IN THE INCOME TAX APPELLATE TRIBUNAL
"C" Bench, Mumbai

Before Shri Ravish Sood, Judicial Member
and Shri N.K. Pradhan, Accountant Member

ITA Nos.754 & 1122/Mum/2015
(Assessment Years: 2010-11 & 2011-12)

Asst. Commissioner of Income Tax, Central, Circle-8(4) 6th Floor, Room No. 658, Aayakar Bhavan, M.K. Road, Mumbai- 400020	Vs.	M/s Indo Saudi Services Carriers Pvt. ltd., Suit No. 301, 16-22, Bake House, Maharashtra Chamber of Commerce Lane, For, Mumbai – 400023

PAN – AABCI0665F

(Appellant) **(Respondent)**

Appellant by: Shri Awungshi Gimson, D.R
Respondent by: Shri Ajay R. Singh, A.R

Date of Hearing: 26.04.2019
Date of Pronouncement: 15.05.2019

O R D E R

PER RAVISH SOOD, JM

The present appeals filed by the revenue are directed against the respective orders passed by the CIT(A)-47, Mumbai, for A.Y 2010-11 and A.Y 2011-12, dated 18.02.2015 and 28.11.2014, respectively. Insofar the appeal for A.Y. 2010-11 is concerned, the same as is discernible from a perusal of the solitary ground of appeal therein raised and further clarified by the ld. Departmental representative (for short 'D.R'), is directed against the 'rectification order', dated 18.02.2015 passed by the CIT(A). As for the appeal for A.Y. 2011-12, the same is directed against the order passed by the CIT(A) disposing off the appeal of the assessee against the assessment framed by the A.O under Sec. 143(3) of the I-T Act. As the issues involved in the present appeals are inextricably interlinked and interwoven, therefore, the same are being taken up and disposed off together by way of a consolidated order. As the genesis of a common issue involved in the present appeal emanates from A.Y 2011-12, therefore, we shall first take up the appeal of the revenue for the said year. The revenue assailing the order of the CIT(A) for A.Y 2011-12 has raised before us the following grounds of appeal :

> "1. On the facts and in the circumstances of the case and in the law, the Ld. CIT(A) erred in deleting the addition of Rs.50,82,862/- made on account of difference in opening and closing balance of cash book as unaccounted income on the basis of loose paper, without appreciating the provision of section 132(4a) which states that if any document is found during search it is presumed that the content of the documents are true.
>
> 2. On the facts and in the circumstances of the case and in the law, the Ld. CIT(A) erred in deleting the addition of Rs.30,37,025/- made on account of difference in sale price of property on the basis of loose paper without appreciating the provision of section 132(4A) which states that if any document is found during search it is presumed that the content of the documents are true.
>
> 3. On the facts and in the circumstances of the case and in the law, the Ld. CIT(A) erred in deleting the addition of Rs.9,55,000/- (Rs. 4,00,000/- (+) Rs.5,55,000/-) made on account of cash receipts from few persons as unaccounted income on the basis of loose papers, without appreciating the fact that the nature of cash deposit remained unexplained.
>
> 4. The appellant prays that the order of the CIT(A) on the above grounds he set aside and that of the Assessing Officer be restored.
>
> 4. The appellant craves leave to amend or alter any ground and /or add new grounds which may be necessary."

Further, the assessee has raised before us the following preliminary objections U/rule 27 of the Appellate Tribunal Rules, 1963:

> *" 1. The Ground No. 1 raised by the department is contrary to the remand report filed by the A.O dt. 14/7/2014, therefore the same should not be entertained.*
>
> *2. As regards Ground No. 2, it is submitted that deptt. Has failed to carry out any independent verification from the party, therefore, addition made on basis of rough noting on loose paper, rightly deleted by CIT(A)."*

2. Briefly stated, search and seizure proceedings under Sec. 132 of the I-T Act were carried out on 22.02.2011 by the Deputy DIT (Inv.), Unit-III (3), Mumbai, at the residential and business premises of "Zaka group" of companies. As the assessee company was a group entity of Zaka group, therefore, it was also covered under the said search proceedings. The assessee company which was engaged in the business of a travel and cargo agent filed its return of income for A.Y 2011-12 on 30.09.2011, declaring total income of Rs.54,77,440/-. Subsequently, the case of the assessee was subjected to scrutiny assessment under Sec. 143(2) of the I-T Act.

3. The A.O while framing the assessment observed that during the course of the post-search proceedings, it was noticed that while for in the printed 'cash book' (taken from the seized computer back up) for F.Y 2009-10 the 'opening balance' was Rs. 4,32,111/-, whereas as per the 'trial balance' for F.Y 2008-09 there was a 'closing balance' of Rs. 55,14,973/-. It was thus observed by the A.O that there was a difference of Rs. 50,82,862/- in both the aforesaid documents. As the assessee failed to furnish any satisfactory reply, thus the A.O treated the aforesaid amount of Rs.50,82,862/- as the assesses unaccounted income. Further, it was observed by the A.O that as per a seized annexure viz. Annexure A/1, Page No. 30 to 40 which was a 'sale deed' entered into between Shri Paresh G. Rastogi and the assessee company, the assessee had purchased the property under consideration for Rs.42,23,500/-. However, it was noticed by him that as per the seized document viz. Annexure A/1, Page 43 (forming part of seized Annexure A/1, Page 41-43, which was a 'cost sheet' of the property under consideration, the purchase price of the said property was shown at Rs.72,60,525/-. As the assessee failed to furnish any satisfactory explanation in respect of the aforesaid variance, therefore, the A.O made an addition of the difference of Rs.30,37,025/- as an

'unexplained investment' in the hands of the assessee. Apart there from, it was observed by the A.O that certain 'cash receipts' issued by the assessee were seized during the course of the search proceedings, and were marked as Annexure A/2, Page No. 49-51. The details as were discernible from the said receipts read as under:

Page No.	Receipt No.	Name	Amount
49	2110644	Pappu Bhai	Rs. 4,00,000
50	2110643	Salem Sheikh	Rs. 5,50,000
51	2110642	Ismail	Rs. 5,55,000
		Total	Rs.14,55,000

As the assessee failed to reconcile the aforesaid receipts with its "books of accounts", therefore, the A.O treated the aforesaid amount of Rs.14,55,000/- as the unaccounted income of the assessee for the year under consideration.

4. The A.O after inter alia making the aforesaid additions to the returned income of the assessee, therein vide his order passed under Sec.143(3), dated 28.03.2013 assessed its income at Rs. 3,69,39,690/-.

5. Aggrieved, the assessee carried the matter in appeal before the CIT(A). In the course of the appellate proceedings the CIT(A) called for a 'remand report' from the A.O. Insofar the addition of Rs.50,82,862/- that was made by the A.O as regards the difference in the opening and the closing balance of cash as per the 'books of accounts' of the assessee was concerned, it was observed by the CIT(A) that the said addition was made on the basis of the seized 'trial balance' which did not tally with the audited 'trial balance'. The CIT(A) observing that as the said addition was merely based on uncorroborated loose sheets without any basis whatsoever, therefore, concluded that the same could not be sustained and was liable to be vacated. As regards the addition of Rs.30,37,025/- that was made by the A.O towards

unexplained investment of the assessee for purchase of property, it was observed by the CIT(A) that the said addition was also based on rough notings on the 'loose sheets' seized during the course of the search proceedings and was not backed by any corroborative documentary evidence. As is discernible from the 'remand report' of the A.O [as is reproduced in the order of the CIT(A)] , the assessee had in the course of the appellate proceedings placed on record a copy of a 'registered agreement', as per which the purchase price of the property was stated at Rs. 1,12,16,500/-. On the basis of the said 'Sale agreement', it was submitted by the assessee that as the value for which the property under consideration was purchased was more than that as stated in the 'draft agreement', therefore, no adverse inference as regards the investment made by it towards purchase of the property under consideration was liable to be drawn. On the contrary, it was submitted by the A.O in his 'remand report' that a perusal of the 'registered agreement' which was produced by the assessee for the first time in the course of the appellate proceedings, was for an area of 217.49 sq. mtr, while for the property as per the 'draft agreement' seized during the course of the search proceedings was having an area of 94 sq. mtr. It was thus submitted by the A.O in his 'remand report' that the seized documents viz. Annexure A-1, Page No. 41-43 were not copies, but were 3 different 'cost sheets' for three parts of the property mentioned in the executed agreement. Accordingly, the A.O aggregating the value stated against the respective seized documents viz. Annexure A-1, Page No. 41-43, therein concluded that the assessee had made a total investment of Rs. 1,91,77,775/- [Rs. 72,60,525/- + Rs. 71,58,625/- + Rs. 47,58,625/-]. As such, the A.O comparing the aforesaid amount of Rs. 1,91,77,775/- as against the disclosed investment of Rs. 1,12,16,500/-, submitted before the CIT(A) that as the copy of the 'registered agreement' was never furnished by the assessee in the course of the assessment proceedings, therefore, the difference of Rs. 79,61,275/- made by the assessee towards investment in the property under consideration may be considered. It was observed by the CIT(A) that the aforesaid adverse inferences as regards the investment made by the assessee towards purchase of the property under consideration were drawn by the A.O only on the basis of general rough notings on 'loose sheets'. The CIT(A) observed that though it was the claim of the A.O that the assessee had made the payment of on-money in cash for purchase of the property under consideration, however, the said claim was not backed by any corroborative documentary evidence. In the backdrop of his aforesaid observations, it was concluded by the CIT(A) that in the absence of any evidence which would corroborate that the investment made by the assessee towards purchase of the property under consideration was over and above the amount shown in the 'registered agreement', no addition merely on the basis of the notings on the 'loose sheet' found during the course of the search proceedings could be sustained. As such, the addition of Rs.30,37,025/ made by the AO was deleted by the CIT(A). As regards the addition of Rs.14,55,000/- made on account of cash receipts stated to have been received by the assessee from three persons viz. (i) Mohd. Wasim (Pappu Bhai): Rs.4,00,000/-; (ii) Shaikh Bellap Abdul Salam (Salam Shaikh): Rs. 5,50,000/-; and (iii) Mohd. Ismile Khan (Ismile): Rs.5,55,000/-, it was observed by the CIT(A) that the said additions were also made by the A.O on the basis of 'loose papers'. In order to verify the factual position the CIT(A) directed the A.O to make necessary inquiry as regards the facts leading to the aforesaid addition in the hands of the assessee. The A.O in the course of the remand proceedings issued summons under Sec.131 to the aforementioned parties. In response to the aforesaid summons one of the person viz. Shri Abdul Salam appeared before the

AO, and in his statement recorded u/s 131 admitted that he had deposited an amount of Rs.5,50,000/- with the assessee company on 05.02.2011 for purchase of tickets for haji's. Insofar the summons which were issued to the remaining two persons viz. S/sh. Mohd, Wasim (Pappu bhai) & Mohd Ismile Khan (Ismile) were concerned, the same were returned unserved by the postal authorities. The CIT(A) observed that though two of the aforementioned parties had failed to put up an appearance before the A.O in the course of the remand proceedings, however, their respective confirmations which were placed on record therein corroborated the claim of the assessee that the amounts were received from them for purchase of airline tickets. On the basis of his aforesaid deliberations, it was observed by the CIT(A) that as the A.O had made an addition of Rs.14,55,000/- on the basis of 'loose papers', therefore the addition made by the A.O merely on the said count could not be sustained and was liable to be vacated.

6. The revenue being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. The ld. Departmental Representative (for short 'D.R') took us through the facts of the case in context of the issues under consideration. As regards the ground of appeal No. 1 pertaining to an addition of Rs.50,82,862/-, it was fairly submitted by the ld. D.R that the A.O in his 'remand report', dated 14.07.2014 had stated that the said addition which pertained to A.Y 2010-11 was inadvertently added by him while framing the assessment in the case of the assessee for the year under consideration viz. A.Y. 2011-12. As such, the ld. D.R did not press the the ground of appeal no. 1. Insofar the addition for Rs.30,37,025/- towards unexplained investment made by the assessee for purchase of a property, it was submitted by the ld. D.R that the assessee in order to impress upon the CIT(A) that the property under consideration was purchased for an amount substantially more than that shown in the

seized Annexure A-1, Page 43 , had for the very first time filed a copy of 'registered agreement', as per which the purchase price of the property was stated to be Rs.1,12,16,500/-. The ld. D.R submitted that a perusal of the said 'registered agreement' revealed that the same pertained to some other property having an areas of 217.49 sq. mtr., and not the property under consideration which as per the seized document viz. Annexure A-1 – Page 30-40 was having an area of 94 sq. mtr. In sum and substance, it was the contention of the ld. D.R that the CIT(A) on the basis of misconceived facts as were placed before him by the assessee had wrongly deleted the addition that was made by the A.O. In order to substantiate his aforesaid contention, the ld. D.R took us through the 'registered agreement' (area 217.49 sq. mtr.) that was relied upon by the assessee before the CIT(A) (Page 175-215) of the assesses 'Paper book' (for short 'APB'). It was submitted by the ld. D.R that the matter in all fairness may be restored to the file of A.O so that the correct factual position may surface. As regards the addition of Rs.14,55,000/- that was made by the A.O on the basis of seized documents viz. Annexure A/2, Page No. 49-51 towards unaccounted income of the assessee, it was submitted by the ld. D.R that as the statements of two persons viz. (i). Sh. Mohd. Wasim (Pappu Bhai); and (ii). Sh. Mohd. Ismile Khan (Ismile) could not be recorded, therefore, the matter in all fairness may be restored to the file of the A.O for making necessary verifications.

7. Per contra, the ld. Authorised Representative (for short 'A.R') for the assessee submitted that there were certain peculiar facts as regards the addition of Rs.50,82,862/- which was made by the A.O while framing the assessment in the case of the assessee for A.Y. 2011-12. The ld. A.R submitted that the CIT(A) had disposed off the appeals of the assessee for A.Y 2010-11 and A.Y 2011-12, vide his respective orders passed u/s 250(6) on 12.12.2014 and 28.11.2014,

respectively. It was submitted by the ld. A.R that the A.O had inter alia made an addition of Rs. 50,82,862/- while framing the assessment for A.Y 2011-12. The ld. A.R submitted that the CIT(A) while disposing off the appeal of the assessee for A.Y 2011-12, vide his order dated 28.11.2014 had deleted the addition of Rs. 50,82,862/- on merits. Also, the appeal of the assessee for A.Y 2010-11 was thereafter disposed off by the CIT(A) on 12.12.2014. Subsequently, on the basis of a rectification order, dated 16.02.2015 [as could be gathered from a perusal of the 'rectification order' of the CIT(A), dated 18.02.2015 for A.Y 2010-11] the issue as regards the addition of Rs. 50,82,862/- was held by the CIT(A) as not relevant to the year under consideration viz. A.Y 2011-12, as the same pertained to the immediately preceding year viz. A.Y 2010-11. Thereafter, the CIT(A) passed another 'rectification order', dated 18.02.2015 for A.Y 2010-11, wherein he observed that as the addition of Rs. 50,82,862/- pertained to the said year viz. A.Y 2010-11, thus on a suo motto basis incorporated the said issue as a 'ground of appeal' for A.Y 2010-11 and adjudicated upon the same in the garb of his said rectification order. The ld. A.R taking us through the genesis of the issue under consideration, submitted, that the A.O vide his 'remand report', dated 14.07.2014 that was filed with the CIT(A) in the course of the appellate proceedings for A.Y. 2011-12, had stated before the CIT(A) that the addition of Rs.50,82,862/- pertaining to difference of opening and closing balance of cash book was though relatable to A.Y. 2010-11, but the same was inadvertently added by him while framing the assessment A.Y. 2011-12. It was submitted by the ld. A.R that the CIT(A) while disposing off the appeal of the assessee for A.Y. 2011-12 did not give any weightage to the said submission of the A.O, and vide his order dated 28.11.2014 deleted the aforesaid addition of Rs.50,82,862/- on merits. Subsequently, the CIT(A) vide his aforesaid rectification orders, therein on a suo motto basis excluded the issue from the appeal of the assessee for A.Y 2011-12 and incorporated the same as a ground of appeal for A.Y 2010-11. By so doing, the CIT(A) vide his respective rectification orders treated the issue as regards the addition of Rs. 50,82,862/- as not relevant to A.Y 2011-12, and thereafter incorporating the same as a ground of appeal for A.Y 2010-11 adjudicated the same on merits and did not draw any adverse inferences in the hands of the assessee for A.Y 2011-12. It was vehemently submitted by the ld. A.R that the respective rectification orders passed by the CIT(A) on suo motto basis for A.Y 2011-12 and A.Y 2010-11 were not as per the mandate of law. Apart there from, it was averred by the ld. A.R that no notice of the purported rectifications was ever served upon the assessee by the CIT(A). In fact, it was submitted by the ld. A.R that the copies of the said orders were also never provided to the assessee, and the same were only in the course of the present appellate proceedings made available by the ld. D.R. It was submitted by the ld. A.R that the respective rectifications carried out by the CIT(A) without putting the assessee to notice were invalid and not sustainable in the eyes of law. On a specific query by the bench, that now when the CIT(A) after incorporating the 'fresh issue' as regards the addition of Rs.50,82,862/-in the appeal of the assessee for A.Y 2010-11 had thereafter not justified the addition on merits, then how the assessee would be adversely hit in either of the manners envisaged in sub-section (3) of Sec. 154 viz. (i) enhancing of the assessment; (ii). reducing of a refund; and (iii). increasing the liability of the assessee, which would mandate a reasonable opportunity of being heard to the assessee, it was submitted by the ld. A.R that though no addition was sustained by the CIT(A) in A.Y 2010-11, however, the incorporating of the said 'fresh issue' without affording any reasonable opportunity of being heard to the assessee, would act to the prejudice to the assessee as the same gave a license to the revenue to carry the matter in further appeals. In sum and substance, it was submitted by the ld. A.R that a subsequent reversal of the order of the CIT(A) on the issue of addition of Rs. 50,82,862/- at any stage by the higher appellate authorities would result to an increase in the liability of the assessee on an issue which was incorporated by the CIT(A), vide his order passed u/s 154, without affording any opportunity of being heard to the assessee. As regards the addition that was made by the A.O on account of suppressed purchase consideration of a property, it was submitted by the ld. A.R that the assessee had purchased two properties viz. Property No. 117 & 118 in a complex viz. "KS Trident", Lower ground floor, 10, Rana Pratap Marg, Lucknow during the year under consideration. It was submitted by him that the A.O had wrongly inferred that the assessee had also purchased Unit No. 116 (admeasuring 94.70 sq. mtr) in a complex viz. "KS Trident", Lower ground floor, 10, Rana Pratap Marg, Lucknow. The ld. A.R submitted that the assessee had only purchased the property viz. Units No. 117 & 118 in the complex viz. "KS Trident", Lower ground floor, 10, Rana Pratap Marg, Lucknow, vide registered deed dated 20.05.2009 from M/s Rohtas Projects Ltd., Lucknow. In sum and substance, it was the contention of the ld. A.R that the A.O had erred in observing in his 'remand report' filed with the CIT(A) that the assessee had also purchased the property admeasuring 94.70 sq. mtr. i.e the aforementioned property viz. Unit No. 116. Apart there from, it was submitted by the ld. A.R that the aforesaid addition of Rs.30,37,025/- was merely based on the notings on 'loose sheets' found during the course of the search proceedings from the premises of M/s Four ways Travels Pvt. Ltd., and was not on the basis of any concrete documentary evidence which would corroborate making of any such investment by the assessee. As regards the addition made by the A.O of Rs.14,55,000/- on the basis of documents seized during the course of the search proceedings, which therein revealed that the assessee was in receipt of unexplained money from three parties, it was submitted by the ld. A.R that one of the person (out of the three persons) had in the course of the remand proceedings appeared before the A.O and had confirmed that the said amount was paid by him to the assessee for purchase of airline tickets. Insofar the remaining two parties were concerned, it was submitted by the ld. A.R that due to their non-availability at the relevant point of time, they could not put up an appearance before the AO. It was however submitted by the ld. A.R that the said respective parties can now be produced before the A.O for necessary verification.

8. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record and the judicial pronouncements relied upon by them. As regards the addition of Rs.50,82,862/- on account of difference in opening and closing balance of 'trial balances', we find that the A.O had admitted in his 'remand report', dated 14.07.2014 filed with the CIT(A) during the course of the appellate proceedings for A.Y 2011-12, that the contents of the aforesaid documents and the resultant addition of Rs. 50,82,862/- did not pertain to the year under consideration. Apart there from, the ld. D.R had also not controverted the said submissions of the A.O. We thus in terms of our aforesaid observations dismiss the **Ground of appeal No. 1** as having been rendered as infructuous.

9. We shall now advert to the addition of Rs.30,37,025/- that was made by the A.O on account of suppression of the purchase price of a property by the assessee. As observed hereinabove, the A.O on a perusal of certain loose papers i.e a 'cost sheet' of a property that was

seized during the course of the search proceedings from the premises of M/s Four ways Travels Pvt. Ltd viz. Annexure A-1, Page 43, noticed that the investment made by the assessee towards purchase of a property from Shri Prakash Rastogi was shown at Rs. 72,60,525/-, as against that claimed by the assessee at Rs. 42,23,500/-. On the basis of his aforesaid observations the A.O made an addition of Rs. 30,37,025/-. The A.O in his 'remand report', dated 14.07.2014 had tried to impress upon the CIT(A) that on a reappraisal of the seized documents viz. Annexure A-1, Page 41-43 an addition of Rs. 79,61,275/- was called for in the hands of the assessee. As the CIT(A) was of the view that neither the addition towards alleged payment of on-money of Rs. 30,37,025/- that was made by the A.O while framing the assessment, or his claim raised in the course of the remand proceedings that the assessee had paid on-money of Rs 79,61,275/- was backed by any documentary evidence, thus he deleted the addition of Rs. 30,37,025/- made by the A.O.

10. As the revenue in its present appeal has only assailed before us the deletion of the addition of Rs. 30,37,025/-, therefore, we confine ourselves to the said aspect only. Admittedly, in the course of the search and seizure proceedings an unsigned 'draft agreement' between the assessee and Shri Paresh Rastogi s/o Sri. L.C Rastogi, R/o. 14/1, Jopling Road, Lucknow for purchase by the assessee of a Unit No. 116, in a complex known as "KS Trident", Lower ground floor, Property No. 10, Rana Pratap Marg, Lucknow, admeasuring 94.70 sq. mtr. was found and seized from the premises of M/s Four ways Travel Pvt. Ltd. viz. Annexure A-1, Page No. 30 to 40. As per the said 'draft agreement', the purchase consideration of the property was stated as Rs.42,33,500/-. However, it was observed by the A.O that as per the seized Annexure A-1, Page No. 43 which was a 'cost sheet' of the property, the purchase price was shown at Rs.72,60,525/-. On the

basis of the aforesaid details, the A.O in the absence of any explanation as regards the aforesaid variance made an addition of Rs.30,37,025/- [Rs. 72,60,525/- (-) Rs. 42,33,500/-] towards suppressed investment of the assessee towards purchase of the property under consideration. On appeal, the assessee furnished with the CIT(A) a 'registered agreement', dated 28.05.2009 for Rs. 1,12,16,500/- pertaining to purchase of a property i.e Units No. 117 & 118 in a commercial complex viz. "KS Trident", Lower Ground Floor, 10, Rana Pratap Marg, Lucknow (admeasuring 217.49 Sq. mtr) from M/s Rohtas Projects Ltd., Regd. Office: 27/18, Raja Ram Mohan Roy Marg, Lucknow. It was the claim of the assessee that as it had purchased the aforesaid property viz. Units No. 117 & 118 in "KS Trident", Lower Ground Floor, 10, Rana Pratap Marg, Lucknow (admeasuring 217.49 Sq. mtr) for a consideration of Rs. 1,12,16,500/- , which was more than the amount appearing in the 'draft agreement', therefore, the A.O had erred in making an addition of Rs. 30,37,025/- in its hands. We find that the CIT(A) observing that the adverse inferences as regards the investment made by the assessee towards purchase of property were drawn by the A.O only on the basis of general notings on the 'loose sheets' seized during the course of search proceedings, and not on the basis of any corroborative documentary evidence which could prove that any on-money had actually changed hands, thus deleted the addition of Rs. 30,37,025/- made by the A.O.

11. We have deliberated at length on the issue under consideration and find that the issue has not been correctly appreciated by the CIT(A). As is discernible from the orders of the lower authorities and the material available on record, the issue before the A.O/CIT(A) as regards the unexplained investment of Rs. 30,37,025/- was in context of a Unit No, 116 in a complex viz. "KS Trident", Lower Ground Floor, 10, Rana Pratap Marg, Lucknow (admeasuring 94.70 Sq. mtr). As is

discernible from a perusal of an unsigned 'draft agreement' viz. Annexure A-1, Page 30-40 that was seized from the premises of M/s Four ways Travels Pvt. Ltd., the assessee had agreed to purchase the aforesaid property viz. Unit No, 116, in "KS Trident", Lower Ground Floor, 10, Rana Pratap Marg, Lucknow (admeasuring 94.70 Sq. mtr) for a consideration of Rs. 42,23,500/- (exclusive of stamp duty charges : Rs. 2,95,700/- and other registration charges). As per the seized document viz. Annexure A-1, Page 41 which was a "Cost sheet-Statement of A/c" of Unit No. 116, the 'basic sale price' of Unit No. 116 was stated at Rs. 42,23,500/-. Further, as per certain other seized documents viz. Annexure A-1, Page 42-43 which were also stated to be "Cost sheet- Statement of A/c" of Unit No. 116, the total sale price was stated at Rs. 71,58,625/- and 72,60,525/-, respectively. As such, there was a clear variance in the purchase price mentioned in Annexure A-1, Page 30-40 and Page 41 on the one hand, and that as was discernible from Annexure A-1, Page 42-43 on the other hand. We find that it was never the claim of the assessee before the A.O that it had not made any investment towards purchase of Unit No. 116 in commercial complex "KS Trident", Lower Ground Floor, 10, Rana Pratap Marg, Lucknow (admeasuring 94.70 Sq. mtr). Rather, in the course of the appellate proceedings before the CIT(A) the assessee had placed on record a 'registered agreement' for Rs. 1,12,16,500/- and had claimed that as the purchase price of the same was more than the amount appearing in the 'draft agreement', therefore, no addition made by the A.O on account of suppressed purchase consideration could be sustained. We find that the CIT(A) summarily accepted the aforesaid claim of the assessee and further observing that the addition of Rs. 30,37,025/- towards payment of on-money was based on 'loose papers' and not supported by any corroborative documentary evidence, thus deleted the said addition. In our considered view the CIT(A) had proceeded with on the basis of incorrect facts. As is discernible from a perusal of the 'registered agreement', dated 28.05.2009 for Rs. 1,12,16,500/- that was filed by the assessee for the first time before the CIT(A), the same pertained to property viz. Units No. 117 & 118 in a commercial complex viz. "KS Trident", Lower Ground Floor, 10, Rana Pratap Marg, Lucknow (admeasuring 217.49 Sq. mtr) that was purchased by the assessee from M/s Rohtas Projects Ltd., Regd. Office: 27/18, Raja Ram Mohan Roy Marg, Lucknow. In our considered view, the conclusion arrived at by the CIT(A) while vacating the observations of the A.O as regards the suppressed investment of the assessee towards purchase of Unit No. 116 have been arrived at on the basis of misconceived facts. In fact, the CIT(A) had failed to appreciate that the 'registered agreement' for Rs. 1,12,16,500/- furnished by the assessee before him was in context of purchase of Units No. 117 & 118 and not in context of Unit No. 116. We find that though the A.O in his 'remand report', dated 14.07.2014 had brought it to the notice of the CIT(A) that the 'draft agreement' under consideration was in context of a property having an area of 94 sq. mtr., while for the 'registered agreement' for Rs. 1,12,16,500/- filed by the assessee before him was in respect of some other property having an area of 217.49 sq. mtr., however, the said material fact was not considered by the first appellate authority. Be that as it may, in our considered view the contents of the seized document viz. Annexure A-1/<u>Page 30-40</u> which is an unsigned 'draft agreement' between the assessee and Shri Paresh Rastogi s/o Sri. L.C Rastogi, R/o. 14/1, Jopling Road, Lucknow, in context of purchase by the assessee of a Unit No. 116 in a commercial complex i.e "KS Trident", Lower ground floor, Property No. 10, Rana Pratap Marg, Lucknow, admeasuring 94.70 sq. mtr., had not been verified by the lower authorities. Insofar the observations of the CIT(A) that the addition in context of the issue under consideration was merely based on the contents of certain 'loose sheets' and was not corroborated by any documentary evidence, we are afraid that the said observation in the backdrop of the nature of the documents found during the course of the search proceedings does not find favour with us. We thus in the backdrop of our aforesaid deliberations restore the matter to the file of the A.O, with a direction to verify as to whether the aforementioned property i.e Unit No. 116 in the complex i.e "KS Trident", Lower ground floor, Property No. 10, Rana Pratap Marg, Lucknow, admeasuring 94.70 sq. mtr., was ever purchased/transacted by the assessee, either directly or indirectly during the year under consideration, or not. The A.O for making such verification would be at a liberty to call for such information/examine the aforementioned seller party i.e Sri Paresh Rastogi S/o Sri L.C. Rastogi, & 14/1, Joppling Raod, Lucknow; record the statement of the assessee; as also make necessary verifications from the occupants of the property; or in any other manner as he deems fit. The matter is set aside to the file of the A.O for fresh adjudications in terms of our aforesaid observations. The **Ground of appeal No 2** is allowed for statistical purposes.

12. We shall now advert to the addition of Rs.14,55,000/- that was made by the A.O on the basis of certain receipts which were seized during the course of the search proceedings from the premises of M/s Four ways Travels Pvt. Ltd. viz. Annexure A-2, Page No. 49-51. As is discernible from the orders of the lower authorities, the aforesaid seized documents revealed that the assessee was in receipt of cash aggregating to an amount of Rs.14,55,000/- from three parties viz. (i) Mohd. Wasim (Pappu Bhai): Rs.4,00,000/-; (ii) Shaikh Bellap Abdul Salam (Salam Shaikh): Rs. 5,50,000/-; and (iii) Mohd. Ismile Khan (Ismile): Rs.5,55,000/-. As the assessee in the course of the assessment proceedings could not substantiate its claim that the

respective amounts were received from the aforementioned parties for booking of their airline tickets, therefore, the A.O added the same as the unaccounted income of the assessee. During the course of the appellate proceedings, the CIT(A) directed the A.O to make necessary verifications and find out the true facts in respect of the said cash receipts. In the course of the remand proceedings one of the party (out of three parties) i.e Shri Abdul Salam (Rs.5,50,000) appeared before the A.O and admitted in his statement that he had paid the said amount to the assessee company on 05.02.2011 for purchase of airline tickets for haji's. Despite the fact that the A.O had issued summons under Sec.131, the remaining two parties viz. Mohd. Wasim (Pappu bhai) & Mohd. Ismile Khan (Ismile) though did not put up an appearance before him, however, their confirmations were placed on record by the assessee. In the course of the hearing of the appeal before us, it was submitted by the ld. A.R that as both of the aforementioned persons were unaware of the notices which were issued by the A.O under Sec. 131, therefore, for the said reason they had failed to appear before him. In fact, as is discernible from the reply of the assessee, dated 28.11.2014 that was filed with the CIT(A), it is claimed that while for Mohd. Wasim (Pappu Bhai) who was staying with his aged parents at 205, Kapadia Complex, 33, Saranga Street, Mumbai had no idea of any such notice/summons, and was of the view that his parents not having understood the purpose of the said notice might have in sheer ignorance not received the same. Insofar Mohd. Ismile Khan (Ismile) was concerned, it was stated that as he at the relevant point of time was out of station, therefore, he could not for the said reason appear before the A.O. In the backdrop of the submission of the ld. A.R that both of the aforementioned persons are ready and willing to appear before the A.O, we are of the considered view that in all fairness an opportunity to the said effect should be given. As a matter of fact, we find that now when the confirmations of the said respective parties are already available on record, therefore, the room for any afterthought play on the part of the assessee by obtaining self-suiting statements from the said persons stands clearly ruled out. We thus in terms of our aforesaid observations direct the A.O to summon the aforementioned two persons viz. (i) Mohd. Wasim (Pappu Bhai); and (ii) Mohd Ismile Khan (Ismile) for making necessary verifications. In case the aforementioned parties confirm to the satisfaction of the A.O that the respective amounts were paid by them to the assessee for purchase of airline tickets, then no adverse inferences would be liable to be drawn in the hands of the assessee. Insofar the addition that was made by the A.O as regards Shaikh Bellap Abdul Salam (Salam saikh) of Rs. 5,50,000/- is concerned, we find that as the latter had in his statement recorded u/s 131 by the A.O in the course of the 'remand proceedings', admitted, that he had given the aforesaid amount to the assessee for purchases of airline tickets for hajis, therefore, in our considered view the CIT(A) had rightly deleted the addition to the said extent. We thus in terms of our aforesaid observations partly allow the **Ground of appeal No. 3** for statistical purpose.

13. The appeal of the revenue in terms of our aforesaid observations is partly allowed for statistical purposes.

ITA No. 1122/Mum/2015
<u>A.Y. 2010-11</u>

14. We shall now advert to the appeal of the revenue for A.Y 2010-11. The revenue has assailed the rectification order passed by the CIT(A) on the following grounds of appeal:

> "1. On the facts und in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of Rs.50,82,862/- mode on account of difference in opening and closing balance of cash book as unaccounted

income on the basis of loose paper, without appreciating the provision of section 132(4), which states that, if any document is found during search, it is presumed that the content of the documents are true.

2. The appellant prays that the order of the CIT(A) on the above grounds be set aside and that of the Assessing Officer be restored.

3. The appellant craves leave to amend or alter any ground or add a new ground that may be necessary.”

15. Apart there from, the assessee has also raised its preliminary objections by filing a revised application under Rule 27 of the Appellate Tribunal Rules, 1963, as under :

“1. The rectification order passed suo-moto taking fresh ground for A.Y. 2010-11 is non nest and invalid.

2. The issue of disallowance of Rs.50,82,862/- cannot be taken by way of a rectification proceeding u/s. 154 of the Act.

3. The rectification order passed dated 18/02/2015 in regards to disallowance of Rs.50,82,862/- cannot be subject matter of rectification as the issue is debateable.

4. The aforesaid rectification order passed suo-moto is without providing the opportunity to the assessee to put forward it’s case.

5. The ground raised by department doesn't arise from the Assessment order dated 28/03/2013 nor from the order of CIT(A) dated 12/12/2014, therefore the same should not be entertained.

6. The appeal is not maintainable.”

16. Briefly stated, the assessee company pursuant to notice issued under Sec. 153A had filed its return of income for A.Y. 2010-11 on 09.03.2012, declaring total income at Rs.48,88,359/-. Subsequently, the income of the assessee was assessed by the A.O vide his order passed under Sec.153A r.w.s 143(3), dated 28.03.2013 at Rs. 3,41,24,020/-.

17. Aggrieved, the assessee carried the matter in appeal before the CIT(A), who vide his order dated 12.12.2014 partly allowed the appeal on merits.

18. As observed hereinabove, the CIT(A) thereafter passed a suo motto rectification order, dated 18.02.2015 for A.Y 2010-11. In order to appreciate the issue under consideration, the brief facts as regards the genesis of the rectification order passed by the CIT(A) for A.Y 2010-

11, are culled out hereinafter. An addition of Rs. 50,82,862/- that was made by the A.O in the assessment framed by him u/s 143(3), dated 28.03.2013 in the case of the assessee for A.Y 2011-12, was thereafter inter alia deleted on merits by the CIT(A), vide his order dated 28.11.2014. The appeal of the assessee for the year under consideration viz. A.Y 2010-11 was also disposed off by the CIT(A) by his order dated 12.12.2014. Subsequently, the CIT(A) passed a rectification order dated 16.02.2015 for A.Y 2011-12, and observing that the issue as regards the addition of Rs. 50,82,862/- pertained to A.Y 2010-11, vacated the same from the appeal of the assessee for A.Y 2011-12. At the same time, the CIT(A) passed a rectification order dated 18.02.2015 for the year under consideration i.e A.Y 2010-11 and incorporated the issue as regards the addition of Rs. 50,82,862/- in the appeal of the assessee for the said year i.e A.Y 2010-11. After so doing, the CIT(A) vide his rectification order, dated 18.02.2015 observed that the addition of Rs. 50,82,862/- could not be sustained on merits. As claimed by the ld. A.R, neither the assessee was ever served with any 'show cause' notice as regards the proposed rectifications which were sought to be carried out by the CIT(A) in the aforementioned respective years i.e A.Y 2010-11 and A.Y 2011-12, nor the copies of the rectification orders were thereafter made available to him. The said factual position have not been controverted by the ld. D.R before us. In sum and substance, the CIT(A) on the basis of his aforesaid suo moto rectifications orders had finally incorporated a 'ground of appeal' pertaining to an addition of Rs.50,82,862/- in the appeal of the assessee for A.Y. 2010-11, which already had been disposed off by him. At this stage, we may herein observe that no addition of Rs.50,82,862/- was ever made by the A.O while framing the assessment for A.Y 2010-11, vide his order passed under Sec.143(3) r.w.s 153A, dated 28.03.2013. In nutshell, the CIT(A) in the garb of his rectification order dated 12.12.2014, has as a matter of fact sought to enhance the income of the assessee by incorporating an issue which did not emanate from the assessment order for the year under consideration.

19. We are of the considered view that though the CIT(A) as per sub-section (1) of Sec.251 is inter alia vested with the powers to enhance as assessment, however, the same can only be exercised at the stage of disposing off the appeal. Apart there from, the exercise of the powers of enhancement by the CIT(A) is subject to certain riders as are envisaged in sub-section (2) of Sec. 251, which reads as under:

> *" (2). The Commissioner (Appeals) shall not enhance an assessment or a penalty or reduce the amount of refund unless the appellant has had a reasonable opportunity of showing cause against such enhancement or reduction.*
>
> *Explanation. – In disposing off an appeal, the Commissioner (Appeals) may consider and decide any matter arising out of the proceedings in which the order appealed against was passed, notwithstanding that such matter was not raised before the Commissioner (Appeals) by the appellant."*

As such, the powers of the CIT(A) to enhance an assessment are circumvented and therein limited to the matters arising out of the proceedings in which the order appealed against was passed. Now, in the case before us, the matter as regards the addition of Rs.50,82,862/- did never arise from the assessment proceedings for the year under consideration i.e A.Y 2010-11, which thereafter had culminated into an assessment order u/s 153A r.w.s 143(3), dated 28.03.2013 for A.Y 2010-11. Accordingly, the CIT(A) in exercise of his aforesaid powers of enhancement had no jurisdiction to advert to issues which did not arise out of the proceedings in which the order appealed against was passed. Apart there from, we are also of the considered view that the powers of enhancement can only be exercised by the CIT(A) in the course of disposing off the appeal, and not in the garb of a rectification order. As such, the embarking on the jurisdiction to enhance the income of the assessee appellant after the culmination of the appellate proceedings and disposal of the appeal is not permissible on the part of the CIT(A). Alternatively, the entire exercise of enhancing of the income of the assessee by incorporating a new issue as regards the addition of Rs. 50,82,862/-, without affording any opportunity of being heard to the assessee would also be hit by sub-section (2) of Sec. 251, which mandates affording of a reasonable opportunity to the assessee to show cause against such enhancement. Apart there from, we find that sub-section (3) of Sec. 154 clearly provides that an income-tax authority shall not make an amendment, which has the effect of enhancing an assessment or reducing a refund or otherwise increasing the liability of the assessee, unless such authority has given a notice to the assessee of its intention of so doing and had allowed the assessee a reasonable opportunity of being heard. Admittedly, as no addition or enhancing of the liability of the assessee had taken place pursuant to the rectification order, therefore, at the first blush it appeared that no prejudice was caused to the assessee as it was not adversely hit by either of the situations envisaged in sub-section (3) of Sec. 154 viz. (i) enhancing of the assessment; (ii). reducing of a refund; and (iii). increasing the liability of the assessee, which would have mandated affording of a reasonable opportunity of being heard to it by the CIT(A). But then, we find ourselves to be in agreement with the contention of the ld. A.R that though no addition was sustained by the CIT(A) in A.Y 2010-11, however, the incorporating of the said 'fresh issue' without affording any reasonable opportunity of being heard to the assessee, would act to the prejudice to the assessee, as the same gave a license to the revenue to carry the matter in further appeals. In sum and substance, a subsequent reversal of the order of the CIT(A) on the issue of addition of Rs. 50,82,862/- at any stage by the higher appellate forums or courts would result to an increase in the liability of the assessee on an issue which was incorporated by the CIT(A), vide his order passed u/s 154, without affording any opportunity of being heard to the assessee.

20. We have deliberated at length on the issue under consideration, and on the basis of our aforesaid observations are of the considered view that the exercise of the powers of rectification by the CIT(A) for the year under consideration i.e A.Y 2010-11 clearly militates against the mandate of law as had been deliberated by us at length hereinabove. Accordingly, we are constrained to quash the rectification order passed by the CIT(A). As the rectification order passed by the CIT(A), dated 18.02.2015 for the year under consideration i.e A.Y. 2010-11 has been quashed by us, therefore, the contention advanced by the revenue as regards the validity of the deletion of the aforementioned amount of Rs.50,82,812/- on merits does not survive and is dismissed as having been rendered as infructuous. Accordingly, the **Ground of appeal No. 1** is dismissed as infructuous. Further, the preliminary objection raised by the assessee challenging the validity of the rectification order passed by the CIT(A), dated 18.02.2015 is allowed.

21. The appeal of the revenue is dismissed.

22. As such, the appeal of the revenue for A.Y. 2010-11 in ITA No. 1122/Mum/2015 is dismissed, while for its appeal for A.Y. 2011-12 in ITA No.754/Mum/2015 is partly allowed for statistical purposes.

Order pronounced in the open court on 15.05.2019

Sd/-	Sd/-
(N.K. Pradhan)	(Ravish Sood)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 15.05.2019

Ps. Rohit

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**