speaks eloquently of the transactions entered into by the assessee Which have not been recorded in the books of account of the assessee maintained for the purpose of revenue authorities. According to the Commissioner (Appeals), there is a direct nexus between the entries appearing in the diaries A-53 and A-54, found from the premises of the finance broker of the assessee i.e., Paras Ram Rohira and the Mehul note book, and is supported by the loose sheets A-41 and A-39 written in the handwriting of Paras Ram Rohira which were found at the residence of the assessee. She has further stated that the denial by Shri Paras Ram Rohira on 16-1-1997, that they were not written by him is patently false, for even a cursory glance at these documents would reveal that the handwriting on these loose papers and in diaries A-53 and A-54 is absolutely identical. Thus, according to her the denial made at later stage is being motivated because substantial tax implications were involved in both the cases. Thus, according to her no cognizance of the same can be taken.

33. The learned Commissioner (Appeals) has further stated that these loose papers provide a clear link in establishing the genuineness of the entries in the Mehul note book. She referred to the transactions in A-53 diary on the dates as appearing in slip No. 41. According to her the entries in A-53 diary appears at pp. 287, 291, 292 and 293 of the said diary and the said pages enclosed with the order of the Commissioner (Appeals) as Annex. B are having very close connection. She compared the two documents and noticed that an amount of Rs. 4,00,000 had been taken by the assessee on 1-7-1993, against the name Om Prakash & Co. The digit 17 is suffixed. According to her 17 stands for 1st of July. The entries are appearing on the date 1-10-1993. In the slip of paper (41) (Annex. B enclosed with Commissioner (Appeals) order) both these dates appear and 400 has been encircled. Thus, she has stated that this clearly indicates that 4 lakhs of rupees were made available to the assessee for the period 1-7-1993 to 1-10-1993. The slip No. 41 gives a calculation of interest of Rs. 14,106.67 which works out to 14 per cent on Rs. 4 lakhs. The learned Commissioner (Appeals) further referred to slip No. 41 and noticed another entry for the period 5-7- 1993 to 4-10-1993. The corresponding entry in A-53 diary appears on pages No. 291, 292 of the diary, which is enclosed with the order of Commissioner (Appeals) as an annexure. According to her the entries are suffixed by No. 57, 57 stands for 5th July and the date in the diary is 4-10-1993. The '+' sign multiplied by 5000 gives a total of 6,50,000. In the slip No. 41, 650 is encircled. The interest has been calculated at a figure of 22,514.60. According to her, this again works out 14 per cent per annum. She has further stated that the entries appearing on slip No. 41 are also recorded in the Mehul note book. She referred to entry Nos. 13 and 14 in the said note book and noticed that 400 is written against the date 1-7-1993 and 650 is written against the date 5-7- 1993. Similarly, she pointed out that the entries in slip No. 39, written in the handwriting of Paras Ram Rohira and found at the premises of the assessee tallies with those in the Mehul note book. The encircled figures and the '+' in the A-53/A-54 diaries when multiplied by 1000 and 5000, respectively, they tally. She has further pointed out that the very fact that code language has been used by both the assessee and his finance broker with whom admittedly there have been dealings for the last 12 years is a pointer to the clandestine character of the entries and the intention of the parties to the transactions. She has further stated that the

intention all along was to keep a record of transactions carried out, which only the parties to the transactions would be able to decipher and which were obviously for only personal use of the parties to the transaction, since they were never intended to be recorded by the parties in their regular books of account. She has pointed out that it is the encircled amount, which is shown in the Mehul note book. She stated that this further lends credence to the fact that the transactions in the Mehul note book was a faithful record of transactions actually carried out.

34. The learned Commissioner (Appeals) has also stated that the contention of the assessee that no reliance can be placed on these documents in drawing an adverse inference on the ground that at the time of search itself, the assessee had disowned those documents is not tenable. According to her a person can always disclaim a particular document as not pertaining to him if he is aware that claiming the ownership of the document can lead him into trouble. Besides this, one does not contemplate that corroborative evidence in the form of documents would be found at the premises of the other party to the transaction. Regarding the argument of the assessee that if the documents had represented transaction pertaining to him, he would certainly have incorporated the same in the disclosure made by him under section 132(4) of the Act, she has stated that the same is also not tenable for the reason that the document is indicating loans received by the assessee and receipt of loans in cash, though being in violation of the provisions of section 269SS under the Income Tax Act but do not ordinarily constitute income. According to her the assessee has admitted that the papers pertain to Paras Ram Rohira, his finance broker, and they have most probably been left in his premises by Mr. Paras Ram Rohira who used to visit the assessee frequently. It was further admitted by the assessee that the name of Shri Paras Ram Rohira does appear on top of seized papers in Mehul note book which according to the assessee proves that the said papers belong to Shri Paras Ram Rohira.

35. The learned Commissioner (Appeals) thus observed that the transactions recorded in the Mehul note book pertain to M/s Om Prakash & Co., where the frequency of the transactions is substantial and large amounts are involved in cash, therefore, it was necessary for both the parties to keep a record of these transactions for purpose of cross-matching. She has, therefore, stated that the

denial made by the assessee and Paras Ram Rohira at later stage is of no consequence in the light of its overwhelming circumstantial evidence disclosed during the course of search at the premises of the assessee and the finance broker Shri Paras Ram Rohira. Regarding the contention of the assessee that since the partners of the firm, have an interest in a number of concerns, which run into approximately 20 in number, therefore, it is wrong to presume that the transactions belong to M/s Om Prakash & Co., the learned Commissioner (Appeals) has stated that the same is not correct for the reason that the name of 'M/s Om Prakash & Co.' is clearly mentioned in the slips 39 and 41 and in A-53 and A-54 diaries. According to her, the transactions in the Mehul note book cross-match with the transactions in these papers. Therefore, even though the name M/s Om Prakash & Co. is not written on the Mehul note book it is nevertheless clear that the loan transactions pertain to M/s Om Prakash.& Co. She also stated that the fact that M/s Om Prakash & Co. not written on the note book is not relevant. She, therefore, has come to the conclusion that Mehul note book belongs to M/s Om Prakash and Co., and since the two pages written in it are of M/s Om Prakash & Co., the entries in this note book are to be treated as pertaining to Om Prakash & Co. She has also stated that M/s Om Prakash & Co. is also having loan transactions with the party having the surname 'Madnani' which are recorded in the regular books of account maintained by the assessee. The learned Commissioner (Appeals), therefore, has finally held that on the basis of the entire circumstantial evidence, the Mehul note book is containing entries of loans and advances taken, interest paid, which have not been recorded in the books of account prepared for income-tax purposes. She has further observed that the fact that the books of account are audited and, therefore, represent the true state of affairs is also not correct, for the auditors are not an investigative agency required to analyze and make enquiries regarding transactions carried on by the assessee outside the books of account and disclosed by the parties to the auditors. Since the auditors move within limited parameters, their report has to be viewed in the given context only. Thus, the learned Commissioner (Appeals) confirmed the action of the assessing officer for resorting to the provisions of section 145(2) of the Act and estimating the income of the assessee based on the seized documents found at the premises of the assessee.

36. The learned Commissioner (Appeals) further observed that no Hundi documents were found pertaining to those transactions, either at the premises of the assessee or at the premises of Mr. Paras Ram Rohira. She has further stated that no such documents were also brought to her notice. In the absence of such documents, the learned Commissioner (Appeals) concluded that the provisions of section 69D cannot be invoked. She has further stated that the mere fact that a cash loan has been taken does not suo moto convert it into a 'Hindi loan'. According to her it is true that there would be difficulties in recovering amounts advanced without Hundis, but that in itself does not presupposes the existence of 'Hundi'. She has further stated that even the discharged Hundis were not found at the premises of the assessee. She, therefore, held that on the basis of the entries as appearing in seized documents one cannot invoke provisions of section 69D of the Income Tax Act in bringing to tax the said advances under the deeming provisions. According to her the said amounts represent 'cash credits' and since the documents found are in actual fact a part of the books of account, not disclosed to the department, it will have to be analysed as to whether the cash credits represented by these entries can be taken to be explained or not. She has thus, stated that these papers have not been prepared with the object of disclosing them to the department but have been prepared with the intention of keeping a record for personal use and since they have been kept for personal use, the statement of affairs recorded therein have to be treated as the 'real state of affairs'. She has also stated that the assessee may not want to disclose the identity of the party from whom it has received the amount, yet the fact cannot be denied that it has received the amount from those parties. According to her these documents were found during the course of search and even the assessing officer admits that the entries pertain to cash loans taken in violation of provisions of section 269SS. Thus, she has stated that the loan have genuinely been taken through or from Paras Ram Rohira, the finance broker, and that accordingly no addition on account of loan so taken in violation of provisions of section 269SS can be made in the hands of the assessee. She, therefore, directed the assessing officer to delete the addition of Rs. 72 lakhs. According to her, the only addition that can be made is in respect of the amount earned by utilization of the said amount, and in respect of any expenditure that the assessee may have incurred in the form of

'brokerage' and interest for procuring these loans.

37. During the course of hearing the learned Departmental Representative argued that the addition of Rs. 72 lakhs comprises of two amounts, i.e., the addition of Rs. 47 lakhs has been made on the basis of diaries A-53 and A-54 seized from the premises of the Paras Ram Rohira and the addition of Rs. 25 lakhs has been made on the basis of Mehul note book seized from the premises of the assessee. He explained that the transactions recorded in the note book of the assessee are tallying with these recorded in the books of assessee's finance broker. Thus, the cross-tallying of the dates amounts, etc., clearly prove that they are similar and such unaccounted transactions actually took place. He further stated that since in the note book of assessee, there is a mention of Paras Ram Rohira, the finance broker, the direct nexus is established. The learned Departmental Representative, therefore, contended that the materials seized from the premises of the assessee and that of the finance broker pertain to similar transaction. He argued that Paras Ram Rohira is a finance broker and he is arranging loans for the assessee. According to him the figures given in the Mehul note book are in the handwriting of the assessee. He, however, admitted that this diary was not sent to the handwriting expert for confirmation that the figures were written by the assessee himself. He contended that loose sheets A-41 and A-39 were found in the premises of the assessee and the handwriting in these loose papers was exactly similar to the handwriting in the diaries A-53 and A-54 seized from the premises of Shri Paras Ram Rohira. The arguments of the learned Departmental Representative were actually based on the findings of the learned Commissioner (Appeals), who in her order has stated that the handwriting in loose sheets A-41 and A-39 is identical to the handwriting of Shri Paras Ram Rohira in diaries A-53 and A-54. Thus, the arguments of the learned Departmental Representative are not based on the report of any handwriting expert. The Departmental Representative, therefore, argued that there is a direct nexus between the entries appearing in the diaries A-53 and A-54 found from the premises of the finance broker of the assessee and the Mehul note book and it is also supported by the loose sheets A-41 and A-39 written in handwriting of Paras Ram Rohira which were found from the premises of the assessee. The learned Departmental Representative, therefore, contended that the department is relying on the

principle of 'preponderance of probability'. He argued that Mehul note book pertains to the assessee with the name of the Shri Paras Ram Rohira, therefore, this diary contains the transactions between the assessee and Mr. Paras Ram Rohira. He further argued that whether the loans are taken or given, the results so far as the undisclosed income is concerned would remain the same. The learned Departmental Representative contended that as per the presumption under section 132(4A) of the Act, the documents seized from the premises of the assessee belongs to him and contents of these documents are true unless rebutted by the assessee. He argued that presumptions are not restricted to section 132(5) only. To support his contention, he relied on the following court cases :

(i) CIT v. P.R. Metrani (HUF) : [2001]251ITR244(KAR) and

(ii) Pioneer Publicity Corporation & Ors. v. Dy. CIT (2000) 67 TTJ (Delhi) 471.

The learned counsel thus contended that the onus is on the assessee to rebut the presumption under section 132(4A), but the same has not been rebutted by the assessee. So far as the facts of the case are concerned, the learned Departmental Representative relied on the order of the assessing officer.

38. The learned Departmental Representative also argued that the assessing officer made the addition under section 69D of the Act because these transactions were in the nature of Hundi loans. The learned Commissioner (Appeals) deleted the addition made under section 69D of the Act because no Hundi documents were found during the course of search either at the residence of the assessee or at the premises of Shri Paras Ram Rohira. The statement of Shri Paras Ram Rohira was not recorded on the seized slips and other documents found from the premises of the assessee. This fact was admitted by the learned Departmental Representative. The assessee was also not given any opportunity before making the addition. The learned Departmental Representative, however, contended that the copies of the diaries A-53 and A-54 seized from the premises of Shri Paras Ram Rohira were not given to the assessee because there were certain names appearing on these diaries, which were of top secret nature and the same were not to be disclosed in the public. The learned Departmental Representative,

however, brought to our notice that some portions of the papers of these diaries were made available to the assessee on the direction of the learned Commissioner (Appeals) as the other portions of the papers were not pertaining to the assessee, therefore, they were not made available to him.

39. The learned Departmental Representative took us through the seized papers 39 and 41, which were found from the premises of the assessee (compilation pp. 44 and 45). He also took us through the compilation pp. 46 to 124 which pertain to the diary A-53 and A-54 seized from the premises of Shri Paras Ram Rohira. He argued that the learned Commissioner (Appeals) has decoded these papers on the basis of the figures given therein and also the interest which has been calculated at the rate of 14 per cent. He invited our attention to p. 42 of the compilation filed by the assessee which is a seized paper of Mehul note book seized from the residence of the assessee and contended that the figures mentioned in column No. 1 have to be multiplied by one thousand to determine the exact amount and in column No. 4 the interest amount has been calculated at the rate of 14 per cent. He referred to p. 44 of the compilation which is a loose paper A-39 seized from the residence of the assessee and contended that the figures appearing in this paper are exactly the same which have been shown on the Mehul note book (compilation p. 42). He stated that the figures (250), (500), (500) and (1000) mentioned on p. 44 of the compilation (seized loose paper A-39) are the same which have been mentioned on computation p. 42 (Mehul note book). According to him if these figures are multiplied by 1000 and interest on the amount is determined at the rate of 14 per cent, the total interest would come to Rs. 78,295.83 which is mentioned on seized loose paper A-39 and the same interest has been calculated on p. 42 of the compilation (Mehul note book). Thus, according to him, the figures on Mehul note book pertain to cash loans and the actual amount of cash loans has to be determined by multiplying these figures by 1000. Thus, he argued that the assessing officer has correctly decoded the figures to find the actual amount of cash loans. He also referred to compilation p. 45 which is a loose paper A-41 seized from the residence of the assessee and according to the learned Departmental Representative the figure of (4 00) is actually amount of Rs. 4,00,000 (400 x 1,000) and on this amount also the interest at the rate of 14 per cent has been calculated which comes to Rs. 14,101.67 for

the period 1-7-1993 to 1-10-1993. According to him, this is the same figure which has been shown on p. 1 of the Mehul note book in column 1 (compilation p. 42). Similarly, he argued that figure (650) is actually the amount of Rs. 6,50,000 (650x1000) and the amount of Rs. 22,674.16 is the interest on this amount at the rate of 14 per cent for the period 5-7- 1993 to 4-10-1993. He contended that figure of 650 is also appearing on p. 1 of the Mehul note book. He, therefore, contended that the assessing officer has done the decoding correctly and the amount of cash has been determined on that basis. The learned departmental Representative contended that the extracts of Paras Ram Rohira's diaries with each '+' were decoded as 5000 as admitted by Shri Paras Ram Rohira at the time of search. These extracts were made available to the assessee. The seized diaries A-53 and A-54 mention the names 'Om Prakash & Co.' According to the learned Departmental Representative these entries in Paras Ram Rohira's diaries tallied on a day-to-day amount basis with Mehul note book seized from the premises of the assessee. He, therefore, contended that as per the provisions of section 132(4A) of the Act the presumption is drawn against the assessee that all loans were taken by the assessee in cash from Shri Paras Ram Rohira and the amount involved in such cash loans is mentioned in diaries A-53, and A-54 seized from the premises of Shri Paras Ram Rohira under the name of 'Om Prakash & Co.' in coded words ('+' - 5000). This presumption according to him is further supported with the fact that such entries tally with diaries A-53 and A-54 seized from the premises of Shri Paras Ram Rohira with the entries found in Mehul note book seized from the premises of the assessee.

40. The learned Departmental Representative argued that if the learned Commissioner (Appeals) came to the conclusion that the provisions of section 69D of the Act were not applicable, she should have made the addition under the provisions of section 68 of the Income Tax Act. The learned Commissioner (Appeals) has concluded that the Mehul note book is a document containing entries of loans and advances taken, interest paid which have not been recorded in the books of account of the assessee prepared for income-tax purposes. She also agreed with the assessing officer that the provisions of section 145(2) are applicable to the facts of this case and the assessing officer was well within his right in resorting to estimate the income of the assessee. She has deleted the

addition only on the basis that no Hundi documents were found pertaining to these transactions either at the premises of the assessee or at the premises of Shri Paras Ram Rohira. In the absence of such documents she came to the conclusion that the provisions of section 69D cannot be invoked. Thus, the learned Departmental Representative contended that the facts remain that the cash loans of Rs. 72 lakhs were recorded in the seized documents found from the premises of the assessee which were not accounted for in the regular books of account of the assessee, hence, the learned Commissioner (Appeals) was fully empowered to make the alternate addition under section 68 of the Act once she came to the conclusion that no addition can be made under section 69D of the Act. Thus, the learned Departmental Representative contended that the learned Commissioner (Appeals) has not passed the proper order. The learned Departmental Representative therefore, raised the additional ground (supra). It is stated in the additional ground that on the facts and in the circumstances of the case and in law, the learned Commissioner (Appeals) having held that the entries made in the seized documents (Mehul note book) represent cash credits in the books of the assessee, ought to have upheld the addition of Rs. 72 lakhs under section 68 of the Act as the actual source of such cash credits routed through finance broker Paras Ram Rohira remains unexplained. The learned Departmental Representative contended that the appellate powers conferred on the Commissioner (Appeals) under section 251 of the Act were not confined to the matters considered by the Income Tax Officer. Therefore, even if it was held that the addition under section 69D of the Act cannot be made, the learned Commissioner (Appeals) should have made the addition of Rs. 72 lakhs under s, 68 of the Act which was very much within her jurisdiction. To support his contention the learned departmental Representative placed his reliance on the decision of the Hon'ble Supreme Court in the case of CIT v. Nirbheram Daluram : [1997]224ITR610(SC) . The learned Departmental Representative also referred to the decision of the Madras High Court in the case of M. Ganapathi Asari v. CIT : [1970]75ITR296(Mad) , wherein the High Court has held that the order of the Appellate Assistant Commissioner appealed against being one passed under section 31, the appeal to the Tribunal by the department was maintainable. The court further held that objection to the order need not necessarily be confined to

what the order has stated but may extend to what the order has omitted to say. The learned Departmental Representative contended that the new ground of appeal filed by the department is maintainable though the issue involved in the new ground was not taken up before the learned Commissioner (Appeals). The learned Departmental Representative contended that the learned Commissioner (Appeals), in fact has not passed a proper order. The learned Departmental Representative referred to the decision of the Supreme Court in the case of CIT v. S. Nelliappan : [1967]66ITR722(SC) and contended that the Tribunal is empowered in hearing an appeal to give leave to the assessee to urge grounds not set forth in the memorandum of appeal and in deciding the appeal the Tribunal is not restricted to the grounds set forth in the memorandum of appeal or taken by leave of the Tribunal. Thus, the learned Departmental Representative argued that the additional ground filed by the assessee can be admitted by the Tribunal, though the issue involved in that appeal has not been decided by the learned Commissioner (Appeals). The learned Departmental Representative further referred to the decision of the Madhya Pradesh High Court in the case of National News Print and Paper Mills v. CIT : [1997]223ITR688(MP) , wherein it has been held by the High Court that if factual premises are already on record, the legal ground can be raised before the Tribunal. The Hon'ble court held 'that rule 11 of the Income-Tax (Appellate Tribunal) Rules, 1963, provides that the assessee shall not raise additional grounds except by leave of the Tribunal. That does not mean that the Tribunal had no jurisdiction to permit the additional grounds to be raised. If the factual premises are already on record and legal grounds are alone urged, no application for condonation of delay is required. All that is required is permission to raise additional grounds and proper notice to the other side. The Tribunal had treated it as if an appeal was sought to be filed and there was no justification to have denied this additional ground'. The learned Departmental Representative, therefore, contended that the assessee is entitled to file the additional ground on legal issues, therefore, the assessee should be allowed to raise the additional ground.

41. The learned Departmental Representative also made reference to the powers of the learned Commissioner (Appeals). He placed his reliance on the decision of the Hon'ble Supreme Court in the case of CIT v. Kanpur Coal Syndicate :

[1964]53ITR225(SC) and contended that the Commissioner (Appeals) has plenary powers in disposing of an appeal. The scope of his powers is co-terminus with that of the assessing officer. He can do what the assessing officer can do and also can direct him to do what he has failed to do. If the assessing officer has the option to assess one or other of the entities in the alternative, the Commissioner (Appeals) can direct him to do what the assessing officer should have done in the circumstances of the case. The learned Departmental Representative further referred to the decision of the Supreme Court in the case of Kapurchand Shrimal v. CIT (supra) and contended that the appellate authority has the jurisdiction as well as the duty to correct all errors in the proceedings under appeal and to issue, if necessary, appropriate directions to the authority against whose decision the appeal is preferred to, dispose of the whole or any part of the matter afresh unless forbidden for doing so by statute. Similarly, the learned Departmental Representative made reference to the Supreme Court decision in the case of CIT v. McMillan & Co. : [1958]33ITR182(SC) and argued that a non exercise of the power by the assessing officer under section 145(2) is also a decision inasmuch as it amounts to an acceptance of the method of accounting on the ground that the income, profit and gains can be properly deducted therefrom. It is, therefore, open to the Commissioner (Appeals) to reject the assessee's books of account which have been accepted by the assessing officer. The learned departmental Representative, therefore, contended that the Commissioner (Appeals) has held that there were cash loans in the seized 'Mehul note book ' of the assessee, therefore, she should have resorted to the provisions of section 68 of the Act and should have retained the addition under that section.

42. The learned Departmental Representative argued that the non-exercise of the powers by the Commissioner (Appeals), can be corrected by the Tribunal. Regarding the issue whether the addition under section 68 of the Act can be made or not, the learned Departmental Representative referred to the decision of the Delhi High Court in the case of Daya Chand v. CIT (2001) 250 ITR 327 and contended that section 68 of the Income Tax Act, 1961, provides that where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered was not in the opinion of the assessing officer

satisfactory, the sum so credited may be charged to the income-tax as the income of the assessee of that previous year. The provisions have general application and apply to all cases of regular assessment. The presumption arising under section 132(4A) that 'the contents of such books of account and other documents are true' must be held applicable only in relation to the provisional adjudication as contemplated under section 132(5). He, therefore, argued that the requirement of section 68 has to be fulfilled by the assessee, even where cash credits are found in the books seized under section 132(4A). He also made reference to the Supreme Court decision in the case of A. Govindarajulu Mudaliar v. CIT : [1958]34ITR807(SC) , wherein the Hon'ble Apex Court has held that 'where an assessee fails to prove satisfactorily the source and nature of certain amounts of cash received during the accounting year, the Income Tax Officer is entitled to draw the inference that the receipts are of an assessable nature'. The learned Departmental Representative also contended that the 'Mehul note book' seized from the premises of the assessee is a book of account maintained by the assessee. The learned departmental Representative, therefore, contended that justice has not been done in this case. He prayed that under the circumstances and the facts of this case, the Tribunal may confirm the addition of Rs. 72 lakhs under the provision of section 68 of the Act or in the alternative this issue may be restored back to the lower authorities with the direction to pass a fresh order after making proper enquiries as per the provision of law.

43. The learned counsel for the assessee explained that a search action under section 132(1) of the Act was taken in the premises of the assessee on 25-10-1994. Further search action was also taken in the case of Paras Ram Rohira on 8-12-1994. Annexure A to the Commissioner (Appeals)'s order are the Written pages of 'Mehul note book' which was seized from the premises of the assessee, but the same does not belong to the assessee as the name of the assessee is not mentioned on these papers. According to him, these papers have not been written by any one partner of the firm. These papers have also not been written by any of the relatives of the partners. He invited our attention to the compilation pp. 7 and 8, wherein in response to question Nos. 15 and 16 of the statement recorded during the course of search under section 132(4) of the Act, Shri Omprakash Tolaram Kukreja explained in clear terms that he did not recognize the handwriting

of these papers. He also clarified that the handwriting of these papers neither pertains to him nor to any of his family members. He stated that he knew nothing about the names and particulars of these nothings. The learned counsel also invited our attention to the statement of Shri Paras Ram Rohira which was recorded under section 131 on 16-1-1997, especially he referred to questions 13 and 14 (compilation pp. 39 to 40) which read as follows :

Q. 131 am showing you Annexure A-4 which is a bunch of loose papers seized from the residence of Shri Kukreja. Please refer to pp. 38, 39, 40 and 41 of these annexure. What are these transactions, whether these are recorded in your books and whose handwriting is this ?

Ans. : To the best of my knowledge all these four papers are not in my handwriting. It will not be possible for me to comment on these papers.

Q. 14. It seems to me that pp. 39 and 41 are in the similar handwriting as that of your diaries A-53 and A-54 and the transactions entered on these pages find place in Mehul note book as well as your seized diaries. Please comment ?

Ans. : I do not remember anything and no comments.'

The learned counsel, therefore, contended that Shri Paras Ram Rohira denied the fact that the loose slips found from the premises of the assessee, Nos. 38, 39, 40 and 41 were in his handwriting. He also confirmed that the 'Mehul note book' found from the premises of the assessee did not belong to him and was also not in his handwriting. He further stated that the transactions in the name of 'Paras Ram Brothers' did not pertain to them as they had no firm by the name of 'Paras Ram Bros.'. The learned counsel, therefore, contented that the assessee had stated that the 'Mehul note Book' did not belong to him and it was also neither in his own handwriting nor in the handwriting of any of his family members. Mr. Paras Ram Rohira also denied the fact that the loose slips seized from the premises of the assessee were in his handwriting, he also stated that the Mehul note book found from the premises of the assessee did not belong to him, therefore, the addition has been made without any basis and also without bringing any evidence on record to prove that the loose papers seized and the Mehul note book belong to

the assessee. The learned counsel also contended that the department had not proved that the transactions mentioned in the loose papers and also in the Mehul note book pertain to the assessee and Mr. Paras Ram Rohira. The learned counsel also referred to Q. No. 12 of the statement of the assessee (compilation p. 7), wherein the assessee has also stated that he did not recognize the handwriting of the loose papers. He further stated that he was also not aware of the nature of transactions or their particulars.

44. The learned counsel also brought to our notice that the assessee made the declaration of Rs. 1 crore during the course of search under section 132(4) of the Act. He also contended that no assets were found during the course of search except some jewellery. The learned counsel referred to the statement of Mr. Paras Ram Rohira recorded on 8-12-1994, under section 132(4) of the Act, the copy of which was never given to the assessee. He invited our attention to compilation p. 197 which is a letter dated 17-1-1997, written by the assessing officer to the Commissioner (Appeals) Central IV, Mumbai and pointed out that only under the directions of the learned Commissioner (Appeals) the assessing officer gave us the photocopy of p. 3 of statement of Shri P.R. Rohira which was recorded on 8-12-1994. Thus, the learned counsel contended that the statement of Mr. Paras Ram Rohira had been used against the assessee without providing the copy of the statement to the assessee and also without giving any opportunity of cross-examination of Mr. Paras Ram Rohira. The learned counsel again invited our attention to p. 29 of the compilation which is a statement of Shri Paras Ram Rohira recorded under section 132(4) of the Act on 8-12-1994, especially he referred to question No. 4 (compilation p. 34) which reads as follows :

'Q. 4 What is your procedure in arranging loans for Kukreja group concerns ?

Ans. : I organize cheques from various investors directly in the name of Kukreja group. We give them a slip showing interest and I collect the cheque from the partners of Kukreja and give it to the lenders. I earned brokerage through cheque on advances.'

The learned counsel, therefore, argued that Shri Paras Ram Rohira was arranging loans for the assessee and all such loans had been received by cheques and had

also been paid by cheques. Such loans were regularly entered in the books of account. He contended that Mr. Paras Ram Rohira never admitted in his statements that he was arranging cash loans for the assessee. The Hundi loans were being arranged by him and they had been fully recorded in the books of account.

45. The learned counsel contended that Mr. Paras Ram Rohira had not admitted anything against the assessee. He stated that he was not dealing in cash transactions. To support his contention, the learned counsel again took us through the statement of Mr. Paras Ram Rohira which was recorded on 16-1-1997, under section 131 of the Act (compilation p. 33). In response to Q. No. 6 Mr. Paras Ram Rohira stated that he had not done any cash transaction any time. All the transactions are with cheques only. By, question No. 7, Mr. Paras Ram Rohira was asked whether the loans arranged by him for Kukreja group concerns were of the nature of Hundi loans. Mr. Paras Ram Rohira replied that these were Hundis for which bills of exchange were issued. Regarding the Mehul note book seized from the premises of the assessee, Mr. Rohira in response to question No. 8 stated that this note book did not belong to him nor the entries pertained to his business and the same were also not written in his own handwriting. In response to question No. 9, regarding the diaries marked as Annex. A-53 and A-54 seized from the residence of Shri Paras Ram Rohira, Mr. Rohira stated both these diaries were in his own handwriting. Regarding the entries, he stated that it was difficult for him to remember. He also stated that it was difficult for him to say anything about the authenticity of these transactions. In response to Q. No. 10, which pertained to Mehul note book, Mr. Rohira stated that he had not said '+' was Rs. 5,000. He explained that immediately after the search, he had retracted his statement which he gave on 8-12-1994, and informed about the sign '+'. He stated that he never disclosed that each '+' stands for Rs. 5,000. Regarding identical entries in the seized diaries A-53 and A-54 from the residence of Mr. Rohira and the Mehul note book seized from the residence of the assessee, Mr. Paras Ram Rohira stated that he had no idea because Mehul note book was not in his own handwriting and they had not such firms like 'Paras Ram Bros.' When Mr. Rohira was asked whether these transactions written in his diaries A-53 and A-54 were recorded in his books, whether these transactions were through cheques/cash and

whether he could identify the parties whose names were written in these diaries (Q. No. 10), Mr. Paras Ram Rohira explained that these transactions were not recorded in his books of account because he was only a financial broker and lenders directly gave cheques to the borrowers. He further stated that it would not be possible for him to give any authentication regarding evidence because he had only recorded brokerage. He also stated that he never indulged in cash transactions. The learned counsel, therefore, contended that Mr. Paras Ram Rohira never admitted anything, against the assessee. He also made it very clear that Mehul note book was not written by him, therefore, the department has not brought any further evidence on record to rebut the statements given by both the parties.

46. Regarding the addition made under section 69D of the Act, the learned counsel relied on the findings of the learned Commissioner (Appeals) and contended that the learned Commissioner (Appeals) has deleted the addition correctly as per the provision of law. He invited our attention to Circular No. 208, dated 16-11-1976, of the CBDT. The Taxation Laws (Amendment) Act, 1975, has added a new section 69D in the Income Tax Act, 1961, with effect from 1-4-1977, which provides that if any amount is borrowed from any person on a Hundi or any amount due on it is repaid to any person, otherwise than through an account-payee cheque drawn on a bank, the amount so borrowed or repaid shall be assessed as the income of the tax-payee borrowing or repaying the said amount, for the previous year in which the amount is borrowed or repaid. This will also apply to the amount of interest paid on the amount borrowed on Hundis. The learned counsel, therefore, pointed out that transactions mentioned in the Mehul note book are cash loans as per the presumptions made by the department, therefore, these are not Hundi loans. The provision is applicable only in respect of Hundis and does not cover other types of loans. The learned counsel, therefore, pointed out that this issue is squarely covered in favour of the assessee by the above circular of the CBDT and the learned Commissioner (Appeals) has deleted the addition on its merits.

47. The learned counsel further argued that the assessee was not allowed to cross-examine Shri Paras Ram Rohira. The statement of Shri Rohira was also not

provided to the assessee. Shri Paras Ram Rohira was never asked any question about the assessee. According to him the department also did not make any query regarding the loans. Thus, according to the learned counsel, natural justice has been denied to the assessee. The learned counsel also referred to the findings of the learned Commissioner (Appeals), wherein she has concluded that no addition can be made under section 69D of the Act. Similarly, she also came to the conclusion that the document seized indicates loan received by the assessee in cash though being in violation of the provisions of section 269SS under the Income Tax Act but do not ordinarily constitute income. The learned counsel, therefore, contended that no addition under section 269SS can be made in case the loans had been considered as income of the assessee. The learned counsel also pointed out that the presumption under section 132(4A) can be raised only against the person from whose custody the documents have been found. In the present case, the documents on the basis of which the addition has been made were found in the premises of Shri Paras Ram Rohira, therefore, the presumption under section 132(4A) can be raised only against Shri Paras Ram Rohira. He referred to the Supreme Court decision in the case of Chuharmal v. CIT : [1988]172ITR250(SC) to support his contention. In the above case, the Hon'ble Supreme Court has laid down that where a person is found in possession of anything the onus of proving that he was not its owner was on that person. The Supreme Court further held that 'on the facts a legitimate inference could be drawn that the petitioner had income which he had invested in purchasing the wrist watches and could be held to be the owner of the wrist watches and their value could be deemed to be his income by virtue of section 69A. ' The learned counsel, therefore, contended that the documents on the basis of which the income is being determined were not seized from his possession, therefore, the onus of proving that he was not the owner of such documents was not on him. Similarly, the department has not brought any evidence on record to prove that the income earned has been invested in some assets possessed by the assessee. Therefore, according to him the addition has been made without any supporting evidence and on the basis of presumptions and assumptions. The learned counsel also referred to the following cases of Ahmedabad Tribunal to support his contention :

(i) Prarthana Construction (P) Ltd. v. Dy. CIT (2000) 70 TTJ (Ahd) 122

(2) Unique Organisers and Developers (P) Ltd. v. Dy. CIT (2000) 70 TTJ (Ahd)
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In the case of Prarthana Construction (P) Ltd. (supra), the Tribunal held that loose papers and documents containing narrations of alleged undisclosed transactions of assessee seized from the premises of third parties and statements of said parties recorded at the back of the assessee could not be made the basis of making additions of undisclosed income in the hands of the assessee. Similarly, in the case of Unique Organisers and Developers (P) Ltd., (supra), the Tribunal held that addition on the basis of documents seized from third party without showing any connection with the assessee and merely on the basis of statement of that party which was also not reliable was not sustainable. Thus, the learned counsel pointed out that the diaries A-53 and A54 were seized from the premises of Mr. Paras Ram Rohira, these diaries do not have any connection with the assessee. These documents were also not provided to the assessee. The copy of the statement recorded from Mr. Paras Ram Rohira was also not provided to the assessee. Therefore, he contended that these documents cannot be used against the assessee for making the addition. The learned counsel also referred to the decision of the Bombay Tribunal in the case of Straptax (India) (P) Ltd. v. Dy. CIT in ITA Nos. 694 and 695/Mum/2001, assessment year 1991-92 dated 30-4-2002, wherein the Tribunal held that the presumption under section 132(4A) is applicable only against the person from whose possession books of account or other documents are found and not against any other person. Regarding the presumption under section 132(4A) of the Act, the learned counsel contended that the same is rebuttable and it is not necessary to draw such presumption wherever the books of account are seized ignoring the other relevant factors. To support his arguments the learned counsel referred to the decision of the Kerala High Court in the case of ITO v. T. Abdul Majid : [1988]169ITR440(Ker) , wherein the Hon'ble court held that the provisions of section 271D and 132(4A) enable a criminal court to presume the truth of the contents of books seized from a person. However, it is a presumption, which can be rebutted. Moreover, the presumption envisaged therein is only a factual presumption. It is in the discretion of the Court, depending upon other factors, to decide whether the presumption must be drawn. The expression used in sub-section (4A) of section 132 is '11 may be presumed' as in

section 114 of the Evidence Act, 1872. It is not a mandate that whenever the books of account are seized, the court shall necessarily draw such a presumption irrespective of any other facts which may dissuade the court from doing so. The learned counsel also referred to the decision of the Rajasthan High Court in the case of CIT v. S.M.S. Investment Corporation (P) Ltd. and contended that the presumption can be rebutted on the basis of findings of fact which have been recorded in the seized documents seized from the premises of the assessee. According to the learned counsel the diaries. A-53 and A-54 seized from the premises of Shri Paras Ram Rohira cannot be relied upon unless the writer of these diaries says that he advanced some loans to the assessee. Mr. Paras Ram Rohira never committed that he had advanced loans to the assessee.

48. The learned counsel argued that the Mehul note book was found and seized from the premises of the assessee, The partner of the assessee-firm, however, denied during the course of search that Mehul note book did not belong to him and it had neither been written by him or any of his family members. According to the learned counsel, figures in the note book have no meaning unless it is proved that the assessee was in possession of the amount and the same has either been found during the course of search or it has been invested in some assets. In the case of the assessee; the department could not find any assets corresponding to the addition made of Rs. 72 lakhs. Thus, the learned counsel contended that the department could not find any corroborative evidence to prove the existence of the amount of Rs. 72 lakhs. The learned counsel placed his reliance on the following cases of the Tribunal :

(i) S.K. Gupta v. Dy. CIT (1999) 63 TTJ (Delhi) 532

(ii) S.P. Goel v. Dy. CIT

49. In reply to the arguments of the learned Departmental Representative the learned counsel contended that the statement of Mr. Paras Ram Rohira should be ignored. He referred to Q. No. 3 of the statement of Shri Paras Ram Rohira which was recorded during the course of search on 8-12-1994, wherein Shri Paras Ram Rohira has explained that he was arranging loans for Kukreja Enterprises. The

interest on such loans has been calculated alongwith the brokerage payable to Mr. Rohira. He also explained that the loans were paid through cheques. Thus, according to the learned counsel the statement of Shri Rohira regarding the interpretation of '+' being equal to 5,000 is totally baseless and should be ignored. The learned counsel contended that Mr. Rohira has not divulged assessee's name. He referred to seized document A-5 where the loan is in the name of Kukreja. He argued that the department has not asked any question regarding the Mehul note book from Mr. Rohira, therefore, the entries in the note book cannot be considered against the assessee on the basis that the 'Mehul note book' has been written by Mr. Paras Ram Rohira and the entries in the 'Mehul note book' are similar to the entries made in the diaries A-53 and A-54 seized from the premises of Shri Rohira. The learned counsel also contended that the assessee made a specific request to the assessing officer through his letter dated 27-3-1996 (compilation p. 193), for giving him the statement of Shri Paras Ram Rohira recorded by the Income Tax Officer and also to give him an opportunity to cross-examine Shri Paras Ram Rohira. He especially invited our attention to para 15 of the letter (compilation p. 196), wherein such request has been made. The assessee made it very clear that in case the statement of Mr. Rohira is being used against him, he must be provided a copy of that statement and also an opportunity to cross-examine him. The assessing officer, however, neither provided the copy of the statement to the assessee nor the assessee was given an opportunity to cross-examine Mr. Paras Ram Rohira. So far as the decoding is done by the assessing officer, the learned counsel contended that the same is not correct and is not based on the factual aspects of this case. The learned counsel again invited our attention to the statement of Shri Paras Ram Rohira recorded on 16-1-1997, under section 131 of the Act, especially to question Nos. 13 and 14, wherein Mr. Rohira has clearly mentioned the four loose papers 38, 39, 40 and 41 seized from the premises of the assessee were not in his handwriting. He also explained that he did not know anything about the transactions entered in loose pp. 39 and 41 and also the Mehul note book seized from the premises of the assessee. He, therefore, contended that the decoding done is erroneous and is not based on the actual figures mentioned in the seized loose papers 39 and 41. He, therefore, contended that the addition has been made on the basis of erroneous

presumptions and assumptions which are not based on actual figures in the seized documents. He also argued that the cases relied upon by the learned Departmental Representative are not relevant to the facts of the present case. The learned counsel argued that the undisclosed income could not be estimated on an arbitrary basis and the assessing officer has to bring some evidence on record to make support estimates. To support his views he referred to decision of the Bombay High Court in the case of CIT v. C.J. Shah & Co. : [2000]246ITR671(Bom) , wherein the Hon'ble High Court held that where material is detected after search and seizure operation is carried out, the assessing officer is required to determine the undisclosed income. In such cases additions are generally based on estimates. In matters of estimation some amount of latitude is required to be shown to the assessing officer particularly when relevant documents are not forthcoming. However, it does not mean that the assessing officer can arrive at any figure without any basis by adopting an arbitrary method of calculation. The learned counsel further referred to be decision of the Bombay High Court in the case of CIT v. Dr. M.K.E. Memon : [2001]248ITR310(Bom) , wherein the High Court has laid down that undisclosed income could not be estimated on an arbitrary basis.

50. Regarding the additional ground taken up by the department, the learned counsel argued that the only basis for addition is the Mehul note book, According to him, the figures in the Mehul note book are not properly explained. The learned counsel referred to seized pp. 39 and 41 (compilation pp. 44 and 45) and contended that the dates given on these pages are not relevant to the assessment year under consideration. He also contended that the presumption has not been properly drawn. The department has not found corresponding assets for the addition of Rs. 72 lakhs. Further, Mr. Paras Ram Rohira has not divulged the name of the assessee, therefore, the addition made would not stand as the same has been made without any basis. The learned counsel also referred to the decision of the Bombay High Court in the case of Addl. CIT v. Miss Lata Mangeshkar : [1974]97ITR696(Bom) , wherein the Income Tax authorities sought to assess certain income from undisclosed sources received by the assessee. The evidence on which the IT authorities relied were statements of two persons that they had paid money in 'black' to the assessee and entries in the books belonging

to them regarding alleged payments to the assessee. The Tribunal examined the statements made by two persons and found that the evidence tendered by them suffered from serious infirmities. It held that mere entries in the accounts regarding payments to the assessee were not sufficient as there was no guarantee that the entries were genuine. The Tribunal, therefore, held that there was no proof that the amounts in question represented income from undisclosed sources belonging to the assessee. The department sought a reference to High Court. The Hon'ble High Court held that 'the conclusion of the Tribunal had been reached by it on a proper appreciation of the evidence. This was a finding of fact by the Tribunal and no question of law arose and no reference would lie from the decision of the Tribunal'. According to the learned counsel, section 68 of the Act would be applicable only if it is admitted that the account was maintained by the assessee. He also contended that Mehul note book was not a book of account maintained by the assessee for the previous year under consideration. The learned counsel referred to the decision of the Punjab & Haryana High Court in the case of Smt. Shanta Devi v. CIT (1988) 171 ITR 532, wherein the High Court held that where a partner maintained no books of account and a cash credit entry appeared in the books of the firm in the name of the partner, the amount of cash credit could not be assessed as income from undisclosed sources under section 68 of the Act, in the hands of the partner, treating the books of account of the partnership as those of the individual partner. The learned counsel also referred to the decision of the Madhya Pradesh High Court in the case of CIT v. Shiv Shakti Timber (1997) 90 Taxman 349 (MP), wherein the High Court has held that where there is a credit entry in the books of account of the assessee and there is no satisfactory explanation it will be deemed to be the income of the assessee-firm and can be accordingly assessed. In the present case, the Mehul note book does not belong to the assessee as it was explained by the assessee on the day of search itself in his statement recorded under section 132(4) of the Act. Moreover, the name written on the Mehul note book is 'Paras Ram Bros.' which also suggests that the Mehul note book does not belong to the assessee. Therefore, the learned counsel contended that no addition under section 68 of the Act can be made in the case of the assessee on the basis of the entries-made in the Mehul note book. In reply, the learned Departmental Representative contended that the Mehul note book is a

book of account.

51. We have carefully considered the submissions made by the rival parties. We have also gone through the various documents and the case law produced before us by the learned representatives of the parties. A search and seizure action was carried out at the residential/business premises of the partners of M/s Om Prakash and Co. and their associated concerns. One of the documents seized during the course of search was a note book titled 'Mehul note book' from the residential premises of the partners. This note book had two written pages; p. 1 of the said note book gave details of transactions with a concern 'Paras Ram Bros.' and p. 2 listed some transactions in the name of one Mr. Madnani. In addition to that some loose papers were also seized. These loose papers had details of certain transactions in the name of M/s Om Prakash & Co. Subsequently, a search and seizure action was also conducted at the premises of Paras Ram Rohira, a financial broker. Shri Paras Ram Rohira was acting as the financial broker for some of the Kukreja enterprises. At the premises of Paras Ram Rohira two diaries A-53 and A-54 were seized. These diaries contained details of transactions in the names of a number of parties, including that of M/s Om Prakash & Co., the assessee. Shri Paras Ram Rohira in his statement recorded during the course of search under section 132(4) of the Act on 8-12-1994, admitted that the diaries A-53 and A-54 had been written in his own handwriting. He also admitted that instead of writing the details in numbers, the amounts were entered by putting a '+' sign and each '+' stood for Rs. 5,000. On the basis of this statement, the details of the amounts pertaining to - 'Om Prakash & Co.' were worked out by the assessing officer. The assessing officer compared the details so worked out with the details recorded in the name of Paras Ram Bros., in the Mehul note book and he found that if the amount written in the Mehul note book is multiplied by '1000' the total amount tallied in both the accounts on a day-to-day basis. The assessing officer, therefore, treated the amounts recorded in the Mehul note book as cash loans and made the addition of Rs. 47 lakhs under S. 69D of the Act treating the loans as Hundi loans. The assessing officer further made the addition of Rs. 25 lakhs in respect of cash loan taken from Madnani, which appeared on p. 3 of Mehul note book. Thus, the assessing officer made the total addition of Rs. 72 lakhs under section 69D of the Act. The learned Commissioner (Appeals) deleted the addition

of Rs. 72 lakhs on the basis that no Hundi documents were found pertaining to those transactions either at the premises of the assessee or at the premises of Mr. Paras Ram Rohira. Thus, according to her the provisions of section 69D cannot be invoked. She however, held that the loans have genuinely been taken through or from Paras Ram Rohira, the finance broker. She has also stated that no addition on account of the loans so taken in violation of provisions of section 69SS can be made in the hands of the assessee, as income under the deeming provision of the Act.

52. Now, the first main point for consideration is whether there is any nexus between the transactions mentioned in the diaries A-53 and A-54 seized from the premises of Mr. Paras Ram Rohira and the transactions mentioned in the Mehul note book seized from the premises of the assessee. During the course of search proceedings, the statement under section 132(4) of the Act of Shri Om Prakash Kukreja, one of the partners of the assessee was recorded. In his statement, the assessee explained that the Mehul note book does not belong to the assessee-firm. He stated that the said Mehul note book was found at the residence from where the business of twenty sister-concerns is being carried on and, therefore, it cannot be said that it belongs to the assessee. The assessee also stated that the Mehul note book is neither written in his own handwriting nor in the handwriting of any of his family members. He, therefore, denied the ownership of this document. This document is titled Paras Ram Bros., therefore, there is a possibility that this document might have been written by Mr. Paras Ram Rohira. But Mr. Paras Ram Rohira in his statement has not admitted the ownership of this document. He stated that the seized loose papers and Mehul note book had not been written in his handwriting. The assessing officer and the learned Commissioner (Appeals) have held that the handwriting in diaries A-53 and A-54 seized from the residence of Shri Paras Ram Rohira and the handwriting in the loose papers 39 and 41 seized from the premises of the assessee is the same. The department has not brought any evidence on record to support their contention. The departmental officers are not technically competent to give their findings on the handwriting of the parties. If the assessing officer or the learned Commissioner (Appeals) observed that the documents seized from both the places were having the same handwriting, they should have obtained the opinion of the handwriting expert on

such documents before coming to a definite conclusion. Under the circumstances, we do not find any substance in the findings of the lower authorities that the handwriting of the diaries A-53 and A-54 seized from the residence of Shri Paras Ram is similar to the handwriting of the loose papers 39 and 41 seized from the premises of the assessee. The assessee had made a statement during the course of search that the documents did not belong to the assessee-firm. Shri Paras Ram Rohira disowned these documents in his statement recorded under section 131 of the Act on 16-1-1997. The Mehul note book was found at the residence from where the business of twenty sister-concerns is being carried on and in the absence of any evidence on record, the department cannot presume that the Mehul note book pertains only to the assessee and not to any other concern. Under the circumstances, the department has not rebutted the explanation given by the assessee during the course of search and also the explanation of Shri Paras Ram Rohira that these documents do not belong to him.

53. The assessing officer has made the addition on the basis of the entries found in the Mehul note book. According to the assessing officer, the figures mentioned on p. 1 of the Mehul note book are to be multiplied by 1000 to reach at the correct amount. If all the figures on p. 1 are taken into consideration, the total amount would be more than a crore. If, on the other hand, only first three figures are taken into consideration, which pertain to the assessment year under consideration, the total amount would come to Rs. 16,00,000 only. The assessing officer, however, has made the addition of Rs. 47,00,000 on the basis of diaries A-53 and A-54 seized from the residence of Paras Ram Rohira. Now, if the contention of the assessing officer is accepted as correct there should have been exactly parallel documents written by Shri Paras Ram Rohira; one set should have been in the possession of the assessee and the other set in the possession of Mr. Paras Ram Rohira. But the diaries A-53 and A-54 contain very few figures, which have been reflected in Mehul note book. Even if the decoding of the assessing officer is accepted as correct it is quite unnatural that the assessee wants to have the control of very few transactions only and he does not want to have the full account of all the transactions. We have also gone through the diaries A-53 and A-54 and the Mehul note book. The dates given on both the documents do not tally in most of the transactions. The assessing officer has simply picked up some figures from

the diaries A-53 and A-54 and has tallied with some figures in Mehul note book, which in our opinion is not justified. The decoding should always be done on the basis of all the figures mentioned on the documents. According to the department where the frequency of the transactions is substantial and large amounts are involved in cash, it would be necessary for both the parties to keep a record of these transactions for purposes of cross-matching. If the contention of the department is accepted as correct, then all the transactions appearing in diaries A-53 and A-54 should have also appeared in Mehul note book, but it is not true. Only few transactions as has been stated by the assessing officer are appearing in Mehul note book. This means the assessee does not want to have control over all the transactions which is quite contradictory to the findings of the lower authorities. Thus, the decoding done by the assessing officer does not appear to be logical. Para 1 of the Mehul note book is titled as Paras Ram Bros. According to the department, this page has also been written by Paras Ram Rohira but Mr. Paras Ram Rohira has not admitted that p. 1 of the Mehul note book is also in his handwriting. The department has not brought any evidence on record such as report from a handwriting expert to support t his contention except stating in their orders that both the documents have been written by Shri Paras Ram Rohira. Therefore, the presumption raised by the department that the handwriting in the Mehul note book and loose papers 39 and 41 seized from the residence of the assessee is similar to the handwriting in the diaries A-53 and A-54 seized from the premises of Mr. Paras Ram Rohira is without any substance and the same cannot be accepted as an evidence against the assessee. In case the assessee wanted to have control over the transactions, which have been entered through Mr. Paras Ram Rohira, he could have got the exact copy of such transactions in his control. As per the contention of the department, both the documents have been written by Mr. Paras Ram Rohira, therefore, they could have been written exactly in similar manner and in similar codes. But, as we have noticed the Mehul note book and loose papers 39 and 41 have not been written in the same fashion as the daries A-53 and A-54, written by Shri Paras Ram Rohira.

54. A diary A-51 'Scholar Beautiful Sunday' was also seized from the premises of Mr. Paras Ram Rohira, which contains details of cheque loans extended to M/s Kukreja Enterprises, which have been fully reflected in Annexure C of form 'CD' of

'Kukreja Enterprises'. According to the assessing officer, these are Hundi loans. The assessing officer, therefore, concluded that the loans from Paras Ram Rohira taken in cash as per diaries A-53 and A-54 and corroborated by Mehul note book A-2 seized from Kukreja's premises were also Hundi loans. If the contention of the assessing officer is accepted as correct, then the department could have also found and seized Hundi instruments pertaining to these cash loans. The Hundi instruments are used by the holder to collect money due thereon without using the medium of currency. If the assessee was keeping the Hundi instruments in his custody for the transaction which he has entered through the regular books of account, it was all the more important to keep such instruments for the cash transactions for the security of loans. If the assessee cannot take risk of the transactions which he has entered through bank and keeping the instruments of Hundi loans with him, he cannot take the risk of cash loans by not keeping the Hundi instruments with him. The department has neither found the Hundi instruments in the premises of the assessee nor in the premises of Mr. Paras Ram Rohira regarding these cash loans during the course of search operations in their respective premises. Mr. Paras Ram Rohira is dealing in Hundi loans with various parties as has been observed from the various documents seized from his premises, therefore, if any loans could have been arranged by him for the assessee, the same should have been through the same 'modus operandi' i.e., he could have arranged these loans only through Hundis. In our opinion, no businessman would indulge in advancing or taking cash loans without any corresponding surety for the recovery of such loans. This factor has not been taken into consideration by the department before coming to the conclusion that Shri Paras Ram Rohira has arranged Hundi loans in cash for the assessee which have been entered in Mehul note book. Another important factor for consideration is that these loans have been arranged by Shri Paras Ram Rohira through some other parties and he is only a broker in between. Under these circumstances the names of such parties should have appeared either in the documents seized from the premises of the assessee or in the documents seized from the premises of Shri Paras Ram Rohira, but none of the documents are reflecting such names. In our opinion, it is not convincing that the cash loans are advanced without any guarantee in the form of Hundis or in any other form. Moreover the seized

documents also do not reflect the identities of the creditors. Under the circumstances it cannot be said that Mr. Paras Ram Rohira arranged the cash loans for the assessee as has been alleged by the department. Therefore, the decoding done by the assessing officer is without any basis or evidence on record, therefore, the same does not require any consideration.

55. The next issue for consideration is the decoding of '+' in the diaries A-53 and A-54. In his statement, recorded during the course of search on 8-12-1994, Mr. Paras Ram Rohira stated that the two diaries A-53 and A-54 were written by him and represent some transactions. He further stated that he was unable to recollect the names of the parties to whom these transactions pertain. He stated that Plus ('+') represents Rs. 5,000. Immediately after the search, Mr. Paras Ram Rohira retracted his statement and in his statement record on 16-1-1997, under section 131 of the Act, he made it very clear that he never said '+' representing Rs. 5,000. Even, if the retraction of Mr. Paras Ram is not considered as proper, the decoding done on that basis does not appear to be logically correct. According to the department certain figures on Mehul note book on p. 1 are similar to the figures shown on diaries A-53 and A-54. This has been compared with the figures given on p. 1 of the Mehul note book by multiplying that figure with '1000'. According to the department the figures given on p. 1 of the Mehul note book are in codes and each figure has to be multiplied by '1000' to reach at the correct amount of cash loan. If this contention of the department is accepted as correct then the total amount on p. 1 of the Mehul note book would come to Rs. 1,03,00,000 whereas the total amount on p. 2 would be an astronomical figure of Rs. 2,50,00,00,000. Thus, if the decoding of the department is accepted as correct, then the total addition should have been at an amount of Rs. 2,51,03,00,000, which appears to be totally absurd. The Mehul note book has been seized from the premises of the assessee. Pages 1 and 3 are written pages of this note book, Therefore, the figures mentioned on these pages are of similar nature. The paper seized during the course of search has to be read as a whole and each figure mentioned on such a paper has to be given the similar interpretation. The department cannot give different interpretation to various figures mentioned on that paper according to its own conveniences. If the figures mentioned on p. 1 are coded and each has to be multiplied by '1000' the figures mentioned on p. 3 have also to be considered

as coded ones and they are also to be multiplied by '1000' for the purpose of making the addition. If this interpretation is given which in our opinion is the correct and the only interpretation which is possible as per the provisions of law, it would lead to absurd results as we have mentioned above. Therefore, we do not find any force in the logic applied by the department in decoding the figures given on p. 1 of the Mehul note book. This view is further supported with the contention of the department that the Mehul note book contains the cash loans arranged through Mr. Paras Ram Rohira, therefore, if he has written coded amounts on p. 1, he could have written the amounts on p. 3 also in coded amounts. Mr. Paras Ram Rohira is a finance broker and he is not going to adopt two different standards of writing the amounts in the same note book. Under the circumstances, the decoding done by the department is factually incorrect and without any logical basis, the same therefore, does not require any consideration.

56. The next important issue regarding decoding is the calculation of the interest on the basis of figures given on p. 1 of the Mehul note book. According to the assessing officer, the figures given on Col I are principal amounts and the figures in the fourth column pertain to the interest on the principal amount. He took up the first three figures from the Mehul note book as follows :

350

2-11-1992

1-2-1993

12,709

250

16-11-1992

15-2-1993

8,720

1,000

1-12-1992

1-3-1993

34,500,

According to the assessing officer, the figures shown in the fourth column indicate interest on the principal amount shown in first column. According to him the interest rate is 14 per cent and the figures in fourth column would tally only if the figures given in the first column is multiplied by 1000 and interest is calculated at 14 per cent, He, therefore, concluded that the figures shown in first column are coded one and the actual figures would be determined by multiplying by 1000. The contention raised by the assessing officer and supported by the learned Commissioner (Appeals) does not appear to be correct. The interest at the rate of 14 per cent on Rs. 3,50,000 for three months comes to Rs. 12,250. Similarly, the interest on the amount of Rs. 2,50,000 comes to Rs. 8,750 and interest on Rs. 10,00,000 comes to Rs. 35,000. These figures do not tally with the figures given in fourth column. If the contention of the department is accepted as correct, the interest on these figures at the rate- of 14 per cent for a quarter of a year should have been exactly the same as given in fourth column. The findings of the assessing officer and supported by the learned Commissioner (Appeals) are, therefore, without are proper application of mind. Another important factor for consideration is why the lower authorities have taken into consideration only first three figures on p. 1 of the Mehul note book. The subsequent eight figures also pertain to the period under consideration and interest on these amounts have also been determined. Therefore, there is no logic of ignoring these figures. It appears that the department is indulging in the hit and trial method and picking up some figures, which according to them also appear in the diaries A-53 and A-54 seized from the premises of Mr. Paras Ram Rohira to prove that the loans mentioned against the name of M/s Om Prakash & Co. in the diaries seized from the premises of Paras Ram Rohira are cash loans arranged by Mr. Paras Ram Rohira for the assessee. The contention of the department is without any basis. The department has tallied only three figures of the Mehul note book with the figures of the diaries A-53 and A-54 ignoring the other figures. According to the department

the Mehul note book contains the cash loans arranged through Paras Ram Rohira. If this is accepted as correct then why Mr. Paras Ram Rohira should write only three figures in Mehul note book, infact he should have written all the amounts appearing in diaries A-53 and A-54 against the name of M/s Om Prakash & Co. , in Mehul note book also. There does not appear to be any truth in the imagination of the department. We have also calculated interest at the rate of 14 per cent on other amounts also given on p. 1 of Mehul note book, which also does not tally with the interest given in fourth column of the note book . This clearly proves that the decoding done by the lower authorities is without any proper evidence and the same, therefore, cannot be taken into consideration for deciding this issue.

57. The next important issue pertaining to decoding is regarding the loose papers 39 and 41 seized from the premises of the assessee (compilation pp. 44 and 45). According to the learned Departmental Representative the amounts mentioned on these papers are in coded words, i.e., on p. 39 (250) means Rs. 2,50,000, (500) means Rs. 5,00,000 and (1000) means Rs. 10,00,000; similarly on p. 41 (100) means Rs. 1,00,000 and (650) means Rs, 6,50,000. According to the' learned departmental Representative, these figures also appear on page of Mehul note book and the interest has been determined at the rate of 14 per cent on these amounts. The contention raised by the learned departmental Representative does not appear to be correct. The first figure on p. 39 is (250) which according to the learned departmental Representative is the amount of Rs. 2,50,000. On this amount the interest rate of 14 per cent for the quarter 16-8-1993 to 15-11-1993, would come to Rs. 8,750, whereas the interest shown on the seized paper is Rs. 8,720.83. Similarly, the interest on the subsequent three figures is shown at Rs. 17,441.67, Rs. 17,250.00 and Rs. 34,883.33, respectively, on the amounts of Rs. 5,00,000, 5,00,000 and Rs. 10,00,000, whereas the actual interest on these amounts at ihe rate of 14 per cent comes to Rs. 17,500, 17,500 and 35,000. The total interest shown on these amounts comes to Rs. 78,295.83 whereas the total interest determined at the rate of 14 per cent comes to Rs. 78,750.00. Similarly, on p. 41 the interest on Rs. 4,00,000 at the rate of 14 per cent comes to Rs. 14,000 and on the amount of Rs. 6,50,000 comes to Rs. 22,750, whereas as per the seized paper the interest has been shown at Rs. 14,106.67 and Rs. 22,674.16. Similarly, the total interest shown on this seized papers is only Rs. 36,780.83,

whereas the interest determined at the rate of 14 per cent comes to Rs. 36,750. Thus, the contention raised by the learned Departmental Representative is without any basis and is not supported by any evidence. His contention that the interest determined at the rate of 14 per cent on these figures is approximately the same as shown on seized papers is also without any substance. The interest is being determined at the rate of 14 per cent on the amounts given on seized loose papers, therefore, it should be 100 per cent correct. In our opinion it should be hundred per cent accurate and there is no scope of any difference when the calculations are done on scientific basis. We, therefore, do not find any substance in the arguments of the learned Departmental Representative. Moreover, the figures mentioned on seized papers are not exactly the same as mentioned on Mehul note book. On the seized paper No. 39, the figure of (250) is mentioned for the quarter 16-8-1993 to 15-11-1993, whereas on Mehul note book it is mentioned for the quarter 16-11-1992 to 15-2-1993. The other figures mentioned on Mehul note book also do not pertain to the same periods as mentioned on seized loose papers. The figure of (400) on seized paper 41 is mentioned between the period 1-7-1993 to 1-10-1993, but on Mehul note book it is between 1-1-1993 to 1-4-1993. Similarly, other figures mentioned on seized papers do not correspond to the period mentioned on Mehul note book; even the interest determined on these figures on both the documents are different. The interest shown on (250) on seized paper 39 is Rs. 8,720.83, whereas on the Mehul note book the interest shown at one place is 8,720, on the same figure it has also been shown at Rs. 8,730 subsequently. Similarly, on seized paper 41 the interest shown on (400) is Rs. 14,106.76 whereas on the Mehul note book the same is Rs. 13,800. Similar is the condition regarding the interest on other amounts also. Now, the main point for consideration is whether the figures mentioned on seized loose papers 39 and 41 are the same, which have been mentioned on p. 1 of Mehul note book. In view of the discussion above these figures are not the same. If the contention of the department is accepted the interest figures on the loose papers and on the Mehul note book should have been exactly similar. Both the documents have been seized from the premises of the assessee, therefore, if these accounts were maintained by the assessee for his information, there should not have been any difference in the figures shown in both the documents. Under the

circumstances, the contention raised by the department and vehemently argued by the learned departmental Representative fails in view of our specific findings that interest has not been calculated at the rate of 14 per cent on these figures mentioned on loose seized papers. Therefore, the findings of the department based on the theory that the interest has been charged at the rate of 14 per cent and, therefore, the figures mentioned on p. 1 of the Mehul note book are in thousands also fails. This is also supported by the fact that the figures on p. 3 of the Mehul note book are not in codes. The seized paper has to be read as a whole and two different interpretations are not possible to be given to the various figures mentioned in the same document unless supported by some additional evidence collected during the course of search.

58. The learned Departmental Representative argued that the case of the department is based on the principle of preponderance of probability. According to him, the figures of interest determined at the rate of 14 per cent are approximately the same which are given on the seized loose papers 39 and 41 seized from the residence of the assessee. We do not find any force in the arguments of the learned departmental Representative because this is a search case and the department thoroughly examined each and every document found in the premises of the assessee. Subsequently, the department also searched the premises of Mr. Paras Ram Rohira and seized whatever they deemed fit during the course of search. By taking the search action, the assessee has been fully exposed and nothing remained hidden from the department. The search party was having access to all the documents and other valuables lying in his premises. Now, after unfolding the secrecy of the assessee and collecting the evidence whatever the department deemed fit for investigation, it would be quite unjust and against the natural justice to proceed against the assessee on the principle of preponderance of probability. The provision of section 132 is a complete code in itself and any action against the assessee after the search has to be taken within the provision of that section only. It exists in isolation of other provisions of the Act. It is essentially a procedural section empowering the tax authorities to take action where the income and assets are not voluntarily disclosed. The income of the assessee after search action has to be determined as per the procedure laid down in the Act on the basis of the evidence collected during the course of search. In our opinion, the

department is not empowered to determine the income of the assessee on the basis of the imaginary presumptions and assumptions after the search action. The presumption if any has to be made as per the provisions of section 132(4A) of the Act, which is also rebuttable. The principle of preponderance of probability applies only when actions is to be taken on the basis of circumstantial evidence. In the search cases the question of circumstantial evidence does not arise as the department is already in possession of evidence, which has been collected during the course of search. Under the circumstances, we do not find any force in the arguments of the learned departmental Representative. The principle of de-codification of the seized documents relied upon by the tax authorities and vehemently supported by the learned departmental Representative fails. Therefore, no addition can be made on the basis that the assessee has taken cash loans of Rs. 47,00,000 through finance broker, Mr. Paras Ram Rohira. Further, addition of Rs. 25,00,000 has been made on the basis of p. 3 of Mehul note book which pertains to 'Madnani a/c'. According to the assessing officer these are also Hundi loans because they are similar to the loans mentioned on p. 1. The findings of the departmental authorities are without any basis. According to the department, the figures mentioned on p. 1 are in coded words and to reach at the actual amounts each figure has to be multiplied by '1000'. This logic has not been applied to figures mentioned on p. 3 of the Mehul note book. Mehul note book is one document seized from the premises of the assessee, therefore, the document has to be read as a whole. If the figures mentioned on p. 1 are in coded words, the figures mentioned on p. 3 should also be in coded words. Therefore, we do not find any substance in the contention of the department that the figures mentioned on p. 3 are also Hundi loans. According to the department, the 'Mehul note book' contains the loans arranged by Mr. Paras Ram Rohira because the handwriting of Mr. Paras Ram Rohira on diaries A-53 and A-54 seized from his premises is similar to the handwriting of loose papers 39 and 41 seized from the premises of the assessee. If this is accepted as true, then why Mr. Paras Ram Rohira should write figures in codes on p. 1 and without codes on p. 3. It is but natural that the same document is generally written in the same language unless it is proved otherwise. According to the department, the first three figures mentioned on p. 1 of Mehul note book tallied with the loan figures mentioned in diaries A-53 and A-54

seized from the premises of Mr. Paras Ram Rohira when such figures are multiplied by '1000'. On the basis of this decoding the IT authorities have made the addition of Rs. 47 lakhs which were the loans appearing against the name of Omprakash & Co. The same theory has not been applied to p. 3 of Mehul note book. The assessing officer has not proved that these figures are also appearing in the diaries A-53 and A-54 seized from the premises of Mr. Paras Ram Rohira. Moreover, 'Madnani' has been written on the top of this page which means these transactions pertain to Madnani only and if the contention of the department is accepted as correct that the loose papers 39 and 41 have been written in the handwriting of Mr. Paras Ram Rohira and the transactions on these loose papers are the same which are reflected in Mehul note book, then these transactions must be between Madnani and Mr. Paras Ram Rohira. The department has not proved the identity of Madnani. Even Mr. Paras Ram Rohira has disowned this note book. Under the circumstances, the department has not proved that the transactions of Madnani pertain to the assessee or any of the family Members of the partners of the assess-firm. Therefore, the findings that these transactions also pertain to the assessee are without any material on record or logical basis. Therefore, the addition made of Rs. 25,00,000 is simply based on the wild guess of the tax authorities. Under the circumstances this addition is not justified.

59. Now the next important issue for discussion is regarding the application of the provisions of section 132(4A) of the Act. According to the learned departmental Representative the case of the assessee is squarely covered under the provisions of this section. The presumption could be said to arise when it is established that the article or a thing is found in the possession or control of any person in the course of search. The Mehul note book was seized during the course of search from the residence which is being used for the business of twenty sister- concerns. This note book does not bear the name of the assessee-firm. The partner of the assessee-firm also stated during the course of search that the Mehul note book does not belong to the assessee. The department has not established that the Mehul note book belongs only to the assessee-firm and not to any other concerns which are also conducting their business from the same premises. The Mehul note book has not been seized from the exclusive control or possession of the assessee-firm. In accordance with section 132(4A) if any document is found in the

course of search, then by legal fiction a presumption has to be drawn that such document belongs to the person from whose possession or control it was found and the contents of such document are true, but this presumption is rebuttable. In the present case, the Mehul note book has not been exclusively found in the possession of the assessee-firm. Twenty sister-concerns are carrying on their business - from the same premises, therefore, it cannot be said that Mehul note book pertains only to the assessee-firm and not to any other concern. The assessee-firm's name is not written on this note book and the partner of the assessee-firm also stated in his statement recorded under s, 132(4) of the Act during the course of search that the note book does not belong to the firm. Therefore, the assessee-firm rebutted the presumption raised against it and the department has not brought any evidence on record to prove that the Mehul note book pertains only to the assessee-firm. Further, the department has also not proved in whose handwriting this note book has been written. Subsequently, the search was also conducted in the premises of Mr. Paras Ram Rohira and diaries A-53 and A-54 were found and seized from his premises. The assessing officer found that the handwriting in the seized diaries A-53 and A-54 and the handwriting in the loose papers 39 and 41 is the same, i.e., in the handwriting of Shri Paras Ram Rohira, which fact has also been confirmed by the learned Commissioner (Appeals) though without any report of the handwriting expert. It has been stated by the partner of the firm that the Mehul note book belongs to Paras Ram Rohira. There is a substance in the statement of the partner because the department has itself accepted that the loose papers belong to Paras Ram. Now, if Paras Ram can leave the loose papers in the premises of the assessee, he could have also very well left the Mehul note book in the premises of the assessee. Therefore, the loose papers and the Mehul note book actually belong to Mr. Paras Ram Rohira and not to the assessee. Though it is not admitted by Mr. Paras Ram Rohira, the fact remains that the Mehul note book and the loose papers 39 and 41 have been written by Mr. Paras Ram Rohira. Thus, the findings of the department fully support the view that Mehul note book does not belong to the assessee as the same infact belongs to Mr. Paras Ram Rohira. Once it is proved that the seized documents belong to a particular person, the presumption if any under s. 132(4A) of the Act can be drawn only against that person and not against the person from

whose possession the document has been seized. Under the circumstances, though the document has been seized from the premises of the assessee-firm but presumption under section 132(4A) cannot be drawn against the firm in view of the fact that the department has not brought any evidence on record to prove the exclusive possession of the document by the assessee. Moreover, the subsequent investigation made by the department has fully supported the view that this document belongs to Mr. Paras Ram Rohira. Thus, action if any can be taken against Mr. Paras Ram Rohira and not against the assessee-firm. Thus, the presumption drawn by the department against the assessee gets fully rebutted.

60. The assessing officer has made the addition on the basis that the cash loans were having all the characteristics of Hundi in its substance. The assessing officer made the presumption on the basis that Mr. Paras Ram Rohira was having in his possession Hundis in respect of loans taken in cheque by Kukreja group. The assessing officer, therefore, came to the conclusion that for cash loan Hundis do not exist for obvious reason but in substance, the loans bear all the characteristics of a Hundi. He, therefore, made the addition of Rs. 72 lakhs under the provisions of s. 69D of the Act. The learned Commissioner (Appeals), however, found that no Hundi documents were found pertaining to these transactions, either at the premises of the assessee or at the premises of Mr. Paras Ram Rohira. Thus, she came to the conclusion that the provisions of section 69D cannot be invoked. Accordingly, she deleted the addition of Rs. 72 lakhs. The provisions of section 69D are very clear and according to this section an amount borrowed on Hundi, or repayment thereof, otherwise than by an account-payee, cheque is treated as the assessee's income of the previous year, Thus, the only requirement for applying the provisions of this section is that the amount should be borrowed or repaid on Hundi in cash. Thus, the existence of Hundi is a must for the application of the provisions of this section. As no Hundi documents were found during the course of search either from the premises of the assessee or from the premises of Mr. Paras Ram Rohira, therefore, the provisions of section 69D in this case are not applicable. The learned Commissioner (Appeals) is fully justified in deleting the addition and her findings are, therefore, upheld.

61. The next important issue for consideration is whether the addition can be made under the provisions of section 68 of the Act. This issue was not before the Commissioner (Appeals), therefore, she has not considered this issue. She has, however, agreed with the assessing officer that the assessee-firm has taken cash loans of Rs. 72 lakhs which do not find any place in the books of account of the assessee. The learned Departmental Representative, therefore, took up this issue by filing the additional ground of appeal. According to him the learned Commissioner (Appeals) should have made the addition under section 68 of the Act once she came to the conclusion that the assessee has taken cash loans of Rs. 72 lakhs which are unaccounted and are in violation of the provisions of section 68 of the Act. He contended that the Commissioner (Appeals) has plenary powers in disposing of an appeal. The scope of his powers is co-terminus with that of the assessing officer. He can do what the assessing officer can do and can also direct him to do what he has failed to do. He further contended that the power conferred on the appellate authority by section 246 and which is exercised in accordance with the procedure in section 250 indicates an amplitude and width which is no less wider than that of the assessing officer and the appellate authority could substitute the order of the assessing officer by one of his own. He, therefore, contended that the Commissioner (Appeals) should have retained the additions of Rs. 72 lakhs under section 68 of the Act, once she came to the conclusion that addition under section 69D cannot be made but the loans taken by the assessee are unaccounted. He also argued that the additional ground of appeal can be filed before the appellate authorities at any stage of the proceedings. He, therefore, contended that the additional ground may be admitted regarding the addition to be made under section 68 of the Act. The learned counsel for the assessee gracefully agreed for the admission of the additional ground. The additional ground is, therefore, admitted for consideration of addition under section 68 of the Act. The learned Departmental Representative contended that the Mehul note book is a book of account maintained by the assessee for his unaccounted cash loans. Therefore, the addition under section 68 is to be made on the basis of the entries in that note book . The issue for our consideration is that whether the addition can be made on the basis of Mehul note book found from the premises of the assessee during the course of search. In our considered opinion, the addition if

any can be made on the basis of any one of the following circumstances

(i) under the provisions of section 68 of the Act.

(ii) If the contents of the seized papers are proved to be true by the department.

(iii) On the basis of the admission made by the assessee during the course of search under section 132(4) of the Act.

The powers under section 68 can be invoked if books of account have been maintained by the assessee. When an amount is credited in business books, it is not an unreasonable inference to draw that it is a receipt from business, if the explanation given by the assessee as to how the amount came to be received is rejected by all the IT authorities as untenable. The assessing officer before invoking the power under section 68 must be satisfied that there are the books of account maintained by the assessee and the cash credits are recorded in the said books of account. The existence of books of account is a condition precedent for invoking the power. It is also held by the Courts that such books have to be books of the assessee himself and not of any other assessee. In the present case, the Mehul note book was found from the premises from where 20 sister-concerns were carrying on their business activities. One of the partners of the assessee-firm stated in his statement recorded under section 132(4A) of the Act that Mehul note book did not belong to the assessee-firm. The name of the assessee-firm was also not mentioned on this note book. The department also did not bring any further material on record to prove that the Mehul note book pertained only to the assessee in exclusion of all the other sister-concerns. The department has also not proved that the note book was written by any of the partners or any of their family members. Therefore, the presumption drawn by the department under section 132(4A) of the Act that the Mehul note book belongs to the assessee only is without any substance. In the aforesaid paragraph, we have also stated that the assessee rebutted the presumption raised by the department under section 132(4A) of the Act. Under the circumstances, we do not find any force in the arguments of the learned Departmental Representative that the Mehul note book pertains to the assessee.

62. Another important issue for consideration is whether the addition has been made purely on the basis of the seized Mehul note book or the same is based on certain other documents which have not been seized from the premises of the assessee-firm. The assessing officer has compared the diaries A-53 and A-54 seized from the premises of Mr. Paras Ram Rohira with the seized Mehul note book and came to the conclusion that the first four figures appearing on p. 1 of the Mehul note book if multiplied by '1000' the resulting figures are also appearing in diaries A-53 and A-54 seized from Paras Ram Rohira's premises. This decoding of the figures and multiplication by 1000 is discussed by us in the above paragraphs in detail and we have found that the decoding is nothing but wild imagination of the assessing officer and hence, the same is irrelevant. But even by such decoding the total in the Mehul note book of four figures comes to Rs. 16,00,000 but the assessing officer has made the addition of R. 47,00,000. This addition is based on the amounts which have been mentioned against the names of Omprakash & Co. in diaries A-53 and A-54 which were seized from the premises of Mr. Paras Ram Rohira. Thus, the addition of Rs. 47 lakhs is based on the books, which have been seized from the premises of Shri Paras Ram Rohira and not from the premises of the assessee. As we have mentioned above the power under section 68 of the Act cannot be invoked if books of account have been maintained by the assessee. In the present case the diaries A-53. and A-54 have been maintained by Mr. Paras Ram Rohira and not by the assessee firm, therefore, the provisions of section 68 of the Act are not applicable. The assessing officer before invoking the power under section 68 must be satisfied that these are the books of account maintained by the assessee and cash credits are recorded in the said books of account. The existence of books of account is a condition precedent for invoking the power. Books have to be books of the assessee himself and not of any other assessee as has been held by the various Courts. In the present case, the addition is based on the books which have been seized from the premises of Mr. Paras Ram Rohira and such books do not belong the assessee. Thus, the addition made is erroneous and bad in law.

63. Now, the next issue is whether the Mehul note book can be considered as a book of account maintained by the assessee. In the case of Central Bureau of Investigation v. VC. Shukla & Ors. : 1998 CriLJ1905 , the apex court has laid down

that 'Book' ordinarily means a collection of sheets of paper or other material blank, written or printed, fastened or bound together so as to form a material whole. Loose sheets or scraps of paper cannot be termed as 'Book' for they can be easily detached and replaced. In the present case, the Mehul note book as we have concluded above has not been maintained by the assessee for keeping the accounts of its business. As stated above, this book pertains to Mr. Paras Ram Rohira, therefore, the same has been written by him for keeping his accounts. In this note book only two pages are written, which can also be easily removed. This is a rough note book, the pages of, which can also be easily removed. Therefore, it cannot be considered as a book as the sheets of this note book can be easily detached and replaced. Even if it is considered as a book of account no addition can be made on the basis of the amounts mentioned in this note book as we have discussed above in detail. Thus, the provisions of section 68 of the Act are not applicable to this case.

64. So far as the contents of the Mehul note book are concerned, the assessee has rebutted the presumption raised by the department under section 132(4A) of the Act by stating that this note book does not belong to the assessee and the same has neither been written by the partners of the firm nor by any of their family members. The assessee has made a disclosure of Rs. 1 crore during the course of search under section 132(4) of the Act. During the course of search nothing was found by the department except some jewellery. The department also could not find any assets in the premises of the assessee where the amount of Rs. 72 lakhs was actually invested the search party also could not find any evidence in the premises of the assessee to prove the investment of Rs. 72 lakhs in some securities or in some other moveable or immovable assets. Thus, there was no specific or direct evidence available in this case, which may support the findings of the assessing officer, wherein the considered figure of Rs. 72 lakhs as the assessee's income from undisclosed sources for the assessment year under consideration. Therefore, the contents of the Mehul note book have not been proved as true by the department by any supporting evidence. The addition made is, therefore, merely on the basis of assumptions and surmises and the same could not be sustained. In the case of Assistant Commissioner v. Shailesh S. Shah , the Tribunal held that the revenue can tax only those receipts which first have

been proved to be income in the hands of the recipient and secondly, they are not exempt from tax. Therefore, it is revenue's onus before assessing any receipt as taxable income to prove that the receipt in the hands of the recipient is income and this can be proved or established only on the basis of some material or evidence. In the present case, the department has not brought any material or evidence on record to prove that the assessee was having cash available with him of Rs. 72 lakhs, which he arranged as cash loans through Mr. Paras Ram Rohira. Therefore, we do not find any justification for making the addition.

65. During the course of search, the statement of one of the partners of the assessee was recorded under section 132(4) of the Act. The assessee has not made any admission regarding the availability of cash of Rs. 72 lakhs in addition to the declaration of Rs. one crore made during the course of search. Moreover, the assessee explained that the Mehul note book did not belong to the firm and it had neither been written by the partners of the firm nor by any of their family members. Thus, the assessee has not made any admission regarding the cash of Rs. 72 lakhs. Therefore, no addition can be made on this account also.

66. Shri Paras Ram Rohira has not admitted anything against the assessee-firm. He also stated that he was not dealing in any kind of cash transactions. Regarding the Hundi loans, the Hundi documents were not found in the premises of Mr. Paras Ram Rohira. Hundi is a document on the basis of which, the recovery of the loans is ensured and in the case of default, the holder of the Hundi is entitled to sue on its basis without any endorsement in his favour. Hundi once accepted by the donee, could be negotiated without endorsement. In the present case, it is quite surprising that where the loans had been advanced through cheques the Hundi documents had been obtained by Shri Paras Ram Rohira and had been kept in his safe custody but so far as cash transactions are concerned he had not obtained any Hundi documents even though the risk involved in recovering the cash loans is much more than recovering the loans advanced by cheques. Therefore, we find substance in the arguments of the learned counsel that the assessee had not received any cash loans through Mr. Paras Ram Rohira. For making the addition of Rs. 72 lakhs the department relied upon the statement of Shri Paras Ram Rohira which was recorded on 8-12-1994, under section 132(4) of

the Act during the course of search. But the copy of the statement was not provided to the assessee inspite of the fact that the assessee made request in writing to the assessing officer. The assessee was also not allowed to cross-examine Mr. Paras Ram Rohira. Mr. Paras Ram was also never questioned regarding the assessee-firm. The assessing officer also never made any enquiries regarding the cash loans from the parties from whom such loans were arranged by the financier Shri Paras Ram Rohira. Thus, the natural justice has been denied to the assessee. The assessee also made a request for the copies of the documents A-53 and A-54 seized from the premises of Paras Ram Rohira on the basis of which the addition of cash loans of Rs. 47 lakhs has been made by the assessing officer. The assessing officer refused to make available the copies of such documents on the pretext of secrecy. The statement of Shri Paras Ram Rohira was not made available to the assessee on the basis that the same was recorded in the presence of the assessee. Even on the directions of the learned Commissioner (Appeals), the assessing officer made available only some small paper-cuttings from the diaries A-53 and A-54 seized from the premises of Mr. Paras Ram Rohira. The full pages of the documents were never made available to the assessee on the pretext that such documents contain certain names, which are highly secretive. The department has made the addition of Rs. 72 lakhs on the basis of the statement of Shri Paras Ram Rohira and the diaries A-53 and A-54 seized from his premises. The assessee has been denied the opportunity to go through the statement of Shri Paras Ram Rohira and also to go through the documents on the basis of which the addition has been made. The department is not empowered to make any addition on the basis of seized papers found from the residence of the third party unless such papers are made available to be assessee. The copies of the full documents had to be made available to the assessee, otherwise the addition made would not be justified. In our view, the natural justice has been denied to the assessee, therefore, the addition made is illegal and bad in law. The same is, therefore, deleted. The arguments of the learned Departmental Representative that in the natural course, if justice has not been done, the case can be sent back to the lower authorities with specific directions for providing the copies of the seized documents to the assessee are also without any substance. The statement of Shri Paras Ram Rohira was not

given to the assessee on the basis that the same was recorded in the presence of the assessee. Similarly, the copies of the documents A-53 and A-54 were not made available to the assessee on the basis that such documents contained certain secret names. Even on the specific direction from the Commissioner (Appeals) such documents were not made available to the assessee except certain slips taken out from such documents. Thus, the lower authorities have already taken a competitions decision for not providing the copies of the diaries A-53 and A-54 seized from the premises of Paras Ram Rohira. Similarly, the lower authorities have also decided not to provide the copy of the statement of Shri Paras Ram Rohira to the assessee and also denied the opportunity to the assessee for cross-examining Shri Paras Ram Rohira. Therefore, in our considered opinion, no useful purpose would be served in sending back this case to the lower authorities except putting the assessee again on trial for an indefinite period which would be highly unjustified. The request made by the learned Departmental Representative is, therefore, rejected. The various court cases relied upon by the learned Departmental Representative have been taken into consideration while deciding the aforesaid issues in this case. The learned departmental Representative also brought to, our notice that an these cash loans appearing in diaries A-53 and A-54 seized from the residence of Mr. Paras Ram Rohira have already been assessed in the hands of Mr. Paras Ram Rohira. Therefore, making further addition in the hands of the assessee of the same cash loans would result into double taxation, which would be highly unjustified.

67. The learned counsel for the assessee has also taken up the additional ground pertaining to the provisions of section 269SS of the Act. According to him the Commissioner (Appeals) has erroneously held that the assessee-firm has taken loans through or from Paras Ram Rohira, finance broker, in cash in violation of the provisions of section 269SS of the Act. He referred to the decision of the Supreme Court in the case of Asstt. Director of Inspection (Investigation) v. Kum. A.B. Shanthi : [2002]254ITR258(SC) , wherein the Hon'ble Supreme Court has laid down that the object of introducing section 269SS is to ensure that a taxpayer is not allowed to give false explanation for his unaccounted money or if he makes some false entries, he shall not escape by giving false explanation for the same. During the search and seizure operation unaccounted money is unearthed and the

taxpayer would usually give the explanation that he had borrowed or received deposits from his relatives or friends and it is not easy for the so called lender also to manipulate his records to suit the plea of the taxpayer. The main object of the section 269SS was to curb this menace of making false entries in the account books and later giving an explanation for the same. The learned counsel, thus, contended that in the present case, the assessee has not made any false entries in its books of account. He, further contended that the assessee-firm has neither borrowed nor paid any deposits to any party or his friends or relatives in cash through the finance broker Mr. Paras Ram Rohira, therefore, the question of any manipulation of records in the case of the assessee-firm does not arise. He, therefore, argued that the remarks of the learned Commissioner (Appeals) that the loans have been taken in cash through the finance broker, Mr. Paras Ram Rohira in violation of the section 269SS of the Act are without appreciating the facts and provisions of section 269SS of the Income Tax Act. The learned departmental Representative supported the findings of the tax authorities. In view of our findings in the preceding paragraphs that the assessee-firm has neither borrowed nor paid any cash loans to any party through Mr. Paras Ram Rohira, therefore, the provisions of section 269SS are not attracted in this case. The assessee has also not given any explanation that the firm had borrowed or received deposits from relatives or friends, therefore, the remarks of the learned Commissioner (Appeals) are not relevant to the facts of this case. This additional ground which is consequential to the ground pertaining to cash loans of Rs. 72 lakhs is, therefore, decided in favour of the assessee.

68. The second ground of appeal taken up by the assessee is regarding the addition made on account of interest of Rs. 2,68,750 by the assessing officer and enhancing the same to Rs. 5,79,433 by the learned Commissioner (Appeals). This ground of appeal is consequential to the ground of appeal pertaining to cash loans of Rs. 72 lakhs. We have given our specific findings (supra), that the assessee has not taken any loans in cash through the finance broker Paras Ram Rohira, therefore, the question of making any addition of Rs. 72 lakhs being the cash loans does not arise and accordingly this issue has been decided in favour of the assessee. The addition made on account of interest on cash loans of Rs. 72 lakhs being consequential, therefore, does not survive. This ground of appeal is,

therefore, decided in favour of the assessee.

69. The assessee has also taken up the additional ground pertaining to the addition on account of alleged brokerage that would have been paid by the assessee for arranging the cash loans through Shri Paras Ram Rohira, which is calculated by the assessing officer at Rs. 70,290. This ground of appeal is also consequential to the ground of appeal pertaining to the cash loans of Rs. 72 lakhs. This ground of appeal also does not survive in view of our finding (supra), regarding the cash loans of Rs. 72 lakhs, which has been decided in favour of the assessee. The addition of Rs. 72,290 is, therefore, deleted and this additional ground of appeal is also decided in favour of the assessee.

70. The third ground of appeal taken up by the department is regarding the deletion of the addition of Rs. 13,42,000 made on account of additional profit on enhanced work-in-progress due to undisclosed cost of construction. This addition has been made consequential to the addition of Rs. 72 lakhs made under section 69D of the Act. According to the assessing officer borrowed funds have been taken for business purposes. He, therefore, presumed that they have been utilized towards construction activity. He, therefore, worked out the total undisclosed profit at Rs. 13,42,800. The learned Commissioner (Appeals) has deleted the addition on the ground that the department has not brought any evidence on record to prove that the cash loans have actually been utilized in the business of the assessee. She has also stated that the money borrowed during the year under consideration was Rs. 35 lakhs only and out of that Rs. 25,00,000 have been borrowed at the end of the year. Therefore, according to her the assumption that Rs. 72 lakhs have been invested during the year under consideration towards construction is not well-founded. This ground of appeal is also consequential to the ground of appeal pertaining to the addition of cash loans of Rs. 72 lakhs. In view of our specific findings that the assessee has not taken any loans of Rs. 72 lakhs in cash from Shri Paras Ram Rohira and Shri Madnani, therefore, the question of investment of this amount in the construction business of the assessee does not arise. The addition made of Rs. 13,42,800 is, therefore, deleted.

71. In the result, the cross-appeals filed by the department and the assessed are partly allowed.

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