आयकर अपीलीय अधिकरण "ए" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "A", MUMBAI

श्री पी.एम. जगताप, लेखा सदस्य एवं श्री विवेक वर्मा, न्यायिक सदस्य के समक्ष ।
BEFORE SHRI P.M. JAGTAP, ACCOUNTANT MEMBER
AND SHRI VIVEK VARMA, JUDICIAL MEMBER

आयकर अपील सं. : 8344/मुम/2010
निर्धारण वर्ष A.Y. 2007-08
ITA No. : 8344/Mum/2010
(Assessment year: 2007-08)

आयकर अपील सं. : 83/मुम/2012
निर्धारण वर्ष A.Y. 2008-09
ITA No. : 83/Mum/2012
(Assessment year: 2008-09)

Income Tax Officer -11(2)(1), Room No. 441, 4th Floor, Aayakar Bhavan, M.K. Road, Mumbai -400 020	vs	Shri (DR.) Avinash C Tiwari, A-8/31, Sunder Nagar, CST Road, Kalina, Mumbai -400 072 स्थयी लेखा सं.:PAN: **AAAPT 7886 M**
अपीलार्थी (Appellant)		प्रत्यर्थी (Respondent)
Appellant by	:	Shri Manoj Kumar
Respondent by	:	Shri Mehul Shah

सुनवाई की तारीख /Date of Hearing : 06-06-2013
घोषणा की तारीख /Date of Pronouncement : 19-06-2013

आ दे श

O R D E R

श्रि विवेक वर्मा, न्या स:
PER VIVEK VARMA, JM:

These two appeals arise from the orders of CIT(A) 3, Mumbai, dated 03.09.2010 and 19.10.2011, in the assessment years 2007-08 and 2008-09 respectively.

2. In its appeal, the revenue have raised the following grounds of appeal:

Assessment year: 2007-08:

"1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) Mumbai has erred in deleting the addition made on account of unexplained investment in Avis Motors P. Ltd. u/s 69B of Rs. 4,22,30,000/-.

2. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) Mumbai failed to appreciate the fact that papers were found during the search and seizure action in the case of Shri Haren Chokshi regarding the said undisclosed investment of the assessee of Rs. 4,22,30,000/- in Avis Motors Pvt. Ltd., wherein assessee's wife and son are Directors.*
3. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in coming to the conclusions by overlooking the fact that Shri Haren Chokshi has never specifically denied the transaction.*
4. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in ignoring the business connection between the party from whose premises the papers are found and the assessee, while accepting the assessee's version regarding the notings on the paper."*

3. The facts are that the assessee is a Doctor by profession. His wife, Mrs. Kailash Tiwari and son, Mr. Anand Tiwari are directors in M/s Avis Motors Private Limited.

4. There was a search and seizure operation on the premises of Mr. Haren Choksi and Mr. Harshil Choksi on 05.10.2007, from where certain loose papers and other documents were found and seized. One such document was a loose paper no. 165, wherein certain transaction details were noted, pertaining to some investment in Avis Motors, aggregating to Rs. 1,22,30,000/- in cheques, and Rs. 3,00,00,000/- in cash. When the contents of the document was confronted to the assessee, it was submitted by the assessee that the amount credited in the common bank account held by him and his wife Mrs. Kailash Tiwari, but the amount pertained to his wife. From this submission, the AO averred that when the cheques payment of Rs. 1,22,30,000/- was correct then the cash portion of Rs. 3,00,00,000/- would also be correct. He, therefore, added back Rs. 4,22,30,000/- as unexplained investment of the assessee u/s. 69B.

5. The assessee approached the CIT(A), who took note of the facts and who reproduced the impugned seized paper in the order, which is as under:

Avis Motors P. Ltd.
Investment Made by

		By Cheque	By Cash	Total	Less to be Contributed	Bal to be Contributed
Harshil Chokesy & Haren Choksey 23.6.06 to 20.6.07		30650000	21200000	51850000	35031278	16818722
Bhupinder Singh Kailash Tiwari Avis Motors Anand Tiwari	15400000 10000000 3200000	28600000	21200000	49800000	35031278	14768722
						31587444
Avinash Tiwari		12230000	3000000	42230000	46708371	
Anand Tiwari		(3900000)		(3900000)		(3900000)
Through Cash as per St. as under		59250000	42400000	101850000	116770927	15120927
Cost of project Land from Jet Add: Cash exp. Tiwari As per St Add: Exp. Through Bk	150000000 8578500 52400885					
Total		210979835	Harshil	35031278	30	
Less: Term Loan		(94208458)	Bhupinder Anand T	35031278 46708371	30 40	
		116770927		116770927		

6. In the submissions made before the CIT(A), the assessee contended that, if at all, investment was made by him, it should have reflected somewhere in the accounts/bank statement of the assessee. The mere fact that the entry was shown credited in the joint account held by him and his wife would not establish that the investment was made by the assessee. It was once again reiterated that it was the son and wife of the assessee who were directors in Avis Motor and the assessee had nothing to do with any of the transactions.

7. The assessee also placed before the CIT(A) copies of assessment orders of Avis Motor. Mr. Anand Tiwari and Mrs. Kailash Tiwari for assessment year 2007-09 (i.e. the impugned year) to show that investments and monies were accepted in the names of the two directors of Avis Motor, i.e. Mr. Anand Tiwari & Mrs. Kailash Tiwari.

8. The CIT(A), observed

> *3.4 The assessment status of A.Y. 07-08 in the cases of Appellant's wife and son is seen. Appellant has submitted that investment in Avis Motors by his wife, son and Avis Motors have been accepted. On enquiry during appellate proceedings, Appellant has submitted that he was not a guarantor for Avis Motors nor had he hypothecated any of his assets for any loans by said company. Appellant's monies in the joint a/c. of Appellant with his son and used by the son are shown as loans given to son. The monies deposited by Appellant in the joint accounts with his son and wife have been enumerated by Appellant.*
>
> *Appellant submits that AO disregarded facts of the case entirely and regarding application of any tests regarding the genuineness of the facts submitted by the Appellant AO resorted to a very casual and easy approach by relying on a unsigned piece of paper found during course of a search in the case of a third party from the premise of that third party which was in no way related to Appellant. It was submitted that the onus was on the AO to prove that such investments were made by Appellant. Whereas AO has not been able to bring any material on record to prove that investment, was made by Appellant neither by way of cheque amounting to Rs. 1.223 Crs. nor of cash amount of Rs. 3 Crs. The addition was made merely on surmises and suspicion. Appellant submits that to make an addition u/s. 69B, AO is required to bring record on material supported by cognate evidence of Appellant making investment, whereas no such evidence or material has been brought on record by AO.*
>
> *2.3.6 Appellant cited and relied upon ITAT, Mumbai in the case of Dilshad Trading Co. P. Ltd. Vs. CIT. (49 ITD 348) that these three findings are Cumulative for invoking Section 69B, as under:*
>
> *1) Assessee must have made investment*
> *2) It is found by AO that amount expended on making such investment exceeded the amount recorded in the books of account.*
> *3) Either the assessee offers no explanation about such excess amount of the explanation offered is not satisfactory in the opinion of the AO.*
>
> *The Tribunal went on to say that:-*
>
> *i) The basic finding which is to be recorded on clear and cogent material is in respect of amount expended by the assessee in excess of that shown in the books of accounts.*
> *ii) The onus is on the department to show that the assessee has expended extra amount.*
> *iii) Merely because there exists some comparable cases showing higher price in respect of similar transactions, it could not be said that the assessee had expended extra amount.*

Appellant submits that Delhi High Court in case of CIT Vs. Lalit Bhasin 290 ITR 245 also supports the above view.

2.4 *Facts and material on record are considered. The basis of addition in the AO's order is Pg. No. 165 of loose papers found in the search at premises of Hiren Choksey. The reason for addition by the AO is stated to be that Appellant's wife and son have confirmed having entered into transactions regarding Rs. 1.54 Cr also narrated on the said page no. 165. Therefore, Appellant's denial of the contents of loose paper no.165 does not hold good. On this basis, AO added the entire sum of Rs. 4.223 Cr in Appellant's hands.*

2.4.1 *A study of this loose paper no. 165 shows that period below names of Harshil Choksey and Haren Choksey is 23.6.06 to 20.6.07. Below Bhupinder Singh it states 2006-07. There is no period mentioned against or below Appellant's name. Further, against the total of Rs. 4.223 Cr. shown as contribution by cash and cheque against Appellant's name, a sum of Rs. 4,67,08,371/- i.e. Rs. 4.67 Crs. is shown as 'less to be contributed' — i.e. the narration does not mention any contributed amount but only states "less to be contributed'. The bracketed figure thereafter is 'balance to be contributed' Rs. 44,78,371/-. The bottommost figures also show percentage to be contributed by Anand Tiwari at 40% at Rs. 4,67,08,371/- i.e. the figure mentioned against Appellant's name at 'less to be contributed." Paper no. 165 indicates that the sum of Rs. 4.67 Crs. had to be contributed by Appellant and makes no mention of amounts paid by Appellant.*

It is seen that the AO has not identified the cheque payment of Rs. 1.223 Cr. from any bank account of Appellant during the previous year relevant to the impugned year. The assessment order (impugned) also reflects no dissatisfaction or objections of the AO with regard to any of Appellant's bank account including joint accounts with his wife and son. In fact, this payment by cheque has not been identified from any of Appellant's bank accounts whether disclosed by him or not. In so far as cash shown against Appellant's name is concerned, the assessment order does not indicate any discrepancy in Appellant's details/financial statements etc. or of any unaccounted money or receipts, which would lead to a presumption of Appellant having undisclosed cash of such magnitude

2.4.3 Moreover, Appellant argues that the paper was found in the search action at Haren and Harshil Choksey's place. It also did not contain the signatures of Avis Motors P. Ltd's Directors viz. Appellant's wife and son. Appellant has denied entries made in his and family members names and other strong objections have been taken. In the face of these objections and arguments, establishment of the facts of the case vis-a-vis Appellant was necessary. This has not been done as is evident from the reliance placed by the AO on only two of the figures on loose paper no.165. A complete reading of the description on paper no.165 indicates that Rs.4.223 Cr. against Appel1ant's name could at best be considered a sum which was to be contributed by him. The assessment order does not indicate any facts or evidence to conclude that contribution of the said sum of Rs. 4.223 Cr. (by cash and cheque) has been made by Appellant during the impugned year. The sole reliance placed by the AO is that Appellant's wife Mrs. Kailash Kumari has accepted the amount of Rs. 1.54 cr. shown as paid to her by Mr. Bhupinder on paper no. 165 and therefore the sums mentioned against Appellant's name could at best be considered a sum which was to be contributed by him. The assessment order does not indicate any facts or evidence to conclude that contribution of the said sum of Rs. 4.223 cr *(by cash and cheque) has been made by Appellant during the impugned year. The sole reliance placed by the AO is that Appellant's wife Mrs. Kailash Kumari has accepted the amount of Rs. 1.54 cr. shown as paid to her by Mr. Bhupinder on paper no. 165 and therefore the sums mentioned against appellant's name would be considered undisclosed investment by; him.*

2.4.4 In this background, it is held that AO has not established any investment indicated against Appellant's name on loose paper no. 165 as having seen made by Appellant from undisclosed sources or that the said investment was undisclosed by Appellant. The reason for making the addition as stated by AO is inadequate to determine undisclosed investment in Appel1ant's case. The addition having been made on inconclusive facts, arguments and evidence and relying only on partial Information on page No. 165 is not sustainable in facts and law. It is consequently deleted".

9. The CIT(A), thus deleted the addition made by the AO.

10. Against this order, the department is in appeal.

11. Before us, the DR primarily relied on the order of the AO and reiterated that Avis Motor was owned by wife and son of the assessee and without whose help and contribution, the project would not have got underway. He further submitted that once the cheque entry in the books had been corroborated, cash entry in the same paper also had to be presumed to be correct and this contribution is proved to have been made by the assessee. The DR also submitted that the unsecured loans in the balance sheet tallied with the entries in the impugned paper.

12. The AR supporting the order of the CIT(A), pointed out that the paper was found from the premises of a stranger and from the fact of the document, it can be seen that it was an estimate and the fact, as proved from the supporting documents show that no payment or investment was made by the assessee.

13. On the query from the Bench with regard to the cash flow, the AR produced the same, wherein, it was shown that only Rs. 15,00,000/- was given by the assessee to the son, Mr. Anand Tiwari to

be paid into Avis Motor. This Rs. 15,00,000/- was paid out of sale proceeds of Rs. 30,00,000/- of a plot belonging to Dr. Avinash Tiwari.

14. The AR placed reliance on the decisions of:

Amar Kumar Surana	*69 Taxman 544 (Raj)*
CIT vs. Sanjay Oil Cake Industries	*149 Taxman 90 (Guj)*
Dilshad Trading Company	*49 ITD 348*

15. In these circumstances, the AR submitted, that when the paper itself talks of "to be contributed", shows that the paper does not talk of any transaction but only estimation. From the details as provided, with regard to only Rs. 15,00,000/- provided to the assessee's son, and as corroborated in the cash flow statement, how and why the name of the assessee appears on it, has not been proved by the AO, taking into account the fact, that the assessee does not have anything to do with the proposed transaction or even with the company M/s Avis Motor (P) Ltd. He, therefore, prayed that the order of the CIT(A) is correct and should not be disturbed.

16. We have heard the arguments of both the parties and the following are the undisclosed facts:

a) The search & seizure operations were conducted on strangers;
b) The paper relied upon by the AO was found from the premises searched;
c) No mention of any statement having recorded, either of the assessee or the assessee's son & wife.
d) Avis Motor, Kailash Tiwari and Anand Tiwari have accepted the investments made by them in their assessments.
e) Assessee name does not appear anywhere in the balance sheet of Avis Motor, as pointed out by the DR and relied upon by him.

17. On these facts, we shall proceed, the paper, relied upon the AO to make the impugned addition was found in the search action at

Haren and Harshil Choksey's place. It did not contain the signatures of Avis Motors P. Ltd's Directors viz. Appellant's wife and son. Assessee has denied entries made in his name and other strong objection has been taken against it, even before the AO. These objections and arguments, coupled with the facts of the case was necessary and incumbent upon the AO to deal with. This has not been done, as is evident from the reliance placed by the AO on only two of the figures on the impugned loose paper no.165. The AO in the assessment order has not been able to precisely indicate any facts or evidence to conclude that contribution of the said sum of Rs. 4.223 Cr. (by cash and cheque) has been made by assessee, during the impugned year. The only reliance placed by the AO, that the assessee's wife Mrs. Kailash Kumari has accepted the amount of Rs. 1.54 crore, shown in the impugned paper, as paid to her by Mr. Bhupinder on paper no. 165 could, by itself cannot conclude that contribution of the said sum of Rs. 4.223 cr (by cash and cheque) has been made by the assessee during the impugned year. This by itself cannot be the only criterion for the addition to have been made as undisclosed investment by the assessee.

18. In this background, and as per the cash flow submitted, which does not establish any investment indicated against Appellant's name on loose paper no. 165 as having seen made by Appellant from undisclosed sources or that the said investment was undisclosed by the assessee. The reasons, for making the addition, by AO are inadequate to determine undisclosed investment. The addition having been made on inconclusive facts, arguments and evidence and relying only on partial information cannot be sustained.

19. In our opinion, the CIT(A) was correct in employing the facts and law to delete the addition, which we sustain.

20. In the result the appeal filed by the department is dismissed.

Assessment Year: 2008-09 :

21. In its appeal, the revenue have raised the following grounds of appeal:

> 1. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) Mumbai has erred in deleting the addition made u/s 69B of the Act on account of unexplained investment in Avis Motors P. Ltd. of Rs. 23,40,800/-.*
>
> 2. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) Mumbai failed to appreciate the document seized during the search and seizure action in the case of Shri. Haren Chokshi clearly indicated the said undisclosed investment of the assessee of Rs. 23,40,800/- in Avis Motors Pvt. Ltd. wherein assessee's wife and son are Directors.*
>
> 2.1 *The Ld. CIT(A) has overlooked the fact that Shri Haren Chokshi had never specifically denied the transaction.*
>
> 2.2 *The Ld. CIT(A) has ignored the business connection between the party from whose premises the papers were seized and the assessee, while accepting the assessee's version regarding the notings on the paper.*
>
> 3. *The appellant prays that the order of CIT(Appeals) on the above grounds be set aside and that of the Assessing Officer restored.*

22. The facts are that the assessee is a Doctor by profession. His wife, Mrs. Kailash Tiwari and son, Mr. Anand Tiwari are directors in M/s Avis Motors Private Limited.

23. There was a search and seizure operation on the premises of Mr. Haren Choksi on 05.10.2007, from where certain loose papers and other documents were found and seized. Of those, the impugned documents were loose paper no. 56 & 57, wherein certain transaction details were noted, pertaining to some investment in Avis Motors Pvt. Ltd., to the tune of Rs. 13,48,000/- & Rs. 9,92,000/- respectively. When the contents of the document were confronted to the assessee, it was stated by the assessee that the contents of the loose papers seem to be some rough working estimates upon which, assessee was queried, then how the amounts written against the assessee's wife Smt. Kailash Kumari Tiwari and his son Shri Anand Tiwari in the same bunch of seized loose papers tallied with the their books and

accepted as such by them in their respective assessments. According to the AO, which ultimately knocks down the assessee's claim that the contents of the loose papers are rough workings. To this, assessee stated, vide submissions dated 24.12.2010, are as under:

> *"the loose nos.,56 and 57 appear to be rough working estimates. These papers do not belong to me and / am not aware what is mentioned in the loose papers. Although, the name Dr. Tiwari appear in those papers, it does not mean that they belong to me or the amounts mentioned therein are pertaining to me. Further, as regards the amounts written against my wife Mrs. Kailashkumar Tiwari and son Shri Anand Tiwari in the same bunch of seized papers. / would like to stated that certain cheques have been received by them from Mr. Harshil Choksey and Mr. Bhupinder Singh in pursuance of agreement to sell the premise on the first of the building proposed to be constructed by the Company M/s. Avis Motors Pvt. Ltd. wherein both are directors. The copy of the said agreement has already been submitted in their assessment proceedings. Some of the said amounts may be matching against their names. But, it may please be noted that these papers are rough workings or estimates only and presumptive in nature. Although a few amounts may match with the presumptions it does not mean that other amounts would also pertain to me or my family members. I or my family members have not entered into any partnership with any person. The papers found at Mr. Haren Choksey's place are their papers and their estimates. The are not signed by me. Not a single bit of paper has been found in the name of Mr. Avinashchandra Rambachan Tiwari. Hence, I deny the loose paper Nos. 56 and 57 in the entirety"*

21. The AO, on going through the above assertion of the assessee, held that the assessee was trying to hide the real facts. According to him, on one hand, assessee is claiming that the contents of loose papers appear to be rough working and on the other hand admitting that certain contents in the bunch of papers sized matched with the entries in the books of Mrs. Kailashkumar Tiwari, assessee's wife and Mr. Anand Tiwari assessee's, son. The AO further mentioned in the assessment order, how it can be possible that only certain entries which are matching with the books of asseseeee's son and wife are true and other entries are just rough workings. Thus, the AO rejected the contention of the assessee, and proceeded to add Rs. 23,40,800/- (Rs. 9,92,000/- as per loose paper No. 56 and Rs. 13,48,800/- as per loose paper No. 57), as assessee's investment and treat the amount of

Rs. 23,40,800/- as assessee's unexplained investments u/s 69B of the Income Tax Act.

22. Aggrieved by the assessment order by the AO, the assessee approached the CIT(A) for relief, and reiterated the facts and submissions made before the AO, and made detailed submissions before the CIT(A). The CIT(A), on consideration of the same, concluded,

> *"I have considered the facts. It is seen that the addition has been made on account of loose paper No. 56 & 57 found in the premises of Mr. Haren Choksey during the course of search & seizure action in their case. On going through the page 57, it is seen from the page 57 that "DRAFT" word has been written and mentioned on top of this page which gives the indication, that this page appears to be related to some rough working of project proposal being considered. The total amount at page No 57 is appearing at Rs. 66,42,000/- out of Rs.33,72,000/- is paid and balance of it shown at Rs. 33,72,000/- as payable out of which 13,48,800/- was against the name of Dr. Tiwari. Similarly, as per page no. 56, the amount of Rs. 4,80,000/- is payable out of which Rs. 9,97,000/- was supposed to be paid by Dr. Tiwari. The pages does not indicate name of project or building to be constructed or built and by whom. The AO has also not brought on record any material evidence to suggest that Dr. Tiwari, the appellant, has made investment in the Avis Motors P. Ltd. These loose papers did not contain the signature of the Avis Motors P. Ltd. Directors viz, appellant's wife and son. It is also fact that these are not in the handwriting of the assessee or his family members. It is further seen that this is rough working which appears to be a estimate for a proposed project wherein no name of Avis Motors P. Ltd. is mentioned. It is also seen that these pa'-' does not contain full name or full initials of appellant but only refers as Dr. Tiwari. It is also seen that the amount shown was the draft working page which means that the amount was calculation only and at the same time it was unpaid which was to be contributed and paid in future. I also found that the AO has not brought on record any statement of Hiren Choksey to substantiate that the entries reflected in the name of Dr. Tiwari pertains to the appellant and the appellant has made any contribution towards these supposed future payments. No statement of the assessee was ever recorded on these loose pages during search or after post search enquiry. There is also no reference that Hiren Choksey, has also stated in his statement that details mentioned on these pages were related to Dr. Tiwari. The presumption of the AO that the appellant's wife Mrs. Kailashkumari Tiwari and appellant's son Shri Anand 1wari, are the directors in the Avis Motors P. Ltd, therefore, the sums mentioned against the name of Dr. Tiwari is pertains to the appellant is not based on such evidence. However, in absence of corroborating evidence and to prove that appellant has made any investment in Avis Motors P. Ltd. no adverse inference can be drawn. The appellant has also filed copies of balance-sheet of Avis Motors which does not indicate any investment in the name of the appellant.*
>
> *I find that the AR has reiterated that page No. 56 and 57 appears to be rough estimates and these do not belong to the appellant. The amounts was shown as payable only and therefore the fact remains that these*

amounts were not paid. Thus, there cannot be an adverse inference drawn that there was an unexplained investment made by the appellant as the appellant was not having any financial involvement/ commitment with Avis Motors P. Ltd.

The provisions of section 69B provides that addition u/s 69B can be made where anything found in excess the amount recorded in books. I find that i.e. appellant is neither a share holder nor a director or nor a creditor in Avis Motors P. Ltd. He is not involved in any financial matters of Avis Motors Ltd.

Therefore, the question of making any investment in any form in the said company did not arise. Moreover, the AO has not brought anything on record or any statement of person from whom these papers were seized to establish that the investment of Rs. 23,40,800/- was actually made.

The AR relied in the case of Dilshad Trading Co. 49 ITR 318, wherein it was mentioned that for invoking section 69B, the assessee himself have made investment and he must have found making such investment exceeded the amount recorded in the books of accounts or the assets offers no explanation about the excessive amount. The Tribunal held that the basic dings which is to be recorded are clear and cogent material in respect of the amount explained by the assessee and the onus is on the deportment that the assessee has shown expended extra amount. However, in the instant case, the AO has failed to bring on record any material to justify the conditions laid down in the aforesaid decision of the Tribunal. The other case laws relied by the AR are also supports the case of assessee. Therefore, in absence of any cogent material that figures appearing are actual or part of it appears in balance sheet or the amount which was to be contributed or indicated appellant's name. Therefore, the reasons for making the addition as stated by the AO are inadequate, unestablished, inappropriate to determine the undisclosed investment in the name of the appellant. Thus, the addition made by the AO is not justified. It is also relevant to mentioned here that similar type of addition made in the case of appellant on account of loose paper No. 165 found and seized from Mr. Hiren Choksey for assessment year 2007-08 also stands deleted by the CIT(A)-3, Mumbai vide order No. ITA No. 328/09-10 dated 3.9.2010. Further, such type of addition made in the case of Avis Motors P. Ltd. were also deleted by CIT(A) -16, Mumbai vide his order dated 5.4.2010 These facts and finding of the appellate authorities, also shows that the additions were made based on third party material by the AO were without any basis. The facts of this year is also identical, therefore. I have no reason to deviate from the findings of my predecessor CIT(A)-3 and CIT(A).

In the light of aforesaid facts and the case laws relied by the AR, the addition of Rs. 23,40,800/- by the AO is therefore, deleted. This ground of appeal is allowed".

23. The CIT(A) thus deleted the addition, as made by the AO.

24. Against this order, the department is in appeal before the ITAT.

25. Before us the DR, strongly supported the order of the AO, whereas, the AR, supported the order of the CIT(A).

26. We have heard the detailed arguments from both the sides, and have perused the facts. Pages No. 56 and 57, as noted by the CIT(A), are rough estimates and does not belong to the assessee, as they were neither found from the possession of the assessee, nor were they claimed to be correct by the assessee, as the assessee was never confronted by the AO, with regard to the contents of the impugned papers. The amounts were shown as payable, therefore, it is apparent that these amounts were not actually, paid. Thus, there cannot be an adverse inference drawn against the assessee, that there was an unexplained investment made by the assessee, as the assessee did not have any transaction with the concern, Avis Motors P. Ltd. The provisions of section 69B are clear, that the addition u/s 69B can be made, if anything is found in excess of the amount recorded in books or the explanation provided is unacceptable. I find that the assessee is neither a share holder nor a director or nor a creditor in Avis Motors P. Ltd.

27. Therefore, the question of making any investment in any form in the said company did not arise. Moreover, the AO has not brought anything on record or any statement of person from whom these papers were seized to establish that the investment of Rs. 23,40,800/- was actually made.

28. The AR relied in the case of Dilshad Trading Co. 49 ITD 318, wherein it was mentioned, *"that for invoking section 69B, the assessee himself have made investment and he must have found making such investment exceeded the amount recorded in the books of accounts or the assets offers no explanation about the excessive amount. The*

Tribunal held that the basic thing which is to be recorded are clear and cogent material in respect of the amount explained by the assessee and the onus is on the deportment that the assessee has expended extra amount, as shown".

29. However, in the instant case, the AO has failed to bring on record any material to justify the conditions laid down in the aforesaid decision of the Tribunal. The other case laws relied by the AR also support the case of assessee. Therefore, in absence of any cogent material that figures appearing are actual or part of it appears in balance sheet or the amount which was to be contributed or indicated appellant's name, no adverse inference could be drawn against the assessee, specially when the evidence(s) being relied upon by the AO are inadequate, unestablished, inappropriate, and fail to prove the undisclosed investment in the name of the assessee. It has also been seen from the order of the CIT(A), that the CIT(A) noted that similar addition was made in the case of Avis Motors P. Ltd., as well, which, incidentally, was also deleted by CIT(A)-16, Mumbai vide his order dated 5.4.2010. These facts and finding of the CIT(A), also show that the additions were made based on third party material by the AO, which were without any basis or corroborated by any cogent fact.
In the light of aforesaid facts and the case laws relied by the AR, the CIT(A) deleted the addition of Rs. 23,40,800/- made by the AO.

30. Considering the entire factual matrix, we are of the opinion, that the CIT(A) was correct in employing the facts and law to delete the addition, which we sustain.

31. In the result the appeal filed by the department is dismissed.

To sum up :

Appeal in ITA No. 8344/Mu/2010, filed by the department is dismissed

Appeal in ITA No. 83/Mum/2012, filed by the department is dismissed.

Order pronounced in the open Court on 19th June, 2013.

Sd/-	**Sd/-**
(पी.एम. जगताप)	**(विवेक वर्मा)**
लेखा सदस्य	**न्याईक सदस्य**
(P.M. JAGTAP)	**(VIVEK VARMA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Date: **19th June, 2013**

प्रति/Copy to:-

1) अपीलार्थी /The Appellant.
2) प्रत्यर्थी /The Respondent.
3) आयकर आयुक्त(अपील) -3 Mumbai / The CIT (A)-3, Mumbai.
4) आयकर आयुक्त – 11, Mumbai /The CIT–11, Mumbai,
5) विभागीय प्रतिनिधि "ए" , आयकर अपीलीय अधिकरण, मुंबई/ The D.R. "A" Bench, Mumbai.
6) गार्ड फाईल Copy to Guard File.

आदेशानुसार/By Order

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उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण, मुंबई
Dy./Asstt. Registrar
I.T.A.T., Mumbai

*चव्हान व.नि.स
*Chavan, Sr. PS