

Ms. Aishwarya Rai Vs. Dcit

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Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Jun-30-2005

Reported in : (2007)104ITD166(Mum.)

Judge : R Tolani, K P Rao, K Singhal, S, V Gupta, F S Ahmed

Appellant : Ms. Aishwarya Rai

Respondent : Dcit

Judgement :

1. On a difference of opinion between the Members, who heard this appeal, the following question has been referred to me by the Hon'ble President under Section 255(4) of the Income-tax Act, vide order dated 25-2-2005, for my opinion as Third Member.

Whether on facts and circumstances of the case, the addition of Rs. 50,00,000/- made by the AO and confirmed by the CIT(A) is to be sustained or not? 2. The appeal involves various other grounds, on which there is no dispute. The difference of opinion between the learned Members, is on the issue raised in Ground No. 7 of the assessee's appeal, which is as under: 7. On the facts and circumstances of the case and in law the learned Commissioner of Income Tax (Appeals) erred in confirming the addition of Rs. 50,00,000/- on account of alleged unexplained investment in purchase of flat in La-Mer Building.

3. Brief facts are - the assessee is a famous model/cine artist. She along with her father, mother and brother by agreement dated 26-9-2000 purchased a flat on 12th Floor of the building La-Mer at Bandra (W), Mumbai from M/s. Jay Construction Company ("JCC" for short), who were builders and developers of the building for a consideration of Rs. 90 lakhs. Search and seizure operations were carried out in the premises of the assessee on 26-9-2000, during the course of which, some loose papers were also found and seized, which included pages No. 5, 44 and 45 of the file marked as Annexure-A3, which pertain to this flat.

Statement of Mr. Krishnaraj Rai, ("KRR" for short) father of the assessee, was recorded under Section 132(4) of the Act on 26-9-2000. In reply to one of the questions, he stated that for the 12th Floor, Mistry Plaza, La-Mer, Bandra, Rs. 50 lakhs was paid as additional amount in cash for the purchase of this property. Thereafter, in post-search inquiry before the Dy. DIT, the said KRR in statement recorded under Section 131 on 16-10-2000 stated that in respect of this flat in La Mer, Mistry Park, no additional payment was made in cash beyond the agreement value. By a letter dated 29-11-2000, KRR explained that the statement under Section 132(4) dated 26-9-2000 was taken at mid-night, at very odd time, and he was not in proper state of mind due to mental and physical fatigue, which resulted in inadvertent and wrong statement about the payment of on-money in respect of this property. It appears that during the course of block assessment proceedings, JCC i.e. builder was called by the AO and was asked to furnish copies of sale deed made in respect of the assessee. It was found by the AO that those sale deeds were executed on 23-5-1999 in favour of the assessee and her family members as under: i) Shri Aditya K. Rai Rs. 22,02,560/- Flat No. 201 & 1202 ii) Shri Krishnaraj Rai Rs. 21,91,470/- Flat No. 1203 iii) Ms Aishwarya K. Rai Rs. 23,06,630/- Flat No. 1204 & 1205 iv) Smt. Vrinda K. Rai Rs. 23,06,230/- Flat No. 1206 & 1207 4. The AO, further observed that 10th and 11th floor of the building, were purchased by Shri Sachin Tendulkar of the same area for Rs. 153 lakhs each, which he adopted as a comparable case for cost of flat. The AO, deciphered the loose paper found during the course of search, which shall be dealt with later. The AO based on his inquiries & loose paper etc. held that unaccounted cash amount of Rs. 50 lakhs was paid for this flat, and since the assessee had major share in earning of the family, it was held that the entire on-money was paid out of

her undisclosed sources, the amount was accordingly added to her block income on substantive basis and proportionately in the hands of other family members on protective basis.

5. The learned Judicial Member, who wrote the lead order, held that subsequent retraction by the KRR was a correction of the statement and the same was valid. The flat purchased by Shri Sachin Tendulkar was from third party and not from the builder, JCC, as against which, the assessee had made agreement with the said builder directly much prior to purchase by Shri Sachin Tendulkar, therefore, no fruitful comparison could be made with the same. If the AO had made inquiries from the builder, he could have easily found out the details from other various flat purchasers who booked flats, which was not done. It was held that deciphering of the seized papers was self-contradictory and reliance thereon was on the basis of suspicion, which cannot take place of proof. In consideration of circumstances and facts of the case, the addition was deleted.

6. The learned Accountant Member, on the other hand, held that deciphering and interpretation of seized paper provide a strong corroboration of statement given by KRR under Section 132(4) accepting on-money payment of Rs. 50 lakhs. The purchase instance of Shri Sachin Tendulkar was a good comparable instance, as all the three flats have identical floor area and applying the test of human probabilities and of surrounding circumstances, as laid down by the Hon'ble supreme Court in the case of Sumati Dayal v. CIT 214 ITR 801 (SC) it was held that the addition of Rs. 50 lakhs was rightly confirmed by the CIT(A).

7. In this background, the above question is referred to the undersigned for opinion.

8. The learned Accountant Member has agreed with the narration of the facts as mentioned by the learned Judicial Member in his order by following observations:
3. The facts of the case and the rival submissions with regard to Ground No. 7 are mentioned in detail in para 31 to 39 of the order of my learned brother and therefore these are not being repeated hear.

In fine, there appears to be no dispute in regard to the facts of the question. The learned Counsel for the assessee, referred to the seized paper No. 44 which is reproduced at page No. 27 of the assessment order and the learned Accountant Member also has reproduced the same in para 6, page No. 6 1 of his dissenting order.

9. Learned Counsel for the assessee contended that the initial part of this paper reflects a summary of payments made through cheques by various family members, which aggregates to Rs. 78 lakhs. The seized pages No. 5 and 45 are details of these payments, which have been found to be matching with this figure and recorded in the books of accounts, the whole controversy revolves around page No. 44. Middle part of the paper on the extreme left hand side contains inscribing "Promise Diwali 98", just next to this figure from 3/98 to Dec... "59" and on the extreme right of the paper "+3" was written. The oral agreement was made in March, 1998 with a promise to pay a sum of Rs. 59 lakhs by December 98, the column below figure "59", totaling "84" represents the promise to pay the instalments as mentioned therein. However, the assessee made the payment through cheques against the promised schedule as under.Sr.

Date of cheque Bank Amount ByNo. No.6.

2.3.99 (534455) UBI (Khar) 400,000 VR7 29.3.99 (028141) UBI (Khar) 300,000 KR8.

29.3.99 (374535) VB (S-cruz) 100,000 AR9 29.3.99 (48093) VB (--do--) 200,000 VR 10. The learned Counsel pointed out that till December, though the assessee promised to pay Rs. 59 lakhs only a sum of Rs. 3 lakhs was paid on 17-5-1998. Thereafter, the dates of payments made, broadly match with the promises, in the sense, January 99 promised payment was made on 19-1-1999. The assessee on 4-2-1999 made a payment of Rs. 8 lakhs and for 13-2-1999 promise the assessee made payment of Rs. 4 lakhs and on 2-3-99, in two instalments by two cheques of Rs. 4 lakhs each, a sum of Rs. 8 lakhs was paid. Thus, the payment totaling to Rs. 34 lakhs nearly matches and is verifiable from the accounts of the assessee. The revenue has assumed that the middle column represents on-money payments, whereas the case of the assessee is, these promises have been kept by making

payments.

11. No where in this paper, there is any indication that the assessee has made any payments in cash. The word "promise" clearly signifies that the assessee promised to make these payments, as against which, the total payment of Rs. 78 lakhs was paid, which was duly recorded in the books of accounts, observation and conclusion of learned Judicial Member were relied on in this behalf.

12. The learned Counsel pointed that if theory of department is accepted, then Rs. 84 lakhs is on-money payment and Rs. 78 lakhs cheque payment which totals to Rs. 162 lakhs. The assessee has given total cheques of Rs. 90 lakhs, i.e. the assessee has paid Rs. 12 lakhs more after these payments. If the department's theory is accepted, then the payment towards flat made by the assessee will come as under: i) By cash (on-money) : Rs. 84 lakhs ii) By cheque as recorded in in paper : Rs. 78 lakhs iii) By cheque paid thereafter : Rs. 12 lakhs Total : Rs. 174 lakhs 13. It was contended that this total itself defeats the theory of the department. The price of Rs. 174 lakhs will result in addition of Rs. 84 lakhs, as against which the AO has made an addition of Rs. 50 lakhs, which has been confirmed by the CIT(A). The amount of Rs. 174 lakhs, if it is the correct value, the department should have made necessary additions in the case of Shri Sachin Tendulkar and others. It was contended that the theory of department, in interpreting the loose paper, is blown out of proportion, which has lead to inherent contradictions. If the addition called for was Rs. 84 lakhs, there was no point in ignoring this paper and basing the addition on comparison of prices of flats purchased by Shri Sachin Tendulkar, which is not comparable. The department is not clear in its mind as to how it wants to make addition. Much is made out of this paper, but when it came to make the addition, the paper has been given a go-bye and the addition has been made on the basis of flats purchased by Shri Sachin Tendulkar.

It was contended that in fact the dispute about the loose paper is irrelevant as the same has not been made a basis of addition and used to create suspicion to impress that the assessee has given on-money, and this being so, the addition should be made because Shri Sachin Tendulkar got the flat at higher amount. Interpretation of loose paper proposed by department was self-contradictory and

only a suspicion.

14. The learned Counsel, then adverted to the statement of the assessee's father KRR and its corrections thereto, contending that the search and seizure operations were carried out in assessee's premises on 26-9-2000, during course of which, the above papers were found and statement of assessee's father was recorded under Section 132(4), in which, in reply to question No. 7, the assessee's father admitted that, for the 12th Floor Flat at Mistry Park, an amount of Rs. 50 lakhs was paid in cash and no receipt was provided. It was contended that much is being made by the department that the statement was retracted by the assessee's father, whereas the fact is, in post-search inquiry, again a statement of KRR was recorded under Section 131 on 16-10-2000 i.e.

about 20-days after search, wherein the Investigating Officer clearly mentioned to KRR in question No. 51 that the builders of La-Mer building have been examined, who confirmed the factum of receipt of cash components by them, in respect of the property, how this cash was generated. Father of the assessee in answer to question No. 52 clearly stated that for La Mer Building, no cash payment was made upto date.

The contention is, post-search inquiries were conducted by the department, and KRR was asked a leading question by the department that builders have confirmed the cash receipt, despite that it was replied that no cash in respect of La Mer was paid upto that date. This amounts to a correction of statement during the inquiries conducted by the department itself. It may be appreciated that it was the first search in the family. the assessee's father was looking after the accounting and financial aspects of the assessee's professional activities as well as the family as a whole. It cannot be held to be improbable, if the assessee makes one wrong assessment of facts and in later departmental inquiries, the same is corrected. Thereafter, father of assessee filed a letter dated 29-11-2000, explaining the facts in this behalf to the effect that due to search proceedings, he was under physical and mental fatigue and nervousness. The official started recording his statement late in night, which continued till next morning. Due to mental pressure, he replied some questions in casual manner without understanding proper meaning and

accounting aspects of the same. He made a request for supply of photo-copies of the statement, so that things may be clarified properly, which were not supplied till the writing of the said letter. He requested the officials to allow his Chartered Accountant to sit during the course of recording of the statement, which was denied. The learned Counsel stressed that the assessee has given proper clarification of the facts in an inquiry by the department. Copies of the earlier statements were not supplied to enable proper verification in this behalf, though, the department while recording statement under Section 131 dated 16-10-2000 made KRR to believe that the builders have confirmed on-money receipt, he still denied having made any payment in cash. The stand taken by the department was not correct, inasmuch as the builders have never confirmed that they received any on-money. The reply of the assessee during the statement on oath, at the behest of the department, clearly spells out the facts. Therefore, the assessee's clarification cannot be held to be retraction. A statement during the course of search is not the final word for making addition but has to be seen in the light of attendant facts in totality. Reliance was placed in various case laws as under: It was contended that corrections to the statements during post-search inquiry in the given facts and circumstances is valid and has to be given due effect.

15. The learned Counsel then took up the third aspects. The department is not coming out with proper inquiries made with builders, JCC in respect of alleged cash payment. It was vehemently argued that the AO and the CIT(A) both at various places in their respective orders have given clear observations that builders have confirmed that the flat was agreed to be sold for Rs. 90 lakhs on 25-5-1999 and the conveyance has been executed accordingly. They have denied having received any on-money by cash payments from the assessee. The assessee made a request to produce the material collected from builders which was not done. During the course of hearing of this appeal, before the Division Bench, the assessee times and again requested the department to produce the record of inquiries conducted from JCC in respect of alleged cash payment, interestingly the same has not been produced. Following suit, the department has not produced any such record even at the time of present hearing. Non production of record of such inquiries, suggest that the builders have clearly denied having received any on-money/cash payment in this behalf. When the inquiry is

conducted in respect of any transaction, which involves two parties, examination and investigation of other party, becomes a logical consequence, which though has been undertaken in this case, the department is not forth-coming with the relevant record. The AO and the CIT(A) have made observations that builders have confirmed the agreement of flat for Rs. 90 lakhs and the conveyance at the stipulated price. Besides, assessee has given a logical explanation and interpretation of the loose paper which tallies with the books of accounts. The builder has denied having received any cash payment in this behalf, therefore, necessary inference shall be drawn in this behalf. The interpretation of the AO about inscriptions of paper are self-contradictory and do not go beyond suspicion.

16. Coming to the comparability with the price paid by the Shri Sachin Tendulkar in respect of Flats at Floor No. 10 and 11, which is stated to have been purchased for Rs. 1.53.00,001/- for each flat, the learned Counsel contended that the assessee had booked the flat at the time of starting of construction, directly from the builder in March, 1998, whereas, Shri Sachin Tendulkar purchased these flats from a third party and not from the builder at about June 1999. The AO has tried to compare between un-comparables, if at all, the comparison of the flat was material, the correct person for this purpose would have been those who originally booked flats with builders and not Shri Sachin Tendulkar, who is an ultimate buyer. It is a common practice in luxury flats that the value of the flats increases with the purchases by the celebrities. Besides, the persons who have originally booked the flats, they do it at a comparatively lesser price, as compared to the persons, who purchase the same from the persons who booked the flats. Therefore, overwhelming reliance placed on the instance of purchase of flats by Shri Sachin Tendulkar as against the booking of the flats by the assessee, which is earlier in time, cannot be held to be a proper sale instance so as to saddle the assessee with the difference in purchase rates. The addition made is unsustainable and learned Judicial Member has rightly deleted the same.

17. The learned DR, on the other hand, vehemently contended that the statement made under Section 132(4) by the father of the assessee at the time of search was a strong piece of evidence which is corroborated by the AO by way of other evidence i.e. loose paper and comparable case of purchases of flats by Shri

Sachin Tendulkar. The statement given by the father about the on-money was given along other transactions, the plea that statement was given in confused state of mind cannot be accepted on the face value, as onus to establish the same is on the assessee. Overall statement of the assessee's father gives clear indication that he was in perfect physical and mental state to give statement. Subsequently also the assessee has not retracted from the statement as it is only a statement under Section 131 and not a retraction. Similarly, there is no retraction in the letter dated 20-9-2000 given by the assessee's father. No affidavit has been filed in this behalf. It was argued that first statement is binding on the assessee, which has not been retracted by subsequent statement, and the addition made on this basis is perfectly justified.

18. Coming to the interpretation of loose paper, the learned DR contends that the assessee is totally silent about the middle column stannic from "59" to "84". The total of "84" contains cash and cheque entries and if the cheque entries are reduced, then the balance amount works out to Rs. 50 lakhs, which corroborates with the statement of the assessee's father. The learned DR then advened to figure of "1.40" written on the left side of "10/99", on the extreme right hand total of the last column is "56"; "84" is paid earlier, the total whereof comes to Rs. 140 lakhs i.e. Rs. 1.40 crores which has been written in the loose paper on the left hand side. The assessee is totally silent about the meaning of "1.40".

19 Coming to the theory of payment, as canvassed by the assessee, it was contended that the promises for payments are generally made on month basis, whereas in this case promises are date specific, facts about the papers are known to the assessee. The learned DR pointed out that the AO from undisclosed saving ban); account of Maharashtra Cooperative Bank Ltd., has seen a cash withdrawal of Rs. 5 lakhs on 19-5-1999, which coincides with the cash payment of Rs. 9 lakhs made in May, 1999, indicating cash payment was made, a proper set off of this amount has been made. The learned DR relied on the interpretation given by lower authorities and learned Accountant Member 20. Adverting to non-production of record regarding builders inquiries, the learned DR pointed out that they are third-party and loose papers have been found from the assessee's premises. Onus to explain the papers lies with the assessee and not on the third-party. Therefore,

no adverse inference can be drawn on this respect.

21 Coming to the comparability of the price of the flats with purchased by Shri Sachin Tendulkar, the learned DR referred to page 40 of the AO's order and (sic)intended that he purchased two flats on 10th and 11th floors with identical built-(Sic) area of 240.53 sq.mtrs.. each for a sale consideration of Rs. 1,53,00,001/-,. The agreement in respect of these flats was executed by the assessee on 25-3-1999 and by Shri Sachin Tendulkar in June/July, 1999. Therefore, it cannot be said that there can be a huge difference in the price of flat purchased by the assessee and by Shri Sachin Tendulkar. Even if the assessee's contention that flat in question was orally purchased in and around March, 1998 is accepted, there cannot be such huge price variation, as there was recession in real-estate market at the material time. The flats bought in the subsequent period of time fetched lesser value and not more value. The learned DR wanted more time for his arguments.

Therefore, the hearing was adjourned to next date i.e. 29-3-2005, when the learned DR reiterated his argument about the comparability of prices of flats purchased by Shri Sachin Tendulkar and relied on the Supreme Court judgment in the case of Sumati Dayal v. CIT 214 ITR 801 for the proposition that considering the surrounding circumstances and applying the test of human probabilities, the order of lower authorities were justified. Further reliance was placed on the following decisions: ii) Ramesh T. Salve v. ACIT (2000) 75 ITD 75 (Mum) : (2001) 71 TTJ 111, iii) ACIT v. Laxmanbhai J. Patel (2001) 77 ITD 166 (Rajkot) : 72 TTJ 211, Kunhambu (V.) and Sons v. CIT v) Pranav Construction Co. v. ACIT (1998) 96 TAXMAN 323 (Mum.) (MAG.), Hotel Kiran v. ACIT ix) Lallubhai Bhikhabhai Tandel v. Competent Authority, Ahmedabad 186 ITR 117, Param Anand Builders P.Ltd. v. ITO (1996) 59 ITD 29 (Mumbai) : (1996) 56 TTJ 21.

22. At the time of hearing the learned DR moved an application for admission of additional material dated 29-3-2005 with the following contents.

2. I am submitting herewith a press release, published in Mid-day on 15.10.2003 indicating that the broker Shri Krishna Kumar Sethi filed a complain against Ms Aaishwaria Rao for not paying the commission in connection with purchase of flat

at La-MER building. The said broker further reported that Ms Aaishwaria Rao and family members paid Rs. 1.75 crores, for the said flat to builder.

3. This press release supports the stand of the Department "whether on the facts and circumstances of the case the addition of Rs. 50 lakhs made by the Assessing Officer and confirmed by the CIT(A) is to be sustained ?.End: as above.

Commissioner of Income-tax ITAT-VII, H-Bench, Mumbai.

Copy to: The CCIT-VI, Mumbai with reference to the personal discussions, the undersigned held with him on 29.3.2005.

23. Regarding its admissibility, the learned DR made out the following arguments:

ii) Even if it is assumed so, the same is relevant with reference to the question referred to the Third Member. This being so, it should be accepted for proper determination of the question; iii) The question referred to does not talk about "material available on record". In view thereof, the additional material should be considered.

24. It was pointed out to the learned DR that nothing has been said about reasons for revenue's inability for not filing the evidence at the time of original hearing. It was contended that he came across this material only on the evening of 28-3-2005 and the same was argued to be sufficient reason for admission thereof. The learned DR relied on the additional evidence of press news published in newspaper "Mid-day" dated 15-10-2003 and urged that the addition may be upheld. Alternatively, it was contended that in view of this evidence, matter may be set aside.

25. The learned Counsel for the assessee, on the other hand, in counter, vehemently opposed to the addition of additional evidence on the following grounds- i) Third member has to decide the question referred on the basis of facts and circumstances available, which include the material available before the original Bench, who heard originally the matter.

ii) Third Member is not empowered to entertain any additional evidence. Reliance was placed on the following case laws.

iii) The evidence is dated 14-10-2003 and the order of the CIT(A) is dated 29-8-2003, a news item which has come into existence after the order of the CIT(A) cannot be called an additional evidence by any stretch of imagination.

iv) If the additional evidence is accepted, it defeats the calculations and method of interpretation of the entries of loose paper as advanced by the Revenue.

26 Coming to the merits of the case, the learned Counsel contended that the retraction is a general word and what has to be seen is whether the assessee corrected statement of his own or during the course of further investigations. In the instant case, the assessee corrected his statement during the course of post-search inquiries conducted by the department itself by a statement on oath under Section 131, which has to be given a logical meaning. In fine, it amounts to correction of earlier statement deposed before the appropriate authority under oath.

Having done so, there is no further requirement for the assessee to file separate affidavit or a separate letter in this behalf. It was for the Investigating officer to ask further questions to cross verify the assessee, about his correction, therefore, it does not lie with the department to say that the assessee's correction was in an improper format. Relying on the case laws cited above, the learned Counsel contends that subsequent correction of statement, during the course of post-search inquiries and being on oath, supported by sufficient reasons, was admissible and cannot be rejected.

27. Coming to loose paper, the learned Counsel contends that the department is not sure about the base of addition whether it is the loose paper in question or the comparability with Shri Sachin Tendulkar's flats. If the version of the department is accepted, then the middle column represents cash payments and right hand amounts represent the cheque payment. The flat purchased by the assessee for Rs. 90 lakhs and the total on extreme right hand side shows "78" lakhs, meaning thereby, Rs. 12 lakhs was to be further paid by the assessee.

If the paper is interpreted in this manner of the department, then the total cost of the flat works out as under: i) Cash payment (middle column) : Rs. 84 lakhs ii)

Cheque payment (extreme hand in column) : Rs. 78 lakhsiii) Balance cheque payment i.e. (90-78) : Rs. 12 lakhs Total Rs. 174 lakhs 28. If this calculation is adopted, then it has to be assumed that assessee has paid Rs. 84 lakhs as on-money, whereas the department has added only Rs. 50 lakhs. The learned DR has taken another plea that middle column i.e. total of "84" includes cheque and cash, the same is not correct as the assessee was able to show cheque payment against those promise entries. It was contended that interpretation on the loose paper given by the department is self-contradictory and cannot be relied on. The burden on the assessee is to offer reasonable explanation, a proper explanation that the flat was orally booked in March, 1998 and promised to pay the sum of Rs. 59 lakhs till December to the builders JCC is given. These promises are noted in the paper and till May, 1999 an amount of Rs. 84 lakhs was promised to be paid.

Inscription "promise" against these entries supports the explanation of the assessee. The schedule of payment could not be adhered and assessee paid only Rs. 34 lakhs by this date. Subsequent payment on the right hand side also has been verified from the bank accounts of the assessee. Therefore, in the given facts and circumstances, the assessee has given a reasonable explanation of the loose paper.

29. The learned Counsel stressed that first statement of KRR was properly corrected in the second statement under Section 131 deposed before the competent authority, which has not been controverted, therefore, the first statement dated 26-9-2000 cannot be held to be binding on the assessee, as subsequently, the assessee corrected that for La Mer flat, no cash was paid till date. KRR co-operated in the search proceedings fully and it cannot be assumed that he will reply each and every question accurately and the same will not involve any subsequent corrections. Therefore, the subsequent correction by KRR in this behalf has to be accepted in view of facts of the case.

30 Coming to the silent stand of the department about the investigation carried in ICC, the learned Counsel pointed out the AO and CIT(A) have given finding that the said builder have accepted the version of the assessee. Despite several requests, the department has not produced the material at any stage, at the time

of original hearing or before third Member. Under these circumstances, the finding about the builders having corroborated the assessee's version becomes final. Regarding verification of schedule of promised payments or cash payments, the proper persons were builders. The arguments of the learned DR that they are third party and not relevant, cannot be accepted as they are necessary party to the proceedings, who could give clinching evidence about the correctness of the amount. In any case the fact stands accepted in the record in the form of finding of lower authorities that builders have accepted the assessee's version.

31. Coming to the comparable case of Shri Sachin Tendulkar, the learned Counsel contended that the same cannot be applied against the assessee for the following reasons: i) The assessee is an original buyer having booked the flat by oral agreement in March 1998, which has not been disputed. As against which, Shri Sachin Tendulkar purchased the flats in June/July, J 999 i.e. after a period of about 15-months.

ii) The assessee has booked/purchased the flat directly from the builder at a very earlier stage, whereas Shri Sachin Tendulkar purchased the Hat from a third person, who must have earned a profit out of it.

iii) The details about Shri Sachin Tendulkar were never given to the assessee to cross-verify and plead its case on the basis of verification of these documents.

iv) There were various other original buyers who have not been examined in this behalf.

32. In view of these discrepancies, it was contended that the price paid in this behalf cannot be made a basis to make an addition in the hands of the assessee.

33. I have heard the rival contentions and perused the material available on record. First, I shall decide the admissibility of additional evidence, adduced by the Revenue. In my considered opinion, third Member has to decide the question referred on the basis of facts and material as existed before the Division Bench, who originally heard the same. There is no merit in the contention that since words "material available on record" are not mentioned in the question referred, the third

member can admit the additional material. The words "whether on the facts and circumstances of the case" will automatically include availability of the material so as to decide what were the facts and circumstances of the case. Under these circumstances, respectfully following the authorities cited by the learned Counsel, *supra*, the additional evidence adduced by the revenue cannot be admitted and the matter will be decided on the basis of record available before the original bench.

34. Coming to the merits of the case, in order to decide the controversy, the following four facets arise for the consideration.

i) Evidentiary value of the statement made under Section 132(4) and subsequent corrections/retraction in statement under Section 131.

iii) Inquiries conducted at builders' end and its effect on the aspect Nos. (i) and (ii) above and merits of the case.

iv) Reliance on the comparable case cited by the Revenue i.e. flats purchased by Shri Sachin Tendulkar to make the same as a basis for addition.

35. Coming to the first issue, the initial statement dated 26-9-2000 was given by the assessee's father. KRR during the course of search, accepting on money payment of Rs. 50 lakhs. Thereafter, post-search inquiries continued and further statement under Section 131 was recorded at the behest of the Investigating Officer, in which KRR was informed that builders of La Mer have been examined and who have accepted the factum of receipt of cash payments. The assessee despite this leading information replied that no cash for La Mer was paid till date. Thereafter by a letter dated 29-11-2000, KRR explained to the DDIT (Investigation) that he had not received the copies of the statement, his Chartered Accountant was not allowed to make presence during the inquiries, at the time of statement during the course of search. He replied the questions without understanding them properly.

The issue raises a question whether to accept the original statement and ignore the subsequent inquiries conducted by the department. The general legal principle

in this respect is well settled that a statement under Section 132(4) is not the last word, and if the person concerned retracts/clarifies the same subsequently on ascertainment of correct state of affairs and explains the same, it can be allowed. The burden to prove that the assessee has given the statement under misunderstanding and that subsequent statement was corrected, lies on him. Useful reference can be had from the decision in the case of Pullangode Rubber Produce Co. v. State of Kerala (SC) 91 ITR 18(SC), Karamchand v. ACIT 68 TTJ 789 (Chandigarh), Pushpa Vihar v. ACIT 48 TTJ 389 (Bombay). In the instant case, the so-called retraction is in fact a clarification which was given by the assessee during the course of post-search inquiries of department itself by a statement under Section 131 on 16-10-2000. The Investigating Officer asked KRR a leading question that builders have accepted the receipt of cash money, despite which, KRR replied that no on-money was paid in cash regarding La-Mer property. The subsequent statement cannot be called a retraction technically because the same was a clarification regarding an answer given by him before the search inquiries were concluded. More so when the subsequent question was posed with leading question that builders had confirmed on money, which as the facts emerge was not a correct leading question, as the builders have not confirmed the same. Non availability of copies of statement may in certain circumstances be handicap for the person concerned, at the end of the proceedings to realise the full impact. The subsequent statement was by the inquiries of the department itself, if Investigating Officer was not satisfied with the answer of KRR further question may have been asked in this behalf, which has not been done. As the facts emerge, copies of the statement were not given, leading questions though were asked, still KRR replied that no on-money was paid for La Mer property.

Consequently, the logical conclusion which springs up is that the subsequent clarification given by him has to be accepted as proper explanation of earlier statement during the course of search. The plea about not filing of the affidavit is of no consequence as KRR has made statement under oath in Section 131, which has to be considered as a deposition on oath. Under these circumstances, addition cannot be retained only on the basis of earlier statement ignoring the subsequent clarification given before the conclusion of search inquiries.

36. Coming to loose paper, the same was written in coded manner. One interpretation of the revenue is that extreme right column of figure totaling "78" represents cheque payments and the middle column represents cash payments and cheque payments. Apropos that, assessee's contentions is, the word "promise" is clearly written on the side of inscription, therefore, these were promises made, actual payments are duly recorded in the books of accounts, which have been verified. Oral agreement for the property was executed in March, 1998 and till December, 1998 an amount of Rs. 59 lakhs was promised to be paid. The assessee's contention is, words written had to be given proper effect, therefore, the word "promise" has to be given proper meaning, entries in the middle column represent only promises, as and when payments are made they are reflected. If the departmental explanation is considered, then all the middle column entries are cash payments which totals upto "84" and adding Rs. 90 lakhs being the agreement value, the cost of flat comes to Rs. 174 lakhs resulting in addition of Rs. 84 lakhs, whereas the lower authorities have taken only Rs. 50 lakhs, which shows the contradictory stand. After hearing the parties, I am of the view that the assessee's version could have been very well clarified from the end of builders regarding schedule of payments, any on-money involved and the actual payment made. No record of the builders has been produced by the department, for the reason best known to them, but at various places, the AO and CIT(A) have given finding that the builders have clarified that the property was transacted for agreed value of Rs. 90 lakhs. The revenue has referred to entry "10/99" on the left-hand side "1.40" and on the right-hand side "56" is written.

According to the Revenue "1.40" represents cash components and cheque components. In that case also addition should have been Rs. 84 lakhs and not Rs. 50 lakhs. Under these circumstances, the Revenue could have bettered its case by inquiry from the builder concerned. Having not done so, things can not be assumed in this behalf so as to uphold the addition. In the given facts and circumstances, the Revenue's stand suffers from contradictions in the interpretation of the seized papers, as against which, the explanations of the assessee though not fully verifiable, appears more reasonable. Non-disclosure of builders' inquiry also affects the Revenue's case adversely. In the given facts and circumstances, the loose paper does not support case of the Revenue.

37. Coming to the effect of builders' inquiries, it appears that the Revenue conducted inquiries from builders, JCC, since the record has not been produced, it cannot be ascertained the level and depth of such inquiries. In the given facts, it has to be assumed that the department was serious in conducting these inquiries, in the absence of record, no comments can be made, but the fact remains that AO and CIT(A) have given finding that builders confirmed the price paid by the assessee.

In my considered opinion, in the interest of justice the department should have produced the relevant record of the inquiries from the builders. irrespective of results, which the inquiries would have led to. In the absence thereof, it has to be appreciated that both the AO and the CIT(A) have given finding that builders have accepted the price of Rs. 90 lakhs paid by the assessee, this is to be given due effect on the basis of preponderance of probabilities. Therefore, as a logical consequence, the findings of the lower authorities in respect of builders' statement, have to be considered to be corroborating the version of the assessee. It cannot be held that the builders are third-party and non-production of record has no consequence, as both the lower authorities have referred to these inquiries. The builders being a necessary party, the effect of such inquiries cannot be held as irrelevant. The explanation of the assessee stands corroborated by the undisputed observations of the lower authorities in this behalf.

38. Coming to the support derived from the comparable cases of Shri Sachin Tendulkar, the fact that the assessee agreed to purchase the flat in March, 1998 directly from the builder at booking stage, has not been denied. Similarly, the fact regarding Shri Sachin Tendulkar having purchased flats in June, 1999 from a third-party also has not been denied. The inquiries conducted in this behalf and the material facts about the comparability of Shri Sachin Tendulkar's flats and inquires in this respect were not confronted to the assessee at the assessment stage, so as to controvert the same. Time gap of 15 months is significantly long, fact about direct booking of flats from builders and purchase from third party also has very important effect on the price of the flat. Only explanation given by the lower authorities is that, there was a recessionary time and subsequent flats may have been sold at a lesser figure, is general and sweeping statement, which could not

be used against the assessee. There were other flat buyers, who could have also be examined, particularly, those who booked the flats from the builders at early stage. This comparability at the most can create a suspicion which cannot be made a basis of addition. In the given facts and circumstances, comparative purchase instance of Shri Sachin Tendulkar, cannot be made a basis for addition in the hands of the assessee. In view of foregoing, I hold that in the facts and circumstances of the case, the addition of Rs. 50 lakhs as made by the AO and confirmed by the CIT(A) cannot be sustained and the same should be deleted. I agree with the conclusion of the learned Judicial Member on this issue.

39. The matter will now go back to the regular Bench for passing consequential order in accordance with majority decision.

1. In this appeal there is a difference of opinion between the Judicial Member and the Accountant Member with regard to the Ground No. 7 and therefore the matter is referred to the President, Income Tax Appellate Tribunal, with a request that the following question may be referred to a Third Member or the President may pass such order as he may desire.

Whether on the facts and the circumstances of the case the addition of Rs. 50,00,000 made by the A.O. and confirmed by CIT(A) is to be sustained (K.S.S. Prasad Rao) (Ahmed Fareed) JUDICIAL MEMBER ACCOUNTANT MEMBER 1. This appeal is filed by the Assessee having been aggrieved by the order of the Commissioner of Income Tax(Appeals), Central Circle-1, Mumbai, passed on 29-8-2003.

2. The Assessee has raised 12 issues in the Grounds of Appeal. Both parties were heard regarding the issues in extense apart from their legal implications.

3. The Assessee has filed Paper Book Consisting of 181 pages comprising all the relevant documents that are made available before the Departmental Authorities. The issues in nutshell are as follows: 1. Confirmation of addition of Rs. 3,65,200/- on account of alleged Unexplained cash found during search.

2. Confirmation of addition of Rs. 4,00,960/-out of the value of two items of Diamond Jewellery.
3. Not giving of specific direction regarding the relief of Rs. 15,88,668/-allowed by him in Para No. 4.5 of the impugned order.
4. Confirming the disallowance of depreciation claimed by the Assessee and allowed in the regular assessments for the Assessment Years 1996-97, 1997-98,and 1998-99 amounting to Rs. 14,61,131/- and for the Assessment Years 1999-2000 to 2001-02 (30-9-2000) amounting to Rs. 10,01,161/- in respect of Office Premises bearing Nos, 1701 & 1702 as well as 1601 &1602 at Brook Hill Apartments, Lokhandwala Complex, Andheri (W), Mumbai.
5. Confirmation of the addition of Rs. 7,05,193/- on account of creditord written back in the Books of Account on 31-3-2000.
6. Confirmation of the addition of Rs. 1,18,237/- on account of credits appearing in S.B.A/c. No. 52774 for the Assessment Year 1992-93.
7. Confirmation of the addition of Rs. 10,28,404/- in respect of credits in Maharashtra State Co-Operative Bank instead of Rs. 17,28,404/- offered by the assessee, in respect of the entire deposits made in the said account.
8. Finding of the Assessing Officer's view of Rs. 5,00,000/-has been utilized by the payment of 'on money' for purchase of property at La-mer and Rs. 2,00,000/-is utilized for payment for the interior decoration of flat at La-mer building.
9. Confirmation of addition of Rs. 50,00,000/-on account of alleged unexplained investment in purchase of flat at La-mer building.
10. Confirmation of addition of Rs. 7,25,000/-on account of alleged cash payment made to carpenter.
11. Confirmation of addition of Rs. 25,79,000/-on account prize money and remuneration received by the assessee from Miss.

World(Jersey)Ltd., U.K. 12. Confirmation of addition of Rs. 3,214/-on account of the amount credited to the Capital Account of the assessee for the Assessment Year 1997-98.

13. Confirmation of addition of Rs. 13,11,210/- on account of bonus, interest and other receipts received by the assessee from Miss World(Jersey)Ltd., 14. Enhancing the assessment by Rs. 9,85,461/- on account of alleged excess credit in the account with Royal Bank of Scotland, pic, London.

4. On careful consideration of the material made available with the tribunal and analyzing the same in the light of the arguments addressed on behalf of both parties and the citations relied on by them, we find the undisputed facts relating to the issues raised in this appeal are as follows;.

5. Search & seizure action was carried out in the case of the assessee on 26.09.2000. The assessee is a film artist and is engaged in feature films and modeling. During the course of search action the following premises were covered of the assessee and her family members: (iii) Flat No. 1701 A & 1601 A Brook Hill Apartment, Lokhandwala Complex, Andheri (E), Mumbai.

Various bank lockers of the assessee and her family members were covered in the action under Section 132 of Income Tax Act, 1961.

During the course of search action, certain valuables were found and seized. Various loose papers/documents were also seized as per the annexures to the Panchnama from different places covered in the search. Among other things, cash of Rs. 8,49,900/- was found, out of which Rs. 4,95,200/- was seized and jewellery found was worth Rs. 42,02,970/- out of which jewellery worth Rs. 10,22,068/- was seized.

Deposition under Section 132(4) of Income Tax Act, 1961 (hereinafter referred to as the Act) was recorded of the assessee and her father Mr. Krishnaraj Rai & brother Mr. Aditya Rai.

6. The assessee filed return of income for the block period 1.4.99 to 26.9.2000 declaring undisclosed income of Rs. 35,00,000/- on 22.2.2001 in response to

notice issued by the assessing officer under Section 158 BC dated 8.11.2000. The break up of the undisclosed income declared is as under:5. To cover up possible discrepancies in the Block Period Rs. 10,48,632 Total Rs. 35,00,000 The assessing officer passed the assessment order under Section 158BC read with Section 143(3) of the Act determining the undisclosed income at Rs. 1,94,07,940/-. The assessing officer determined the undisclosed income on account of following:9. Undisclosed Bank A/c. with Maharashtra Rs. 10,28,404 Co-op. Bank Ltd.15. Amount transferred from City Bank - NRI A/c.

Rs. 13,09,597 Total Undisclosed Income Rs. 1,94,07,940 7. Being aggrieved the assessee carried the matter in appeal. The first appellate authority gave partial relief as detailed hereunder:1. Unaccounted cash 4,95,200 1,30,000 3,65,2002. Unaccounted Jewellery 19,89,628 15,88,668 4,00,9603. Depreciation on Office Premises 14,16,131 - 14,16,1314. Depreciation on Flat No. 10,01,166 - 10,01,1665. Outstanding Creditors 7,05,193 - 7,05,193 A.Y. 92-93 1,18,237 - 1,18,237 Maharashtra Coop. Bank Ltd., 10,28,404 - 10,28,404 La-mer Flats 50,00,000 - 50,00,000 Carpenter 7,25,000 - 7,25,00010. Remuneration as Ms. World 35,79,000 10,00,000 25,79,00011. Amount credited in City Bank 3,214 - 3,214 Bank NRI A/c.

13,14,210 - 13,14,210 City Bank NRI A/c.

13,09,597 3,09,597 10,00,000 Besides the CIT (A) enhanced the assessment and made fresh addition of Rs. 9,85,461/- on account of excess credits in the bank account with Royal Bank of Scotland, plc, London, U.K. In the present appeal the assessee is contesting the additions sustained and enhanced by first appellate authority except for the amount transferred from City Bank NRI A/c. Rs. 10,00,000/-. There are twelve grounds of appeal. The assessee filed paper book containing 282 pages. The grounds of appeal taken by the assessee are adjudicated as under: 8. The first ground is regarding the addition sustained of Rs. 3,65,200/-on account of cash found and seized. At the time of search cash of Rs. 6,45,200/- was found at the residence of the assessee and Rs. 2,00,000/-was found at the office premises of the assessee at Andheri (W). Out of this Rs. 4,95,200/- was seized. During the course of assessment proceedings the

assessing officer asked to explain the sources of the cash found. The assessee explained that the cash found represents the cash balance as per cash book maintained, out of cash withdrawals from Maharashtra State Coop. Bank Ltd and partly by the cash withdrawals of other family members. The assessing officer did not accept the explanation of the assessee for the reasons that no books of account were found at the time of search. Therefore he concluded that no regular books of account were maintained and the books of account produced before him was afterthought & prepared after the search. He also relied on the statement of the father of the assessee Shri Krishna Raj Rai recorded under Section 132(4) of the Act wherein he explained the cash to the extent of Rs. 3,50,000/- withdrawn from Bank accounts of the assessee. Therefore he treated Rs. 3,50,000/- as explained and the balance Rs. 4,95,200/- was treated as undisclosed income of the block period.

9. During the course of first appeal the assessee reiterated her earlier submissions and also filed a table explaining the sources of cash. It was stated that cash belonged to the family members. The table submitted by the assessee before CIT (A) reads as under:

Sr. No.	Name of the	Amt. (Rs.)	Remarks
1	Aishwarya Rai	1,95,000	Balance out of withdrawals from
2	Vrinda Rai	25,000	Cash withdrawals from bank on 5.7.2000
3	Aditya Rai	50,000	Cash withdrawals from bank on 7.9.2000
4	Krishnaraj Rai	80,000	Cash withdrawals from bank on 4.9.2000

Krishnaraj Rai 80,000 Cash withdrawals from bank on 4.9.2000 The cash balance shown in the cash book includes opening balance of Rs. 76,531/- as on 1.4.2000. Further a sum of Rs. 2,00,000/- was stated to be received from one producer Shabnam towards professional receipts on 24.09.2000. A sum of Rs. 1,95,000/- was lying out of total cash withdrawals of Rs. 7,00,000/- from Maharashtra State Co-op. Bank Ltd. This account was found to be undisclosed and the assessee in her return for the block period shown the entire credits in this account as undisclosed income amounting to Rs. 17,28,404/-. The assessee withdrew Rs. 7,00,000/- in aggregate from Maharashtra State Co-Op. Bank Ltd. during the period from 1.4.99 to 18.7.99 and Rs. 1,20,000/- was lying as cash in hand as on

1.4.99 out of the cash withdrawals from Maharashtra State Co-Op. Bank Ltd. in earlier period. Out of which Rs. 6,25,000/- was stated to have been paid to Mrs. Nupur Doshi, an interior decorator. The CIT (A) did not accept the cash balance shown by the books of accounts and he concurred with the version of the assessing officer that the books were not maintained regularly as the same were not found at the time of search. The CIT (A) relied on the decision of the Bombay High Court in the case of Sheraten Appearels v.ACIT 256 ITR 20 wherein it was held that unless the books are totalled and balanced, the same can not be regarded as books of account. Mere containing or recording of entries in the book will be a mere memorandum book and not books of account. The CIT(A) accepted the explanation of the assessee partly for Rs. 50,000/& Rs. 80,000/- being cash withdrawn by the family members of the assessee from their bank accounts in the proximity of the date of search as shown in the table.

He, therefore, allowed part relief of Rs. 1,30,000/- and sustained the addition to the extent of Rs. 3,65,200/-.

10. Before us, the Id. assessee's representative strongly opposed the action of the CIT (A) and argued that the entire cash found is fully explained and the CIT (A) ought to have deleted the full addition. He submitted that the books of account were maintained by the Chartered Accountant of the assessee. The assessee's financial matters i.e.

investments, maintenance of books of account etc. were looked after by her father Shri K.R. Rai. This fact is evident from the records. Right from the inception of the search the assessee stated that her financial matters, books of account etc. are looked after by her father. The books of account were regularly maintained by the C.A. and the same were subjected to audit also. The audited statement of accounts were filed along with the income tax returns of the assessee from year to year. Her income tax assessments were scrutinized in past and during the course of assessment proceedings of different years under Section 143(3) the audited books of accounts were produced before the assessing officers. The copies of assessment orders were filed in the paper book.

He further submitted that since the books of account were lying with the Chartered Accountant of the assessee, therefore the same were not found at the time of search at the premises of the assessee. He stated that the only ground for not accepting the explanation of the assessee regarding cash balance as per books of account both by the assessing officer & CIT (A) was that the books of account were not found at the time of search. He submitted that this is not tenable. Mere non finding of books of account at the time of search can not be a ground to hold that the assessee is not maintaining the regular books of account in view of the fact that the same were produced in the scrutiny assessment proceedings before the assessing officer prior to the date of search.

The assessing officer & CIT (A) were wrong in ignoring this vital fact.

He further submitted that barring this the assessing officer & CIT (A) has nothing to say in this regard. The assessing officer & CIT (A) did not find any fault with the books of account produced. The contents of the books of account were found to be in order. The entry of receipt of professional fee of Rs. 2,00,000/- appearing in the cash book was summarily rejected. The assessing officer did not bring any material on record to substantiate that the said sum was not received from the party concerned. Without making inquiry from the party concerned this can not be rejected just on assumptions and presumptions. Similarly the opening cash balance is coming in the cash book as per the closing balance of previous year's cash book. The book of account of previous year 1999-2000 were duly audited. No fault of any nature whatsoever was found or noticed and brought on record. It was therefore submitted that the cash balance as per cash book maintained by the assessee is required to be accepted. He also argued that the CIT (A) ought to have accepted the cash withdrawal of the mother of the assessee from her bank account on 5.7.2000. There is no evidence that mother has utilized the said cash for any other purpose. Mother of the assessee is staying with her along with her father & brother. Nothing contrary has been brought on record. In view of this the same can not be ignored. As regards cash balance remained with the assessee out of the cash withdrawn from Maharashtra State Co-op. Bank Ltd., it was submitted that there is no reason for not accepting it. The fact of cash withdrawal from the said bank is not in dispute. The assessing officer rejected the same on

flimsy grounds. Mere suspicion cannot be a ground for rejecting the explanation unless contrary (sic) is brought on record. The assessing officer did not bring any material on record to rebut the contention of the assessee. In view of this it was submitted by the Id. counsel that the explanation of the assessee about the cash found at the time of search is valid and bonafide and therefore the same be accepted and the addition upheld by the CIT (A) be deleted.

11. The learned departmental representative supported the orders of lower authorities. He submitted that the explanation of the assessee was rightly rejected and since the books of account were not found at the time of search, it has to be assumed that the assessee was not maintaining the regular books of account. She can not rely on the books of account prepared afterwards. He further submitted that the assessee has stated at the time of search that her financial matters are looked after by her father. Her father in his deposition under Section 132(4) could explain only Rs. 3,50,000/- as withdrawn from bank accounts. He did not produce any books of account at the time of search to substantiate the source of cash as per cash book and hence the subsequent version of the assessee is a make believe story. Therefore he submitted that the addition was rightly made and does not call for any interference.

12. We have carefully considered the rival submissions. We have perused the order of the assessing officer and of the CIT (A). The statements of the assessee and of her father recorded under Section 132(4) were also perused. The major controversy lies about the maintenance of regular books of account. Admittedly the books of account were not found at the time of search. The father of the assessee spontaneously explained the source of cash to the extent of Rs. 3,50,000/- which was in his memory at the time of search. The rest of the entries which are appearing in the books of account could not be explained as the books of account were not available at the time of search. However, later on, in the assessment proceedings and before the CIT (A), the assessee explained the source of cash found with proper reconciliation supported by books of account and other relevant documentary evidence. The Assessing Officer & CIT (A) rejected the existence of books of account and accordingly rejected the explanation of cash balance as reflected in the cash book. The cash balance remained in hand out of

the cash withdrawals from Maharashtra State Co-op. Bank Ltd. was also not considered. From the perusal of the table appearing in para 3.3 on page 6 of the CIT (A)'s order, it is observed that the assessee explained the source of cash found at the time of search. The table is reproduced here under for the sake of understating the explanation in a proper perspective:2.

Aishwarya Rai 1,95,000 Balance out of withdrawals from Maharashtra State Co-op. Bank Ltd.3.

Vrinda Rai 25,000 Cash withdrawals from bank on 5.7.20004.

Aditya Rai 50,000 Cash withdrawals from bank on 7.9.20005.

Krishnaraj Rai 80,000 Cash withdrawals from bank on 4.9.2000 The total cash found at the time of search was Rs. 8,45,200/-. The Id.representative of the assessee contended that the whole cash is found to be explained. As regards cash balance as per cash book of the assessee, which was produced before the assessing officer and no discrepancy was noticed by him, the same needs to be accepted. The Assessing Officer did not point out any fault with the entries appearing in the cash book which leads to the cash balance of Rs. 4,96,000/- as on 26.9.2000 (the date of search). The proposition that books of account not found at the time of search but produced later on cannot be relied upon, in our view, does not hold good. There may be a number of reasons for non availability of the books of account at the time of search but that can not lead to the conclusion that books of account are not maintained or if the same are produced at a later date, the same can not be considered as books of account in the eyes of law.

In absence of any specific defects as to the entries of the cash book produced before the assessing officer we don't find any reason for not accepting the same. The said books were subjected to audit also. The auditors also did not point any discrepancy in the same. In view of this, we have no hesitation to accept the explanation of the assessee with regard to \ cash balance available as per the cash book on the date of search. The reliance of the CIT (A) on the decision of Sheration Apparels v. ACIT (supra) is not applicable to the facts of this case. The books are duly balanced and totalled one and also audited. These are not

memoranda books. This leaves us to the next limb of the issue of Rs. 1,95,000/- as coming out of cash withdrawals of the assessee from her bank account with the Maharashtra State Co-op. Bank Ltd. The dates of cash withdrawals from this account finds place in the assessment order. The existence of this account is not in dispute. The source of credits in this bank account of Rs. 17,28,404/- has been offered as undisclosed income of the block period. The same was included in the return for the block period. The cash withdrawals from this bank account on different dates is not in dispute. The only dispute remains is whether the assessee could have cash balance left with her out of the cash withdrawals from this bank account. The assessee submitted that she was having balance out of the withdrawals from this bank at Rs. 1,20,000 as on 1.4.99. Thereafter cash withdrawals from this bank was Rs. 7,00,000/-. Out of this she paid Rs. 6,25,000/- to Mrs. Nupur Doshi an interior decorator. This payment is duly corroborated with other papers/documents found and seized during the search. The remaining amount of Rs. 1,95,000/- was claimed to be available with the assessee on the date of search. The Assessing Officer & CIT (A) rejected the explanation of the assessee merely on the ground that there is a substantial time gap between the date of withdrawals and date of search. Therefore it is the apprehension of the assessing officer & CIT (A) that the cash withdrawn might have been used for some other purposes and live assessee can not possess the same cash on the date of search. From the perusal of the records we find that there is no other material to support the version of the Assessing Officer and CIT (A). It is a settled position that bare apprehension is not enough to reject the explanation of the assessee which otherwise is quite probable. It can not be ruled out that the assessee might have utilized the cash withdrawn for some purposes but the converse is also equally possible. It is quite possible that the assessee might have withdrawn the cash for some purpose but the same remained to be unutilized for one reason or the other and the cash continued to remain with her. Some times it may also happen that cash withdrawn from bank continue to remain as cash balance with the assessee even for months and some times cash withdrawn is utilized on the same day. All these probable aspects of the matter can not simply be ignored or brushed aside. But the fact remains that cash was withdrawn from the bank and that is not in dispute at all. In view of this the explanation of the

assessee deserves to be accepted unless contrary is brought on record, which has not been done. Similarly the cash withdrawn by mother of the assessee on 5.7.2000 from her bank account of Rs. 25,000/- needs to be accepted as she is also staying with the assessee. We find no justification for not accepting this amount by CIT (A). Considering totality of the circumstances and the facts of the case and in view of the above discussion, we hold that the cash found on the date of search stands explained and we delete the addition of Rs. 3,65,200/-upheld by CIT (A) on this count.

13. The ground No. 2 of the appeal disputes the addition upheld by CIT (A) of Rs. 4,00,000 (approx.) on account of diamond jewellery. At the time of search from the premises and the lockers in banks jewellery worth Rs. 42,02,978/- was found and part of it was seized. The assessing officer asked to explain the source of jewellery. The assessee explained the same. The assessing officer did not accept the explanation and held that jewellery worth Rs. 19,89,628/- is unexplained and he accordingly treated the same as undisclosed income of the block period. The CIT (A) directed the Assessing Officer to prepare a reconciliation with the help of the assessee and accordingly after a detailed exercise the assessing officer finally came to the conclusion that two items of diamond jewellery stands unexplained and he accordingly supported for the addition to the extent of Rs. 8,57,960/-(Rs. 4,06,700 + Rs. 4,51,260) being the market, value of the said two items as per valuer's report on the date of search. The CIT (A) found that these two items were subject matter of regular assessment in past and therefore the same can not be a subject matter of block assessment proceedings again. He found that the assessee is in possession of the purchase bills for the same. He accordingly accepted the cost of these items as explained and the remaining amount, i.e.

difference between market value on the date of search and the acquisition cost of these items, of Rs. 4,00,000/- (approx.) was held as unexplained and he sustained the addition to this extent. The assessee is in appeal for this addition being upheld by the CIT (A).

14. The Id. counsel for the assessee argued that this addition is totally unwarranted in view of the fact that the source of acquisition was accepted but the

addition was sustained for difference in market value on the date of search and the purchase price. The addition relates to the two items. These items are appearing in the valuation report Dt.26-9-2000 of departmental valuer at S. No. 34(Diamond Pendent with chain) & 42(Diamond Tops Setin Gold}. The assessee purchased the items on 15.11.97 & 3.6.97. The purchase price of these items are Rs. 1,44,000/- & Rs. 3,15,200/-respectively totalling Rs. 4,59,200/-. The copies of purchase invoices are placed at paper book pages 113, 114 & 115. The CIT (A) accepted the cost of these items as explained. He further submitted that once the acquisition of the items are treated as explained then how the addition for the same can be made for mere appreciation in value. In view of this it was argued that the addition is misconceived and liable to be deleted. On the other hand the Id. D.R. supported the order of CIT (A). He argued that the addition was rightly upheld by CIT (A).

15. We have considered the rival submissions. We find that the CIT (A) accepted the acquisition of these items which are supported by purchase invoices. The payments for purchase of the same are duly reflected in the regular books of account. These items were also subject matter of scrutiny assessment in past in the A.Y. 1998 -1999. The addition was made in the regular assessment made under Section 143(3) of the Act which was partly reduced by CIT (A) in the appeal for that assessment year. CIT (A) in para 4.5 on page 16 of his order recorded a finding to this effect. We find considerable force in the argument of the Id. A.R.that once the acquisition of the items of jewellery is accepted, then, mere appreciation in value due to passage of time can not be a subject matter of addition. It is quite common that jewellery items consisting of Diamonds and Gold do appreciate in value because of passage of time.

The CIT (A)'s finding on this issue reads as under at Page No. 16 of the impugned order: ... This is to drive home the point that the issue was already a subject matter of past assessment order and the search action has not yielded any new materials to change the position. Therefore, this being the case, law does not permit that the issue can be brought back in the block assessment proceedings....

The finding given by the CIT (A) is a categorical finding on the issue and therefore, in our view, no addition at all ought to have been made on account of these items of jewellery. We accordingly hold that the addition of Rs. 4,00,960/- on account of jewellery is unwarranted. We direct to delete the same accordingly.

16. The Ground No. 3 is regarding the disallowance of depreciation on the premises being 1701/1702 & 1601/1602 at Brook Hill Apartment, Lokhandwala Complex, Andheri (W), Mumbai. The assessee claimed depreciation in the A. Y. 96 - 97, 97 - 98 & 98 - 99 amounting to Rs. 14,61,931/- for the above premises and Rs. 10,01,161/- was claimed in the A.Y. 99 - 2000 to 2001 - 02 (broken period upto 30.9.2000). The assessing officer disallowed the depreciation claimed in the regular returns and assessed it as undisclosed income of the block period as he was of the view that it was wrongly claimed and the assessee is not entitled for the same. The assessing officer heavily relied on one letter dated 30.3.96 written by Bhagat Erectors & Development Services (I) Ltd. to the appellant. This letter was found during the course of search and was also seized vide page No. 32 in the file marked as Annexure A - 3. Copy of this letter has been extracted in the assessment order at page 15 & 16. The contents of the letter are that Bhagat Erectors & Development Services (I) Ltd. had written to the appellant on 30.3.96 that for flat Nos. 1701 & 1702 in Brook Hill Tower occupation certificate from Bombay Municipal Corporation has not been received and in view of this the alteration in the flats could not be carried out and proper electricity and water supply would be connected only after receipt of occupation certificate from the Bombay Municipal Corporation. The assessing officer considered this letter as an incriminating evidence found during the course of search and therefore he concluded that wrong claim of allowance of depreciation in regular assessments can be assessed as undisclosed income of the block period.

The assessing officer drew inference that since the occupation certificate from Municipal Corporation was not received for the premises being flat No. 1701 & 1702 in Brook Hill Apartment the appellant could not have used the flats for her professional activities. He also took support from the fact that the appellant has not shown electricity expenses for the flats in her Income & Expenditure Account submitted along with the regular returns for these years. He reached to the

conclusion that there was no electric consumption for these flats and therefore the same could not have been used for the profession of the assessee and accordingly he held that the claim of depreciation for the premises 1701 & 1702 in the regular assessment was false and he accordingly proceeded to assess the same as undisclosed income of the block period.

17. As regards the other premises i.e. flat No. 1601 & 1602 in the same building, the assessing officer made use of the statement of Mr. Aditya Rai, the brother of the assessee. This statement was recorded on 26.9.2000 during the course of search at 1701 A/1601 A, Brook Hill Tower. According to the assessing officer the assessee's brother in his statement had stated that nobody stays in flat No. 1601 & 1602 as the same is under renovation and the assessee used the flat No. 1701 & 1702 not on a permanent basis and whenever she was in this area i.e. close to Andheri she was using these premises to freshen up as she used to keep a very hectic schedule. The assessing officer derived support from the information supplied by the brother of the assessee in his deposition to the effect that flat No. 1601 & 1602 was under renovation and nobody stays there. Accordingly he concluded that flat 1601/1602 was also not used by the assessee for her professional activities and therefore the assessee wrongly claimed the depreciation in the regular returns for this premises and he proceeded to assess the same as undisclosed income for the block period. The assessee submitted before the assessing officer that she was using both these premises for her profession. The electricity charges were grouped under the head sundry expenses shown in the Income & Expenditure Account. The flat No. 1601 & 1602 went under renovation only for a couple of months before the date of search. Prior to that it was used by the assessee for her profession. The letter of Bhagat Erectors & Development Services (I) Ltd. (page 32 of the paper book) is only for not to carry out the alteration in the subject flats. It did not say that otherwise it could not be used in its present condition. The assessing officer rejected all the contentions of the assessee and determined the undisclosed income of the block period to the extent of Rs. 24,17,297/- being the amount equal to the amount of depreciation claimed in the regular returns for the A.Y. 96-97, 97 - 98, 98 - 99, 99 - 2000, 2000 - 01 & 2001 - 02 (upto 30.9.2000 broken period).

18. Before the Commissioner (Appeals), the assessee reiterated her arguments as were advanced before the assessing officer. The assessee submitted before the CIT (A) that she was using these premises for her professional purpose. She had purchased the premises and taken possession from the Builder. Thereafter she was using these premises for her professional purposes without any interruption. To rebut the contentions of the assessing officer as regards the letter of Bhagat Erectors & Development Services (I) Ltd. which forms part of seized documents and also the adverse inference drawn regarding the statement of the brother of the assessee Mr. Aditya Rai, the assessee submitted to CIT (A) that the letter of Bhagat Erectors & Development Services (I) Ltd. talks of non receipt of occupation certificate from the Municipal Corporation and for that reason the developers denied for carrying out any alteration in the flats. But the possession of the flats were given to the assessee way back in the second half of 1996.

It was submitted that the assessee, after taking possession, wanted to make some alterations in the premises which the builders denied in view of non occupation certificate. But the user of flats were not denied in the said letter. It was further submitted that the electricity charges were paid and there was electric consumption in the flats. Similarly it was stated that in the statement of Aditya Rai he never stated that the flat Nos. 1601/1602 were not used for profession. He merely stated that the same was under renovation at that point of time and therefore no one was staying there. The CIT (A) did not accept the contentions of the assessee and he upheld the action of the assessing officer. He rejected both the arguments of the assessee i.e. disallowance of depreciation can be considered in block assessment legally and also on merits he found that the assessee is not entitled to depreciation. As regards flat No. 1701 & 1702 the CIT (A) held that the said premises could not have been used in absence of electricity consumption and in view of the letter of Bhagat Erectors & Development Services (I) Ltd. As regards flat No. 1601 & 1602 the CIT (A) was of the view that the assessing officer had rightly made the addition on the strength of the statement of the brother of the assessee. Accordingly he upheld the addition.

19. Before us the learned representative of the assessee vehemently contended that the both the assessing officer & CIT (A) were wrong in arriving at the

conclusion that the depreciation claim was wrongly made in the regular returns. His arguments are two fold. His first argument was that this issue is settled in the regular assessments made Under Section 143(3) of the Act for various years and there was no incriminating material found during the course of search and therefore this issue can not be a subject matter of block assessment proceedings.

He submitted that the letter of Bhagat Erectors & Development Services (I) Ltd. found during the course of search can not be considered as incriminating one. He drew our attention to the said letter which is reproduced in the assessment order at page 15 & 16 regarding flat No.1701 & 1702 in Brook Hill Tower. He submitted that this letter is dated 30.3.96 & talks of giving possession of the flats. He stated that this clearly establishes the fact that the possession of the premises were given to the assessee before 31.3.96. He submitted that nothing incriminating is mentioned in the said letter to prove that the flats were not used or were not in usable condition. He further submitted that the inference drawn by the assessing officer from this letter about no electricity in the flats was totally wrong. This letter merely says that "proper electricity and water" will be provided after receipt of occupation certificate from BMC. It does not mean that the electricity and water is not there. It was stated by him that till such time the occupation is received the builders provide the electric supply and water from their connections. This is a general practice prevailing in Mumbai. Therefore he submitted that this letter is not at all an incriminating document found in the search. As regards flat No.1601 & 1602 he submitted that the statement of Aditya Rai recorded on 26.9.2000 is also not incriminating. He merely stated "Nobody stays in the flat No. 1601/1602 as the same is under renovation." He argued that this statement was in the context of the present position as on the date of search. He stated that possession of these flats were taken in the year 96 -97. Therefore he submitted that the assessing officer was wrong in raking this issue in the block assessment on the strength of the statement of Mr. Aditya Rai & the letter of the builders.

20. Coming to the merits, he submitted that the assessee's claim for depreciation is fully justified. As regards flat No. 1701/1702, the possession was taken in the year 95 - 96 relevant to the A.Y. 96 - 97 and the assessee claimed 50% of the normal depreciation as the same was used for less than 180 days. For flat No.

1601/1602 the possession was taken in the year 96 - 97 but depreciation was claimed from the A.Y. 98 - 99 (P.Y. 97- 98). He stated that the maintenance charges were paid for the flats 1701/1702 from April 96 and for flat No. 1601/1602 from April 97. He drew our attention to the copies of bills for maintenance charges raised by the builders and also the receipts for payments issued by them placed at paper book pages 144 to 162. He further submitted that initially the builders provided the electricity & water.

Later on the assessee paid the electricity charges. In support of this, our attention was drawn to the ledger account submitted in paper book at page 163 to 166 which relates to the payments made to BSES (Bombay Suburban Electric Supply Ltd.). He further submitted that during the course of search a large number of dresses and costumes and 85 pairs of shoes, sandals etc. of the assessee were found from this premises at 1701A & 1601A and the authorized officer made inventory of the same.

The inventory of these personal items runs in to 5 pages (placed in paper book at page 44 A to 44 E). Not only that, a sum of Rs. 2,00,000/- was found and seized from these premises at 1701 & 1601. He argued that in such situation how it can be said that the flats were not used for business. According to him it clearly established that the assessee was using these premises for refreshing herself, changing the costumes, shoes etc during the shooting schedule. Otherwise, why she will keep all these clothes, costumes and shoes in these premises.

There can not be any other purpose but the profession. He drew our attention to the copy of panchnama made during search on the premises 1701 & 1601 (placed at paper book page 43 & 44). In the panchnama in column No. 8 it is written that search commenced at 9.30 a.m. and closed at 9.15 p.m. He submitted that how the income tax people worked for nearly 12 hours (including 3 hours after sunset) if there is no electricity in the flats. In view of all this he concluded his arguments to the effect that both the flats were used for professional activity of the assessee and therefore the assessee is entitled for depreciation in law.

21. The Learned departmental Representative supported the order of lower authorities. He submitted that there was incriminating material found in the search

in the form of letter of builders (page 32 of seized Annexure A -3) and the statement of Mr. Aditya Rai. Therefore the assessing officer was justified in invoking this issue in block assessment. He supported the action of the assessing officer even on merits. He stated that in absence of proper \ electricity and water connection how one can work in the premises. This boils down to the point that these premises were not used for the profession of the assessee and therefore she is not entitled for depreciation.

Accordingly he pleaded to uphold the impugned additions.

22. We have carefully considered the rival submissions. We have perused the orders of assessing officer & CIT (A). We have appraised the relevant documents supplied to the Tribunal regarding the issue in hand. To adjudicate this issue, firstly, it is to be seen whether any incriminating documents/information were detected during the course of search and if so, whether on merits the assessee is entitled for claim of depreciation. The assessing officer invoked this issue for flat No.1701/1702 in the block assessment proceedings on the basis of one letter written by Bhagat Erectors & Development Services (I) Ltd. dated 30.3.96 which was seized vide page No. 32 of Annexure A - 3. For flat No. 1601/1602 he made his foundation on the statement of Mr. Aditya Rai recorded Under Section 132 (4) on the date of search. In the opinion of the assessing officer these were the incriminating material sufficient to get the jurisdiction to proceed under chapter XIV B of the Income Tax Act, 1961. The CIT (A) concurred with the views of the assessing officer. The assessee's contention has all along been that no jurisdiction lies with the assessing officer regarding this addition.

To decide this, we need to examine the letter dated 30.3.96 which finds place in the assessment order at page 15 & 16. The letter is reproduced here under: We are pleased to give you the possession of Flat No. 1701, 1702 in A in "Brook Hill Tower", A Wing, Plot No. 39 A/B, Lokhandwala Complex, Andheri (W), Bombay for furnishing of the same. We have not received the occupation certificate from BMC. You will not do any alteration without our permission so that BMC occupation certificate may not be held up. Proper electricity and water will be provided only after occupation certificate (Built up area 1180 sq. ft.). You shall not carry on any

addition or alteration in the said flat shall provide grills as per our specification.

The perusal of this letter makes it clear that the letter is, dated 30.3.96. It is written by the Builders of the Apartment Bhagat Erectors & Development Services (I) Ltd. to the assessee. It shows that the builders have given possession of the premises to the assessee on 30.3.96. It further says that the proper electricity & water connection would be provided at a later date after receipt of occupation certificate from the Municipal Corporation. Till such time the assessee was asked not to carry out any alteration in the flat. The assessing officer picked up the words 'proper electricity & water connection' and arrived at a conclusion that there was no water and light in the said flat and therefore the same could not have been used for business purpose and the assessee claimed the depreciation wrongly. From the records we find that the assessing officer did not make any further inquiry in the matter as to whether there was any electricity even on temporary basis provided by the builders, which normally the builders do at the time of giving possession of the flats. The water is also normally provided by the builders out of their construction line water connection or from borewell or from tankers. We are of the firm view that before giving possession normally these things are provided by the builders, otherwise there is no point in giving possession of the flat.

Even for furnishing work of the flat, electricity is required by the carpenters etc to run the drill machines, polish machines etc. We are afraid to accept this proposition of the assessing officer. At the same time the assessing officer did not make any inquiry from the builders as to when the light was provided in the flat. He merely proceeded on his imagination that 'no proper electricity & water connection' means there was no light and water at all. The reading of the letter seems to be non incriminating. It rather supports the case of the assessee that the assessee gets possession in the year 95 - 96 relevant to the A.Y. 96 - 97. It is not the case that the assessee claimed depreciation for the period prior to getting the possession of the flat. Had it been so then it could have, probably been considered as an incriminating evidence. But that is not the case here. Assessee started claiming depreciation on flat No. 1701/1702 from the A.Y. 96 - 97 and onwards i.e. from the year in which she took possession. Therefore, in our opinion, this letter can not be considered to be an incriminating document giving jurisdiction to the

assessing officer for proceeding in the block assessment. The assessee filed in the paper book, bills and receipts for maintenance charges, ledger account of electricity payment etc. which give credence to the case of the assessee. It makes sense that nobody will pay maintenance charges for years together without having possession and use of the flat, if it is not in a habitable/usable condition. We find considerable force in the arguments of the Id. AR that a huge inventory of costumes and shoes found at both these premises i.e. 1601 & 1701 is a clear indication of the flats being used for the profession. No prudent man will keep his artisans (tools of the profession) at a place which is not used for the profession. We can not agree with the observation of the CIT (A) to the effect that there is no material to suggest that the appellant would be engaged in shootings in that specific locality nearby these premises.

The huge inventory of dresses and costumes and shoes made out by the department at the time of search on these premises is a clear pointer to establish the fact that whenever shooting was in that area the assessee was using these premises. Besides a substantial sum of Rs. 2,00,000/- was found and seized from these premises. The case of the assessee also gets justified from the fact that income tax search party carried out in these premises their search operations nearly for 12 hours from 9.30 a.m. to 9.15 p.m. in the night. There is no evidence of any complaints from them is available on records regarding non provision of electricity and water. Considering all these aspects and totality of the circumstances we are of the considered view that the premises 1701/1702 & 1601/1602 were used for the profession of the assessee and the claim of the assessee was in order on merits. As regards the statement of Mr. Aditya Rai regarding flat No. 1601/1602 we don't find any justification for drawing any adverse inference. The premises 1601/1602 were purchased by the assessee and she took possession on 30.3.97. The documentary evidence is available on the record. The assessee paid maintenance charges for this flat from April 97 & onwards. From the statement of Mr. Aditya Rai it can not be inferred that the flat was under renovation right from April 97 till 26.9.2000 (the date of search). It is highly improbable. We don't find this statement in providing any adverse information against the assessee so as to give jurisdiction to the assessing officer to proceed in the block assessment proceedings. At the same time the fact remains that

assessing officer has not made any local independent inquiries with the builders/society etc. to find out the reality. In view of the above discussion and considering the totality of the circumstances we come to the conclusion that the assessing officer has no jurisdiction to proceed under chapter XIV-B in assessing the depreciation claim of the assessee as undisclosed income of the block period, more so, when the same was allowed Under Section 143(3) proceedings. On merits also the claim of depreciation of the assessee needs to be accepted.

Accordingly we delete this addition of Rs. 24,17,297/- which was made on account of depreciation claim of the assessee on both the premises namely flat No. 1601/1602 & 1701 & 1702 in Brook Hill Tower. This ground is allowed.

23. In the ground No. 4 the assessee is agitating the addition of Rs. 7,05,193/made on account of creditors written back in the books of account on 31.03.2000. The facts are that there were outstanding creditors of Rs. 7,05,193/- as on 31.03.99 which was shown by the assessee in her balance sheet filed along with the regular return of income for the A.Y. 99 -2000. The assessee has written back this amount as on 31.03.2000 in the books of account and offered for tax as remission of liability under Section 41(1) of the Act in the return filed for the A.Y. 2000 -01. Admittedly the return was filed after the date of search but within the time allowed under Section 139(1) of the Act. The search took place on 26.9.2000 and the return was filed on 30.10.2000 which is earlier to the due date for filing the return in assessee's case 31.10.2000. The assessing officer had taken a view that the return was filed after the date of search and therefore this amount is required to be included in the block period. The CIT (A) concurred with the view of the assessing officer and upheld the addition.

24. The Id. AR pointed out that this item can not be included in the block period at all. He pointed out that the assessing officer made this addition not on the basis of any seized material. He took us to the relevant portion of the assessment order and the order of CIT (A) and pointed out that no reference of any specific seized document is made for making this addition. Therefore the assessing officer was not justified in making this addition. He further argued that even otherwise the time limit for filing the return was 31.10.2000 & the assessee filed the return before that

date therefore in view of provisions of Section 158 BB(1)(d) this addition could not have been legally made. On the other hand the Id. DR supported the order of Assessing Officer and CIT (A).

25. The arguments were considered carefully by us. After perusal of the order of assessing officer & CIT (A) we find that no specific seized document is referred as basis for making this addition. In spite of a query from the bench, the Id. DR could not point out any seized document, which could be the basis for making this addition. In absence of that the addition can not survive. We find from the records that the assessee wrote back this amount of sundry creditors as on 31.03.2000 in her books of account which is prior to the date of search. On the date of search the time limit for filing the return in the case of the assessee was not expired. There was no incriminating material found or seized in the course of search action carried out. Therefore the assessing officer does not get any jurisdiction to include this amount in the block assessment which was otherwise offered by the assessee in her regular return for the A.Y. 2000 - 01. In assessment order on page 21 the assessing officer has listed out the amount of sundry creditors as on 31.3.93, 31.3.94, 31.3.95, 31.3.96, 31.3.97, 31.3.98 & 31.3.99 for the corresponding assessment years 1993 - 94 to 99 - 2000. It appears that the assessing officer had taken these figures from the balance sheets of the respective years which were filed along with the regular returns for all these years. This clearly shows that this information was already available with the department & search proceedings did not bring anything new on records. The A.O's reference "it is seen from the seized materials...." is without reference to any specific seized document and therefore is merely a vague observation.

In view of this we find full force in the arguments of the assessee and we differ from the view taken by AO & CIT (A). At this juncture we may point out that the CIT (A) himself in this case has held in his order while dealing with the addition made by the assessing officer on account of jewellery that law does not permit an issue to bring back in the block assessment proceedings if the same was a subject matter of past assessments and the search action has not yielded any new materials to change the position. It is surprising that while deciding this issue a different view was taken by him. The addition is ill founded and not based on any

material, muchless cogent. Therefore we hold that this addition is required to be quashed. We therefore delete this addition.

26. The ground No. 5 of appeal relates to the addition of Rs. 1,18,237/- on account of deposits in the bank account with State Bank of India being A/c No. 52774 during the period 1.4.91 to 31.3.92 (A.Y.2002 - 03). The assessing officer found that there were two credits of Rs. 8,347 and Rs. 1,09,890/- on 3.12.91 & 18.2.92 in this bank account. The assessee did not file the return for the A.Y. 1992 - 93.

The assessing officer found from the copies of bank statement that there are two credits aggregating to Rs. 1,18,237/- in the account with State Bank of India being account No. 56/52774. The assessing officer asked for the explanation of the assessee regarding the nature of these credits. The assessee explained that these credits are the result of past accumulation on account of gifts on various occasions like Holi, Diwali, birthday etc. The assessing officer did not accept the explanation of the assessee as no evidence was filed. Since no return was filed for A.Y. 92 - 93 and the due date of filing the return expired he treated these credits as unexplained cash credits and included in the block period. Before the first appellate authority the assessee explained that one credit of Rs. 8,347/- is the maturity value of recurring deposit and the other credit of Rs. 1,09,890/- is a telegraphic transfer which is on account of gift from a relative. The CIT (A) observed that the assessee has changed his explanation in the appellate proceedings. In absence of any evidence he agreed with the assessing officer's conclusion and upheld the addition.

27. Before us the Id. AR of the assessee contended that these credits are in the bank account of the assessee. The existence of this bank account has been duly disclosed to the department before the date of search. There was no incriminating material found with regard to this bank account in the \ search and therefore no undisclosed income results on account of these credit entries in this bank account. He further submitted that the copy of the bank statement was filed on the records on the Assessing Officer in regular assessment proceedings for the A.Y. 1993-94, and when once the bank statement is available on the records of the Assessing Officer in regular assessment proceedings then the Assessing Officer does not get

jurisdiction to proceed in the block assessment. He therefore, submitted that this addition is out of jurisdiction. In support of his arguments he relied on the case laws reported in 250 ITR 141 (Delhi), 248 ITR 562 (Calcutta), 249 ITR 4 (Allahabad), 248 ITR 350 (Raj.), 247 ITR 448 (Bombay), 112 Taxman 96 (Bombay) and 63 ITD 245 (Mumbai ITAT). He submitted that this issue is more or less settled by now and therefore he pleaded for deletion of the addition. On the other hand the Id. DR supported the addition on the ground that the assessee did not explain the nature of these credits with any documentary evidence and also did not file the regular return for the A.Y. 92 - 93 and therefore the case is squarely covered by Section 158 B (b) which defines the undisclosed income. The assessee had not disclosed this year's transaction by filing a regular return and therefore this amount is the undisclosed income within the meaning of the definition given by Section 158 B (b). Therefore he urged to uphold the addition.

28. We have carefully considered the rival submissions. The issue to be decided here is whether this can be considered in the block assessment.

Admittedly the assessing officer had not made reference to any specific seized document to substantiate this addition, we find force in the argument of the learned Authorised Representative that this addition is not based on any seized document. The Assessing Officer discussed this issue in para 16 on page 23 of the Assessment Order as follows: ...During the course of block assessment proceedings, it is found that assessee has saving bank account with State Bank of India, Linking Road Branch, Bandra (W), Mumbai 400 052, vide A/c No. 56/52774. Perusal of the above shows that the Assessing Officer noticed this fact in the assessment proceedings and he did not rely on any specific seized material. The block assessment is a special procedure for making assessment of undisclosed income on the basis of material found in search action. It has been the view of the Hon'ble courts by now that block assessment should be restricted to the material gathered in search proceedings. Section 158BB states that undisclosed income is required to be determined on the basis of evidence found as a consequence of search. In the instant case no such evidence to support this addition was detected in search proceedings. We therefore, are of the view that this addition is not warranted in the block assessment. The case laws relied on by the Learned

Authorised Representative fully supports this view. We therefore, hold that this addition is not based on any seized material and therefore can not be made in block assessment and we therefore delete this addition of Rs. 1,18,237/-.

29. In ground No. 6 the assessee relates to the manner and reasoning of the addition and not the quantum. Briefly stated the facts are that assessee was having a saving bank account with Maharashtra State Co-op.

Bank Ltd. (MSCBL). This bank account was not disclosed to the department. The total credits/deposits made by the assessee in the bank account since inception to the date of search was amounting to Rs. 17,28,404/-. The assessee in the return for the block period offered the entire credit of Rs. 17,28,404/- as undisclosed income and paid the tax thereon. The assessing officer found that the assessee has withdrawn cash from this bank account on two different dates Rs. 5 lakhs & Rs. 2 lakhs. The assessing officer tried to correlate these two cash withdrawals with the alleged unaccounted investment made in flat in La-Mer building and for interior decoration. Therefore he made a break up of the amount offered by the assessee and Rs. 7 lakhs he considered in the other heads and balance 10,28,404/- was retained under this head. Before the CIT (A) assessee stated that the assessing officer was wrong in making this sort of bifurcation. The CIT (A) did not find any merit in the explanation of the assessee and he did not depart from the assessing officer's finding. Before us it was pleaded that the assessing officer should not have done this exercise of bifurcation. The addition under this head should have been Rs. 17,28,404/- and not Rs. 10,28,404/-. The Ld. DR supported the action of the lower authorities.

30. We heard the parties and perused the assessment order and also the order of CIT (A). The issue seems to be simple. There is no dispute about the quantum but the bifurcation of the income declared by the assessee. The assessee offered the entire credits in the bank account of Rs. 17,28,404/- as undisclosed income of the block period. The assessing officer reduced the amount of two cash withdrawals from this account on 19.5.99 Rs. 5,00,000/- & on 28.7.99 Rs. 2,00,000/- from this head and determined undisclosed income from this source at Rs. 10,28,404/-. The withdrawal of Rs. 5,00,000/- was considered by him as undisclosed investment in

the alleged cash payment for purchase of flat in La Mer building by the assessee which is covered by ground No. 7 of this appeal and Rs. 2,00,000/- was considered by him as unexplained investment for interior decoration of the flat which is covered by ground No. 8 of the present appeal to which we will consider little later. Accordingly he determined the undisclosed income of Rs. 7 lakhs in different head of the same block period. By doing this the quantum of the income does not get affected, but the assessee contends that bifurcation should not have been done as there was no alleged cash payment for purchase of flat and also there was no unexplained cash payment for interior decoration. The issue to be decided here is whether the action of the assessing officer is correct or not. The assessee declared the entire deposits in the bank of Rs. 17,28,404/- as undisclosed income of the block period on account of the credit entries appearing in the bank account with Maharashtra State Co-op. Bank Ltd. All the credits in the bank was declared as income as the same was probably not explainable in the opinion of the assessee. The undisclosed income, in the case of entries in the books of account or other documents, needs to be determined normally on the basis of credit entries. The debit entries merely represent the deployment or application of the funds. The income results because of inflow of funds in the bank account. Outflow is the cash withdrawals from bank. In our view the credits of the bank account need to be considered to determine the undisclosed income. The subsequent utilisation is not the income but it is a mere application of income. The assessing officer, if at all wanted to link these withdrawals with the other investments, should have given credit for these amounts while making additions on account of those items. In our view the correct amount of undisclosed income on account of credit entries in the bank pass book in the instant case would be Rs. 17,28,404/and not Rs. 10,28,404/- as determined by the assessing officer. Accordingly this addition is modified to that extent and on account of this head the undisclosed income would be taken at Rs. 17,28,404/-. We order accordingly. The application of this income will certainly qualify for set off against the other undisclosed income resulting from unexplained investment by applying the principle of telescoping. This ground of appeal is allowed.

31. Ground No. 7 relates to the addition of Rs. 50 lakhs on account of alleged cash payment for purchase of flat in La Mer building by the assessee. The facts in brief,

as borne out from the records, are that the assessee Ms. Aishwarya Rai along with her father, mother & brother purchased one flat on 12th floor in La Mer Building at Bandra. The agreement for this flat was executed in the name of all these four persons. This flat was purchased from M/s. Jai Construction Co. who were the builders & developers of this building. The agreement value of this flat was Rs. 90 lakhs. The date of agreement for purchase of this flat was 25.5.99. In the search some loose papers were found and seized. On these seized papers details of payment made to Jai Construction Co. are mentioned. On one of the papers the coded figures are mentioned. These papers were seized vide page No. 5, 44 & 45 of the file marked as annexure A - 3. In the course of search deposition of the father of the assessee Mr. Krishna Raj Rai was recorded under Section 132(4) of the Act. In this statement the details of purchase of properties by assessee and her family members in past few-years were given by him. One question was posed to him to state as to whether any cash payment was made for purchase of properties over and above the agreement value. In answer to this question he stated that additional amount in cash was paid for purchase of three properties as under:(i) Flat No. 1601/1602 at Brooke Hill Tower Rs. 13,80,000/-(ii) Flat No. 1701/1702 at Brooke Hill Tower Rs. 11,10,000/-(iii) 12th floor, Mistry Palace (La Mer Building) Rs. 50,00,000/- During the post search inquiries before the Dy. Director of Income Tax, the father of the assessee filed one letter dated 29.11.2000. In this letter he stated that additional payment made for flat No. 1601/1602 & 1701/1702 at Brooke Hill Tower was towards stamp duty, club house and car parking etc. In respect of flat at 12th floor in La Mer Building no additional payment was made in cash beyond the agreement value. It was stated by him that the statement on 26.9.2000 was taken at midnight at very odd time and he was also not in proper state of mind due to mental & physical fatigue. He has inadvertently given a wrong statement about payment of 'On - Money' in regard to property dealings which he could not support. A statement of the father of the 'A' was recorded Under Section 131 of the Act on 16.10.2000 by the Dy. Director of Investigation. In this statement he stated that no on money was paid for 'La Mer' flat and for flats at Brooke Hill Tower the cash was paid not as on money but towards car parking, club house and stamp duty.

During the course of block assessment proceedings he maintained this stand. From the returns filed for the block period, it is seen that the payment made in cash towards flats 1601/1602 & 1701/1702 were treated as undisclosed income of the block period in the hands of Shri Krishna Raj Rai. The assessing officer heavily relied on the original statement of the father of the assessee recorded Under Section 132(4) and he found that this statement regarding payment of Rs. 50 lacs in cash as on money is corroborated by the seized papers. He made analyse of the entries recorded on the seized papers and came to the conclusion that on money was paid for purchase of flat at La Mer building of Rs. 50 lakhs. He also made inquiries with the builders of this building M/s.

Jai Construction Co. It appears from the reading of the assessment order that the builders have not confirmed the receipt of amount in cash over and above the agreement value. The assessing officer further derived support from one. sale instance on 10th & 11th floor of this building. The star cricketer Sachin Tendulkar purchased flats on 10th & 11th floor of the same area for Rs. 153 lakhs each. Taking all this into consideration the assessing officer concluded that on money of Rs. 50 lakhs was paid in this deal and since the assessee had the lion share in the earning of the family he presumed that this money was paid by the assessee out of her undisclosed sources. He therefore assessed this sum of Rs. 50 lakhs in the hands of the assessee in the block period on substantive basis. Since the agreement for this property was in the name of all four persons of the family, he also made additions in the hands of other assesseees namely Mr. Krishna Raj Rai (father), Mrs. Vrinda Rai (mother) and Mr. Aditya Rai (brother) in equal proportion i.e. Rs. 12,50,000/- in each case on protective basis.

32. In the first appeal, the assessee contested that there was no on money payment for purchase of this property and the addition ought not to have been made. The assessee tried to rebut all the observations of the assessing officer. It is worthwhile to reproduce the assessee's submissions before CIT (A), which finds place in para 9.10 on page 32 of CIT (A)'s order. The same reads as under: The A.R.s emphatically argued the case and the written submission placed by the appellant is reproduced as under: Addition made by the Assessing Officer is unjustified as the same has been made purely on the basis of statement recorded

Under Section 132(4) of Shri K. Raj on 26 & 27.9.2000 in an exhausted condition. The alleged payment of on money of Rs. 50 lakhs has been retracted by Shri K. Rai during the search proceedings. This being the fact the assessing officer ought to have brought further evidences on record to justify the addition made by him. The assessing officer has not even brought on record any confirmation from the builder M/s, Jay Construction to whom the alleged on money was paid. It is submitted that Shri K. Rai repeatedly denied that any on money was paid for purchase of house property at Lamer Building. During the course of assessment proceedings of M/s. Jay Construction the statement of Shri K. Rai was recorded Under Section 131 wherein Shri K. Rai categorically stated that no money was paid to M/s. Jay Construction.

The addition made by the assessing officer is bad in law as the same has been made without making available the enquiries and/or material gathered by the assessing officer/DDL It is therefore submitted that the above addition is contrary to the principle of natural justice and fair play and therefore liable to be deleted.

The assessing officer has made addition of Rs. 50,00,000/- on account of alleged cash payment (on money over and above the agreement price) for purchase of flats at La-Mer Building at Bandra.

The impugned addition was made on the basis of notings on loose page No. 5, 45 & 44 of file marked as A - 3 (seized) and the initial statement of my father I respectfully submit that he has repeatedly in the search proceedings itself and thereafter denied to have made any cash payment (on money) for purchase of these flat. In the course of statement before Dy. Director of Investigation as well as before the assessing officer Under Section 131 he has categorically denied of making any cash payment for purchase of this roperty. He has also explained that he was not in a proper state of mind because of continuous ongoing search proceeding of more than 20 hours and the statement was taken at the odd hours i.e. late in the night and concluded early morning. As such, no cognisance of such initial statement ought to have been taken by the assessing officer. The assessing officer should have considered all these peculiar circumstances in which the statement was made. In this regard I also draw your attention to the answer to

question No. 52 (page No. 29 of the assessment order) of the statement Under Section 131 recorded by the Dy. Director of Investigation. The same is reproduced as under: Q. No. 52 Can you specify the names of the persons to whom cash for property dealing for both the properties "Brook Hills" and "La-Mer" was paid? Ans.: For Brook Hiss Towers, the promoter's office bearer who were in the office at that time. I do not recall the name at present. For La-Mer no cash is paid upto date.

From the above you will find that my father has categorically stated that no cash was paid for La-Mer flats. As such the assessing officer was clearly in error in not considering this aspect regarding the statement of my father. It is therefore submitted that no cognisance of the initial statement of my father be taken.

In this regard I also draw the attention of your honour to the case of Pushpa Vihar v. ACIT 48 TTJ 389 wherein the ITAT in para 10 has held that it cannot be concluded that what the assessee said originally was sacrosanct and the assessee is not at liberty or it does not lie in his mouth to correct the error, originally committed by giving a different version of truth.

Similar were the views in the case of Shri Krishanan v. Kurushestra University 1975 SC-2 GJX 0173 (SC) and Krishnalal Shivchandra v. CIT 88 ITR 293 (P & H).

In view of the above it is submitted that the initial statement of my father which was corrected later on cannot be relied upon and the impugned addition is bad in law.

As regards the page No. 5, 44 & 45 of file A - 3 I submit that these pages do not at all show any payment in cash as has been inferred and alleged by the assessing officer. Your honour will find from the perusal of these papers that all the cheque transactions are recorded on these pages as reproduced by the assessing officer in the assessment order. Page No. 5 contains the notings regarding payment by cheques to M/s Jay Constructions. The full details such as cheque No. , date, name of the bank account and the name of the persons from whose account the cheque was issued is written so as the case with the notings on page No. 45. The notings on page No. 45 is verbatim copy of the notings written on page No. 5. All these amounts are duly reflected in the bank accounts and books of account. On page No. 44 in the initial part the summary of payments made by cheques by

various family members is written which aggregates to Rs. 78,00,000/- which also find place on page No. 45 & 5. Below that the promise for payment to be made is written and against that the figure of the actual amount paid is written. On the extreme left the words written are "Promise Diwali 98". Just next to this "59" and on the extreme right of this paper "3" is written.

From this it becomes clear that my father made a promise for making payment of Rs. 59,00,000/- (59 stands for Rs. 59 lakhs as in case of other figures written on the top of this page where 78 stands for Rs. 78 lakhs paid by cheques which is mentioned on page No. 5 & 45) by December, 1998 but as against that the actual payment made was only Rs. 3,00,000/-. Full payment could not be made as promised.

This payment of Rs. 3,00,000/- was made by cheque No. 103700 dated 17.05.1998 from UBI, Khar Branch from the account of Shri Krishnaraj Rai. The same is reflected in the seized page No. 5 (page No. 45 is a xerox copy of page No. 5) which is also admitted by the assessing officer in the assessment order. The assessing officer is drawing inference that I have made payment by December, 1998 a sum of Rs. 59,00,000/- and out of which Rs. 34,00,000/- was paid by cheques and Rs. 25,00,000/- was paid by cash (6th para of page No. 32 of the assessment order). This is factually totally incorrect. We have paid Rs. 3,00,000/- only till December, 1998 to M/s. Jay Constructions and that too by cheque. We have not made payment by cheques of Rs. 34,00,000/- upto December, 1998 as is evident from the seized page No. 5 itself. The only payment made upto December 1998 was Rs. 3,00,000/- and not more than that. Thus the assessing officer has proceeded on wrong footings altogether by stating wrong facts in the assessment order. He has not brought on record any evidence to show that the payment by cheque was Rs. 34,00,000/- upto December, 1998 (as alleged by him in the assessment order). In fact it was mere Rs. 3,00,000/- which is written on this very paper on the extreme right.

Below that on this page No. the following dates and figures are written: Promise Diwali 98 From 3/98 to Dec.

59 1/99 5 Thus the promise was made for payment of Rs. 59 lakhs by December, 1998 and thereafter it was further promised that in the months of January, 1999 Rs. 5 lakhs will be paid. Likewise it was further promised to pay Rs. 4 lakhs by 04.02.1999, Rs. 5 lakhs by 13.02.1999, Rs. 2 lakhs by 02.03.1999 and Rs. 9 lakhs in the month of May, 1999. Thus it was promised to pay Rs. 84 lakhs by May, 1999.

But as against this only Rs. 34 lakhs could be paid which is written on the right hand side of this very page. This fact can be verified from the notings made on another seized page No. 5 reproduced in the assessment order at page No. 26. The total payment made upto May, 1999 was as under: Date Cheque No. Amt. (Rs.) 17.05.98 703700 3,00,000 The above payments are reflected in the seized page No. 5 of file A - 3. Thus you will find that as against promise of Rs. 59 lakhs to be made by December, 1998 only Rs. 3 lakhs was paid. Similarly in January, 1999 Rs. 5 lakhs was paid as per the promise. On 4th February, 1999 Rs. 8 lakhs was paid against the promise of Rs. 4 lakhs. On 13th February, 1999 Rs. 4 lakhs was paid as promised. On 2nd March, 1999 Rs. 8 lakhs was paid as against promise of Rs. 2 lakhs. On 29th March, 1999 a further sum of Rs. 6 lakhs was paid, though there was no promise, as per our convenience and request of the party we have made the payments. Thus the figures of 59, 5, 4, 5, 2 & 9 are not the amounts paid in cash as inferred by the assessing officer on page No. 32 86 33 of the assessment order. The assessing officer states in the assessment order as under: On 2nd line it is written as 1/99 against which figure is mentioned at 5, which shows the cash payment of Rs. 5 lakhs in Januarys 99.

On 3rd line it is written as 4.2.99 against which figure is mentioned at 4, which shows the cash payment of Rs. 4 lakhs on 4.2.99.

On 4th line it is written as 13.2.99 against which figure is mentioned at 5, which shows the cash payment of Rs. 5 lakhs on 13.2.99.

On 5th line it is written as 2.3.99 against which figure is mentioned at 2, which shows the cash payment of Rs. 2 lakhs on 2.3.99.

On 6th line it is written as 5/99 against which figure is mentioned at 09, which shows the cash payment of Rs. 9 lakhs in the month of May, 99.

From the above you will find that assessing officer is making mere assumptions and presumptions that the above amounts were paid in cash. Nowhere on this paper it is written that any payment was made in cash. As such the mere assumptions can not be a foundation of the assessment. This is very well established principle of law. Time and again, the courts including the apex court of our land had laid down the principle that bare suspicion cannot be a foundation of the assessment. Therefore it is submitted that the inference of the assessing officer for alleged cash payment is totally wrong and not in accordance with law and therefore the conclusion of the assessing officer on bare suspicion needs to be struck down.

On latter part of this page, the amounts paid by cheques are written of Rs. 10 lakhs, Rs. 10 lakhs & Rs. 12 lakhs in 6/99, 10/99, 12/99 and in 6/2000 (inadvertently written as payment on 6/99) respectively. The assessing officer has also accepted these payments as made by cheques and reflected on seized page No. 5, on page No. 33 & 34 of the assessment order. The assessing officer has again presumed the figure of 1.40 written on the left side at bottom of the page No. 44 as Rs. 1.40 crores. This is also totally incorrect.

All the figures on this paper is in lakhs then how this 1.40 can be assumed in crores is also without any basis and is factually incorrect. Thus from the above explanation and discussion you will find that only payments made by cheques are noted down on this page No. 44. The assessing officer has merely made assumptions that cash payment is also mentioned on this page, whereas this paper does not have any mention of cash payment. As such no additions are warranted on this page on mere surmises, conjectures, assumptions and presumptions. It is settled principle by now that assessment is to be made only with reference to the cogent material and not on the basis of suspicion.

Your attention is also drawn to the fact that the assessing officer has made inquiry with the builders M/s. Jay Constructions (page 33 of the assessment order - para 5). The builders have furnished the details that the agreement value was Rs. 90

lakhs and they have received payment of Rs. 90 lakhs only. No payment was stated to be received by them over and above Rs. 90 lakhs. Thus the assessing officer has not corroborated his version of alleged payment of Rs. 50 lakhs in cash and therefore there is no substance in his findings.

The assessing officer has given instance of the agreement price of the flat purchased by Mr. Sachin Tendulkar in the same building on 10th & 11th floor in the assessment order. It is submitted that we have purchased the flats in May, 1998 whereas Mr. Sachin Tendulkar has purchased the flats in June/July 1999 much after our purchase.

As such no comparison of the price of his flats can be made with our purchase price. We also don't know on what terms and conditions he has purchased the flats. We don't know what are the amenities given to him. The assessing officer did not give any opportunity to us before relying on the sale instance of Mr. Sachin Tendulkar. As such the action of the assessing officer is in gross violation of principles of natural justice. In any view of the matter this issue is not at all relevant for making assumptions in our case in the block assessment. It is worth to be noted that Mr. Sachin Tendulkar has not purchased the flats on 10th & 11th floors directly from the builders M/s. Jay Construction. Some other person/s originally booked the flats on 10th & 11th floors and Mr. Sachin Tendulkar has purchased those flats from the third party/parties. This fact has a substantial bearing on the price of the flats purchased by Mr.

Sachin Tendulkar.

In view of the above it is submitted that the addition of Rs. 50 lakhs is merely based on suspicious and needs to be deleted.

Attention of your honour is also drawn to the case of D.N. Kamani HUF v. DCIT 70 ITD 77 wherein the Patna Income Tax Appellate Tribunal has held that presumption however strong can not take the place of evidence and deleted the addition made on suspicion.

Similarly in the case of Pooja Bhatt v. ACIT 79 ITD 205 the Hon'ble Mumbai ITAT deleted the addition made on account of alleged on money paid for purchase of flat. The ITAT held as under: There may be a strong suspicion of payment of on money in respect of the property deals but no addition can be made on mere suspicion. It is established principle of law that howsoever strong it may be it does not take the place of proof.

In view of the above it is respectfully submitted that the additions be deleted....

33. The CIT (A) after examining the submissions of the assessee and the order of the assessing officer was of the view that action of the assessing officer was correct. He observed that retraction of the assessee was not acceptable. He further observed that instances found in the case of flat purchased by Sachin Tendulkar gives support to the conclusion of the assessing officer. He found that the initial statement of the father of the assessee was backed up with analysis of the seized documents and the assessing officer was right in making the impugned addition and therefore he upheld the addition.

34. Before us the Id. AR of the assessee argued that no cognizance of the initial statement of the father of the assessee can be taken. The statement was recorded in the late hours in night on 26.9.2000 and continued till early morning on 27.9.2000. This was a first search action in the family. Before this Mr. Krishna Raj Rai never faced any search proceedings. The initial statement was given in exhaustive conditions. He was not in a proper state of mind due to mental strain and physical fatigue. There was no occasion to read the statements at that time. Later on immediately in the statement recorded on 16.10.2000 Mr. K.R. Rai denied to have paid any on money in cash to the builders for purchase of flat in La Mer building. He drew our attention to page No. 29 of the assessment order where the relevant portion of the statement recorded on 16.10.2000 by Dy. Director of Income Tax has been extracted by the assessing officer. In answer to Q. No. 52 Mr. Rai stated that for La Mer flat no cash was paid upto date. He further stated that Mr. Rai again wrote a letter dated 29.11.2000 to Dy.

Director of Income Tax and stated that initial statement was wrong and no cash was paid for 'La Mer' flat. In assessment proceedings vide letter dated 20.9.2002

again this fact was denied. He strongly argued that the initial statement of the father of the assessee which was subsequently retracted on many occasions by him can not be considered for making additions in the assessment. More so when there is no other evidence brought on record by the assessing officer to support the fact that any money was paid in respect of flat in La Mer building. In view of this he submitted that the initial statement was not correct and the same was corrected later and this can not be used as a foundation of making the additions. He also relied on various authorities in this regard namely Pushpa Vihar v. ACIT 48 TTJ 389, Pullangode Rubber Produce Co. Ltd. v. State of Kerala and Anr. 91 ITR 18 & Krishnalal Shivchand Rai v. CIT 88 ITR 293 for the proposition that the statement given in the search can be retracted later on and mere confessional statement can not be the basis for making additions.

Secondly he submitted that the assessing officer has merely drawn inference on his own guess work and assumptions while analysing the seized papers. He took us to the seized papers 5, 44 & 45 (placed at paper book pages 182 to 184) of Annexure A - 3. Page No. 5, 44 & 45 are also extracted in the assessment order at pages 26 & 27. He stated that on page 5 & 45 of Annexure A - 3 the details of cheque numbers, name of the bank, amount etc. are mentioned along with dates of payment regarding the payments made to Jay Construction Co. by the different family members. Then he submitted that on page 44 of Annexure A - 3 nowhere anything is written about payment made in cash. The page starts with the words "Promise Diwali 98". He submitted that the word promise finds place on this page and that clearly shows that it was promised to pay certain amount but that does not mean that it records the actual payment. He thereafter explained the various entries appearing on this seized page No. 44 of Annexure A - 3. According to him this paper does not contain any entry regarding cash payment to M/s Jay Construction Co. The assessing officer has merely proceeded on the assumptions and therefore the addition is bad in law. He then argued that the assessing officer has made inquiries with the builders and they denied to have received any amount in cash. He submitted that comparable instance of Sachin Tendulkar is not applicable to the facts of this case. Sachin Tendulkar did not buy the flat from builders, but he purchased in resale from a third party. Secondly he purchased the flat in June/July 99 whereas the assessee purchased the flat much before in May

98. He said that it is not known what was the arrangement between the seller (original purchaser from the builders) and Sachin Tendulkar. But that does not prove any cash payment. The Id. AR further argued that there are many other flats in the same building. Many other persons have purchased the flats from builders. The assessing officer has not given reference to any other sale transaction of builders with other purchases which can be compared with the case of the assessee. Sachin's case is a case of resale by a third party and not a sale by builders.

It was therefore submitted that no cash payment was at all made in this property deal and the inference drawn by the assessing officer is purely a guess work and therefore the addition can not stand for legal scrutiny. He therefore pleaded to delete the addition.

35. The Id. DR supported the order of assessing officer & CIT (A). He argued that the assessing officer has made addition after detailed analysis of the seized papers. The statement of Mr. K.R. Rai is duly corroborated by the seized material. His partial retraction is not valid and only the original statement which was given spontaneously at the time of search needs to be considered as correct. The subsequent denial belatedly is merely an afterthought and not supported by any material. He pointed out that the assessee did not allege any coercion on the part of the department and the statement Under Section 132(4) was given voluntarily and without any pressure and therefore no retraction can be allowed. The seized paper 44 of Annexure A -3 clearly shows the entries of cash payments with specific dates and therefore it does not lie in the mouth of the assessee to deny the truth of the matter. In the statement Under Section 132(4), the admission of father of assessee of Rs. 50 lakhs for purchase of this property is duly corroborated with the amount and entries written on this page 44. The assessing officer has properly linked the sum total of entries of page 44 (A - 3) and rightly came to the conclusion of on money payment of Rs. 50 lakhs. This is further supported by the evidence gathered by the assessing officer of the sale instance of star cricketer Mr. Sachin Tendulkar in the same building on one floor below. The value of Tendulkar's flat is matching with the value of the assessee taking cash component of Rs. 50 lakhs into consideration. All these facts clearly establish that

on money was passed in this transaction which was also admitted by the father of the assessee Under Section 132(4) and therefore he strongly pleaded to uphold the addition.

36. We have carefully considered the rival submissions. The orders of the assessing officer & CIT (A) were perused by us. The material made available to the Tribunal was considered. We have perused the statements of the assessee, her father & brother recorded during search and thereafter. We have considered the analysis done by the assessing officer of various seized papers and the reply of the assessee in rebuttal. Relevant seized papers were perused. The central issue in the matter boils down to the point as to whether any on money over and above the agreement value was paid and if so, whether the material available on record prove this fact. It is seen from the seized paper No. 44 of Annexure A - 3 that certain figures in coded form are mentioned. On the left hand side the words 'promise Diwali 98' are mentioned. Across that on the other side the figures are mentioned along with month & year. The assessing officer says that the figures mentioned are total amount paid including cash component. The assessee says that the promise was made to pay the amount by certain dates but in fact it could not be paid fully as per the promise. The assessing officer made inquiries with the builders who admittedly denied to have received any on money in cash over and above the agreement value. We find certain contradictions in the observation of the assessing officer. For instance on page 32 of the assessment order in 5th para (third para from bottom) the assessing officer gave his finding regarding first line of page No. 44 of A - 3 as under: ... In the first line, it is written as from 3/98 to Dec. As against this figure is mentioned at 59. This shows that from March 98 to December, payment was made at 59 lakhs. As discussed in succeeding paras on this issue figure of 59 includes cheque component of Rs. 34 lakhs and cash payment of Rs. 25 lakhs....

From the above it is seen that the assessing officer says that upto December 98 payments by cheques of Rs. 34 lakhs was made. On page 26 of the assessment order the seized pages 5 & 44 have been extracted by the assessing officer. Both these pages contain the payments to the builders by cheques. As per the noting on these pages up to December 98 only Rs. 3,00,000/- was paid by cheques. This

is in sharp contradiction to the observation of the assessing officer. On page 32 of the assessment order where he says up to December 98 payment by cheque was Rs. 34 lakhs. The assessing officer has not given any details of payment by cheques of Rs. 34 lakhs up to December 98. It is not in dispute that the payment by cheques are not reflected in the accounts of the assessee. It is not the case of the assessing officer that cheque payments recorded on seized papers 5 & 45 are not correct. On the contrary it is seen that he relied on these papers to substantiate his findings. The assessing officer accepts the noting of cheque payments as correct as mentioned by him in para 18 (viii) on page 30 of the assessment order. The assessing officer discussed on page 30, 31 & 32 of the assessment order the details of payments made by cheques by all the family members of the assessee to the builders M/s. Jai Construction Co. He states that the payments by various family members by cheques were as under: Admittedly all the above payments were found to have been reflected in the accounts of the assessee and other family members. From the perusal of the above payments it is seen that only Rs. 3,00,000 was paid before December 1998. This amount was paid by Krishna Raj Rai on 17.05.1998.

All other payments mentioned above were made after December 1998. Thus the finding of the assessing officer regarding first line of page No.44 of Annexure A - 3 given on page 32 is incorrect. The contradiction lies in the findings recorded in the assessment order itself. We may point out at this stage that CIT (A) chose to remain silent on this aspect in spite of objected to by the assessee in her submissions in the proceedings before him. Needless to mention here that the finding of first line is the starting point of the issue. We find from the finding of the assessing officer that subsequent figures mentioned on this page was assumed as payment made in cash. Now the question arises as to what is the evidence of having paid in cash. This paper does not suggest anything about this aspect. From the notings on this paper it is not clear as to whether the payment was in fact made and that too in cash. It is only an assumption of the assessing officer. But we find force in the argument of the Id. AR that the figures mentioned on this page after the first line were the amounts promised to be paid as the words promise is written on this page. According to him the promise was made for payment of Rs. 84 lakhs by May 99 but in fact 34 lakhs were paid. Payment of Rs. 34 lakhs is

reflected in the accounts and is also accepted by the assessing officer. We, therefore are of the view that it is only a suspicion of the assessing officer to the effect that amount might have been paid in cash. No evidence of any nature of actual payment made in cash is available in the seized material. We are of the considered view that mere suspicion can not be the basis for making the addition. Suspicion however strong it may be will not take the place of proof. In view of this we are inclined to hold that entries appearing on the seized paper No. 44 of Annexure A - 3 by itself do not prove the payment made in cash of Rs. 50 lakhs by the assessee to the builders M/s. Jai Construction Co. The finding of the assessing officer in this regard will not stand for legal scrutiny.

37. Now we come to the statement of the father of the assessee Mr.

Krishna Raj Rai. His first statement was recorded on 26.9.2000 Under Section 132(4) of the Act during the course of search action.

Subsequently another statement was recorded on 16.10.2000 before Dy.

Director of Investigation. In his statement Under Section 132(4) a question was posed to him regarding payments made in cash for purchase of various properties. He stated that additional money of Rs. 13.80 lakhs was paid for flat No. 1601/1602 in Brooke Hill Tower. For flat No. 1701/1702 in Brooke Hill Tower, additional money of Rs. 11,10,000/- was paid. Regarding flat on 12th floor, Mistry Palace, La Mer bldg.

additional money of Rs. 50,00,000/- was given. Later on another statement was recorded 16.10.2000 before the Dy. Director of Income Tax. The question and its answer as extracted in the assessment order reads as under: Q. No. 52 : Can you specify the names of the persons to whom, cash for property dealings for both the properties Brook Hills and La mer was paid? Ans.: For Brook Hill Towers, the promoter's office bearer who were in the office at that time, I do not recall the name at present. For La mer no cash is paid upto date....

38. Perusal of the above shows that Mr. K.R. Rai clarified that for flats 1601/1602 & 1701/1702 the additional amount was paid for stamp duty, car parking and club

house. As regards flat in La Mer building no cash was paid till date. He also stated that the additional amount for flats 1601/1602 & 1701/1702 was paid as the transaction was complete but the transaction of La Mer building flat was not completed for amenities and stamp duty etc. and therefore no additional amount was paid till date. Later on a letter was written on 29.11.2000 (filed at paper book page 80) by the father of the assessee Shri Krishna Raj Rai.

In this letter he again clarified that for flat No. 1601/1602 & 1701/1702 in Brook Hill Tower the extra amount was paid as the possession of the flats were taken and the transaction was complete. He further stated that the amount was paid towards stamp duty, club house, car parking etc. Where no possession was taken nothing was paid beyond the agreement value. The assessing officer found the retraction as afterthought & rejected it. The CIT (A) also concurred with the assessing officer. Here the question to be examined is whether a person who made any statement during search can be allowed to correct his statements later on. In search action normally the assessee is asked so many questions, explanations. This action continues for a long time even beyond 12 hours or more. It is quite likely that any person covered by search proceedings may not be able to give correct explanations of all the questions. Mental state of a person also gets upset during the search proceedings. A person may not even be aware of the implications of the explanations given. Sometimes to get rid of the situation a person in hurry may state incorrect things to suit the requirements of the authorized officer. All these probabilities can not be ruled out. Can it be said that whatever stated becomes sacrosanct and the assessee can not correct it later on. In our view it can not be so. Many times this issue had arisen in past and courts have taken a view that the assessee can correct his statements later on. The ratio of the decisions cited by the Id. AR reported in 48 TTJ 389 & 91 ITR 18 & 88 ITR 293 is that the assessee can correct his error committed earlier. In this case the CIT (A) observed that selective retraction is casting a doubt on the veracity of the retraction. He rightly observed that mere confessional statement without any documentary evidence could hardly be regarded as sufficient evidence. But the retraction was not accepted because it was selective. Mr. Rai had denied for cash payment for La-Mer flat and for other properties he confirmed the cash payment.

In our view the selective retraction is not casting a doubt on the veracity of retraction but on the contrary it supports its veracity.

There was no material whatsoever was found during the search to prove any cash money paid for purchase of flats 1601/1602 & 1701/1702 in Brook Hill Tower. In spite of this Mr. Rai later on confirmed that the cash money was paid for these properties. He could have easily denied for cash payment for these properties also. No body could stop him from doing so. But he had not done so. This gives credence to his subsequent correction. This only clarifies that wherever cash was paid he confirmed subsequently but where it has not been paid he denied. In our view the subsequent correction can not be termed as a mere afterthought. We are not inclined to accept the proposition of the CIT (A) that selective retraction is casting a doubt on the veracity of the retraction. Taking into consideration the circumstances and facts of the instant case we incline to agree with the arguments of Id. AR that the retraction is valid and it can not be rejected altogether.

39. The CIT (A) also supported the conclusion of the assessing officer on the ground that the assessing officer after making elaborate inquiries brought on record one comparable case of sale instance of flat in the same building. The assessing officer stated that Mr. Sachin Tendulkar had purchased flat in the same building in June/July 99. This flat was situated on 10th floor of the same building in which the assessee also purchased a flat on 12th floor. The area of the flat was equal to that of the flat of the assessee. His agreement value was Rs. 153 lakhs and the value in the case of assessee was Rs. 90 lakhs.

According to the assessing officer this proves the fact of on money payment by the assessee. We find from the records that the assessee had purchased the flat in May 98 as is mentioned in the assessment order.

The date of purchase of Mr. Tendulkar is June/July 99. It is also seen from the records that the assessee had purchased directly from the builders M/s. Jay Construction Co. & Mr. Tendulkar purchased it from a third party and not from the builders. It was argued by the Id. AR that Mr. Tendulkar bought the flat in a ready condition whereas the assessee had booked the flat at the time of starting of the construction. It is also not known what is the arrangement between the third party

and Mr.

Tendulkar. The time of purchase is different. We find that this comparison can not be of any help to the case of assessing officer. In our opinion the real comparison should have been made with the original purchaser who booked the flat with Jay Construction Co. and later on sold flat to Mr. Tendulkar. There are many other flats in this building. Many other persons might have also booked the flats with the builders. The fruitful comparison could be made with those instances who booked the flats with the builders around the same time when the assessee also booked the flat. It is seen from the records that the assessing officer has not done so. If the assessing officer made inquiries from the builders and he could have easily found out the details of other various flat purchasers from the builders. Mere one selected instance and that too of a different time and uncomparable material particulars can not be based for the addition. In this background we hardly find any force in the findings of the assessing officer and the observations of the CIT (A). Considering the totality of the circumstances and the facts of the case before us we are of the considered view that this addition is not warranted and we delete the same.

40. The ground No. 8 relates to the alleged unaccounted payment to one Mrs. Nupur Doshi for interior decoration of flat by the assessee of Rs. 7,25,000/-. This issue has been elaborately discussed by the assessing officer in the assessment order at page 43 to 46. During the course of search one loose paper being page No. 51 of the Annexure A - 3 was found and seized. This page is placed at paper book page 185. The assessing officer found that certain payment made to Mrs. Nupur Doshi are reflected on this page on one side. This paper also contains payment to Ajay Vishwakarma & others on the other side. The assessing officer asked for the explanation of the assessee. The assessee explained that she has appointed Mrs. Nupur Doshi, an interior decorator and the said interior decorator in turn employed the other persons like Ajay Vishwakarma & others. The assessee submitted details of payment made along with source of the funds to the extent of Rs. 10,00,000/- paid on different dates as reproduced in the assessment order at page 44. The assessing officer did not accept the explanation of the assessee on the ground that the dates of payments to Nupur Doshi & date of cash withdrawal

from bank does not exactly match. He considered those payments as explained where cash was withdrawn from bank on the same day on which the payment was made to Nupur Doshi. The remaining payments were considered by him as unrecorded payment and he accordingly included the same in the undisclosed income of the block period. Before the CIT (A) the assessee contended that assessing officer was clearly in error in making the impugned addition. The CIT (A) rejected the explanation of the assessee and upheld the addition.

41. Before us, the Id. AR of the assessee contended that the assessing officer & CIT (A) was wrong in arriving at the conclusion that part of the payments to Mrs. Nupur Doshi are unrecorded. He pointed out that source of all the payments were explained and nothing unrecorded remains. He pointed out the details of payment and corresponding source of the amount which is placed at paper book page 122. According to him Rs. 6,25,000/- paid on different dates were paid out of cash withdrawals made from Maharashtra State Co-op. Bank Ltd. and Rs. 1,00,000/- was paid out of the cash on hand available with the assessee which is reflected in the books of account. He drew our attention to the statement of cash withdrawals from Maharashtra State Co-op. Bank Ltd. and its utilization for payment to Mrs. Nupur Doshi. This document was supplied to the Tribunal in paper book at page 54. He also pointed out that Rs. 1,00,000/- paid on 28.8.99 is reflected in the regular cash book placed in the paper book at page 124. The balance amount of Rs. 6,25,000/- was paid out of the amounts withdrawn from the Maharashtra State Co-op. Bank Ltd. He therefore submitted to delete the entire addition. On the other hand, the Id. DR of the revenue pleaded that the addition was rightly made. The different dates of payment were not corroborated with the dates of cash withdrawals from bank accounts of the assessee. Therefore the assessee's explanation is devoid of any truth and has no merit in it. He submitted that the addition is therefore required to be upheld.42. We have carefully considered the rival arguments. From the perusal of the assessment order we find that the details of payments of Rs. 10,00,000/- made to Mrs. Nupur Doshi were picked up by the assessing officer from page No. 51 of Annexure A - 3 seized during the course of search (page 51 of Annexure A - 3 is placed at paper book page 185).

The assessing officer has thereafter compared the dates of cash withdrawal from bank with the dates of payment to Mrs. Nupur Doshi.

Where the dates were same he accepted the explanation of the assessee.

The CIT (A) endorsed the view taken by the assessing officer on the ground that utilization of cash withdrawn from Maharashtra State Co-op.

Bank Ltd. for payment to Mrs. Nupur Doshi was not supported by any material/document and payment out of cash balance can not be accepted as a plausible explanation. We find that the bank account with Maharashtra Co-op. Bank Ltd. was not disclosed prior to the search and all the credits aggregating to Rs. 17,28,404/- was offered by the assessee as undisclosed income of the block period. The assessee withdrawn cash from this bank account on different dates. In our view, once the entire credits of this account is taxed as undisclosed income, the claim of assessee for utilization/application of amounts withdrawn in cash from this account deserves to be considered on the principles of telescoping., mere non matching of dates can not be a ground to reject the claim of the assessee altogether. We find that the date of payment to Mrs. Nupur Doshi is not prior to the date of cash withdrawal from bank. Since the bank account was not earlier disclosed, the assessee might have kept the cash in hand for some time and thereafter paid to Mrs. Nupur Doshi. The possibility of payment made out of the withdrawal from Maharashtra State Co-op. Bank Ltd. can not be ruled out. Particularly in view of the fact that the withdrawal of cash is prior to the date of payment. The application of income assessed needs to be set off against the investment/expenses of the assessee. Taxing both may result in double taxation which is certainly not permissible in law. Here the assessee has declared the entire credits of the Maharashtra State Co-op. Bank Ltd. as undisclosed income and claimed to have utilized a part of the money withdrawn from the said bank in cash for making payment to Mrs. Nupur Doshi. We find no reason for not accepting this proposition of the assessee. It is pertinent to note that the assessing officer has not brought contra material on record to rebut the claim of the assessee. It is not the case of the assessing officer that payment to Mrs. Nupur Doshi was made from any other undisclosed bank account or from anywhere else.

Having not done so, in our considered view, the explanation of the assessee has full merits and on mere technicalities such as no exact matching dates etc., it can not simply be ignored and brushed aside. We accordingly accept the assessee's explanation that Rs. 6,25,000/- was made out of the amount withdrawn from MSC Bank Ltd. Similarly payment of Rs. 1,00,000/- from the cash balance which is reflected in the cash book of the assessee deserves to be accepted. There is no material brought on record to prove it false. No defect in the cash book of whatsoever nature has been brought on record. In this view of the matter this payment of Rs. 1 lakh also needs to be treated as recorded. We are therefore inclined to agree with the arguments of the Id. AR of the assessee and accordingly hold that this addition is not sustainable for legal scrutiny. We delete the addition of Rs. 7,25,000/-.

43. In ground No. 9 relates to the action of assessing officer in making addition of Rs. 25,79,000/- on account of prize money and remuneration received by her from Miss World (Jersey) Ltd. U.K. Briefly stated the facts relating to the issue in hand are that the assessing officer while passing the block assessment order found that the assessee received prize money and remuneration from Miss World (Jersey) Ltd., U.K. on her being crowned as 'MISS WORLD'. She was crowned as Miss World in November 94. She entered into a contract with Miss World (Jersey) Ltd. for a period of one year. She was to be received 10,000 pounds as a prize and 40,000 pounds as remuneration. An agreement was also executed in writing. This agreement inter alia provided for duties, obligations, remuneration etc. The assessing officer found that in the A.Y. 95 - 96 (previous year 94 - 95) & in the A.Y. 96 - 97 (previous year 95 - 96) this amount has not been taxed. After examination of the regular assessment records he found that in both these assessment years i.e. A.Y. 95 - 96 & A.Y. 96 - 97 the assessments were completed Under Section 143(3) of the Act. The assessment orders for both the years contains elaborate discussion in the body of the order to the effect of prize money and remuneration. In the A.Y. 95 - 96 the then assessing officer on the reply of the assessee's representative accepted the fact that this amount will be considered in the A.Y. 96 - 97 as the same was not received. In the assessment proceedings for the A.Y. 96 - 97 the assessee's representative, on being asked specifically by the then assessing officer, submitted inter alia a copy of the

agreement of assessee with Miss World (Jersey) Ltd. It was informed that the assessee received as prize money and remuneration of 50000 pounds. It was claimed before him that it was not taxable in view of assessee being non resident in the year of entering into the contract. The then assessing officer accepted the explanation of the assessee and passed a speaking order for A.Y. 96 - 97 and did not bring this amount of 50,000 pounds to tax. The copies of the assessment order passed Under Section 143(3) for A.Y. 95 - 96 & 96 - 97 have been supplied to the Tribunal and placed at paper book page 138 to 143. The assessing officer carrying out the block assessment proceedings raked up this issue again and treated this amount as undisclosed income of the block period since in his opinion it escaped taxation in the regular assessments. Before the assessing officer explanation of the assessee inter alia was that this issue had already been discussed and settled in the regular assessment proceedings and nothing incriminating was found in search proceedings, can not again be taken up in the block assessment proceedings. The assessing officer did not accept the claim of the assessee and he found that one paper being page No. 87 of seized Annexure A - 3 was found and seized which shows interest earned on Gold deposit account. This Gold deposit account was opened with Royal Bank of Scotland, London in the name of the assessee. The amount received from Miss World (Jersey) was credited in this account of 50000 pounds.

The assessing officer stated that the amount of 50000 pounds was appropriately dealt with in the regular books of account but interest earned in this bank account was nowhere reflected in regular books of accounts and therefore he was of the view that this is the origin of initiation of enquiry during the course of block assessment proceedings. In view of this he rejected the explanation of the assessee in this regard & proceeded further. The assessee took various alternative arguments like the assessee was non resident in the relevant year, the prize money was in the nature of casual and non recurring receipt and therefore not taxable. The claim for deduction Under Section 80 RR was lodged before the assessing officer. The assessing officer rejected all these grounds. He finally came to the conclusion that the assessee misrepresented before the then assessing officers in the regular assessment proceedings about the taxability of this item and therefore the assessee claimed this income exempt by giving false information. He

accordingly proceeded to tax the income of 50000 pounds equivalent to Rs. 25,79,000/- as undisclosed income of the block period. He also rejected the claim of the assessee for deduction Under Section 80 RR. In his opinion this case is covered by the amended definition of undisclosed income in Section 158 B (b) which covers expenditure, deduction and allowance claimed if found to be false.

44. Being aggrieved the assessee carried the matter to CIT (A). The assessee reiterated the same arguments before him. He was of the view that since the assessee avoided payment of tax on this income in past in regular assessments, the assessing officer was right in taxing this income in block assessment.

45. Before us the Id. Advocate Mr. Sonde vehemently argued that both the lower authorities were wrong in arriving at the conclusion that this issue can be taken up in the block assessment proceedings. He submitted that the loose paper No. 87 of Annexure A - 3 as referred to by the assessing officer in the assessment order can by no stretch of imagination be termed as incriminating material with regard to prize money and remuneration of 50000 pounds. He pointed out that this is a letter from Royal Bank of Scotland, London. It shows interest payment to the assessee on this bank account. It nowhere talks of any prize money and remuneration received. Secondly he stated that whatever prize money & remuneration was received by the assessee were already disclosed to the department. The assessee received 50,000 pounds and that was disclosed to the then assessing officers in the regular assessment proceedings for A.Y. 95 - 96 & 96 - 97. He drew our attention to the discussion that took place in the correspondence during the assessment proceedings for A.Y. 95 - 96 & 96 - 97. In one of the letters written to the then assessing officer, which is also extracted by the assessing officer in the block assessment order at page 64, he showed us the amount of 50000 pounds received by the assessee on becoming Miss World is written in one para. He therefore submitted that this alleged letter page 87 of Annexure A - 3 does not bring anything new which was not in the knowledge of the department or which was hidden from the department prior to search. He stated that it is not the case of the assessing officer that this letter reveals that the assessee had received more than 50000 pounds which was earlier informed to the assessing officer. He drew our attention to Section 158BB which speaks of determining the undisclosed

income on the basis of evidence found as a result of search. He therefore submitted that this issue is already settled in regular assessments completed Under Section 143(3) after calling for details and proper application of mind by the then assessing officers. He submitted that this addition is illegal and liable to be set aside. For this proposition he relied on the decisions rendered in CIT v. Ravikant Jain 250 ITR 141 (Delhi), Bhagwati Prasad Kedia v. CIT 248 ITR 562 (Calcutta), CIT v. Smt. Usha Tripathi 249 ITR 4 (All), CIT v. Rajendra Prasad Gupta 248 ITR 350 (Raj.), CIT v. Vinod Dhanchand Godavat 247 ITR 448 (Bom), Sunder Agencies v. DCIT 63 ITD 245 (Mumbai ITAT) and P.K. Guneshwar v. DCIT 80 ITD 429 (Chennai.).

He then put forward alternative arguments regarding non taxability of this prize money and availability of deduction Under Section 80 RR etc.

which were taken up before the lower authorities. He further tried to rebut the stand of the assessing officer that this issue can be taken up in view of the amended definition of undisclosed income as provided in Section 158 B (b). He argued that assessing officer's conclusion is wrong to the effect that this clause deals with false claim of any expense, deduction or allowance under this Act. In support of this proposition he relied on the decisions reported in 226 ITR 867 (Gauhati High Court), 200 ITR 739 (Bombay High Court), 203 ITR 737 (Bombay High Court) & 235 ITR 484 (Gauhati High Court). He pointed out that these decisions were rendered on Section 143(1)(a) of the Act which dealt with the prima facie adjustments for inadmissible claim of any deduction, allowance or relief. He pointed out that the ratio of the above decision is that any item of income can not be considered to be covered by the words deduction, allowance or expense. In view of the above he submitted that the conclusion of the assessing officer in this regard is illegal & void. He therefore pleaded that the impugned addition is not warranted and be deleted.

46. On the other hand the Id. Departmental Representative relied on the orders of assessing officer & CIT (A). He submitted that the assessee had made misrepresentation before the assessing officers in regular assessment proceedings for the A.Y. 95 - 96 & 96 - 97 and successfully avoided the payment

of tax on this prize money and remuneration of 50000 pounds. v There is no reason why this income is not taxable.

Since it escaped taxation it was rightly assessed in the block assessment. He further submitted that incriminating material was found during the course of search which led to the inquiry and in this process this undisclosed income was detected. He submitted that in the amended definition of undisclosed income as contained in Section 158B(b) of the Act false claim of exemption of income is covered and therefore the assessing officer was right in including this income in the block assessment. He therefore pleaded to sustain the addition.

47. We have carefully considered the submissions of the assessee and the revenue. The whole controversy lies in the legality of the issue.

The assessee's main thrust of the argument is that it is not fitting in the letters of law and the assessing officer's claim is contrary. To decide the issue we need to analysis the relevant sections of the statute dealing with this aspect. The sections are 158 B (b) & 158 BB (1). The Section 158B reads as under: i. "undisclosed income" includes any money, bullion, jewellery or other valuable article or thing or any income based on any entry in the books of account or other documents or transactions, where such money, bullion, jewelry, valuable article, thing, entry in the books of account or other document or transaction represents wholly or partly income or property which has not been or would not have been disclosed for the purposes of this Act, or any expense, deduction or allowance claimed under this Act which is found to be false....

Perusal of the above provision shows that this section was amended by the Finance Act 2002 with retrospective effect w.e.f. 1.7.95. The last line starting from ' any expense, deduction or allowance claimed under this Act which is found to be false' were added in the section. The result is that if the assessee has claimed any expense, deduction or allowance in the regular assessment and in the search proceedings if it is found that the claim of expense, deduction or allowance was false then to the extent of the amount of such expense, deduction or allowance, the amount will be treated as undisclosed income for the purpose of chapter XIV B of the Act. The amendment brought in the ambit of undisclosed. income any false

claim of expense, deduction and allowance. The term expense is something, which is incurred for earning the income or to run the business. The expenses are like establishment expenses, salaries of staff, value of purchases, rent of the premises used for the business and so on. It is an outflow of money for the business.

Therefore to arrive at the net profit this is set off against the gross revenue, sales etc. The relevant sections of the Act dealing with the claim of expenses are 30, 31, 36 & 37. The claim of deduction is in the nature of special deduction provided by the statute against any income. The deductions provided in the Act are contained in chapter VI A of the Act. The income is taxable but to give incentives and keeping other considerations in mind the Govt.

grants a deduction from the income included in the gross total income. There are various deductions provided in the Act and the relevant sections are 80 CCC to 80 U. For example for the new industries set up in specified areas a deduction is provided in Section 80 IB. The income is included in the gross total income but a specified percentage of the income or fixed amount is granted as deduction. Similarly the allowance is like depreciation allowance which is provided by Section 32 of the Act. The question arises is whether the assessee's income of prize money & remuneration received from Miss World (Jersey) Ltd. U.K. of 50000 pounds can fit in these words expense, deduction or allowance. The assessing officer & CIT (A) both were of the view that this can fit in this amended definition. The assessee is contesting this. In this regard we have to analyse Section 143(1) which was in force for quite a number of years and that section which stood at material point of time reads as under: ... 143(1)(a) Where a return has been made under Section 139, or in response to a notice under Sub-section (1) of Section 142, - (i) if any tax or interest is found due on the basis of such return, after adjustment of any tax deducted at source, any advance tax paid and any amount paid otherwise by way of tax or interest, then, without prejudice to the provisions of Sub-section (2), an intimation shall be sent to the assessee specifying the sum so payable, and such intimation shall be deemed to be a notice of demand issued under Section 156 and all the provisions of this Act shall apply accordingly; and (ii) if any refund is due on the basis of such return, it shall be granted to the assessee:

Provided that in computing the tax or interest payable by, or refundable to, the assessee, the following adjustments shall be made in the income or loss declared in the return, namely: (i) any arithmetical errors in the return, accounts or documents accompanying it shall be rectified; (ii) any loss carried forward, deduction, allowance or relief, which, on the basis of the information available in such return, accounts or documents, is prima facie admissible but which is not claimed in the return, shall be allowed; (iii) any loss carried forward, deduction, allowance or relief claimed in the return, which, on the basis of the information available in such return, accounts or documents, is prima facie inadmissible, shall be disallowed: Provided further that an intimation shall be sent to the assessee whether or not any adjustment has been made under the first proviso and notwithstanding that no tax or interest is due from him: Provided also that an intimation under this clause shall not be sent after the expiry of two years from the end of the assessment year in which the income was first assessable....

The third proviso to this section provided that after filing the return of income the assessing officer could make adjustments for any claim of expense, deduction or relief which was prima facie inadmissible.

Meaning thereby if any such claim was inadmissible the assessing officer could add back this amount to the returned income. In past the assessing officers tried to make adjustments for items of income which were either claimed as exempt or not shown in the return etc. The matter came to be examined by the judicial authorities. In the cases relied by the Id. AR of the assessee the issue was whether the phrase claim of expense, deduction or relief could include in its ambit the items of income. The courts were of the unanimous view that the items of income can not be said to be covered in the phrase expense, deduction or relief. This view is supported by the decisions reported in 226 ITR 867 (Gauhati), 200 ITR 739 (Bom), 235 ITR 484 (Gauhati) and 203 ITR 737 (Bom). In our view the similar words are also contained in Section 158B (b) which were added by the Finance Act 2002. The receipt of 50000 pounds by the assessee is an item of income and it certainly can not be a case of claim of expense, deduction or allowance.

Therefore we have no hesitation to hold that this receipt can not fit in the amended definition of undisclosed income. The conclusion of the assessing officer that this is covered by the words expenses, deduction or allowance will not stand for legal scrutiny and hence deleted.

48. The other crucial issue with regard to the impugned addition is whether this can be a subject matter of block assessment. It is seen from the records that this issue was discussed in the regular assessments for the A.Y. 95 96 & 96 - 97. The assessee's receipt of 50000 pounds, on becoming Miss World, was in the knowledge of the then assessing officer. The assessing officer asked about the taxability of this amount in regular returns. The assessee replied and informed to the assessing officer that she received 50000 pounds on becoming Miss World as prize and remuneration from Miss World (Jersey) Ltd. A copy of agreement was filed on the records of the then assessing officer. The income was claimed to be exempt on the ground that it is a prize money and the assessee was non resident in the relevant year and so on. After due application of mind the then assessing officers decided the issue and did not tax this amount and passed the speaking assessment orders for these assessment years. Assessee says no material was found in search which relates to the receipt of this money. The assessing officer says a letter of Royal Bank of Scotland was found in search which shows interest earned on gold deposit account maintained with that bank by the assessee. In the assessment order the assessing officer admits that the receipt of prize money and remuneration deposited in this account are appropriately dealt with in the regular books of account but interest earned on this bank account was not reflected anywhere in the regular books of accounts. It is not known what was the amount of interest earned, the assessing officer has failed to point out this. It is not the case of the assessing officer that remuneration was more than 50000 pounds which was already disclosed by the assessee. We are of the view that this letter can not be an incriminating document or material with regard to the prize money and remuneration received from Miss World (Jersey) Ltd of 50000 pounds.

The assessing officer therefore does not get jurisdiction to proceed in the block assessment for this amount. Moreover this issue was discussed in the regular assessments and therefore the assessing officer completing the block assessment

can not take this issue in the block assessment. In our considered opinion this addition was not warranted in the block assessment. The opening words of Section 158BB(1), which deals with determination of undisclosed income, clearly state that the undisclosed income of the block period shall be computed in accordance with the provisions of the Act and on the basis of material found in search. This issue was judicially examined in the cases of CIT v. Ravikant Jain 250 ITR 141 (Delhi), Bhagwati Prasad Kedia v. CIT 248 ITR 562 (Calcutta), CIT v. Smt. Usha Tripathi 210 ITR 4 (All.), CIT v. Rajendra Prasad Gupta 218 ITR 350 (Raj.), CIT v. Vinod Dhanchand Godabat 247 ITR 448 (Bom), Sunder Agencies v. DCIT 63 ITD 245 (Mumbai ITAT) and P.K. Guneshwar v. DCIT 80 ITD 429 (Chennai.). The courts were of the view that unless there is material found in search the assessing officer does not get jurisdiction to proceed in the block assessment.

Accordingly we hold that the action of the assessing officer was without any jurisdiction and therefore we delete the impugned addition.

The alternative grounds of the assessee regarding non taxability of the income, deduction Under Section 80RR etc. are not adjudicated as we have deleted this addition.

49. The next ground No. 10 of the appeal relates to the addition of Rs. 3,214/-. This addition was made for the reason that assessee had credited this amount in her capital account under the head transfer from City Bank. The capital account was submitted along with the regular return of A.Y. 97 - 98. The return was filed before search action on 31.10.97. The assessing officer noticed this entry from the capital account submitted in the regular return. The assessing officer stated that the assessee did not offer any explanation for this amount and therefore he treated as undisclosed income of the block period. The CIT (A) confirmed this addition for want of elaborate explanation.

Before us it was argued by the Id. AR of the assessee that no reference of any seized material has been made for making this addition by the assessing officer in the assessment order. This entry came to the notice of the assessing officer from the regular returns filed and therefore it can not be a subject matter of block

assessment. On the other hand the Id. Departmental Representative supported the orders of lower authorities. We find from the records that this addition is not backed up by any material found or seized during the course of search.

For the reasons given supra while dealing with the ground No. 9 we delete this addition. This ground is accordingly allowed.

50. In ground No. 11 the assessee is challenging the action of CIT (A) in confirming the addition of Rs. 13,14,210/- (in appeal memo wrongly typed as Rs. 13,11,210/-) on account of bonus, interest and other receipts received by the assessee from Miss World (Jersey) Ltd. equivalent to 22484.135 pounds. The facts are that the assessee credited in her capital account a sum of Rs. 13,14,210/- being the amount transferred from Royal Bank of Scotland, London for the financial year 97 - 98 relevant to the A.Y. 98 - 99. This capital account was filed along with the return of income filed for A.Y. 98 - 99. The return for A.Y. 98 - 99 was filed prior to the date of search.

The assessment for A.Y. 98 - 99 was completed under Section 143(3) after taking the details etc. on record. The assessing officer noticed this entry from the return filed for A.Y. 98 - 99. He found that this amount was credited in the capital account but was not shown as income of that year. He found that it escaped taxation and therefore he subjected this to tax in block assessment. Before the assessing officer it was contended that this issue is covered in regular assessment and there was no material found in the search and therefore this can not be considered in block assessment. The assessing officer rejected the contentions of the assessee. Before the CIT (A) the assessee reiterated the same arguments. It was contended that this amount can not be covered in block assessment in terms of Section 158B (b) and 158BB(1) of the Act. The CIT (A) did not accept this explanation. Alternatively it was claimed before the CIT (A) that on this amount tax has been deducted in U.K and in view of the provisions of Double Tax Avoidance Agreement between India & U.K. This amount can not be taxed in India.

The proof for deduction of tax was filed before him. The CIT (A) accepted this argument of the assessee and directed the assessing officer to give relief after verification. The assessee is contesting the action of the CIT (A) for upholding the

addition on legal grounds.

Before us the Id. AR of the assessee contended that this can not be a subject matter of block assessment. He repeated his arguments which were advanced while dealing with ground No. 9 of this appeal. The Id.DR supported the action of assessing officer & CIT (A). From the records we find that this addition is not supported by any seized material. The assessing officer noticed from the regular return that this amount was credited in the capital account but was not offered as income of the A.Y. 98 - 99. This being the position we are inclined to accept the arguments of the Id. AR that this can not be a subject matter of block assessment. For the reasons given in para 44 while deciding the ground No. 9 of the present appeal we hold in favour of the assessee and allow this ground. The addition of Rs. 13,14,210/- is therefore deleted.

51. The last ground relates to the enhancement made by CIT (A) of Rs. 9,85,461/-. The facts in brief are that CIT (A) found from the bank statement filed before him of Royal Bank of Scotland, London that there are total credits of 119971.18 pounds in this Gold Deposit Account, in the name of the assessee. The value in INR works out to Rs. 69,88,268/-. Out of this a sum of Rs. 52,02,807 was considered for assessment. Balance Rs. 9,85,461/- has escaped taxation. He therefore invoked the provisions of Section 251(1) of the Act & issued enhancement notice to the assessee. The assessee replied that this account was maintained by Miss World (Jersey) Ltd. Whatever amount transferred to the assessee has been already considered in the assessment. The impugned amount was not received and hence not liable for any taxation. The CIT (A) found that the assessee did not file any documentary evidence that this account belonged to Miss World (Jersey) Ltd. He therefore rejected the arguments and proceeded to enhance the assessment by Rs. 9,85,461/-. Before us the same arguments were reiterated. However no evidence in support of the claim that bank account belonged to Miss World (Jersey) Ltd. was filed. We find from the records that one letter of Royal Bank of Scotland, London was found in search which gives the information of the existence of this bank account. This bank account was not disclosed to the department in the regular returns. What the assessee disclosed in the regular returns are the remittances received from this account to her bank

account in India. The remittances already disclosed to the department have been dealt with in the regular returns. However this amount of credit over and above the remittances received escaped assessment. Therefore this income of Rs. 9,85,461/- needs to be assessed in the block period as undisclosed income. We are in full agreement with the conclusion of CIT (A) on this point. We therefore dismiss this ground. The addition of Rs. 9,85,461/is therefore confirmed.

52. The technical objection raised by the learned DR was cured by the assessee by filing the revised Form No. 36 duly signed by the assessee herself.

1. I have perused the order proposed by my learned brother and I am unable to persuade myself to agree with the conclusions arrived at by him with regard to the Ground No. 7. In respect of the other grounds I am in agreement with the conclusions reached by my learned brother. I, therefore, proceed to write a dissenting order with regard to the Ground No. 7.

On the facts and circumstances of the case and in law the Learned Commissioner of Income Tax (Appeals) erred in confirming the addition of Rs. 50,00,000/- on account of alleged unexplained investment in purchase of flat in La-Mer Building.

3 The facts of the case and the rival submissions with regard to Ground No. 7 are mentioned in detail in para 31 to 39 of the order of my learned brother and therefore these are not being repeated here.

4 In my considered view the addition of Rs. 50,00,000 has to be confirmed for the reasons given below.

5. The assessee alongwith her father mother and brother purchased the entire 12 floor of the building La-Mer situated in Bandra (W), Mumbai vide sale-deed executed on 23.5.1999. The payments by cheque aggregating Rs. 78,00,000 were made during the period ending June 2000.

In the same building Shri Saehin Tendulkar also purchased the entire 10th & 11th floors between June 1999 to March 2000. Therefore the arguments of the Id A.R. of the assessee that in respect of the 10th the 11th and the 12th floor the time of purchase was different cannot be accepted. Further all the three floors admittedly

have identical floor-areas. And there is nothing on record to suggest that there was any material difference about the transactions relating to the 10th, the 11 and the 12th floors of the building. Shri Sachin Tendulkar purchased each of the 10th and the 11th floors for Rs. 1,53,00,000 and therefore the assessee's claim that the 12th floor was purchased for Rs. 90,00,000 is improbable and cannot be accepted.

6 The transactions appearing in the seized paper No. 44 are reproduced in para 18 (page 27) of the Assessment Order as under.

7. The transactions appearing in the upper half of this paper represent payments aggregating to Rs. 78,00,000 made by cheque. The transactions appearing in the lower half are noted in two distinct columns. The figures in the right hand column aggregating to 78 manifestly represent payments by cheque. The details of the individual payments by cheque appear at page 41 of the order of my learned brother. The first item of '+3' appearing in the above mentioned column represents payment of Rs. 3,00,000 made by cheque on 17.5.1998. The + sign shows that it is in addition to what is written on its left hand side in the first column.

Similarly the next figure of +34 represents payment of Rs. 34,00,000 made by cheque from 17.5.1998 to 29.3.1999. The details of these payments appear at page 33 of the order of my learned brother. The subsequent figures in the above mentioned second column represent cheque payments of Rs. 10,00,000, Rs. 12,00,000, Rs. 10,00,000 and Rs. 12,00,000 made in June 1999, Oct 1999, Dec 1999 and in June 2000. The details of these payments appear at page 41 of the order of my learned brother. The figures appearing in the left hand column, in my considered opinion, represent cash payments of Rs. 5,00,000, Rs. 4,00,000, Rs. 5,00,000, Rs. 2,00,000 and Rs. 9,00,000 made on/in January 1999, 4.2.1999, 13.2.1999, 2.3.1999, May 1999 respectively. The mentioning of dates of 4.2.1999, 13.2.1999 and 2.3.1999 are strong indications of actual payments having been made on these dates and therefore the plea of the Id A.R. of the assessee that these figures represent mere 'promise' of payments is not acceptable. The payments aggregating to Rs. 84,00,000 are mentioned once again on the extreme left and the payments aggregating to Rs. 56,00,000 made up to Oct 1999 are written on the extreme right in the form of coded figures of 84 and 56 respectively'. The sum total of these two figures of Rs. 84,00,000 and Rs. 56,00,000 is Rs.

1,40,00,000 and is mentioned as 1.40 between the two figures of 84 on the extreme left and 56 on the extreme right.

The above analysis/interpretation of the transactions appearing in the aforesaid seized paper provides strong corroboration of the statement given by assessee's father Under Section 132(4).

8. In her statement recorded Under Section 131(1), the assessee repeatedly stated that her father was taking care of all her savings and investments. And her father in his statement recorded Under Section 132(4) of the Act on 26.9.2000 stated in reply to Questions No. 7, 8, 12 and 23 as under.

Q. No. 7 : Please state whether any cash money has been paid over and above the agreement money shown in the agreement of afore mentioned investments in properties? ans. : In following flats the additionally money which has been paid over and above the agreement rates are as follows: Q. No. 8 : Do you confirm that the afore said amounts were paid in cash and no receipts were provided Ans. : Yes, I confirm Q. No. 12 : Do you accept the fact that the cash money paid over and above the agreement amount had not been disclosed to the department and therefore, it represents unaccounted income in the hands of the respective members holding the possession of flat as per the agreement Ans. : Yes, I accept.

Q No. 23 : Please state why the final agreement regarding the Le-Mer building is not available with you? Ans. : I have not made the final payment. This agreement is Just a draft. There is no final agreement as yet and I am not bound by this agreement. I know the consequences of false statement and I wish to state that these conditions apply to me until delivery of the flat to me.

9. The statement made by the assessee's father is corroborated by the comparable case of the 10th and the 11th floor of the same building and also by the transactions appearing in the seized paper. If the tests of 'human probabilities' and of 'surrounding circumstances' as laid down by the Supreme Court in the case of Sumati Dayal (1995) 214 ITR 801 (SC) are applied to the present case the assessee's arguments/claims fail miserably. I am therefore of the opinion that the addition of Rs. 50,00,000 was rightly confirmed by CIT(A).

10. During the hearing the Id AR of the assessee made an alternative submission saying that the impugned property was purchased in the names of the assessee, her father, her mother and her brother and therefore the entire addition could not be made in the name of the assessee alone. For the reasons discussed by the CIT(A) in para 9.9 of his order this plea cannot be accepted. The Ground No. 7 is accordingly rejected.

1. This appeal was originally heard on 26.8.2004. The assessee had raised 12 grounds. Ground No. 7 related to the addition of Rs. 50,00,000/- on account of alleged unexplained investment in the purchase of flat in La-Mer Building. The Judicial Member was of the view that the addition was not justified for the reasons given by him in his proposed order. While the Learned Accountant Member, vide order dated 11.11.2004, rejected the ground of the assessee. Hence, there was difference of opinion between the Learned Members. Consequently, the matter was referred to the Hon'ble President Under Section 255(4) of the Income Tax Act, 1961. Accordingly, Illrd Member was appointed to adjudicate the following question: Whether on the facts and circumstances of the case, the addition of Rs. 50,00,000/- made by the AO and confirmed by the CIT(A) is to be sustained or not? Learned Illrd Member, vide order dated 30.6.2005, agreed with the opinion expressed by the Learned judicial Member.

2. The matter was finally fixed before us for giving effect to the order of the Learned Illrd Member mentioned above. In view of the majority opinion, the ground No. 7 is adjudicated in favour of the assessee and the order of the Learned CIT (Appeals) is set aside on this issue and consequently, the addition of Rs. 50,00,000/- sustained by him is hereby deleted.

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