

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/TAX APPEAL NO. 612 of 2018**

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PRINCIPAL COMMISSIONER OF INCOME TAX 4

Versus

TEXRAJ REALTY P LTD

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Appearance:

MRS MAUNA M BHATT(174) for the PETITIONER(s) No. 1

for the RESPONDENT(s) No. 1

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CORAM: HONOURABLE MR.JUSTICE AKIL KURESHI

and

HONOURABLE MR.JUSTICE B.N. KARIA

Date : 12/06/2018

ORAL ORDER

(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)

1. Revenue has filed this appeal challenging the judgment of the Income Tax Appellate Tribunal dated 16.11.2017 raising following question for our consideration:

"Whether the Appellate Tribunal has erred in law and on facts in deleting the addition made u/s 68 of the the Income Tax Act, 1961?"

2. Issue pertains to the assessment year 2011-12. Respondent-assessee is a private limited company. The business premises of the company was subjected to survey operation under section 133 of the Income Tax Act, 1961 ('the Act' for short). During the survey operation, the Revenue claimed to have seized and

impounded a diary which allegedly reveal certain cash transactions with respect to sell of Vatva land. Statement of the directors of the company were also recorded. Based on such materials, the Assessing Officer carried out the assessments making additions of undisclosed income under section 68 of the Act. Commissioner of Income Tax (Appeals) confirmed the additions, upon which, the assessee approached the Tribunal.

3. The Tribunal in its detailed order noted that the directors during the course of survey, had retracted the statements by filing affidavits. They also claimed that the diaries were created under the pressure of the survey party. The Tribunal noted decision of the Supreme Court in case of **Paul Mathews & Sons v Commissioner Of Income Tax** reported in [2003] 263 ITR 101 (Ker) and of Supreme Court in case of **The Commissioner Of Income Tax vs M/S.S.Khader Khan Son** reported in (2012) 25 taxmann.com 413 (Supreme Court), in which, it was highlighted that the statement under section 133A of the Act was not on oath and would have at best a corroborative value. The Tribunal also noticed that

on the date of survey, the property itself was under several litigations. Though the assessee had purchased the land from one S.M.L. Maneklal Industries, the said seller was facing litigation with the Bombay High Court in Company Petitions. There were several disputes before the City Civil Court, Ahmedabad, concerning the same subject matter land. The Tribunal was therefore of the opinion that on the date of the survey i.e. 23.11.2010, the title to the property of the assessee was itself under serious doubt. Notably, the Bombay High Court's decision in Company Petition was rendered on 21.10.2011. It was also noticed that the City Civil Court, Ahmedabad, had granted status quo with respect to the same land on an application filed by GIDC. The Tribunal therefore noticed that the assessee itself do not have absolute right to alienate the property. It was noticed that in the diary, the name of the purchaser was not mentioned. There was no agreement to sell executed. The Tribunal found it unlikely that an unknown person would give sizable cash to the extent of Rs.14.85 crores even before the agreement to sell is executed. *Inter alia*, on such

grounds, the Tribunal deleted the additions.

4. From the above discussion, it can be clear that the entire issue is based on appreciation of evidence. The Tribunal having considered relevant aspects and having come to the conclusion that the Revenue has failed to bring on record sufficient evidence of cash amounts have been received by the assessee, no question of law arises. Tax Appeal is dismissed.

(AKIL KURESHI, J)

(B.N. KARIA, J)

ANKIT SHAH



आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ - अहमदाबाद /

**IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD – BENCH 'B'**

**BEFORE SHRI PRAMOD KUMAR, ACCOUNTANT MEMBER
AND
SHRI RAJPAL YADAV, JUDICIAL MEMBER**

आयकर अपील सं./ ITA No.3520/Ahd/2015

निर्धारण वर्ष/Asstt. Year: 2011-2012

Texraj Realty P.Ltd. 16, 4 th Floor, Agrawal Mall S.G. Highway Ahmedabad. PAN : AACCT 6305 L	Vs.	DCIT (OSD), cir.8 Ambawadi Ahmedabad.
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अपीलार्थी (Appellant)		प्रत्यर्थी (Respondent)
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Assessee by :	Shri G.C. Pipara, AR
Revenue by :	Shri Surendrakumar, CIT-DR

सुनवाई की तारीख/Date of Hearing : 19/09/2017

घोषणा की तारीख/Date of Pronouncement: 16/11/2017

आदेश/ORDER

PER RAJPAL YADAV, JUDICIAL MEMBER:

Present appeal is directed at the instance of assessee against order of Id.CIT(A)-4, Ahmedabad dated 14.10.2015 passed for Asstt.Year 2011-12.

2. Sole grievance of the assessee is that the Id.CIT(A) has erred in confirming addition of Rs.14.85 crores.

3. Brief facts of the case are that the assessee-company was incorporated on 13.3.2007 with an object to carry out business of

real estate. It has filed its return of income for the Asstt.Year 2011-12 on 25.10.2012 declaring total loss of Rs.66,863/-. The case of the assessee was selected for scrutiny assessment and notice under section 143(2) of the Income Tax Act was issued on 13.8.2013 which was duly served upon the assessee. On scrutiny of the accounts, it revealed to the AO that a survey under section 133A of the Act was conducted at the business premises of the assessee on 23.11.2010. During the course of survey a diary (loose chit/note book) was found and impounded. Statement of Shri Deven R. Patel was recorded. According to the AO diary contains narration exhibiting receipt of money in cash amounting to Rs.14.85 crores. The director of the company, Shri Deven R. Patel has admitted such receipts as unaccounted income. However, while verifying the returned income, it revealed that such income has not been shown, and therefore, he issued a show cause notice to the assessee asking him to explain as to why the above amount of Rs.14.85 crores should not be added to total income of the assessee. In response to the show cause notice the assessee has filed a letter dated 13.1.2014. The AO has reproduced copy of the letter in the assessment order from page nos.2 to 11. Thereafter, the Id.AO has summarized main points of the stand taken by the assessee in its submission. The submissions/stand point of the assessee as construed by the AO reads as under:

i). No such amount of cash of Rs. 14.85 Crore has been received by the company as the land in question was disputed.

ii). In the statement of Shri Deven Patel recorded on 24.11.2010 it has been stated that what is being mentioned in the said Dairy is relating to land situated at Vatva (Vinzol)

and the said Diary contains details of land purchase/sale transactions. Whereas from the perusal of the said diary it is seen that there are no details of purchase/sale transactions.

iii). The details in the diary relate to the cheques which have been received giving the date, amount & from the said cheques have been received and the heading pertaining to cash received is "Cash received by Mr. Deven Patel". Thereafter, under the said heading only month & amount is mentioned.

iv). There is no date to state that on what date the impugned amount of so called 'on money' has been received.

v). There is no mention/indication of any name, area of land rate at which sold so as to derive the working of 'on money'.

vi). The said land is under dispute and the Bombay High Court vide order dated 21.10.2011 has declared the sale as valid and thus prior to that there was no reason for collection of 'on money' on the impugned land which was under dispute relating to the acquisition of the title in the land itself.

vii). The assessee has relied on various case laws in his support wherein it has been held that statement recorded during the course of survey cannot be made basis for addition in assessment."

4. The Id.AO made an analysis of narrations in the diary. He observed that apart from certain entries recorded in cash, there were entries representing cheque payments. He made reference to page no.2 wherein details of cheque amounting to Rs.27 lakhs paid to Kusum Overseas are written. He verified this entry with bank account of the assessee and observed that payment of Rs.27 lakhs was made by the assessee which is verifiable from the bank account. He scanned copies of these entries as well as bank statement on page no.13 of the assessment order. In a similar

manner, he has highlighted other entries and cross-verified them with the bank statement of the assessee. On the strength of these details he construed genuineness of entries mentioned in the diary. He found that since narrations representing cheques are verifiable with the bank account of the assessee, it showed that entries in diary are genuine and correct. Thereafter, he made analysis of other entries and assumed that these are cash received by the assessee on sale of Vatva land. For buttressing his contentions, he took corroborative support from the disclosure statement of director, Shri Deven R. Patel. The AO in this way, drew conclusion that assessee intended to sell land at Vatva and in that process, it has received on-money in cash, which has not been accounted for in the books. This has been treated as undisclosed income. The Id.AO in this way has made addition of Rs.14.85 crores. Appeal to the Id.CIT(A) did not bring any relief to the assessee. The Id.CIT(A) has concurred with the AO and confirmed addition. Discussion made by Id.CIT(A) reads as under:

"8. The second and third ground of appeal are against the addition of Rs.14.85 crores made by the AO considering this amount as 'on-money' receipt of the appellant company, which has not been disclosed to the department in regular books of accounts. Facts of the case is that a survey u/s 133A of the Act was conducted on the business premises of the appellant on 23-11-2010. During the course of survey, some documents were found in the form of diary, which shows figures of Rs.14.85 crores and mentioned in detail in the assessment order by the AO. The appellant company is engaged in the business of development of land and on asking question about the nature of the amount mentioned in these documents in the form of diary, Shri Deven Rameshbhai Patel, Director of the appellant company stated while giving statement that the diary (Royal book) pertain to his company Texraj Realty Pvt. Ltd.' He further stated that the diary has been written by him and the other director Shri

Vishnubhai Patel. The amount written in the diary pertains to the purchase & sale of land at Vatva Vinzol. In reply to Q. No.17, Shri Devan Rameshbhai Patel, Director of the company further stated that whatever amount shown as received through cheques has been reflected in the books of account of the company. The cash of Rs.7,80,00,000/- received by Shri Deven R. Patel and Rs.7,05,00,000/- received by Shri Vishnubhai Patel (total cash receipt of Rs.14,85,00,000/-) has not been shown in company's books of accounts.

8.1 In reply to Q. No.18 of the statement, Shri Deven R. Patel stated that this amount of Rs. 14.85 crores was received in cash as 'on-money' against the land of the company at Vatva Vinzol and it is unaccounted & not shown in the books of accounts of the company. He confirmed the same while replying to Q. No. 19 of the statement saying that this amount was received as per oral agreements and amount through cheques is yet to be received. In reply to Q. No. 20 of the statement, Shri Deven R. Patel, Director of the company admitted this receipt of Rs.14.85 crores as unaccounted income of the FY 2010-11 (AY 2011-12) and surrendered for taxation. He assured payment of tax on the said income. He reiterated these facts while replying to Q. No.21 of the statement. Statement of the Vishnubhai Patel, another director was recorded on 24-11-2010 in which he confirmed the statement of Shri Deven R. Patel and stated that he takes full responsibility to pay tax on the income surrendered. Shri Vishnubhai Patel was present throughout the recording of statement of Shri Deven R. Patel. On these facts the AO made the additions of Rs.14.85 crores on the basis of documents found during the course of survey and admitted by both the directors of the company. The AO discussed all these facts in detail in the assessment order and placed relevant portions of the documents found & statement recorded by scanning the same & made part of the assessment order.

8.2 In the written submissions filed before the AO and during appellate proceedings, the appellant objected to the additions made. The submissions of the appellant have been reproduced in full in paras above. The contentions of the appellant are summarized under the following points :

i) *The appellant contended that this diary was prepared by Shri Devan Patel, Director of the company, on the request of the survey party stating that if he prepares details like this and disclose certain amount, the case of the company as well as individuals will be closed easily without any trouble and under the wrong impression and without understanding properly the repercussion of this act and both the directors agreed to the demand of the survey party. The appellant stated that there are several anomalies in the diaries found.*

ii) *Second contention is that the land under consideration for which 'on-money' has been stated as received was under litigation at various level. There were several matters pending before various authorities pertaining to this land, as the land was owned by SLM Maneklal Industries Ltd., which was closed down. Therefore, nobody will pay advance amount for the land which was riddled with several cases before various authorities. On this basis, appellant stated that on-money was not received at all.*

iii) *Third contention of the appellant is that the statement recorded in pursuant to survey u/s 133A of the Act does not empower IT Authority to examine any person on oath. Therefore, the statement recorded u/s 133A of the Act has no evidentiary value and any admission made during such statement cannot be made the basis of addition. In support of this contention, the appellant cited several case laws.*

iv) *The appellant's director retracted the above statement, therefore, statement should not be relied upon.*

8.3 Regarding the first contention of the appellant that the diary was prepared during the course of survey proceedings at the request of survey team is beyond imagination. It cannot be understood i) why survey team requested for preparing of such diary ii) why a particular amount and for the particular period was written. The appellant is silent on these issues. Both the Directors of the appellant t company were present during the course of survey. The appellant purchased land from SLM Maneklal Ltd. through Debts Recovery Tribunal (DRT) for Rs. 19,22,53,098/- in FY 2006-07. As contended by the directors of the company, there were cases pending before Ahmedabad Civil

Court as well as in the Hon'ble High Court of Bombay and the land was purchased after obtaining clearance from all these authorities. These facts show that the appellant company had team of advocates at their disposal to represent, aid & advice on various matters. The person of such stature, who purchase land worth Rs.19.22 crores in AY 2006-07 and having experience of dealing with different authorities with the help of legal luminaries will come under pressure of IT. authorities to prepare diary and write contents to the extent of Rs.14.85 crores as receipt of on-money is beyond belief of any prudent person. It cannot be accepted that both the directors could not understand repercussion of such act. The true facts are that the diary was found during the course of survey and the contents were explained and admitted by both the directors. Whatever facts stated at the time of investigation on the spot are considered true & correct and the facts narrated after long time can only be considered as afterthought to create confusion and evade liability of payment of tax. The appellant tried to do the same in this case. In reply to Q.No.14 of the statement, Shri Deven R. Patel, Director of the appellant company admitted that the company introduced its own unaccounted money to the extent of Rs.5,35,65,000/- in the name of two entities namely M/s Jupiter Business Ltd. and M/s Sudarsan Enterprise. The Director admitted this amount as unaccounted income for the AY 2008-09 and surrendered the same for taxation. But the appellant is silent on this issue. These facts prove that the appellant made false allegation about the preparation of the diary during the survey proceedings.

8.4 Regarding the anomalies in the contents of the diary as stated by the appellant, it is for the directors of the Company to explain these anomalies. The diary was found at the premises of the appellant, owned by the directors and contents were admitted & explained by the Directors of the company. The onus is upon them to explain the so called anomalies. When the payment shown through cheques as mentioned in those diaries are true and correct and shown in the regular books of the appellant, the other contents of diary was also correct by the AO. As per provisions contained u/s 133A, survey proceedings are approved by the officer of Jt. / Addl. CIT rank, who supervise survey u/s 133A of the Act closely. The

appellant failed to show any evidence that such facts were brought to the notice of higher authorities during the course of survey or immediately after the survey proceedings. This contention is taken before the AO in the written submission dated 13-01-2014, which is after more than three years. Therefore, the contention of the appellant that the diary was prepared at the request of the survey party is nothing but an effort to evade tax liability. This contention deserves to be rejected for the reason given above, therefore, it is rejected.

8.5 About the second contention that the land was entangled with several cases before various authorities and nobody will pay any money for such land, it is a well known fact that several lands entangled in various cases are purchased by the buyers keeping in mind the risk attached and probability of winning the case. The appellant has itself purchased the same land from SLM Maneklal Ind. Ltd. for Rs.19.22 crores, even though several cases before various authorities were pending. This contention of the appellant is in contradiction of its own act. The appellant can buy a land worth about Rs.20 crores even though it is riddled with so many cases, but other cannot venture into risk is not an acceptable argument. Businessman sees an opportunity in such matters and takes risk. Higher the risk, higher the profit is the mantra of business. Ultimately, the land under consideration was got cleared from all the authorities, which prove that there was high profitability of success. The investor in real estate evaluates the pros & cons of his investment and takes a calculated risk in such matters. Keeping in view the discussion above, the contention of the appellant has not been found acceptable, therefore, it is rejected.

8.6 In respect of third contention that statement recorded during the course of survey u/s 133A of the Act should not be relied upon and has no evidentiary value, worth mentioning that in the statement recorded during the course of survey u/s 133 of the Act, Shri Deven Patel, Director of the company merely stated the facts, which have been placed before him on the basis of document found during the course of survey. The statement is simply explaining the facts mentioned in these documents. Admission of undisclosed income was not without evidences but on the basis of clinching written evidences. Name of the appellant company mentioned in the diary, amount was written in clear figures

monthwise and the amount admitted as received by both the directors of the appellant mentioned as payment through cheques tallies with the bank accounts of the appellant. Therefore, the statement given by the directors of the company is nothing but stating the facts mentioned in the document found during the survey. Regarding the various cases laws cited by the appellant, the facts of the appellant's case is distinguishable for the reason that the statement has been made on the basis of written evidences found and the additions have not been made only on the basis of statement recorded during the survey by the AO. Even in absence of statement of the directors or denial of directors about these contents, additions must have been made by the AO because the amount, month & name of the recipient is very clearly mentioned in the diary. Therefore, the case laws mentioned by the appellant are not relevant to the appellant's case as facts are not identical. Only on the basis of written evidences found during the course of survey, additions must have been made. Additions were not made only on the basis of the statement.

8.7 The last contention is that the director of the appellant company retracted the statement making disclosure of unaccounted income of Rs.14.85 crores. It is important to mention that vide letter dated 22-02-2012 i.e. about 15 months after the survey, director of the company informed the ACIT, Cir.8, Ahmedabad, the AO, stating that they are not accepting the disclosure made. This letter was signed by Shri Deven R. Patel one of the Directors, whereas contents of the diary were stated & confirmed by both the directors during the course of survey. At the end of the statement of Shri Deven R. Patel, it is stated that this statement is given in full senses, without pressure of fear & favour and signed after understanding contents of the same. The director of the company made disclosure in statement recorded before Income-tax Authority as per provision of the Act but so called retraction has been filed without stating the reasons why it is being retracted. Affidavits retracting the disclosure were filed on 13-01-2014 i.e. after more than three years from the date of survey. When the statement recorded under some law is not to be relied upon, as per contentions of the appellant, the retraction filed after such a long period cannot be considered a bonafide act. To evade the tax liability, the appellant advanced the arguments, which are contradictory

to its on arguments. Keeping in view the discussion mentioned above, the contention of the appellant deserves to be rejected, therefore it is rejected.

9. On going through the facts of the case and discussion in paras above, the additions made by the A are found justified. Therefore, additions of Rs.14.85 crores are confirmed. This ground of appeal is dismissed."

5. While impugning orders of the Revenue authorities, the Id.counsel for the assessee took us through written submissions filed before the Id.CIT(A) which has been reproduced from pages 4 to 38 of the CIT(A)'s order. He pointed out that the assessee raised multi-fold contentions before the Id.CIT(A) demonstrating circumstances against the probability assumed by the AO of receipt of on-money. In his first fold of contentions he pointed out that the assessee-company was incorporated to acquire immovable properties, develop the same and thereafter re-sale of such developed property. In order to buttress this proposition, the assessee has filed copy of memorandum of association and articles of association as Annexure-I before the Id.CIT(A). According to the Id.counsel for the assessee this business profile would contain three types of activities viz. (a) acquisition of immovable property, (b) development of such property and makes it ready for sale to earn profit, and (c) sale of such developed immovable property. In order to achieve its objects, the assessee-company entered into a deed of conveyance with SLM Maneklal Industries Ltd. on 21-3-2007. Understanding between the assessee and SLM Maneklal Industries was subject to various conditions. The Id.counsel for the assessee took us through copy of the deed available at page no.74 to 93 of the paper book, and drew our attention towards clause (6) of such deed. He pointed

out that the assessee agrees to discharge claim of secured creditors against the vendor. It has to discharge claim of workers' dues relating to PF, ESI, debenture holder, sales-tax, excise duty, municipal tax, property tax, electricity dues. The assessee has made a payment of Rs.5,93,60,261/- on 10/3/2007 and 20/3/2007 by way of six demand drafts. They were given to Recovery Officer of the Debts Recovery Tribunal (DRT). Hence, the land purchased by the assessee was subject to various conditions. Vendor was facing recovery proceedings before the DRT and it was an out-of-court settlement for purchase of the land, which were subject to various subsequent litigations. In his next fold of submissions he contended that charge against the assessee is that during the course of survey a diary/loose papers were found and seized which contained details of on-money received by the directors for sale of Vatva (Vinzol) land. In order to establish genuineness of the transaction mentioned in this diary, the Id.AO divided narrations in two parts; (a) narrations representing cheque entries, and (b) narrations exhibiting cash receipts received by the assessee. The Id.AO has assumed that since cheque entries are verifiable with the bank statement of the assessee, therefore, other part of the entries mentioned in the diary are also to be construed as correct. In order to demolish this plea of the AO, the Id.counsel for the assessee took us through objections filed before the Id.AO as well as before the Id.CIT(A). He pointed out that in the diary against so-called on-money no date has been mentioned and only month was mentioned and not even names of the persons from whom alleged money was taken has been mentioned. It is further submitted that there is no logic for making six entries in a particular month

without any date and that from April to September, notings were in similar fashion and style which *ipso facto* doubt genuineness and correctness of the entries so made. It is submitted that the alleged transactions are pertained to six months i.e. from April to September, 2010, however, looking to the similar types of handwriting with same ink creates more questions than answers. Manner of noting by these two directors are also appears to be identical. All these transactions are appeared to be written on the same day, rather than in different dates as doubted by the Revenue. So-called receipt of money by Shri Deven Patel and Vishnubhai Patel is without any corroborative evidence, and if the on-money assumed to be belonged to the assessee-company, then, there was no need to be noted of the same transactions by two different directors, which itself doubts correctness of the noting. Therefore, finding of the Revenue authorities with regard to the transactions recorded in the diary is devoid of any merit. It is further averred that there are disparities in the findings of the Revenue authorities so much so that the Id.Revenue authorities referred to only "one diary" found during the course of search and the alleged on-money being mentioned at "Rs.14,85,00,000/-". In fact there are two diaries and the alleged amount was sum total of two diaries. This fact demonstrates that diary was being prepared after recording of the statement. It is also pointed out that the loose papers found during the course of search do not correlate the details mentioned in the diary and vice-versa, and therefore, they have no evidentiary value. It is further submitted that in the case of sale/purchase of immovable property, in normal course, where on-money is involved, some cheque payment followed by on-money is to be made in order to establish

buyer's legal right to purchase the property. However, in the instant case, the Revenue authorities failed to establish some kind of payment was made through cheque during the period April 2010 to September, 2010, in which the alleged on-money was received, in order to demolish the claim of the assessee that no sale of the land by the company. The statement made by Shri Deven Patel and Vishnubhai Patel has been retracted as the same are not supported by any supporting evidences. The findings of the Revenue authorities are based on some presumptions and without any corroborative evidences. It is beyond one's imagination that a property which is subject to various litigations before higher forums, and right, title and interest thereof are in dispute, could be put to sale. There was no supporting evidences to establish receipt of on-money except statement of two directors, that too was retracted subsequently. Therefore, it is prayed that finding of the lower authorities that the assessee has sold the property in question and received on-money is based on some mistaken understanding of facts on record and liable to be annulled.

6. On the other hand, the Id.CIT-DR relied upon the orders of Id.Revenue authorities. He submitted that immediately after the survey, assessee has not filed objection contending there in that no such diary was found rather it was prepared on the direction of survey party. He further contended that diary was found showing cash receipt and this fact was accepted by the director. In the light of this, no other evidence is required for holding that assessee received unaccounted money.

7. We have duly considered rival contentions and gone through the record carefully. Solitary dispute for our consideration is

whether sufficient evidence direct or circumstantial, is being possessed by the Revenue to hold that the assessee had received on-money in cash for sale of Vatva land. Analysis of record would indicate that the Id.AO is basically harping upon two circumstances, viz. (a) recovery of alleged diary at the time of survey, and (b) admission of director in the statement recorded under section 133A of the Act at the time of survey. Let us evaluate both these circumstances in the light of explanation given by the assessee.

8. Firstly, we deal with the alleged admission. Director, Shri Devan Patel and Shri Vishnubhai Patel have filed their affidavit during the course of assessment proceedings retracting disclosure made at the time of survey. Copies of these affidavits are available on page nos.191 to 198 of the paper book. Shri Devan Patel in his affidavit has alleged that receipt of Rs.7.80 crores in cash noted in certain loose papers was not found, rather noting in the diary was made during the course of survey only. He met with Chief Commissioner also and appraised him what happened during the course of survey. Since, we have to frame *prima facie* case on the basis of circumstantial evidences, therefore, it is necessary to take note of this affidavit which has explained the position of assessee. It reads as under:

"I, Devan R. Patel, aged about 40 years residing at 11, Shyam Vihar Bunglow, Thaltej, Ahmedabad, do solemnly state and affirm as under:

1. *That I am the Director in Texraj Realty Pvt. Ltd., a Company incorporated on 13th March 2007 and I am one of the initial Director in the said Company.*
2. *That I look after the complete business of the Company i.e. pertaining to the purchase of land from SLM*

Industries Ltd., the various court matters going on in the said Company relating to the said land.

3. A survey was conducted by the Income Tax Department in the business premises of Texraj Realty Pvt. Ltd. situated at 16, 4th Floor, Agrawal Mali, Opp. Bhagvat Vidyapith, S.G. Highway, Ahmedabad 380 061, on 23/11/2010 in the noon.

4. During the course of survey on 23/11/2010, at the business premises no much incriminating documents were found but the survey party pressurized us to disclose certain unaccounted income. During the entire night of 23/11/2010 negotiations went on about the manner and method of disclosure as no incriminating documents were found. Finally, in the early morning on 24/11/2010 I have surrendered and stated in the Statement about the receipt of on-money of Rs. 14.85 cr. though no such on-money has been received by the Company and no amount of Rs. 7.80 cr. as noted on certain loose paper during the course of survey, has been received. The noting in the diary was made during the course of survey only. The same were not found recorded prior to the survey.

5. It was only at the instance of the survey party that the said note was prepared which is in my own hand-writing. The entire noting were prepared on 23/11/2010-24/11/2010 during the course of survey.

6. Since I was under mental tension as litigation was already going on against the property purchased by us, having invested an amount of Rs. 20 cr. and we were under acute financial difficulties as having invested a substantial amount we were not able to develop and sell the property. Therefore, in order to get the survey proceeding closed, I have agreed to prepare the said note relating to the receipt of cash on-the advise of party and accordingly, admitted the same in the Statement.

7. No amount in cash has actually been received by me in my individual capacity or as a Director of the Company.

8. The noting relating to the cheque received is entirely pertaining| to the loan transaction, which has been noted in

the said diary during the course of survey only on the advice of the survey party so that the noting will look genuine.

9. I Immediately, after survey, I, along with my other Director, Shri Vishnubhai Patel, have met the -then Chief Commissioner of Income Tax, Gujarat-I, Shri D.S. Rastogi and explained him the entire facts which has taken place during the course of survey. He then called the concerned officer and the Joint Commissioner, Range-8, and warned then not to repeat such instances in future.

Whatever stated above is true and correct and, no part of the relevant fact has been eliminated or hidden.

9. Similar affidavit was filed by other director which is available on the record. During the course of hearing, we have been appraised as to how statement recorded under section 133A has to be appreciated. Decision of Hon'ble Kerala High Court in the case of Paul Mathews and Sons Vs. CIT, 263 ITR 101 (Ker) was brought to our notice. Similarly, proposition laid down in this decision was approved by Hon'ble Apex Court in the case of CIT Vs. S. Khadar Khan & Sons, 25 taxmann.com 413 wherein the Hon'ble Supreme Court has upheld decision of Hon'ble Madras High Court which has referred judgment of Hon'ble Kerala High Court. In both these cases, it has been propounded that section 133A authorizes survey team to record statement, but such authorization is for recording of statement without administering an oath and statement recorded without oath has just a corroborative value as information. It is not an evidence *per se*. Relevant discussion made in the decision of the Hon'ble Kerala High Court reads as under:

"133A Power of Survey--(1) Notwithstanding anything contained in any other provision of this Act, an, IT authority may enter :

(a) any place within the limits of the area assigned to him, or

(b) any place occupied by any person in respect of whom he exercises jurisdiction, or

(c) any place in respect of which he is authorised for the purposes of this section by such IT authority, who is assigned the area within which such place is situated or who exercises jurisdiction in respect of any person occupying such place, at which a business or profession is carried on, whether such place be the principal place or not of such business or profession, and require any proprietor, employee or any other person who may at that time and place be attending in any manner to, or helping in, the carrying on of such business or profession--

(i) to afford him the necessary facility to inspect such books of account or other documents as he may require and which may be available at such place

(ii) to afford him the necessary facility to check or verify the cash, stock or other valuable article or thing which may be found therein, and

(iii) to furnish such information as he may require as to any matter which may be useful for, or relevant to, any proceeding under this Act."

11. The provision also enables the IT authority to impound and retain in his custody for such period as he thinks of any books of account or other documents inspected by him, provided the authority records his reasons for doing so and also shall not retain the books of account for a period not exceeding 15 days. Section 133A(3)(iii) enables the authority to record the statement of any person which may be useful for, or relevant to, any proceeding under the Act. Section 133A however, enables the IT authority only to record any statement of any person which may be useful, but does not authorize for taking any sworn in statement. On the other hand, we find that such a power to examine a person on oath is specifically conferred on the authorised officer only under Section 132(4) of the IT Act in the course of any search or seizure. Thus, the IT Act, whenever it thought fit and necessary to confer such power to examine a

person on oath, the same has been expressly provided whereas Section 133A does not empower any ITO to examine any person on oath. Thus, in contra-distinction to the power under Section 133A, Section 132(4) of the IT Act enables the authorised officer to examine a person on oath and any statement made by such person during such examination can also be used in evidence under the IT Act. On the other hand, whatever statement recorded under Section 133A of the IT Act is not given any evidentiary value obviously for the reason that the officer is not authorised to administer oath and to take any sworn in statement which alone has the evidentiary value as contemplated under law. Therefore, there is much force in the argument of the learned counsel for the appellant that the statement, elicited during the survey operation has no evidentiary value and the ITO was well aware of this."

10. Thus, alleged disclosure was retracted by directors by virtue of the above affidavits and disclosure was a *simplicitor* as information. In the affidavit the assessee has leveled serious allegations against survey team pointing out that no such entries were found at the time of survey. They were noted during the course of survey under pressure of the survey team. When such a complaint was made during the course of assessment proceedings, and more so when the Chief Commissioner was appraised of this fact, then it ought to have been investigated and truth ought to have been dug out.

11. The second set of circumstances is that no doubt Vatva land was purchased by the assessee from SNL Maneklal Industries, but it was subject to various litigations. The assessee has brought to the notice of the AO judgment of Hon'ble Bombay High Court rendered in Company Application No.1166 of 2007. Similarly, copy of order dated 21.10.2011 of Hon'ble Bombay High Court in Official Liquidator Report No.356 of 2010 and Company Application No.597 of 2010 were also brought to his notice. Copies

of these orders are placed on page nos.115 to 187 of the paper book. The assessee has brought to the notice of the Id.Revenue authorities observation made by the Hon'ble Bombay High Court and some of paragraphs are worth to note in order to evaluate that the land in dispute is subject to litigation. The assessee has made reference to the Hon'ble Bombay High Court's order in para 32, 34, 35, 38 and 43. They read as under:

"32 Therefore, a private sale to be termed as being under the aegis or control or supervision in terms of this rule, must satisfy all the requirements of Rule 66. A private sale of attached immovable properties is permitted only if the requirements specified by the Rule are complied with and not otherwise. In an application of the nature made by the Company in liquidation to the Recovery Officer setting out whatever arrangement it may have arrived at with the bank or with M/s. tex Raj and referring to any sale to M/s. Tex Raj, therefore, cannot be termed as an application for postponement of sale in terms of Rule 66. Once such is the conclusion, reached, then, to my mind, the private sale in favour of the applicant purchaser Tex Raj cannot be said to be covered by Rule 66 of Schedule II which is referred in section 29 of the RDB Act, 1993. Therefore far from being a statutory sale, it is not even a private sale permitted and/or recognized under this rule so as to give any immunity to the purchaser. To my mind, in this case, the company in liquidation and the purchaser have clearly by-passed the company court and the official liquidator and by a private arrangement disposed of and acquired a valuable immovable property of the company in liquidation. Mr. Oza, therefore, cannot content that the sale in favour of M/s. Tex Raj is valid and out of the purview of Companies Act, 1956". (Emphasis Supplied)

Para No. 34, 35 and 38 of the said order is as under

"34] Once a conclusion is reached that the sale in favour of M/s. Tex Raj is illegal, then, all that remains for consideration is whether this Court should grant the request of the Official Liquidator to nullify it or consider the request made by the purchaser to save the transaction".

"35] In that context, what has been argued is that the sale is confirmed in March and July 2007 and none have come forward to object to the sale. The chain of circumstances would indicate that there is no malice and there is no fraud. Even the Official Liquidator does not allege any such thing. There is no allegation that sale is not in the interest of the secured creditors. The argument of Mr. Oza is that assuming the sale by the Company in liquidation is dishonest but there is no allegation that M/s. Tex Raj had knowledge or was a party to this dishonesty or fraud. What the Court has before it is the Official Liquidator's report and some allegations of the Unions but not individual workman". (Emphasis Supplied)

"38] Now the company under liquidation has filed an affidavit and paras thereof have been reproduced by me hereinabove. Therein, the details of the sale in favour of Tex Raj have been set out and the steps in pursuance of the said sale have also been referred. M/s. Tex Raj has deposited Rs. 10.59.43,855/- in DRT and it is stated that all statutory dues have been paid.

The claims of all banks have been settled. The claims of 1350 workers have been settled out of 1600 workers. The company has also settled the claims with the workers and the representatives of authorized unions and a reference is made to the consent terms with Saroday Labour Union, representing remaining 246 workers and the sums paid to all such workers. There is a reference in para 8 of this affidavit to the provident fund dues and in para 9 to the bank dues and thereafter, it is stated as to how the claims of the debenture holders have been settled. A cheque for Rs. 45 lakhs in favour of GIIC has also been referred to as having been forwarded by the Company in liquidation. Thus, it is stated that the Company has settled all its dues. Therefore, it is stated that 'the Court should pass appropriate orders but not declare the sale as void. M/s. Tex Raj has placed on record the details of the proceedings before the DRT". (Emphasis Supplied)

Some of the observation of the Court in para 43 (page 62 & 63) is as under:

32. The emphasis of arguments of all parties opposing M/s. Tex Raj was that this is not a statutory sale or a sale in terms of Rule 66. I have already dealt with that aspect of the matter. All that is then argued is that 353 workmen have not accepted any payment, they are not party to any settlement and today there is collusion between the company in liquidation and auction purchasers. There is also doubt raised about the settlement dated 12th April 2007. Some argument is raised about the stamp paper being not genuine. To my mind, some sweeping allegations without necessary proof either to show that there was a under valuation or that the property was sold at throw away price or that the workers and creditors were de- frauded, cannot be accepted. Neither the secured creditors viz., the banks and financial institutions, save and except GIIC are before the Court nor the Official Liquidator is referring to any particulars and producing any proof to show that fraud has been perpetrated by the officers/ directors of Company in liquidation acting in collusion with M/s. Tex Raj."

12. We have gone through complete order available on the paper book and found that at the time of survey, litigation was pending before the Hon'ble Bombay high Court in Company Petition between vendors of the assessee vis-à-vis other financial institutions. Rights in the land have not been crystallied in favour of the assessee before the Hon'ble Bombay High Court. Decision was pronounced on 21.10.2011 whereas survey was conducted on 23.11.2010. Similarly, the assessee has brought to the notice of the AO that Civil Court in Ahmedabad has also granted *status quo* with respect to the land on an application filed by the GIIC. It has

brought to the notice of the AO order of the Civil Court dated 6.9.2011 whose copy is available on page nos.188 to 190 of the paper book. Thus, the assessee was not having absolute alienable rights in the land at the time of survey.

13. We also find that name of any purchaser was not mentioned in the diary. It is highly improbable that a sum of Rs.14.85 crores would be given by an unknown person to the assessee in cash for purchase of a land without executing any documents. It is also improbable that only cash components would be given by the prospective buyer of the land. Normal practice is that when agreement would be entered into between the parties, part payment would be made through account payee cheque, and over and above that part payment, something may be paid in cash. All such factors are totally missing. Investigation wing of the department could not lay its hand on the details of alleged prospective buyers who have paid this huge money in cash. As far as contention of the AO is that certain entries available in the diary should be cross-verified with the bank details of the assessee is concerned, all these entries are relevant to the payment made by the assessee, and if payments are being made through account payee cheque, then they could be routed through regular books, because, they are easily verifiable then, why directors would not enter such payment made through account payee cheque on loose paper. This case strengthen the stand of the assessee that in order to project genuineness of the diaries certain entries which were made through account payee cheques were picked up and put in the diary. It is pertinent to observe that when explanation or a defence of an assessee based on number of facts supported by evidence and circumstances

required consideration whether explanation is sound or not must be determined not by considering the weight to be attached to each single fact in isolation but by assessing the cumulative effect of all the facts in their setting as a whole. If we make an analysis of all the facts in their setting as a whole, then it would reveal that Revenue failed to bring corroborative evidence on record for demonstrating the alleged receipt of on-money by the assessee. The assessee was not having absolute alienable right in the land at the time of survey. It was subject to various litigations, and no prudent businessman would put such substantial money at a stake on a piece of land whose title is in dispute.

14. We find that the Id.First Appellate Authority, while considering this contention of the assessee has observed that the assessee itself purchased the same land from SLM Maneklal Industries Ltd. for a consideration of Rs.19.22 cores, even though several cases before various authorities were pending. It is pertinent to observe that the Id.CIT(A) has lost sight of about the various negotiations undertaken by the assessee with the financial institutions and payment made to these institutions through Debts Recovery Tribunal. It was a direct deal with SLM Maneklal Industries. The Revenue failed to identify purchaser with the assessee. It is just assuming that some cash component must have been received by the assessee. Similarly, while referring to the statement recorded under section 133A, the Id.CIT(A) has observed that corroborative evidence in the shape of diary was found, and therefore, this statement even if considered as "information" is sufficient to hold that the assessee has received on-money. We have perused discussion made by the Id.CIT(A), but it is pertinent to observe that the Id.CIT(A) has failed to

appreciate evidentiary value of the alleged diary, more so when the assessee has leveled serious allegation against survey team itself. If we appreciate chain of circumstances about existence of diary, then such circumstances considered by the AO are not worthy of credence. Taking into consideration facts of the case on record, we are of the view that Revenue failed to collect sufficient evidence for holding that the assessee has received money for sale of alleged land. Therefore, we allow the appeal of the assessee and delete addition of Rs.14.85 crores (Rupees Fourteen Crores Eight Five Lakhs).

15. In the result, appeal of the assessee is allowed.

Order pronounced in the Court on 16th November, 2017.

Sd/-
(PRAMOD KUMAR)
ACCOUNTANT MEMBER

Sd/-
(RAJPAL YADAV)
JUDICIAL MEMBER