

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
ALLAHABAD BENCH, ALLAHABAD**

**BEFORE : SHRI BHAVNESH SAINI, JUDICIAL MEMBER AND  
SHRI A.L. GEHLOT, ACCOUNTANT MEMBER**

**ITA No. 440/Alld./2012  
Asstt. Year : 2008-09**

M/s. Kesarwani Sheetalaya  
Sahson, Allahabad.  
(PAN : AADFK 6563 D)  
(Appellant)

vs.

D.C.I.T., Central Circle,  
Allahabad.  
  
(Respondent)

Appellant by : S/Sri Ravi Kant, Sr. Adv., Anand Godbole,  
S.P. Agarwal & Umesh Kesarwani, Advocates

Respondent by : Shri Jagdish, CIT/DR

Date of hearing : 02.11.2012  
Date of pronouncement of order : 30.11.2012

**ORDER**

Per Bhavnesh Saini, J.M.:

This appeal by the assessee is directed against the order of Id. CIT(A), Allahabad dated 06.08.2012 for the assessment year 2008-09 on the following grounds :

1. *That in any view of the matter assessment order dated 28.12.2011 passed under Section 153A(b) of the Income Tax Act' 1961 by the Assessing Officer and which is confirmed by the Commissioner of Income Tax (Appeal) vide order dated 06.05.2012 is highly unjustified and incorrect because both the lower authorities **failed to consider real facts of the case and evidences brought on***

***record and also failed to consider books of accounts, past records and cited cases.***

2. *That in any view of the matter the assessee maintained the books of account in the same manner and same fashion as adopted from the year of inception of the appellant firm which is a well recognized method of accounting and also accepted by the department year after year, therefore both the lower authorities while framing and confirming the orders/additions **ignored the principles of consistency**, hence the addition/ disallowances made are confirmed and unwarranted.*
3. *That in any view of the matter order dated 28.12.2011 passed under Section 153A(b) of the Income Tax Act vide which income as determined at Rs. 24,27,32,281/- is at all not correct as the same is not based on any incriminating material found in the course of search but based on presumption and surmises and wrong inferences drawn by ignoring all the Seized annexures which includes subsidiary books though entries were co-related with each book, hence the two lower authorities are wrong in making and maintaining the addition.*
4. *That in any view of the matter the undisclosed income was not determined on the basis of any search material and the Assessing officer simply proceeded as if it is a normal assessment and not on the basis of any search material, therefore section 153A of the Income Tax Act had no application to the facts of the case, hence the assessment is liable to be declared illegal.*
5. *That in any view of the matter addition of Rs. 37,30,710/- made based on Annexure A-3/1 which is a dumb and Waste document by working out an artificial figures which do not have relevancy to the working made by the assessing officer and her actions as confirmed by the Commissioner of Income Tax (Appeal) is unjustified and hence the addition is highly unwarranted.*

6. *That in any view of the matter observation of the assessing officer in para 7.2 of her order are totally incorrect and baseless as she failed to consider the true facts of the case. The Commissioner of Income Tax (Appeal) also recorded his observations with set-mind to confirm the addition of Rs. 37,30,710/- relying only upon assessment order which is wrong. Therefore the addition is unjustified.*
7. *That in any view of the matter addition of Rs. 23,31,28,321/- was made in arbitrary manner without any valid reason and **by ignoring the explanations, and charts filed before the two lower authorities**, hence the action of two lower authorities are not judicious in eyes of law. In making and confirming the addition the allegation of the two lower authorities that the partners of the appellant firm did potatoes business is totally wrong as no incriminating document or any additional evidence indicating any such potatoes business by the partners of the firm was found in the course of search nor the assessing officer brought any evidence on record that the partners were indulged in such potatoes business. Therefore in absence of any evidence two lower authorities were wrong in making and confirming the addition.*
8. *That in any view of the matter addition of Rs. 23,31,28,321/- was made by the assessing officer on flimsy and vague manner **as the basis of the said addition was annexure P-11 & P-13 which are called BHANDARAN-NIKASI-REGISTER** of which columns were filled in at the time of delivery of potatoes to the concerned constituents and **the entries of such registers dully tallied with the entries of Annexure A-2/22, A-2/9 and A-1/1 to A-2/5 respectively** which are the initial register written at the time of entry of the same potatoes in the cold storages having details in similar columns as the Annexure P-11 & P-13. Though the lower authorities verified the facts but ignored the truth of the verification and even no finding was recorded in their orders, hence the addition is unjustified and illegal in facts and circumstances of the case.*

9. *That in any view of the matter after submission of two sets of voluminous paper books before the Commissioner of Income Tax (Appeal) which contain written submission and chart explaining details of the facts of all the columns of all the aforesaid annexures, based on which a **remand report was also called** from the assessing officer. Even before submitting the remand report the concerned Assessing Officer examined and verified all the annexure together at a time in presence of appellant on **23.07.2012** and he **found that the entries of the annexures correlate with each other and he admitted this fact in his order sheet also** but the learned Commissioner of Income Tax (Appeal) failed to consider the same and even failed to make any finding in this regard in his order, hence the addition is wrong and unwarranted.*
10. *That in any view of the matter allegation made by the assessing officer that the partners were indulged in potatoes business by twisting the facts of Annexure P-11 & P-13 IS absolutely wrong and the so called investment and profit as worked out by the assessing officer is simply based on her own imagination and whims to justify the addition and also to mislead the higher authorities. The learned Commissioner of Income Tax (Appeal) also examined and verified all the above mentioned relevant annexures and found that entries/details of each annexure are tallying and the respective gate passes and rent receipts were also examined and he was fully satisfied. But in Commissioner of Income Tax (Appeal)'s order no reference of such examination and verification was given and by ignoring the facts the addition was confirmed which is highly unjustified and against the judicious approach, therefore the addition is incorrect.*
11. *That in any view of the matter the learned Commissioner of Income Tax (Appeal) is highly unjustified and incorrect in observing at page 61 of his order that the appellant could not substantiate the claim whenever the opportunity was given. Such observation of the Commissioner of Income Tax (Appeal) is totally false specially when in **the***

*Assessing Officer's order sheet entry dated 23.07.2012, the Assessing Officer himself has admitted that the relevant annexures were verified and test checked. Therefore such observation of Learned Commissioner of Income Tax (Appeal) is nothing but only an attempt to give strength to his order by confirming the unjustified addition.*

12. *That in any view of the matter the learned Commissioner of Income Tax (Appeal) is totally wrong and incorrect in observing that on the basis of fresh queries raised by the assessing officer in the course of remand report the appellant failed to give explanation when the explanation was offered and is still available on Assessing Officer's record, hence the addition is unwarranted. The entire addition is based on presumption of the two lower authorities by ignoring the facts and entries recorded in the books.*
13. *That in any view of the matter at page 6 of the assessment order the alleged investment of Rs. 21,08,69,838/- as worked out by the assessing officer is simply on the basis of seized papers which belongs to third party Mukhtar Ahmed who is neither employee of the firm nor has any connection any manner with the appellant firm **nor the appellant was given any chance** at any time to confront him nor his statement was recorded in presence of the appellant, therefore the entire concocted theory for making and confirming the addition is illegal and actions of the assessing officer as confirmed by the CIT(A) is also incorrect and unwarranted.*
14. *That in any view of the matter the alleged profit of Rs. 2,22,58,483/- as worked out by the assessing officer at page 6 & 7 of the assessment order is only an artificial and imaginary figure which has no value in the eyes of law specially when **declared rental receipts from cold storage business have been accepted**, therefore the two lower authorities were wrong in making and confirming the addition.*

15. *That in any view of the matter the learned Commissioner of Income Tax (Appeals) failed to give cognizance to the contents of the affidavit of the partner, past record of the appellant and failed to consider principle of consistency, disclosed rental receipts has been accepted year after year, no verification was done by the constituents kept their potatoes in cold storage, no discussion by the Commissioner of Income Tax (Appeals) on the explanation dated 22.08.2012, non consideration of paper book no. 2 hence the entire addition made and confirmed in first appeal is unwarranted.*
16. *That in any view of the matter disallowances of Rs. 3,01,703/- under the head diesel expenses made by the assessing officer and confirmed by the CIT (A) is highly unjustified specially when each and every item of purchases of diesel was recorded in books duly supported by the vouchers hence the disallowances is unwarranted.*
17. *That in any view of the matter disallowance of disallowances of diesel expense @ 10 % of the total purchase of Rs. 30,17,037/- is highly unjustified and incorrect specially when 90 % of the purchase was accepted, in past no such type of disallowances was made, no material about outside purchase of diesel was found in the course of search. Therefore the two lower authorities are wrong in making and confirming the additions.*
18. *That in any view of the matter disallowances of petrol expenses of Rs. 77,099/- out of petrol expenses by saying on account of personal use of car is highly unjustified in the facts and circumstances of the case.*
19. *That in any view of the matter disallowance of Rs. 1,17,246/- under the head depreciation on car for personal use is highly unjustified in the facts and circumstances of the case.*
20. *That in any view of the matter addition of Rs. 5,47,928/- on account of addition under the head building is highly unjustified and the addition has been made simply on the*

*basis of DVO's report only which is not a gospel truth especially when expenditures are recorded in regular books and without rejecting the books the addition is unwarranted.*

21. *That in any view of the matter reference to DVO is not correct in so far as in the course of search operation **no incriminating material**/ document what so ever was found, hence the reference is unwarranted and unjustified.*
22. *That in any view of the matter the penal interest under Section 234A, 234B, and 234C of the Income Tax Act is incorrect and before charging interest no opportunity of being heard was allowed to the appellant nor any working of charging of interest was provided to the appellant and the penalty notice under Section 271 (1)(C) has also been wrongly issued as no income concealed.*
23. *That in any view of the matter the appellant reserves its right to take any fresh ground of appeal or modify/ amend or withdraw before the hearing or at the time of hearing of appeal.*

2. The early hearing was granted in the matter while disposing of the stay application No. 01/Alld./2012 filed by the assessee.

3. We have heard the Id. Representatives of both the parties, perused the findings of authorities below and considered the material on record.

4. Briefly, the facts of the case are that the assessee is a partnership firm engaged in cold storage business with its head office at Sahson. The branches of

the assessee are M/s. Bhol Sheet Grah at Sahson and M/s. Kesarwani Sheetalaya at Soraon. Action u/s. 132(1) was taken on 27.08.2009 in group cases of Keserwani Zarda Bhandar, Sahson, Allahabad and its partners. The AO framed the assessment u/s. 153A vide order dated 28.12.2011 for assessment year under appeal, i.e., 2008-09 and made several additions, which were challenged before the Id. CIT(A). The assessee raised the additional grounds of appeals as well as sought admission of additional evidences before the Id. CIT(A), which were admitted by the Id. CIT(A) for hearing of appeal.

5. Though several grounds have been raised in the appeal of the assessee, but mainly the assessee challenged two major additions on merits apart from disallowances of expenses.

6. The Id. Counsel for the assessee submitted that ground No. 1 & 2 of appeal of the assessee are general in nature and on ground No. 3 to 15, the assessee challenged the addition of Rs.37,30,710/- and addition of Rs.23,31,28,321/-.

7. The first addition under challenge is Rs.37,30,710/-. In the assessment order, the AO has remarked that a bunch of loose papers marked as Annexure A-3/1 was found and seized. At page no. 107 of the above bunch of loose papers, there is

description of consolidated details of cash in hand pertaining to M/s Kesarwani Sheetalaya, Sahson, Soroan and Bhola Sheetgrih, Sahson. These descriptions are relating to F.Y.2007-08. On this particular loose paper, it is mentioned the total cash in hand of both the concerns namely M/s Kesarwani Sheetalaya, Sahson, Soroan and Bhola Sheetgrih, Sahson in the F.Y. 2007-08 is 27,39,932-86. The narration is as under:-

dt 15.03.08  
F.Y. 2007-08  
A.Y.2008-09

Kesarwani Sheetalaya  
Bhola Sheetgrih  
Sohson.

Cash received –

Bhola Sheetgrih	(1) Total rent	9472171.10
Kesarwani Sheetalaya	(2) Total rent	8969700.55
Kesarwani Sheetalaya	Cash withdraw from bank	1200000.00
		19641871.65
Bhola – Expenditure	- 929662.95	
K.S. - Expenditure	- 954275.84	
K.S. - Cash deposit to bank	- <u>15018000.00</u>	<u>16901938.79</u>
		2739932.86

Cash balance - dt. 11.03.08 - cr. 4813470.70 (Kesarwani Sheetalaya)

Cash balance - dt. 03.03.08 - dr. 8790921.62 (Bhola Sheetgrih)  
3977450.92

Opening balance Dr. 248413.47 (Bhola)

Opening balance      Dr. 989104.59 (K.S.)  
1237518.06

Net cash for F.Y. 07-08 = (3977450.92 – 1237518.06 = 2739932.86)

The A.O. has further compared cash in hand with different branches of the concern as per the audit report for the F.Y. 2007-08 relevant to A.Y. 2008-09.

<u>Bhola Sheet Grih</u>	<u>K.S. Soraon</u>	<u>K.S.Sahson</u>	<u>Total</u>
27,95,969.71	22,97,647.48	13,77,025.46	64,70,642.65

7.1 On the above comparison, the A.O. found that actual cash with the above concerns of the assessee was Rs.27,39,932.86/- whereas the assessee has shown the cash at hand at Rs.64,70,642.65/-, meaning thereby the cash amounting to Rs.37,30,709.79/- is unexplained. The A.O. has observed that the excess cash shown in the balance sheet may either relate to bogus liability or unexplained cash from undisclosed source introduced by the partners. The A.O. further remarked that the assessee has not maintained regular books of a/c in the shape of cash book, ledger etc. The search & seizure action did not result in recovering any books of a/c from the business premises of the firm or from the residential premises of the partners of the firm. The said regular books of a/c were not found even in the premises of Shri Sanjay Gupta, FCA whose places were covered u/s 133A of the I.T. Act. On the strength of above discussion, the A.O. has treated Rs.37,30,710/- as bogus liability and has made the additions u/s 68 of the I.T. Act.

7.2 The assessee challenged the addition before the Id. CIT(A) and the submissions of the assessee are reproduced in the appellate order as under :

*“That the assessing officer has discussed the facts in para-3 of the assessment order. The manner and basis of making the addition is highly objectionable in so far as the loose paper marked as annexure A-3/1 page 107 is nothing but a rough, waste and dumb document hence liable to be discarded. The assessing officer while computing the income left this amount to included in the total assessed income of the appellant as he was satisfied with the explanation.*

*That Sir, the first objection of the appellant is that the Assessing Officer's observation in the order that no regular books of account in the shape of Cash-Book & ledger etc. have been found for any financial year either from the business premises of the firm or from residential premises of the partners of the firm during the course of search. Even in the office of the Chartered Accountant Sri Sanjay Gupta, FCA during the course of a Survey under Section 133A of the Income Tax Act the books were not found. Therefore the Assessing Officer observed/ held that it is clear that regular books of account are not maintained by the appellant firm, such observation is absolutely incorrect vague and irrelevant which can be called as unhealthy observation when the facts is that regular books of accounts are being maintained by the appellant and produced and examined by assessing officer hence allegation liable to be sponged and even on the date of search also the books of account were lying in the business premises.*

*That Sir, the appellant firm came into existence in the year 1978 and till date regular assessments have been framed by the department under Section 143(3) of the Income Tax Act for number of years and in those assessments the assessing officer admitted that the books of account were produced and examined. In the present case till date no ex-parte decision was made on the allegation that books were not produced nor maintained. Likewise in the present block period, regular original assessments were framed after examination of the books of accounts for*

*Assessment Year 2004-05, 2005-06 & 2007-08. In this way at one point the department is accepting and admitting that books of accounts are maintained and produced by the appellant but for making the addition of Rs. 37,30,710/- the assessing officer has taken a shelter by saying that "no books of accounts are maintained". Sir, even in earlier years also a matter was referred by the department for a special audit in only Kesarwani Zarda Bhandar cases and during that audit books of accounts of the appellant firm were examined and found in order. In the appellant's case the department has allowed auditor's fee and accounting expenses year after year. Thus simply because in the course of search operation since the books were not taken by the search party although available in the business premises of the appellant that does not mean that the Assessing Officer is free to make any kind of allegation according to her own test.*

*That the assessing officer vide notice dated 28.02.2011 u/s 142 (1) a query no. 06 was made which is reproduced as under :*

*"No books of account of firm have been found and seized during the course of search/ survey operation of the group, in the absence of books of account you are required to justify the books result shown in the audit final account"*

*That in compliance to the query no. 06 reply was given in following manner :*

यह कि आपके नोटिस के प्रश्न नं०-6 के बारे में यह कहना है कि फर्म के व्यवसाय से सम्बन्धित सभी बही खाते विधिवत् ढंग से रखे जाते हैं और जो समय-समय पर विभाग में प्रस्तुत भी किए जाते रहे हैं। इन्हीं बही खातों के आधार पर आडिट रिपोर्ट तैयार होती रही है, जिसमें आडिटर इस बात का सर्टीफिकेट भी देते हैं कि संबंधित बही खाते आडिट के समय प्रस्तुत किए गये जो जाँच के बाद सही पाए गये। **छापे के कार्रवाई के दौरान भी वे सभी बही-खातों मौजूद थे और जहाँ रखे जाते रहे हैं, वहीं रखे हुए थे।** अतः यह कहना गलत है कि बही-खाते नहीं थे क्योंकि बिना बही-खातों के किसानों के आलू का भण्डारण व उससे सम्बन्धित खर्च व लेन-देन व खर्चों का विवरण संभव नहीं हो सकता।

*That thus is the light of addition made above reply was given on the basis of query hence there is no justification to draw a different view.*

*That in this case a search was conducted on 27.08.2009 and before the date of search income tax return for the assessment year in question was already on record of the department along with the audit report. Likewise advance tax was also paid earlier. From the date of search i.e. 27.08.2009 till the start of the assessment proceeding books of accounts were not required by the assessing officer though produced on various date. Sir our auditor appeared before the assessing officer from time to time alongwith books of accounts and other details. During the course of search also statements of various persons were recorded but no query about existence of the book was put to any party. The rent receipt to the extent of Rs. 1,50,60,423/- was accepted by the department and likewise the expenditures as claimed were also allowed. Likewise partner's salary and remunerations were also allowed. In these background the basis of the addition of Rs. 37,30,710/- by making biased observation that books of accounts were not there is not correct and vague considering the volume and nature of business. Sir, it is an admitted fact on record that some of the books such as cash book, ledger and other subsidiary books were seized and still lying with the department as admitted in the letter dated 05.07.2011 and 19.10.2011. Copy enclosed at page..... Even no penalty for non-maintenance of books of accounts were ever imposed till dated.*

*That regarding source of cash, the cash which was generated from rent receipt is appearing everyday in the cash books which is true and correct cash balance. Likewise opening and closing balance are also based on the regular books of account, hence it is not judicious on the part of the assessing officer to discard cash balance based on regular books of account and to give undue weightage to a dumb document only for creating bogus tax liability on old tax payer. The assessing officer in the order has stated that reply filed by the assessee is a 'SIMPLE' reply, so what is wrong in that reply? Sir, in the balance-sheet cash in hand disclosed at Rs. 64,70,642.65 is true cash balance because it is a settled law that the balance-sheet is prepared by taking facts and figures of last date of the concerned financial year. The allegation of the assessing officer that a bogus liability of an amount of Rs. 37,40,710/- has been created is totally incorrect.*

*That sir the amount of Rs. 37,40,710/- is based on artificial working done by assessing officer and for this purpose the assessing officer took/ considered the closing balance of cash in hand as on*

*31.03.2008 as appearing in audit report which is as under :*

<i>Kesarwani Sheetalaya Sahson, Allahabad</i>	<i>13,77,025.46</i>
<i>Kesarwani Sheetalaya Soroan, Allahabad</i>	<i>22,97,647.48</i>
<i>Bhola Sheetgrih Allahabad</i>	<i>27,95,969.77</i>
<i>TOTAL</i>	<i>64,70,642.65</i>

*That after considering the closing balance the assessing officer has deducted a sum of Rs. 27,39,932.86 as balance appearing in rough, dumb and waste document. The balance on such rough paper relates to different dates and so he deducted the said amount of Rs. 27,39,932.86 from the closing balance as per audit report as on 31.03.2008 and made addition to the extent of Rs. 37,30,732.00 (Rs. 64,70,642.65 – 27,39,932.00). For such artificial and irrelevant working the assessing officer stated in the order “It is established on the basis of above mentioned annexure that assessee has raised either bogus liability or unexplained cash introduced by partners by Rs. 37,30,732.00 and added to the income of assessee u/s 68 of Income Tax Act”. In the above observation the word “either” is very important which suggests that the addition was made with negative mindset and is clear cut case of confusion in assessing officer’s mind. Sir in the Income Tax Act or under principle of accountancy, comparison is to be made in uniform method and not in haphazard manner as done in the present case therefore the theory of artificial bogus liability as imagined and created by the assessing officer is unjustified, incorrect and highly objectionable.*

*That for making the said addition the second step is that the assessing officer has invoked provisions of Section 68 of the Income Tax Act and made the addition of Rs. 37,30,710/-. Sir, section 68 of the I.T. Act 1961 reads as under:*

*"Where any sum found credited in books of assessee, maintained for any previous year and assessee offers no explanation about the nature and source, then only the sum so credited may be charged to income tax as the income of the assessee of that previous years."*

*That in the light of aforesaid provision of the Income Tax Act since Rs. 37,30,710/- is not credited in the books of the appellant therefore Section 68 is not applicable in the present case hence addition made*

*under section 68 is legally unjustified and uncalled for and unwarranted.”*

7.3 The AO filed his remand report before the Id. CIT(A) on this issue, which is reproduced as under :

*“Addition was made on the basis of seized paper marked as annexure A-3/1 for want of verification from the seized documents. The assessee had simply replied that “ **books of accounts me is se bhi adhik cash in hand hai**”. Assessee failed to substantiate the cash reflected in the seized papers with that of seized books of accounts. With regard to contention of assessee that books of accounts have been found, it is submitted that only computerized books of accounts for the year under consideration was found and impounded and no books of account were found for other assessment years relevant to block period. Instead of reconciling the above cash in hand with that of books of accounts, the assessee simply submitted replies through post or during the course of hearing. As far as contention of assessee that in the seized paper detail of cash in hand is reflecting only for two branches and detail of cash in hand of one branch is not include in the said paper , is concerned, it is submitted that assessee neither during the course of assessment proceedings before the then assessing officer nor before the undersigned during the course of these proceedings, reconciled the cash in hand with impounded/seized books of accounts of one of left branch of assessee. In the order sheet entry dated 18.10.2011, while examining the seized papers, the then assessing officer has clearly remarked as **not explained for said annexure A-3/1** on which assessee’s FCA has signed and noted. Again, as per further order sheet entries, assessee failed to correlate the seized paper with seized books of accounts.*

*Assessee was asked by the undersigned during the course of discussion on 25.07.2012 to verify the above paper with the books of accounts. But on 25.07.2012, an adjournment was sought for 26.07.2012 and on 26.07.2012, another adjournment was sought for 27.07.2012. On 27.07.2012 also no one attended nor written reply was filed. In the circumstances, I have no option but to justify the addition by my predecessor amounting to Rs.37,30,710/-.”*

7.4 The assessee further filed his rejoinder to the remand report filed by the AO, which is reproduced in the appellate order as under :

*“(a) That with regard to para-9 C of the remand report, it is submitted that in the remand report the assessing officer has tried simply to cover the lapses for not verifying the facts. Annexure A-3/1 (page no. 107) is a single loose / rough paper only because some figures is annexure A-3/1 correlate with audit report but some figures of the rough notings which do not correlate with each other. In this connection a detailed explanation has already been furnished in the paper-book at page 14-23 filed before your good self and contents of the submission are true and real facts of the issue which may kindly be considered, Sir kindly consider human probability also that in such a huge business affairs such type of noting/rough figures often takes place in a casual way. Even in normal life also in connection with day to day affairs also almost every person makes some notings/ rough calculation on a piece of paper but that does not mean that the said rough paper is reflecting his income by ignoring his regular books of accounts maintained by him. So in the present case also similar situation exists and such a huge and illegal addition has been made based on the said rough paper only by ignoring regular books of accounts and detailed explanations of the appellant.*

*(b) That in this connection it is also necessary to mention here that the appellant firm has its three unit in the name and style as mentioned as under :*

- i- M/s Kesarwani Sheetalaya, Sahson, Allahabad (Head Office)*
- ii- M/s Kesarwani Sheetalaya, Soraon, Allahabad (Branch Office)*
- iii- M/s Bhola Sheetgrih, Sahson, Allahabad (Branch Office)*

*That the annexure in question is related to only two units located at Sahson, Allahabad, which is clearly mentioned at the top of the annexure also and he entries of the annexure itself show the opening cash balance, total rent, cash deposits and withdrawal from bank as under :-*

*Kesarwani Sheetalaya, Sashon, Allahabad (Head Office)  
Bhola Sheetgrih, Sahson, Allahabad (Branch office)*

*The combined cash balance of the aforesaid two units as on 01.04.2007 is Rs. 12,37,518.00 which is supported by the audit report as on 31.03.2007 enclosed as annexure 1 and 2 (page 32 & 33). Likewise combined closing cash balance as on 11.03.2008 for one unit and as on 03.03.2008 for other unit is Rs. 39,77,450.92 as appearing in the loose paper. Thus net cash for F.Y. 2007-2008 (i.e. net increase in cash in hand during F.Y. 2007-2008) is Rs. 39,77,450.92- 12,37,518.06= Rs. 27,39,932.86 as alleged. In this way the figure of Rs. 27,39,932.86 is net increase in cash in hand as per A.O. during F.Y. 2007-2008. This is not the figure of cash balance as considered by the learned assessing officer as all the aforesaid figure/details are mentioned in the referred annexure itself.*

*(c ) That, Sir, actually, while comparing the cash in hand as mentioned in the aforesaid documents annexure with the books of accounts, the learned assessing officer has taken the figure of cash in hand of all the three units from the audit balance sheet for F.Y. 2006-2007 relevant to A.Y. 2007-2008 which is Rs.12,37,518.06 and then deducted the cash balance as on 11.03.2008 and 03.03.2008 from Rs. 39,77,450.93 which comes to Rs. 27,39,932.86 (Rs. 39,77,450.92 – 12,37,518.06). In this way the closing cash balance as on 31.03.2008 at Rs. 64,70,642.65 of three units is being compared with Rs. 27,39,932.86 and by such working he added the difference of Rs. 37,30,732.00 (Rs. 64,70,642.65–27,39,932.06) which is totally incorrect and thus the entire working of assessing officer is against the principles of accountancy and done in haphazard manner. In this regard it is also necessary to mention here that only cash in hands of two units of the appellant firm should have been taken from the books of account for the purpose of correct and accurate comparison of cash in hand as per the referred document/ annexure but the assessing officer failed in doing so which is unjustified.*

*(d) (1) That as per the audited balance sheet for F.Y. 2007-2008, the cash in hand as on 31.03.2008 for the two units under consideration is as under :*

<i>Kesarwani Sheetalay, Sahson, Allahabad (Head Office)</i>	<i>13,77,025.46</i>
<i>Bhola Sheetgrih, Sahson, Allahabad ( Branch Office)</i>	<i><u>27,95,969.71</u></i>
<i>Total Cash in hand as on 31.03.2008 of two units</i>	<i>41,72,995.17</i>
 <i>2- And total cash balance of the aforesaid two units as on 11.03.2008 for one unit and as on 03.03.2008 for the other unit as mentioned in the referred document</i>	 <i>39,77,450.92</i>

*3-That, thus from the above it is clear that the main reasons for difference between the cash balance as per the referred document/ annexure and the cash balance as per the audited balance sheet is due adoptability of wrong basis of working/ calculations only. Moreover the comparison is not for the cash balances on one particular day rather they are on different dates which makes the comparison, done by the assessing officer, incorrect and illogical. The whole mistake committed by the assessing officer is this that he compared the figures of 11.03.2008 and 03.03.2008 with the figures of closing cash balance as on 31.03.2008*

*(e) That in this way the entire working of the assessing officer for making the addition of Rs. 37,30,732.00 is based on rough/ dumb document which is against the principles of accountancy. In fact the assessing officer for making the addition adopted the figures on pick and choose basis according to his own test and worked out the figure of Rs. 37,30,737/- and added the same u/s 68 i.e as cash credit for collecting the tax which is not fair rather severe injustice to the appellent.*

*That in view of clarification given above the addition of Rs. 37,30,737/ is unjustified and it is requested not take any adverse view and same may please be deleted.*

*(f) That annexure A-3/1 which provoked the assessing officer to make the addition of Rs. 37,30,737.00 as unexplained liability / addition under section 68 has duly been explained which facts and figure and it*

*was stated that addition made on wrong facts and figures and comparison was also wrongly been made and as such the addition is highly unjustified.”*

7.5 The Id. CIT(A), considering the submissions of the assessee and findings of the AO, confirmed the addition and also directed that since the aforesaid amount is not added in the computation of income, therefore, it is to be added now. Findings of the Id. CIT(A) are reproduced as under :

**“6.2 Decision:**

*The appellant’s first contention is that the loose paper marked as Annexure A-3/1 page no. 107 is nothing but a rough, waste and dumb document hence liable to be discarded. I do not agree with this submission of the appellant because the said loose paper was found from the premises of the assessee. The description of this particular loose paper pertains to the cash receipts and the cash expenditure of three branches of the assessee concern. There are definite figures, definite dates and definite mention of branches. There is also definite mention of cash deposit in the bank. With these definite descriptions how can the assessee deny the significance and the relevance of entries on the above loose sheets. There is no doubt about the fact that the entries pertain to the assessee. The presumption as envisaged u/s 132(4A) is not successfully rebutted by the assessee. Even if the papers are not in the hand writing of any particular person related to the assessee, the entries are very definite in nature. Moreover, as pointed out by the A.O. regular books of a/c were not found and seized from any of the concerned premises including the office premises of the Chartered Accountant who has audited balance sheet and the Profit & Loss a/c. The assessee also failed to turn up before the A.O. during the remand proceeding to explain the difference in the cash. Presuming but not admitting, the regular books of a/c were maintained by the assessee and the search party found them in the premises covered, but did not seize them, the appellant could have made an application before the concerned ADIT (Investigation) to produce them pointing out that the search party left them in the premises. Having not done so, the appellant left enough scope to infer that regular books of a/c were not actually maintained by the*

*assessee. Neither, the history nor the audit report but only actual conduct of the assessee is decisive of the dispute in question. The A.O. has raised question about the availability of regular books of a/c on the ground that those were not found in the premises covered u/s 132(1) and 133A. I do not agree with the contention of the appellant that the addition of Rs.37,30,710/- is based on artificial calculation. It is worthwhile to consider an argument put forward by the appellant that the balance on rough paper relates to different dates and the same has been compared with the closing balance as on 31.03.2008. Just for this reason the A.O. again offered the opportunity to the appellant to explain the difference between the cash balance as per rough sheet and as per the balance-sheet as on 31.03.2008. The A.O. clearly mentions that the assessee neither during the course of assessment proceedings before the then A.O. nor before him during the remand proceedings, reconciled the cash in hand between the two documents. In view of these facts and in the circumstances, I hold that the A.O. was fully justified in treating the excess cash of Rs.37,30,710/- unexplained. The A.O. has, in fact, made the addition u/s 68 on the logic that the assessee has introduced bogus cash credit corresponding to the excess cash amount. I agree with the contention of the appellant that there is no corresponding entry in the books of a/c and, therefore, Section 68 cannot be invoked. The reason is very clear simply because the A.O. has herself denied the maintenance of any books of a/c by the assessee. If there are no books of a/c, the presumption of any entry corresponding to excess cash of Rs.37,30,710/- can also not be substantiated. Therefore, within the inherent powers of the CIT(A), I correct the section under which the addition is made. The addition is confirmed u/s 69A of the I.T. Act. Accordingly, the above grounds of appeal are dismissed.*

*Though the A.O. has made the addition in the body of the assessment order, she has forgotten to add amount of Rs.37,30,710/- in the computation of income. Vide order-sheet entry dated 31.07.2012, the A.Rs. were asked to show cause as to why amount of Rs.37,30,710/- should not be added in the computation. As a matter of fact, this mistake was noticed during the course of appellate proceedings, the appellant has not objected to the addition of the above amount in case it is upheld by my decision. I, therefore, enhance the income of the assessee u/s 251(1)(a) r.w.s. 251(2) of the I.T. Act by Rs.37,30,710/-.”*

8. The Id. Counsel for the assessee reiterated the submissions made before the Id. CIT(A) and submitted that the seized paper was seized from residence of Shri Sanjay Gupta, Chartered Accountant. The assessee is not author of the document and is also not signed by any of its partners. The Chartered Accountant is not examined at the time of search or at the assessment stage. The assessee maintained proper books of account for last 30 years and audited accounts have been prepared on the basis of the books of account. The details pertained to part of the year. The Id. CIT(A) rightly held that the provisions of section 68 are not applicable in this case. However, the Id. CIT(A) was not justified in holding that the provisions of section 69A are applicable in this case. The Id. CIT(A) has no inherent power to change the law to sustain the addition. Excess cash has been noted in the books of account. Therefore, if there is actual shortage in cash in hand, proposed addition is wholly unjustified.

9. On the other hand, the Id. DR relied upon the orders of the authorities below and submitted that the statement of Shri Sanjay Gupta was recorded. During the search, no regular books of account were found to have been maintained by the assessee. The CIT(A) has co-terminus powers to that of AO. Therefore, he can change the section for sustaining the addition and relied upon the decision of

Hon'ble Supreme Court in the case of CIT vs. Nirbheram Daluram, 224 ITR 610. Opening cash balance tally with the books of account of the assessee. Therefore, it is not dumb document and relied upon the decision of Hon'ble Punjab & Haryana High Court in the case of CIT vs. D.R. Bansal & Ors., 327 ITR 44. The Id. DR further submitted that since the document was recovered during the course of search, therefore, the provisions of section 292C would apply against the assessee. In the balance sheet of assessee, the cash balance is shown at Rs.64.70 lacs, but cash as per seized documents was Rs.37.30 lacs. Therefore, the addition is justified.

10. We have heard the rival submissions and the material on record. It is a case of excess cash in books shown by the assessee, but at the time of search, actually lesser cash was found. Therefore, it is admitted fact that no excess cash was found during the course of search with the assessee in order to fasten liability upon the assessee. The AO initially made the addition with the help of section 68 of the IT Act, which the Id. CIT(A) has rightly held not applicable to the facts of the case. The Id. CIT(A), however, applied the provisions of section 69A of the IT Act while confirming the addition in this case. Section 69A of the IT Act reads as under :

***“Unexplained money, etc.***

**69A.** *Where in any financial year the assessee is found to be the owner of any money, bullion, jewellery or other valuable article and such money, bullion, jewellery or valuable article is not recorded in the books of account, if any, maintained by him for any source of income, and the assessee offers no explanation about the nature and source of acquisition of the money, bullion, jewellery or other valuable article, or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the money and the value of the bullion, jewellery or other valuable article may be deemed to be the income of the assessee for such financial year.”*

10.1 Before applying the above provision, it is necessary for the AO to record findings of fact that the assessee is found to be owner of any money and such money is not recorded in the books of account, if any, maintained by him for any source of income and the assessee offers no explanation about the nature and source of acquisition of money or explanation offered by him is not in the opinion of the AO satisfactory. In the present case, the cash in hand in the books of account was found to be more than the actual cash found during the course of search. Therefore, it is not a case where money is not recorded in the books of account of the assessee. The assessee maintained regular books of account in past, on which regular assessments have been framed, have not been disputed during the course of arguments. According to submissions of the ld. DR, the opening cash balance in the seized paper tally with the books of account. Therefore, there is no question of rejection of books of account maintained by the assessee. Merely because the

books of account maintained by the assessee were not found during the course of search is no ground to reject the books of account produced by the assessee before the AO. The AO compared the seized paper on perusal of the audit report in the assessment year under appeal while making the addition on this issue. Since the balances were coming up from the earlier years, therefore, it was the duty of the AO to have scanned the entire cash book in order to say that the cash balance shown in the books of account in hand at Rs.64.70 lacs is correct or not, but the AO did not do any exercise and merely comparing the seized paper from the audit report made the addition. The AO was not definite in his finding while making the addition because he was of the view that either the bogus liability has been created or unexplained cash has been introduced by the partners and for both the propositions, the AO has not brought any evidence on record to substantiate his allegations. There is no case of bogus liability or introduction of unexplained cash by the partners in this case. Thus, it appears that the AO made the addition merely on presumptions. On the one hand, the AO relied upon the balance sheet and the audit report prepared by the assessee showing excessive cash in books and on other side considered the seized paper which has shown lesser cash in hand for the purpose of making addition. Considering the above discussion, it is clear that the AO has done only artificial working of lesser cash as against higher cash shown in the books of account of the assessee. Therefore, it is neither a case of addition u/s.

68 of the IT Act nor section 69A of the IT Act. We, therefore, do not subscribe to the view of Id. CIT(A) in sustaining the addition. As noted above, it is a case of lesser cash in hand as per seized paper as compared with the books of account in which the assessee has shown more cash in hand. Therefore, the authorities below were not justified in holding it to be unexplained money not recorded in the books of account of the assessee. At the most, the authorities below could have presumed that the assessee has spent the difference of amount in question somewhere as per cash in hand as per books of account and lesser cash as per seized documents, but that would also not suffice to make addition under any of the above provisions because every person is at liberty to spend their own amount anywhere as per his choice because the assessee has not claimed any deduction in this case. Examining the case of the assessee from every possible angle, we find the addition of Rs.37,30,710/- wholly unjustified. We, accordingly, set aside the orders of the authorities below and delete the addition of Rs.37,30,710/-. These grounds of appeal of the assessee are accordingly allowed.

11. The other major addition challenged by the assessee is Rs.23,31,28,321/-. The assessee denied to have engaged in the business of potatoes. It was stated that the recorded entries in the seized register marked A-1/7, A-2/9 Bhandaran, gate pass and exit records etc. were totally ignored by the AO. The AO did not try to

ascertain the truth. The AO made the additions based on Annexure P-11 and P-13, i.e., Nikasan (outgoing) release register of potato. The AO did not verify identical entries in the registers marked as A-2/22, A-2/9, A-1/1 to A-1/5, which are potato incoming registers. These entries tally with Annexure P-11 to P-13. None of the partners of the firm did any potato business and made any investment in the purchase of potato. The AO discussed this issue in para 4 of the assessment order. It is remarked by the A.O. that during the course of search & seizure action, various incriminating documents were found and seized from the different business/ residential premises of the case of the group. The A.O. has mentioned the impounding of P-11 found from the premises of the Chartered Accountant of the assessee. In this bundle 3 registers were found wherein the name and the address of the farmers who had stored their potatoes in the cold storage are partly mentioned. The A.O. issued notice to the assessee to show cause as to why the potatoes stored in the cold storage having no name and address of the owners, be not treated as owned by the assessee firm. The assessee replied to the A.O's query stating that in three registers marked as Annexure P-11 entries have been made from SI. No.1-4268. However, the names of the persons have been mentioned only against the entries from SI. No.1-224. Total weight of the potatoes kept in cold storage as per this register is 84238 quintal as mentioned on dated 30.11.2007.

11.1 Referring to the reply of the assessee, the A.O. reached the conclusion that the potatoes kept from SI. No. 225–4268 are not relatable to any constituent and hence it should be the potato kept by the assessee firm.

11.2 Another (Surya Corporate book) relating to keeping of potatoes in M/s Bholi Sheetgrih, (unit of M/s Kesarwani Sheetalaya, Sahson, Allahabad) was also impounded and kept in the bundle marked as Annexure P-11. This register is for the period of 12.03.2007 to 30.11.2007. In this register entries have been made from SI. No.1-4316. Total weight of potato mentioned on the pages relating to 30.11.2007 is 89705.12 quintal. In this register also only SI. No. 1-282 have the name and address of the persons against them. The rest serial nos. do not have such details. Like her inference relating to register found pertaining to M/s Kesarwani Sheetalaya, Sahson, the A.O. inferred that the potatoes kept from SI No.283-4316 belong to the assessee firm.

11.3 Another register impounded and marked as Annexure P-13 for the period 08.10.2007 to 30.11.2007 have the entries from SI No. 2743-3047. This register also does not bear the name and address of the persons from SI No.3048-6292.

11.4 In reply to the notice issued by the A.O., the assessee had stated that as when the potato is released from the storage, rent receipts were issued to the potato owners and these receipts had complete details. The assessee has recorded the rent receipt on the basis of the above. It was also explained by the assessee that the names and addresses of the persons were not recorded due to rush for release of potato. Such details are available on the receipts issued to farmers/ parties.

11.5 The A.O. remarked that the *modus operandi* of the assessee is such that as when the potato is released from the storage, rent receipts are issued to the owners and complete details are mentioned in the receipt. The details in the books are recorded on the basis of rent receipt. Therefore, the A.O. stepped up her argument that the names and addresses of the persons were not recorded from certain serial no. to certain serial no. relating to different premises because the rent receipts were not issued to the potato owners. Had there been rent receipts issued to the potato owners, the appellant would have recorded the names and addresses of the persons in the registers. Another argument of the A.O. was that those details were not recorded even till the finalization of the audit. In the light of above reasoning, the A.O. arrived at the conclusion that the potato stored from certain serial no. to certain serial no. having no name and address of the persons against them belonged to the assessee itself. Therefore, the investment was made by the

assessee to purchase the potatoes. The A.O. has also relied on one document seized as page 47 of LP-1 from the residence of one of the partners of the firm Shri Raj Kumar Kesarwani. This document, as scanned has been made part of the assessment order in the case of Shri Raj Kumar Kesarwani for A.Y. 2006-07. In the statement Shri Raj Kumar Kesarwani had admitted the purchase of potato for his own business. Annexure A-1/7 found and seized from the premise of the assessee firm proved that there was stock outside the books. The A.O. has worked out the cost of purchase of above mentioned potatoes as under:-

SI. No.	Register pertained	Receipt No.		Quantity of Potato Stored in Quintal	Cost of potato @ 900/- per Quintal
		From	To		
1.	Head Office	225	4268	84,238	<b>7,58,14,200</b>
2.	Sheetgrih Branch	283	4316	89,705.12	<b>8,07,34,608</b>
3.	Soraon Branch	3048	6292	60,356.7	<b>5,43,21,030</b>

**Total            234299.82            210869838/-**

11.6. The A.O. has made a note below the above table that the cost of purchase and sale price of potato has been taken from the documents of Shri Mukhtar Ahmed. The above documents were found during the course of search & seizure operation marked as Annexure-B of the panchnama.

11.7 On the strength of the above, the A.O. has made the addition of Rs.21,08,69,838/- for the purchase of potato. It is also mentioned by the A.O. that the same potato have been sold @ Rs.1,100/- per quintal, which give sale proceed of Rs.25,77,29,802/-. The A.O. has given the credit to the storage rent amounting to Rs.2,46,01,481/- to the assessee and has worked out the profit of Rs.2,22,58,483/- after deducting the purchase price and storage expenses from the sale proceeds. So in all addition of Rs.23,31,28,321/- has been made.

11.8 The assessee challenged the addition before the Id. CIT(A) and submissions of the assessee are reproduced in the appellate order as under :

*“That the Assessing Officer has discussed the facts in para 4 of the assessment order. The manner and approach as adopted by the assessing officer is highly unjustified, surprising and incorrect. For making the addition the colours which have been given by the assessing officer in respective para are far away from the true facts of the case with an only intention to mislead and confuse higher authorities/court and to create tax liability in wrong manner. According to the colourful invention of the assessing officer alleging that the partners of the firm during the year under consideration indulged in potato business through own Cold Storages by making an investment of Rs. 21,08,69,838/- in such business as per artificial working of the Assessing Officer and by making such alleged investment they earned alleged profit of Rs. 2,22,58,383/-. In this way according to the assessing officer there was alleged suppression of income of Rs. 23,21,28,321/-. (210869838 + 22258383)*

*That the allegation and self made formulas about so called suppressed income as invented/ worked out as mentioned above is artificial and only based on her imagination, and own presumptions of the assessing officer which is uncalled for, casual and hypothetical*

*too and not based on any incriminating/ loose paper found in the course of the search reflecting any investment or income in potato business. Sir, kindly consider that the appellant firm came into existence in the year 1978 and since then to Assessment Year 2007-08 there was no such allegation about alleged investment and profit from business of potato and income there from either by the firm or its partners and even in subsequent years in A.Y 2009-10 and 2010-11. In this way during last about 30 years the department treated that the firm engaged in the Cold Storage business and derived only rented income from different constituents whose potatoes were stored in the appellant's Cold Storages. The department has also accepted year after year that in respect of business activities of the appellant firm kept voluminous records which have been maintained which are audited and the audit expenditures and accountancy expenditures both were accepted by the department during the year and also in earlier years.*

*That in this connection it is very necessary to state that from the year of inception of the firm similar and uniform methods of accounting was followed by the appellant. The books maintained by the appellant are cash book, ledger, Bhandaran/Niskasan Register, entry gate pass, Weight Slip (Taul Parchi) name and address of the constituents, lot no, no. of bags, Rent receipt showing amount received from the constituents etc. The books of account for the year under consideration and earlier years are brought for kind consideration and verification although the same were produced before the assessing officer also from time to time.*

*That in this connection it is necessary to bring to your kind consideration the working procedures of business and system of our accountancy which are as under:-*

- (1) That the constituent comes with his potato loaded on Tractor/Truck.*
- (2) That on arrival of the potato at the gate of the cold storage a gate-pass is issued to the concerned constituent. The gate pass bears Gate Pass\_Sl. No., Date, Name & Address of the constituent, No. of bags and after filling the same constituent's signature is obtained at various time there on and Original copy of the Gate Pass is given to*

*the Constituent and Carbon Copy of the same is retained with us. Photo copies of some of the gate passes are enclosed herewith.*

*(3) That after that Taul Parchi consisting of Sl. No. Date, Name & Address of the Constituents, no. of bags of potato and Weight of Potato brought by the constituents, lot no., chamber no. etc. is made and a copy of the Taul Parchi is also given to the constituent. Photo copies of some of the Taul Parchi are enclosed herewith.*

*(4) That all these details are recorded in stock & rent register called as Bhandaran Nikasi Register also. The said register was found and seized by the Search Party in the course of search operation on 27.08.2009 and a panchanama was prepared at the premises of M/s Kesharwani Sheetalaya (Head Office) and Bhola Sheetagrah, Branch. Copy of which is enclosed herewith in which that register has been marked as Annexure-A-2/22, A-2/9 and A-1/1 to A-1/5 respectively. In the said registers complete detail, such as Gate Pass No., Taul Parchi details, No. of bags, Weight of potato, delivery date, receipt no., rent amount are mentioned and those registers are still lying with the department. In this regard, a query was also made vide letter dated 11.07.2011 of the assessing officer at query no. 15 of Sl. No. 33 of the query notice. In compliance to the same a reply was furnished before the assessing officer vide per letter dated \_\_\_\_\_ explaining therein nature and true facts of the said A/-2/22 also, copies of the same are enclosed herewith.*

*(5) That at the time of taking out the potato the constituents deposit the rent for which rent receipt is also issued to them alongwith delivery challan and those entries are also recorded in the said stock and rent register. Photo copies of some of the Taul Parchi and delivery challan are enclosed herewith.*

*(6) That datewise daily rent summary register is also kept consisting Gate Pass Number, Date, rent receipt No., chamber no. Taul Parchi no., lot no., no. of bags, Potato weight, rent amount. These entries are recorded in the aforesaid bhandaran/ nikasi register. In this regard a chart is enclosed showing bhandaran nikasi register alongwith rent receipt register for demonstration purpose. Thus the observation that in annexure P-11 and P-13 no name and addresses are mentioned are wrong because the name and addresses are already appearing in*

*annexure A-2/22 , A-2/9, A-1/1 to A-1/5 which is entry register in respect of potatoes.*

*That in the above manner the appellant is maintaining elaborate books of account and details and subsidiaries register which are audited by M/s Gupta Sanjay and Associate every year and the audit report is submitted alongwith the income tax return every year.*

*That the assessing officer in Ist line of para-4 of the assessment order has mentioned as "During the course of search and seizure proceeding various incriminating documents were found" which is totally incorrect. It is a fact that during the search and seizure, operation - simultaneously a survey under Section 133A of the Act was also conducted in business cum office premises of M/s Gupta Sanjay & Associates who is our Chartered Accountant and from there certain documents were found and impounded as P/11 & P/13 which contains three registers. According to the Assessing Officer names and addresses of the farmers who had stored their potato in the cold storages of the appellant was maintained in part in the register and in these background a notice dated 19.10.2011 under Section 142(1) of the Act was issued requiring the appellant to explain as to why the potatoes stored in the Cold Storage which have no names and address of the owners of potato be not treated as appellant's own potato.*

*That in nutshell the only objection of the Assessing Officer is that Sl. No. 225 to 4268 in P/11 and Sl. No. 3048 to 6292 of P/13 do not bear names and addresses of the potato owners and only this fact has been adopted as a basis by the Assessing Officer to draw inference and allege that the partners indulged in potato business and as such made huge addition. But it is absolutely incorrect, as the assessing officer measurably failed to consider and understand full facts appearing in the said annexures i.e. Gate-pass number, Room/Chamber No., Taul Parchi No., Lot No., Nos. of Bags, Weight of Potato, Rent Amount only with a view to give a colour to her thought and formula for making huge addition by twisting the true facts. All columns of the annexure P-11 & P-13 at sl. No. 225 to 4268 and Sl. No. 3048 to 6292 respectively are duly filled in except name and addresses of farmers who stored their potatoes but the A.O. ignored all these fill up columns which are tallied with gate pass, Taul Parchi, rent receipt and bhandaran / nikasi register where every facts are appearing and*

*tallied with the annexures A-2/22, A-2/9, A-1/1 to A-1/5. All these facts were got verified during the course of hearing of the case with reference to seized registers.*

*That in this way a document P-11 & P-13) has been considered by the Assessing Officer in piece-meal whereas the assessing officer was bound to consider the said documents as a whole in which she failed and wrongly considered a document in different manner. In this regard the appellant rely upon following decisions which are as under.*

*In the case of Narmada Ben Magan Lal Thakkar*

*And*

*Pranjivan das Maganlal Thakkar and others*

*A.I.R. 1997 (30) page 119 : The Hon'ble Supreme Court laid down that :*

*“It is now well settled legal position that a document has to be read harmoniously as a whole giving effect to all the clauses contained in the document which is manifest the intention of the person who execute the document.”*

*In the case of Navneet Lal alias Rangji*

*Vs. Gokul and others :*

*A.I.R. (1976) P. 794 (SC)*

*The Hon'ble Supreme Court laid down that :*

*“The true intention of testator has to be gathered not by attaching importance to isolated expressions but by reading the will as a whole with all its provisions and ignoring none of them as redundant or contradictory.”*

*In the case of Kalu Ram Jain Vs. Mahabir Prasad and others AWC (1978) P. 443*

*The Hon'ble High Court laid down that:*

*“Applying the rule of interpretation that the deed must be read as a whole in order to ascertain its true meaning.”*

*That from the above decisions it will appear that the Hon'ble Courts held that the documents to be considered as a whole and not as per own's choice i.e the Assessing Officer. Sir, it is not fair on the part of the assessing officer to state only that in the documents names, and address of the person are not written by digesting corresponding details mentioned in the other columns of the same documents. Sir while computing the income if the assessing officer would have considered informations of each and every columns of both the referred annexures together at a time with supporting documents, judiciously then such artificial and incorrect situation would have not come-up to arise at this conclusion that the appellant carried on potato business and made investment in potato business and earned income. Thus under these circumstances the addition made by the assessing officer is unjustified, arbitrary and without any basis or adverse material on record in any of the past and future years when no such inference drawn and additions made.*

*That the most important fact that the said P-11 & P-13 were found from the premises of M/s Gupta Sanjay Associate and not from the premises of the appellant, therefore it was a seizure of documents from the office of our C.A. Sanjay Gupta No doubt the appellant confirmed that the annexures P-11, P-13 belongs to the appellant firm and which is a compilation of subsidiary books, such Gate- pass, Taul Parchi, Weight-slip, rent receipt register etc as mentioned above.*

*That in this connection it is also necessary to mention here that the rent receipt figures Shown in aforesaid P-11 & P-13 has been duly shown/ entered in cash book and duly considered in the gross receipt as true and correct. There is no adverse finding in this regard and department has accepted the same gladly, meaning thereby that the books of accounts and receipts are accepted as true and correct and when rental receipts are considered as correct which are based on the same supported documents then there is no justification to say simply that because no names and addresses are mentioned therefore the assessee indulged in own potato business therein with unwarranted huge investment and substantial profit. Therefore the unwarranted addition of Rs. 23,31,12,832/-(Investment + Profit) is highly unjustified.*

*That the most important fact is that the assessing officer proceeded and made a huge addition of Rs. 23,31,12,832/- in arbitrary manner on the basis of P-11 & P-13 found from the office of our C.A. Sanjay Gupta as mentioned above and observed that at Sl. No. 225 to 4268 (P-11) & and likewise at Sl. No. 3048 to 6292 (Annexure- P-13) names and address of the constituents are not mentioned but in the entire assessment order there is no discussion about Annexure A-2/22 & A-2/9 though these annexures are also appearing in the Panchanama and still lying with the department. In these two annexures i.e. A-2/22 & A-2/9 names and address of the constituents pointed out by the Assessing Officer based on Annexure P-11 & P-13, are appearing with other complete details also as already appearing in others columns of Annexures P-11 & P-13 also. In this way the assessing officer was bound to consider said Annexure A-2/22 & A-2/9 also together with annexures P-11 & P-13 as already we have explained the nature of entries in Annexure A-2/22 & A-2/9 before the assessing officer in compliance to her query made by her notice dated 11.07.2011. In this way the assessing officer made a mistake in not considering the Annexures A-2/22 & A-2/9 alongwith annexure P-11 & P-13 at a time. Thus such huge addition was made by the assessing officer by ignoring annexure A-2/22 & A-2/9 where the names and address of all the constituents are appearing.*

*That Sir, when the names, addresses and other details of each and every constituents are recorded in Annexure A-2/22 & A-2/9 which are the initial and essential register and the business with constituents starts which are complete in all respect and the rent received from the constituents have been duly recorded in cash book from time to time. Sir, P-11 & P-13 are the Rent Register of Potato whereas A-2/22 & A-2/9 are entry register of Potato (bhandaran / nikasi register). Since same gate pass no. Taul Parchi No. rent amount, weight of potato and number of bags etc. are appearing in aforesaid four registers i.e. P-11, P-13, A-2/22 & A-2/9 A-1/1 to A-1/5 therefore to treat them differently for making huge addition is highly unjustified. The aforesaid fact were already brought to the knowledge of ADI also vide our letter dated 22.10.2009 in compliance to the query dated 19.10.2009. Copies of the same are enclosed at pages..... of the paper books.*

*That Sir, for instance in most of the government departments while entering, a gate pass is made in which gate pass no. and name of party, purpose of visit etc. are mentioned and issued to the concerned person and while going out of the office if only gate pass no. was noted and scored out in register that does not mean that since name and address of out going person is not mentioned again therefore the said person is still in the office. The similar situation is there with the appellants in this case also simply because the assessing officer failed to understand and correlate all the facts mentioned in the aforesaid annexures P-11, P-13, A-2/22 & A-2/9 together at a time with judicious approach and open mind.*

*That on the basis of the annexures A-2/22 & A-2/9 and P-11 & P-13 a compilation has been prepared and is being filed herewith for your kind consideration and convenience to verify the submission and position explained above please be verified with seized registers, if necessary to ascertain true and correct facts.*

*That regarding objection of assessing officer that name and address of the constituents at Sl. No. from 225 to 4268 in P-11 and from Sl. No. 5048 to 6292 in P-13 are not mentioned, it is stated that it is only because the name & address of all the concerned constituents are already appearing in entry stock and rent register (i.e. A-2/22 & A-2/9) and in other subsidiary records and gate pass no. & other details in respect of each constituent as already appearing in these registers are appearing in the P-11 & P-13 also except names & address of the constituents which could not be mentioned by the dealing assistant to avoid duplicacy and repetition of work and to avoid time loss because there was great pressure of the farmers who were interested in release of their goods. This was the only cause of dealing clerk not mentioning the name of party and address of the party. Sir by not mentioning name & address in P-11 & P-13 nature of transaction will not be changed as has been deliberately changed by the assessing officer i.e it could not be inferred that the assessee indulged in own potato business and made investment and earned incomes. Such conclusion has been made in arbitrary manner due to own misunderstandings of the assessing officer.*

*That the most important fact is that the assessing officer issued a notice dated 19.10.2011 u/s 142(1) as discussed in para 4 of the assessment order and from the notice it will appear that the query was made only in respect of seized annexure P-11 and P-13 but not in respect of annexure A-2/22, A-2/9 and A-1/1 to A-1/5 which are the preliminary document and seized in the course of search. If the assessing officer would have examined A-2/22, A-2/9 and A-1/1 to A-1/5 than probably no question would have cropped up but the assessing officer miserably failed in putting the query.*

*That at page 6 of the assessment order a chart has been produced by the assessing officer for working out the alleged undisclosed investment but while preparing the chart the assessing officer miserably failed to consider Annexure A-2/22, A-2/9, A-1/1 to A-1/5 which are foundation register in respect of in coming and out going of potatoes with complete details and it is also a fact that the weight of potato as mentioned in column no. 4 of the chart is duly tallied with bhandaran / nikasi register also i.e. the above four registers which may kindly be verified at your end also.*

*That Sir, it is a search assessment and chapter XIV-B of Income Tax Act' 61 deals with ascertainment of undisclosed income of the party for the block period with reference to the evidence unearthed during the search or information available which are relatable in such evidence but in the present case the documents mentioned above as P-11 & P-13 and its columns which are in dispute duly tallied with regular books, therefore the said document under reference can not be called incriminating documents, so based upon the same addition made by the Assessing Officer is illegal.*

*That in this connection it is also necessary to mention here that in said annexure P-11 & P-13 on various dates, the partners of the firm have put their signatures also in token of verification of the details of the respective columns and collected the rent receipt too and once the rent is tallied with the regular books then drawing any adverse view based on surmises and conjectures are unwarranted.*

*That it is also a fact that the Assessing Officer failed to bring any person from whom the partner purchased the potato for their own*

*business/profit and when no such attempt was made by the Assessing Officer it clearly shows that false addition was made for the sake of addition which is a simple way to create tax liability.*

*That likewise no material has been brought on the record by the Assessing Officer/Department that to whom the partners of the firm sold their own potato to earn profit.*

*Further during the search or survey no unaccounted investment or cash was found in the cold storage premises hence on this very fact the allegation of own potato business on wrong inferences drawn on the basis of P-11 and P-13 is incorrect although duly explained regarding alleged potato business. Thus the addition of Rs. 23,31,12,832/- is absolutely unjustified and uncalled for.*

*That the assessing officer also failed to make enquires from any constituents who had stored their potatoes in the appellant's cold storage whether they had kept their potatoes or not when their names and addresses were available with the department.*

*Further that the assessing officer stated in the order that Raj Kumar Kesarwani indulged in the potato business which is also not correct in so far as the P-47 of LP-1 belong to Narandra Cold Storage and connected with the said concerned and not concerned with present firm. Therefore the observation made at P-6 are liable to be ignore.*

*That likewise entire working of the assessing officer At P-6 regarding investment and profit is baseless prepared by the assessing officer as per her own whim and wishes simple to justify search by some giving reasons or other by without considering whether it is relevant or irrelevant specially when from the year 1978 till date. Such type of arbitrary addition was never made except during the year. The entire addition made by assessing officer on the basis of incorrect inference drawn by her.*

*That in computing the income the assessing officer made an addition of Rs. 21,08,69,838/- on account of investment in potato and alleged profit earned there on to the extent of Rs. 2,22,58,483/-, meaning thereby that total amount of Rs. 23,31,28,321/- involved in such business but in course of search operation no undisclosed amount on*

*investment was found. So therefore, a natural question arises that where such funds have gone and this fact also proves that the addition made is completely hypothetical and is based on surmises only .*

*That further a notice under section 142(1) read with section 153A of the I.T. Act was issued and in the said notice a query was made (query no. 4) which is reproduced as under:*

*“You are requested to submit that the inventories of opening stock and closing stock with vouchers in support of valuation of stock to justify the stock shown in the audited final account filed with the return of income.*

*To furnish comparative purchases, sales and gross profit rate for the year under consideration and for last three years.”*

*That in compliance to query no. 4 a details explanations were furnish which is dated 01.07.2011 and reply to query no. 4 the explanation of the assessee is as under:*

*यह कि आपकी नोटिस के प्रश्न संख्या 4 के सम्बन्ध में यह कहना है कि फर्म में कोई खरीद व बिक्री का व्यवसाय नहीं होता है। जो भी किसान अपना आलू रखते हैं मात्र उनसे किराया प्राप्त होता है। चूँकि माल फर्म का नहीं होता है इसलिये रहतिया का प्रश्न ही नहीं उठता है।*

*That in compliance to query no. 5 our explanation given before the Assessing Officer is as under:*

*यह कि आपकी नोटिस के प्रश्न संख्या 5 के अनुपालन में निवेदन है कि उपरोक्त फर्म में खरीद व बिक्री का व्यवसाय नहीं होता है जैसा कि ऊपर पैरा में बता चुके हैं कि फर्म में आलू रखने वाले लोगों से किराया मिलता है अतः खरीद व बिक्री से सम्बन्धित तुलनात्मा विवरण नहीं बन सकता।*

*That from the above two replies on the basis of query made by the assessing officer a specific reply as narrated above was given to the*

*assessing officer that assessee never indulged / dealt trading activity in respect of potato business on the basis of explanation offered and considering the past records as well as nature of business no adverse view was taken by the assessing officer **till assessment year 2007-08 as well as from assessment year 2009-10 onwards. Once the nature was accepted from the year of inception then there is no need to draw any contrary view only during the year under consideration simply on presumption.***

*That in this connection a chart is also enclosed in the paper book showing gross receipts from potato rent received by the assessee from different constituents as well as in chart weight of potato kept in the cold storage is appearing likewise rent of per quintal charges of potato are mention so once the assessing officer accepted that our gross receipts is correct, weight is correct then there is no justification to say that the partner did potato business simply because two column of annexure P-11 and P-13 in which name and address of constituents left blank for certain reasons but other column are fulfilled and complete then there is no justification to proceed on irrelevant and hypothetical consideration which suits to assessing officer. The matter required proper consideration of all the documents and all columns filled up in the registers but the assessing officer measurably failed to ignore the relevant columns **and on two blank columns such adverse inference was drawn ignoring A-2/22, A-2/9 and A-1/1 to A-1/5** which are the same type of register. Thus the assessing officer accepted the entry register and ignored the nikasi register on irrelevant consideration.*

*Thus the seized register may please be considered in uniform method.*

*Register no. .... to be compared with another register.*

*A-2/22 to be compared with P-11.*

*A-1/1 to A-1/5 to be compared with P-13.*

*That the blank column as appearing in P-11 and P-13 were not compared by the concerned assessing officer with seized another register A-2/22, A-2/9 and A-1/1 to A-1/5 and A-1/1 to A-1/5. Thus the A-2/22, A-2/9 and A-1/1 to A-1/5 and A-1/1 to A-1/5 were the initial register in which complete details are available in different columns*

*and same column are appearing in P-11 and P-13 but the assessing officer failed to consider the initial register that is to say entry register.*

*That Sir, in entire assessment order there is no finding that the books of accounts are unreliable and vague, proviso to Section 145(3) of the Income Tax Act has not been made applicable hence the additions have been made in a very vague, and casual manner and the same is unwarranted and liable to be deleted.*

*That thus in the light of above submission it is further stated that even no enquiry was made by the assessing officer by calling any partner whether they are engaged in potato business and whether any purchase and sale of potatoes was made by them. This request is made with a background that in any earlier or subsequent assessment year such type of allegation was never made by the department especially when sufficient evidences exist on record that the firm kept/ stored potato of different constituents only on rent basis. Likewise the assessing officer while framing the assessment forgot the fact that search assessment is to be framed only on the basis of incrementing materials found during the course of the search and not on the basis of regular books and presumption/ wrong inferences as taken in the present case.”*

11.9           The Assessing Officer submitted his report which is reproduced in the appellate order as under :

*“With regard to addition of Rs.23,31,28,321/-, it is submitted that after discussion with FCA, assessee was required to explain on following points vide order sheet entry dated 18.07.2012 fixing the date of compliance on 19.07.2012.*

- i.       Produce Khasra and Khatauni of at least 50 farmers who had stored potatoes in your cold storage in support*

*of holding of agricultural lands.*

- ii. Please state as to how much potatoes are produced in land owned by the partners of the firm. Detail of consumption of potatoes may also please be explained. During the course of discussion, you have stated that potatoes which are produced are part of daily consumption. Please furnish the details of above consumption alongwith supporting evidence.*
  
- iii. Justification of purchase of potatoes and storage as per seized paper found from residential premises of one of the partners Sri Raj Kumar Kesarwani may please be explained. The said seized paper cannot be a rough paper because some entries are reflected in the books. As has been stated by you that the entries in the seized papers and potatoes relates to M/s Narendra Cold Storage is not acceptable because Narendra cold storage was not in existence from the years relevant to the block period. The building of cold storage was not in existence and plotting of land was being executed, therefore question of storage of potatoes in Narendra Cold storage does not arise. Please explain as to where the said potatoes mentioned in the seized papers were stored ?*
  
- iv. Please correlate the ownership of potatoes with that of seized documents.”*

*Points no.( i) and (ii) remained uncomplined with till date and point no.(iii) is not fully explained. Serial no.11 of Page no.47 of LP-1 seized*

from the residential premise of one of the partner Sri Raj Kumar Kesarwani has not been explained with evidence. Relevant orders from consumer forum as allegedly stated by the assessee has also not been produced for verification. Examination of books of accounts and seized papers in respect of ownership of potatoes has been made and following discrepancies have been noticed which has been confronted to the counsel of assessee vide order sheet entry dated 25.07.2012 and he was further required to explain on various points with supporting evidence on 26.07.2012.

“

Sl No.	Date	Amount as per Rent receipt register	Amount as per cash book	Receipt no. as per Recent receipt register	Receipt No. as per cash book
1	11.06.2007	1,32,345	1,32,345	361- 402	361 - 385
2	12.06.2007	40,687	40,687	403 -413	386 - 413
3	28.09.2007	55,010	55,010	1739 - 1761	1756- 761
4	30.09.2007	46,153	46,153	1780 - 1799	1797-799
5	01.10.2007	68,363	68,363	1800 - 1832	1817- 832

Close to 50 entries were test checked. In respect of previous hearing, the counsel has submitted few documents in order to explain on entries on page no. 47 of LP-1 seized from the residence of Sri Raj Kumar Kesarwani, the partner. The documents are –

- i. Litigation in Allahabad High Court between Jyoti Agarwal and ADJ and others pertaining to Narendra Cold Storage
- ii. Certificate from Allahabad Bank, Civil Lines, Allahabad to explain the entries at sl. No. 9 and sl. No.11 of above LP. One of the entries amounting to Rs.75000/- does match with the certificate provided but the other entry is that of Rs.1,00,000/- whereas the certificate pertains to Rs.1,27,600/-. Further, because order of the consumer has not been produced, it is difficult to fully agree with the contention of the assessee .
- iii. Further, clarification are also needed on the issue of

*reconstitution of partnership deed of the firm on the death of any partner. All partnership deed ( duly certified) executed after death of any of the partner pertaining to the relevant assessment years may be produced. On perusal of one of the partnership deed dated 11.08.2001(uncertified copy), it is found in clause 25 that partnership does not dissolve even after death of one of the partner. This clause overrides section 42 of Partnership Act,1932. It may be explained as to how can a clause in a partnership deed have an overriding impact on a statute.”*

*The date of compliance for the above was also fixed for 26.07.2012 at 12 noon but an adjournment application was filed by the counsel of assessee authorizing one employee of assessee for noting the further date of hearing. Case was adjourned for 27.07.2012 at 12 noon. Even on 27.07.12, neither anybody attended nor any adjournment application whatsoever has been filed.*

*It is submitted that assessee failed to substantiate its claim with evidence after availing proper opportunity of being heard at this stage also. As stated above, Points no.( i) and (ii) remained uncomplined with till date and point no.(iii) is not fully explained by the assessee in support of its contention. Partners of assessee firm owned agricultural land and it is accepted fact that they produces potatoes for own used and for seed purposes. Assessee failed to explain as to how it stored in cold storage and identified its own potatoes. During the course of discussion, it came to notice that one of the partners Sri Bhairo Nath Kesarwani expired on 29.10.2008. Proper fact was not provided by the assessee during the course of assessment proceedings. Assessee was specifically asked to produce the partnership deed in the assessment year 2009-10 as per notice under section 142(1)issued by my predecessor but copy of reconstituted partnership deed was not produced before herself during the course of assessment proceedings. Again, assessee was required vide order sheet entry as mentioned above by the undersigned to produce copy of reconstituted partnership deed after death of any partner, but assessee failed to furnish the same. It is established that no reconstitution of firm was made after the death of one partner Bhairo Nath Kesarwani. **In this way, the firm should be assessed as “AOP”.***

*Since assessee failed to explain with evidence, addition of Rs.*

23,31,28,321/- is established.”

11.10. The assessee filed rejoinder to the remand report before the Id. CIT(A), which reads as under :

*“(i) That with regard to para 9-D of the remand report it is submitted that an addition of Rs. 23,31,28,321/- has been made in arbitrary manner. In the remand report the assessing officer has mainly **put his all emphasis** that the appellant failed to extend his co-operation in remand proceedings but his such allegation is only an attempt to justify his incorrect and unhealthy action and in this regard events of this proceedings are as under :*

#### **EVENTS**

- a) *Hearing of the appeal before your goodself was fixed on 09.07.2012.*
- b) *On 09.07.2012 two separate sets of paper books were filed voluntarily one set for your good self and another for the assessing officer for comments and sending remand report. (copy of covering letter at page 85)*
- c) *On 12.07.2012 a notice for hearing of appeal was served fixing the date on 30.07.2012. (copy of notice at Page 84)*
- d) *On 15.07.2012 i.e 15 days before the hearing the appellant **suo-motto moved** an application through speed post before the Dy. C.I. T , Central Circle, Allahabad for verification of the facts on the basis of seized annexures as mentioned in the written submission also at page 77 to 83 of the paper books.*
- e) *On 18.07.2012 the appellant suo-moto/voluntarily appeared before the aforesaid Dy. C.I.T. Central Circle, Allahabad and discussed the facts. Copy of the order sheet of the said date enclosed at page 75 to 76 then hearing was adjourned to 19/07/2012.*
- f) *On 19.07.2012 the Dy. C.I.T. Central Circle, Allahabad **suo-motto** adjourned the hearing for 20.07.2012.*

- g) *On 20.07.2012 when appellant's C.A. and accountant were present in the office of the Dy. C.I.T. Allahabad along with photo copies of various seized annexures/ details and also furnished list of documents brought there for verification along with copy of order sheet dated 18.07.2012 but since the said Dy. CIT was not in the office therefore the above mentioned documents / papers were delivered to the concerned staff available in the office and receipt thereof was obtained, copies of the same are enclosed at page 72 to 74.*
- h) *On 21.07.2012 and 22.07.2012 the income tax department was closed due to weekly holidays.*
- i) *On 23.07.2012 the appellant's C.A. along with staff B.D. Pant appeared before the learned Dy. CIT who su-moto verified the facts of the referred annexures and filled up the order sheet and the relevant portion of the order sheet is reproduced as under :*

*“ The assessee produced receipts books of the registers and taul parchi in support of his contentions and taken entries of registers of P-11, P-12 (corporate) and P-13 were got verified and found /test checked.*

*Further verification of rent receipt will be made from the books of accounts on the next date of hearing on 25.07.2012 at 11.00 am.”*

- j) *On 25.07.2012 as per direction of the learned Dy. CIT on 23.07.2012 the **appellant's CA** along with our staff **B.D. Pant and Sanjay Kesarwani** appeared and during their presence seal of **impounded annexure P-11 and P-13** was opened and after opening the seal of **annexures P-11 and P-13** necessary verification fo the records for submission of the remand report was examined and the same was **again sealed under their signatures**. Copy of the Panchanama dated 25.07.2012 made by the learned Dy. CIT is enclosed herewith and then the hearing was adjourned to 26.07.2012. (page 36 to 38)*
- k) *On 26.07.2012 due to illness of appellant's C.A./ an adjournment application was moved by an authorized person and thereafter hearing was adjourned to 27-7-2012. (page 39)*

- l) *On 27.07.2012 the Dy. CIT prepared the remand report and closed the chapter in his own ways. Contents of the order sheet entries are enclosed herewith.*

*13 (ii) That in the light of above facts it is further submitted that in the remand report at page-5 allegation made by the assessing officer that the compliance were not made is incorrect and it appears that the purpose of such allegation is nothing but to divert the mind of higher authorities. The appellant su-moto vide his letter sent on 15.07.2012 through speed post made a request to the assessing officer to verify the seized documents and thereafter on 18.07.2012, 23.07.2012 and 25.07.2012 the said documents were verified and examined by the assessing officer in the light of submission made in the paper books and found the same in order. Copies of the letters furnished before the assessing officer during the verification process are enclosed in the paper book. In this way the verification of the seized documents was started on the basis of appellant's written and verbal requests and not by the department nor any such notice was given by the assessing officer to that effect. Hence such allegation of non-compliance made by the assessing office is false and unjust and therefore the same are liable to be withdrawn.*

*13 (iii) That at page-5 of the remand report other allegation of the assessing officer that point no 1, 2 and 3 of the order sheet entry dated 18.07.2012 fixing date 19.07.2012 remained un-complied with is also not correct. In this regard appellant's explanation containing various details was filed on 24.07.2012 (page 43 to 71) because on 19.07.2012 and 20.07.2012 the matter was not taken up by the assessing officer due to his own busy program and on 21.07.2012 and 22.07.2012 the department observed weekly holidays. On 23.07.2012 our C.A. Sri Sanjay Gupta and Accountant appeared before the assessing officer along with copies of the seized documents and the verification work was done.*

*13(iv) That in the above mentioned explanation letter filed on 24.07.2012 quarries at point no 1, 2 and 3 as required by the assessing officer were fully explained in details along with the evidence, hence the assessing officer is wrong in saying that the*

*quarries at point no 1, 2 and 3 were not complied. Copy of the letter dated 24.07.12 is enclosed herewith.*

*13(v) That as per quarry no 1 the assessing officer required Khsarara Khatauni of at least 50 farmers who had stored potatoes in the cold storages in support of holding agriculture land. To this quarry the appellant furnished his explanation as under:*

- a) That the transaction with different concerned constituents from whom we have received rent was done during the period 01.04.2007 to 31.03.2008 whereas now we are in the year 2012, so please consider whether it is possible to locate them after four years? and whether the constituents will give their Khasara Khautani when their transaction was over ?*
- b) That it was also brought to the knowledge of the assessing officer that the nature of the business of cold storage is just like nature of business of dry-cleaning and stitching of clothes (Tailor) where when a person gives his cloth for dry-cleaning or stitching he never give advance payment because cost of his goods is more than the service- amount charged. Moreover if the shopkeeper is asked to bring his four years old customer whose clothes were dried- cleaned or tailored by him then how can he do so ? So similar situation is there in the appellant's cold storage also. Therefore the matter requires a practical approach and sympathetic consideration from the angle of a businessman only.*
- c) That in cold storage business there is neither any government's rule/ act nor in any other cold storages of the district such type of khasara khautani is demanded from the constituents who store their potatoes then how we can do so? And if we demand such thing no body will come to us to store the potatoes and in this way the cold storage will come to stand still and ultimately it will cause loss to the revenue and unemployment also.*
- d) That sir kindly consider that our receipt received from the constituents during the year, books entries, method of accounting and past record, are not in doubt, therefore querries as raised by the assessing officer are not appropriate nor suits to the nature of business activities.*

- e) *That regarding point no -2 that how much potatoes are produced in the land of partners, it is stated that already we have submitted that potatoes are produced in limited quantity only in ancestral land of the partner's for consumption of huge family members of this group and consumed in domestic use only and seeds for coming year. Moreover it is an agriculture produce/ agriculture income which in any way cannot be linked up with any other business.*
- f) *That regarding point no -3 about a loose paper found from the residential premises of Sri Raj Kumar, it is stated that in this respect our explanations as already furnished before the assessing officer vide the aforesaid a letter on 24.07.2012 at page no- which is reproduced as under :*

*“Justification of purchase of potatoes and storage as per seized paper found from residential premises of one of the partners Sri Raj Kumar Kesarwani may please be explained. The said seized paper cannot be rough paper because some entries are reflected in the books. As has been stated by you that entries in the seized papers and potatoes relate to M/s Narendra Cold Storage is not acceptable because Narendra Cold Storage was not in existence from the years relevant to the block period. The building of the cold storage was not in existence and plotting of land was being executed, therefore question of storage of potatoes in Narendra Cold Storage does not arise. Please explain as to where the said potatoes mentioned in the seized papers were stored.”*

*That in compliance to the above query it is stated that it is a fact that we stated that page no. 47 of the annexure LP-1 is a rough paper/ notings because credit side and debit side both sides entries on the said seized paper **are identical and similar, therefore we call the same a rough paper only**. For your understanding and with a view to enable you to take judicious decision with regard to such seized paper, which is not connected with the appellant firm in any manner, a separate chart is enclosed herewith showing therein all the entries of the said paper and mentioning thereby nature / facts against each such entries along with supporting documents / evidences. So kindly consider **year, month and nature** of all such entries based on the*

*details as mentioned in the said chart duly supported by the evidences / documents.*

*That from the enclosed chart and explanations against each of the entries duly supported by the documents / evidences mentioned, it is now crystal clear that the said seized paper has no connection / link or relevance with the appellant firm. From the enclosed papers such as challans, details of cheques, case-court order, form-16A, payment of brokerage in respect of sale of Narendra Cold Storage, payment to C.A. etc. it is clear that the entries relate to Narendra Cold Storage only and not to the appellant firm, **thus the inference drawn on the basis of these entries/ document is liable to be ignored legally.***

13 (vi) *That thus in this way queries at point no 1, 2 and 3 raised by the assessing officer were properly and fully explained by the appellant which even could not be perused by the assessing officer and therefore he made such uncalled for allegation, for the reason best known to him but the same is unfair and unjustice.*

13 (vii) *That in the remand report at page -5 another new issue was raised by the assessing officer about non execution of partnership deed due to death of Bhairo Nath Kesarwani on 29.10.2008 and at the time of putting the query, the assessing officer on his own arrived on a conclusion also that the firm should be assessed as "AOP". In this regard it is clarified that the partnership deed was duly been executed and the partnership firm is valid and the said issue as raised is of no relevance for the year under consideration.*

13 (viii) *That sir kindly consider that your good self called a remand report from the assessing officer in the light of our submissions/ details/ information in the form of two sets of paper books made in the light of assessment order dated 28.12.2011. Though on the initiative of the appellant the assessing officer verified the seized documents in connection with the additions of Rs. 23,31,28,321/- and Rs. 37,30,710/- and other disallowances and when the same were found in order then the assessing officer shifted on the new issue which are not in dispute. In this way the assessing officer raveled beyond his jurisdiction.*

*13(ix) That in the light of aforesaid events kindly consider that how and in what manner the matter was dealt with. Therefore the allegation as made in the remand report against of the appellant are not correct and the same are liable to be withdrawn.”*

11.11 The Id. CIT(A), considering the explanation of the assessee confirmed the addition and his findings in para 7.2 of the appellate order are reproduced as under:

***“7.2 Decision:***

*The logic on which the A.O. has made the addition is that three release registers mentioned in the assessment order did not have the names and addresses of the persons from certain serial no. to certain serial no. against them. The A.O. has made the reply of the assessee a basis to make the foundation of the addition in which the assessee had stated before the A.O. that complete details are mentioned on the receipts issued to the potato owners at the time of release. The A.O. has inferred that whatever details were available with the assessee taken from the rent receipts were recorded in the registers used for the release of the potatoes. If the assessee at all had the details about the remaining constituents, the same would have been mentioned in the register. Since from certain serial no. to certain serial no. of the registers, the names and addresses of the constituents have not been mentioned, no such persons actually existed. Therefore, potatoes stored against those serial nos. belong to the assessee. The A.O. has also referred to the statement of one of the partners Shri Raj Kumar Kesarwani who had stated that he had made investment in potatoes. The A.O. mentions that the seized paper has been made part of the assessment order in the case of Shri Raj Kumar Kesarwani for A.Y.2006-07. The aforesaid paper is part of Annexure A-1/7. The A.O. did not accept the plea of the assessee that the names of the persons and their addresses were available in other register used for Bhandaran/ storage of the potatoes.*

*In order to give the assessee one more opportunity to explain their view point the issue was remanded to the A.O. The A.O., vide his*

*report dated 27.07.2012, has submitted that he asked the assessee through order-sheet entry dated 18.07.2012 to comply with the following:-*

- i. Produce Khasra and Khatauni of at least 50 farmers who had stored potatoes in your cold storage in support of holding of agricultural lands.*
  
- ii. Please state as to how much potatoes are produced in land owned by the partners of the firm. Detail of consumption of potatoes may also please be explained. During the course of discussion, you have stated that potatoes which are produced are part of daily consumption. Please furnish the details of above consumption alongwith supporting evidence.*
  
- iii. Justification of purchase of potatoes and storage as per seized paper found from residential premises of one of the partners Sri Raj Kumar Kesarwani may please be explained. The said seized paper cannot be a rough paper because some entries are reflected in the books. As has been stated by you that the entries in the seized papers and potatoes relates to M/s Narendra Cold Storage is not acceptable because Narendra cold storage was not in existence from the years relevant to the block period. The building of cold storage was not in existence and plotting of land was being executed, therefore question of storage of potatoes in Narendra Cold storage does not arise. Please explain as to where the said potatoes mentioned in the seized papers were stored ?*
  
- iv. Please correlate the ownership of potatoes with that of seized documents.”*

*The A.O. has remarked that the assessee did not reply to query nos. 1 & 2 till the date of submission of the remand report. Query at SI No. 3 was also not fully explained. The A.O. has also test checked close to 50 entries found written in document marked LP-1. The A.O. found the difference in receipt nos. as per receipt register and receipt no. as per cash book. The A.O. has referred to the litigation in Allahabad High Court between Jyoti Agarwal and ADJ and others pertaining to Narendra Cold Storage. The A.O. gave opportunity to the assessee to reply the queries on 26.07.2012 but received only an*

*adjournment application filed by the counsel of the assessee. The A.O. further gave one day time to the assessee. But nobody attended and any adjournment application was also not filed either.*

*I have given due thought to the submission of the appellant and to the report of the A.O. the appellant has been arguing that the A.O. did not verify other relevant registers. But I find that the A.O. has once again given opportunity to the assessee to explain the ownership of the potatoes entered in the registers from certain serial no. to certain serial no. having no names and addresses. Whatever may be the practices of the assessee, I find that it has failed to avail of the opportunities given by the A.O. to explain the impugned ownership of the potatoes. In the light of above facts and in the circumstances, I find my views aligned with the A.O. that the appellant could not substantiate the claims whenever the opportunity was given to it. Accordingly, I uphold both the additions amounting to Rs.21,08,69,838/- being the investment in the potatoes and Rs.2,22,58,483/- being the profit on the sale of the potatoes. The affidavit given by one of the partners is nothing but the reiteration of submission given before the A.O. and before me. Those do not give any support being independent evidence to be considered. Moreover, the veracity of the content of the affidavit also becomes questionable in the face of no replies to the queries raised by the A.O. Again the confirmation letters given from the employees also do not carry much meaning mainly because (i) the letters only reiterate what the assessee had stated (ii) the possibility of the employees under the influence of the assessee cannot be ruled out.*

***I, therefore, dismiss the grounds taken above.”***

12. The Id. Counsel for the assessee reiterated the submissions made before the authorities below and submitted that the addition has been made merely because the names and addresses of the parties/constituents are not recorded in the Exit Register. The AO in the remand report found the entries of assessee in Bhandaran

and Nikasan registers tally with the exit register. Complete copies of Annexure P-11 to P-13 of Bhandaran Nikasan register seized by the department as A-2/22, A-2/9, A-1/1 to A-1/5 have been filed in the paper book and specimen of the same are filed in the written submissions at page 76 to 83. The Id. Counsel for the assessee by referring to these documents, submitted that all the entries of Exit Register which is the basis for making addition, tally with the Bhandaran and Nikasan Register. PB-87 is the remand report of the AO dated 23.07.2012 in which the AO after verifying the records of P-11 to P-13 and A-/, A-2/9, A-1/1 to A-1/5 found with the receipt book and Taul Parchi support the contention of the assessee and the entries were got verified and were test checked. He submitted that in the cold storage, only potatoes can be stored and the same cannot be used for any other purpose. No other business activities are permitted. He has referred to the U.P. Regulation of Cold Storages Act, 1976 to highlight various provisions to show that only licensed person can run a cold storage and cold storage can be used for storage purpose and it is highlighted in the Act that at the time of delivery of goods, the hirer shall surrender the receipt and pays all charges due to the licensee. Therefore, there is stress on maintenance of rental receipts. Since the assessee maintained proper records of cold storage and no violation of any law has been brought on record and the assessee maintained proper Taul (weight) receipts and rent receipts and all the registers, therefore, merely because no names were

mentioned at some places in Exit Register, is no ground to presume that the assessee has made investment in purchase of potatoes. He has submitted that the addition is made merely on presumption and no material or evidence has been brought on record to prove that the assessee is engaged in business of potatoes or making investment in purchase of potatoes. He has submitted that the assessee's case is only of bailee and the transaction between the assessee and the constituents are the bailment, i.e., storage of potatoes and later on delivery. Therefore, no liability can be put upon the assessee as is done by the AO. He has relied upon the decision of Hon'ble Supreme Court in the case of CIT vs. Messrs P.M. Rathod & Co., 1959 AIR 1394 on the proposition that it is the duty of the bailee to dispose of the goods in accordance with the directions of the bailor, which in that case was to deliver the goods against payment. He has also relied upon the decision of Hon'ble Supreme Court in the case of UCO Bank vs. Hem Chandra Sarkar (1990)3 SCC 389, in which it was held that bailee does not represent bailor – where person has no authority to change contractual or legal relationship of parties, this indicates that he is a bailee and not an agent. He has submitted that in the case of the assessee, there is no element of sale at all. Therefore, there is no question that the assessee concealed unexplained sale of potatoes. He has, therefore, submitted that the entire addition is unjustified.

13. On the other hand, the Id. DR relied upon the orders of the authorities below and submitted that the assessee failed to explain the entries in receipt and dispatch registers. No names and addresses are mentioned in the register. Therefore, onus upon the assessee to explain the entries has not been discharged. From Annexure P-11 to P-13, the AO found that the assessee has made unaccounted investment in purchase of potatoes and also earned profit. The assessee did not produce complete details before the AO. The AO called for details at the remand proceedings, which were not filed. The principle of bailment would not be applicable in the case of the assessee and the findings of the authorities below lead to an inference that the stock belonged to the assessee only.

14. We have considered the rival submissions and the material on record. The Id. Counsel for the assessee, during the course of arguments, referred to U.P. Regulations of Cold Storage Act, 1976, which regulated the functioning of cold storages and extended to whole of Uttar Pradesh. The definition of cold storage has been provided as “Cold Storage” means an enclosed chamber insulated and mechanically cooled by refrigeration machinery to provide refrigerated condition to agricultural produce stored therein, but does not include refrigerated cabinets and chilling plants having a capacity of less than 100 cubic metre. The definition of “hirer” provides “a man who on payment hires space in a cold storage for storing

agricultural produce”. Licensee would mean “any person to whom a license is granted under this Act”. The meaning of “receipt” has been provided as “receipt means a cold storage receipt including a duplicate receipt issued by a licensee under this Act. According to section 5 of the above Act, no person shall carry on the business of storing any agricultural produce in a cold storage except under and in accordance with the terms and conditions of a license granted under this Act. Permission is required for construction of cold storage from Licensing Officer on specifying circumstances. According to section 12 of this Act, every licensee shall take such care of the goods stored in his cold storage as a man of ordinary prudence would take of his own goods under similar circumstances and conditions. Section 13 provides duty of every licensee before commencement of business every day, display and exhibit in the prescribed manner on or near the main entrance of cold storage, the information regarding total capacity of cold storage, capacity physically occupied and vacant capacity. Section 14 provides, licensee shall not refuse to store potato seeds of bona fide cultivators, and further provides that no licensee shall refuse to accept the agricultural produce for storages in his cold storage without any lawful excuse. Section 15 provides, every licensee shall keep in his cold storage agricultural produce of one hirer separate from such produce of other hirer and from other produce of the same hirer, for which a separate receipt has been issued, so as to permit at all times the identification and

easy delivery thereof. Section 16 provides licensee to allow facilities for the hirers to inspect the goods. Section 19 provides above delivery of goods and provides, every licensee shall on demand made by or on behalf of the hirer, deliver the goods stored in the cold storage, provided the hirer surrenders the receipt and pays all charges due to the hirer. Every receipt so surrendered to the licensee shall be defaced and shall not be re-issued. Subject to agreement between the parties, the hirer may take partial delivery of the goods stored in a cold storage and in every such case, the licensee shall make necessary endorsement on the receipt and return it to the hirer. Section 20 provides licensee's lien over possession of goods in cold storage until the receipt thereof is surrendered and necessary charges are paid in accordance with section 19. Section 27 provides every licensee shall maintain account books and records in such form and manner as may be prescribed. Section 32 provides, every licensee shall issue in the form prescribed, a receipt for the agricultural produce stored in his cold storage. The above salient features / provisions in the U.P. Regulation of Cold Storages Act clearly specify the rights and duties of the licensee and hirer. The assessee claimed to have received rent from the hirer for storage of potatoes in its cold storage. Thus, the above Act clearly specified and highlighted that the licensee could run the business of cold storage on getting license from the State Government for the purpose of storage of agricultural produce and at the time of inward and delivery of goods to the hirer,

the hirer shall have to surrender the receipt to the licensee. Therefore, the above Act clearly provides mandatory maintenance of receipts by the licensee in prescribed form for issue to the hirers for storage of agricultural produce. In the above Act, the licensee is not authorized to store their own agricultural produce for business purpose in the same cold storage. No violation of the above Act has been noticed or brought on record by the Assessing Officer in this case. It is, therefore, clear from the findings of the authorities below that the assessee did not violate the terms of provisions of the U.P. Regulation of Cold Storages Act, 1976. The cold storage of the assessee has specified storage capacity. The incoming of the potatoes stored in the cold storage have not been disputed. However, it is not clarified in the orders of the authorities below as to when the assessee allegedly stored its own potatoes, in which investment has been made in purchase, where the incoming potatoes kept on hire have gone out of the storage. It is also not specified in the orders of the authorities below whether there had been further space available for keeping/storage of the potatoes of the assessee alleged to have been purchased for investment purposes. When potatoes are released from the storage to the hirer, the receipts are surrendered by the hirer and the goods are delivered to the hirer on payment of charges. The assessee in the paper book has filed large number of rent receipts which are issued to the constituents/owners of potatoes in which complete details have been mentioned to show to whom the goods have been delivered with

complete particulars and weight of potatoes etc. Thus, the assessee maintained the mandatory receipts meant for keeping and delivery of the agricultural produce to the hirer in their cold storage. No incriminating material / evidence was found in the search or survey that the assessee made any investment in purchase of potatoes or made sales thereof or earned profit thereon. During the course of search and survey, no unaccounted stock of potatoes belonging to the assessee was found. No evidence has been brought on record to prove any history of the assessee in past for dealing in potatoes or making investment in purchase of potatoes. The assessee maintained proper books of account. Gate passes are issued to release the potatoes to owners/constituents and copies retained by the assessee. Weight receipt (Taul Parchi) is issued with complete details of potatoes and the names of owners/constituents are filed in the paper book to support the above findings. Bhandaran and Nikasan Registers were also seized as A-2/22, A-2/9, A-1/1 to A-1/5. These contain complete details of gate passes, Taul Parchi, number of bags, weight, delivery and rent etc. The same tally with the seized documents P-11 to P-13, which is the only basis of the addition. At the remand proceedings, these documents were produced before the AO and the AO vide order sheet dated 23.07.2012 found the contention of the assessee to be correct and the receipt book and Taul Parchi support the contention of the assessee and the entries tally with the seized paper P-11 to P-13 and the AO on verification and test checking found the

contention of the assessee to be correct. It would lead to irresistible conclusion that the assessee delivered back the same goods (potatoes) to their owners / constituents, who have stored their goods in the cold storage of the assessee, on surrender of rent receipts after expiry of storage period. It would also establish that the assessee did not make any investment in purchase of potatoes. Sale of potatoes by the assessee or earning of profit thereon is only assumption of the AO without corroborated by any evidence or incriminating material on record. The explanation of the assessee is fully corroborated by Taul Parchi and the rent receipts. The assessee has filed voluminous Taul Parchies and rent receipts in the paper book, which falsify the findings of the AO. No evidence was found against the assessee at the assessment stage of dealing in potatoes. The AO wanted to tax the assessee on such unaccounted income on account of unaccounted investment in potatoes and unaccounted profit but no evidence has been brought on record to establish any such case against the assessee. Therefore, the onus on the AO to tax a particular income against the assessee has not been discharged. It appears that the addition has been made merely on the names and addresses have not been mentioned in the exit register. It was, thus, a presumption of the AO only that the assessee made unaccounted investment in the purchase of potatoes, in which there is nothing on record to support such finding of the AO. The details maintained by the assessee in Bhandaran and Nikasan registers, rent receipts, Taul Parchi clearly support the case

of the assessee that in the exit register, the assessee delivered back the goods to the same constituents/owners of potatoes who stored their goods on surrender of rent receipt and on payment of rent charges. Nothing is provided that it was mandatory for the assessee to mention the names and addresses in the exit register also. The assessee in page 71 to 72 of the written submissions has mentioned that in earlier assessment years as well as in subsequent assessment years, the assessee earned only income on account of rent, therefore, the authorities below on the principle of consistency should have accepted the claim of assessee. On examination of the Bhandaran and Nikasan register and comparison with the seized document P-11, 13 we find that all the entries are same at the time of delivery of goods which were recorded at the time of inward entry of taking the potatoes for storage except that names of the parties are not mentioned. Therefore, there is nothing before the AO to support his findings of assessee making unaccounted investment in purchase of potatoes or making sales or earning profit thereon. Since no violation of the Rules of Cold Storages Act has been brought on record and the assessee maintained mandatory rent receipts as per this Special Act, which is available on record, therefore, the authorities below should not have drawn adverse inference against the assessee. In the absence of any incriminating material or evidence against the assessee, we are of the view that the huge addition made against the assessee was merely based on presumption and assumptions of facts, which cannot take place of

legal proof. No evidence of purchase, sales or unaccounted stock belonging to the assessee during the course of search or survey was found or established. Thus, the assessee has been able to prove that the assessee acted only as a bailee and earned rental income. Thus, the authorities below have acted against the assessee in haste in making substantive addition without any basis and without considering entire seized material. We, therefore, do not find any justification for the authorities below to make or confirm the addition of the aforesaid nature. We accordingly, set aside the orders of the authorities below and delete the addition of Rs.23,31,28,321/-. Resultantly, the grounds of appeals of the assessee on this issue are allowed. Ground No. 3 to 15 are allowed.

15. The assessee on ground No. 16 & 17 challenged the addition of Rs.3,01,703/- under the head 'diesel expenses'. On examination of books of account, it was found that the purchase vouchers for diesel expenses claimed under the head generator expenses in cash are not supported by evidence. The assessee also explained before the AO that certain vouchers are misplaced or not traceable. The AO accordingly disallowed 10% out of these expenses. The Id. CIT(A) following his order for the assessment year 2005-06, confirmed the addition. The Id. Counsel for the assessee submitted that prior to search, no disallowances have been made on this head and comparative chart is filed at PB-113. The Id. DR relied upon the orders of the authorities below.

16. On consideration of the rival submissions, we are of the view that the authorities below were justified in disallowing the expenses under this head because it was admitted by the assessee before the AO that certain vouchers are misplaced or not traceable. However, the AO has not given exact details of the amount, in which the vouchers have not been produced before him at assessment stage. The diesel is used in generator, which is necessary for running of cold storage due to frequent failure of electricity in the State of U.P. Therefore, it was necessary component/expense for running the cold storage. Considering the above, it would be reasonable and appropriate to restrict the addition by disallowing 5% of the expenses instead of 10% confirmed by the authorities below. We, accordingly, modify the orders of the authorities below and restrict the addition of disallowance to 5%. In the result, these grounds of appeal of the assessee are partly allowed.

17. On ground No. 18 & 19, the assessee challenged the disallowance of petrol expenses of Rs.77,099/- and disallowance of 1,17,246/- under the head depreciation on car for personal user. The AO noted that personal user of the car by the partners cannot be denied and accordingly, 20% of these expenses have been disallowed. The Id. CIT(A) following his order for the assessment year 2005-06 confirmed the additions. The Id. Counsel for the assessee submitted that there

is no element of personal use of these expenses and in earlier years, no disallowance has been made prior to the block period and all vehicles were used for the purpose of business. On the other hand, the ld. DR relied upon the orders of the authorities below.

18. On consideration of the rival submissions, we are of the view that the addition is excessive in nature. The assessee is a firm and running a cold storage at different branches. Therefore, vehicles must have been used for the purpose of business. Nothing is specified in the order as to how the AO disallowed 20% of the expenses, but in absence of maintenance of any record or logbook of the vehicles, it could be inferred that the vehicles have been partly used for other than business purposes. Further, in preceding assessment year as per chart filed at PB-115 prior to block period, no disallowance has been made under this head. Therefore, the addition appears to be excessive in nature. We, accordingly, modify the orders of the authorities below and restrict the disallowance to 5% of the expenses on both these disallowances of expenses. The AO is directed to disallow 5% of expenses instead of 20%. These grounds of appeal of the assessee are partly allowed.

19. On ground No. 20 and 21, the assessee challenged the addition of Rs.5,47,928/- on account of addition under the head 'building'. The AO found that the assessee has made addition to the fixed assets under the head building. The assessee was required to produce the bills/vouchers for verification but no compliance was made. Therefore, the matter was referred to the Valuation Cell on 19.10.2011, who had submitted the report on 09.12.2011. This report was confronted to the assessee and the assessee filed his objections in which one of the objections was that the report of the DVO is not independent and it was prepared after obtaining the details of year-wise investment in construction from the assessee. It was only the opinion of the AO and that the DVO inspected the property on 18.11.2011 whereas the construction fall in different assessments from 2004-05 to 2010-11. The AO, however, did not accept the contention of the assessee and the difference in the cost of construction / investment as noted by the DVO and disclosed by the assessee was considered as investment from undisclosed sources in a sum of Rs.5,47,928/- and addition was accordingly made. The Id. CIT(A) following his order for the assessment year 2005-06 confirmed the addition. The Id. Counsel for the assessee reiterated the submissions made before the authorities below and submitted that the assessee maintained proper books of account which have not been rejected and during the course of search, no incriminating material was found against the assessee. The AO did not reject the

books of account of the assessee which contained day-to-day expenditure/investment recorded in the books of account. Therefore, the addition is unjustified. On the other hand, the ld. DR relied upon the orders of the authorities below.

20. We have considered the rival submissions and the material on record. Hon'ble Supreme Court in the case of Sargam Cinena vs. CIT, 328 ITR 513 held that when books of account of the assessee are not rejected, the Assessing Officer cannot refer the matter to the Departmental Valuation Officer. Hon'ble Rajasthan High court in the case of CIT vs. Pratapsingh Amrosingh Rajendra Singh & Deepak Kumar, 200 ITR 788 held that *“there was no dispute that the assessee maintained proper books of account and same had been accepted in past and no defects were pointed out in the books. The expenses were fully supported by vouchers. Full details were also mentioned in respect of each items in the books. Simply because valuation report was of a higher amount, books could not be said to be unreliable. The Tribunal was, therefore, justified in deleting the addition of Rs.55,780/-.”* The assessee filed details of investment made in earlier years in the property at pages 116 of the paper book, which support the submissions of the assessee that investment has been made from the assessment year 2004-05 to 2010-11. The assessee maintained proper books of account in past and it was only when

no regular books of account were found during the course of survey, the AO inferred that the assessee did not maintain regular books of account, but with regard to shortage of cash on which addition of Rs.37,30,710/- was made, the AO on perusal of the audit report relevant to assessment year under appeal took the figure of cash available with the assessee firm at Rs.64,70,642/-. Thus, the AO acted on the audit report, which is prepared on the basis of the books of account maintained by the assessee. Thus, there were no reasons to discard the books of account merely because the same were not found during the course of survey. The AO should have verified each and every entry from the books of account of the assessee on this issue before making reference to the DVO. However, no such findings have been given and the AO merely because the assessee did not produce bills and vouchers referred the matter to the DVO for estimating cost of construction. The findings of the AO are, therefore, not justified in view of the judgments of Hon'ble Supreme Court and Rajasthan High Court referred to above. It, therefore, appears that the matter requires reconsideration at the level of the AO. We accordingly, set aside the orders of the authorities below on this issue and restore the matter to the file of the AO with direction to re-decide the issue by considering the books of account produced by the assessee. In the result, ground No. 20 & 21 of the appeal of the assessee, are allowed for statistical purposes.

21. Ground No. 22 is for charging of interest u/s. 234A, B & C, which is mandatory and consequential in nature. Therefore, the same is dismissed.

22. Ground No. 23 is general and is rejected.

23. In the result, the appeal of the assessee is partly allowed as indicated above.

Order pronounced in the open court.

**Sd/-**  
**(A.L. GEHLOT)**  
Accountant Member

**Sd/-**  
**(BHAVNESH SAINI)**  
Judicial Member

\*aks/-

Copy of the order forwarded to :

1. Appellant
2. Respondent
3. CIT(A), concerned
4. CIT, concerned
5. DR, ITAT, Allahabad
6. Guard file

By order

Asstt. Registrar

True copy