IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER AND
SHRI BIJAYANANDA PRUSETH, ACCOUNTANT MEMBER

आयकर अपील सं./ITA No.197/SRT/2022

(Assessment Year: 2017-18)

(Physical Hearing)

Shah Maganlal Gulabchand Choksi, 3/138, Parsi Sheri, Navapura, Surat – 395003.	**Vs.**	The ACIT, Central Circle – 2, Surat
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: **AAJFS5582Q**		
(Appellant)		**(Respondent)**

आयकर अपील सं./ITA No.224/SRT/2022

(Assessment Year: 2017-18)

The ACIT, Central Circle – 2, Surat	**Vs.**	Shah Maganlal Gulabchand Choksi, 3/138, Parsi Sheri, Navapura, Surat – 395003.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: **AAJFS5582Q**		
(Appellant)		**(Respondent)**

Appellant by	Shri Rasesh Shah, CA
Respondent by	Shri Ravi Kant Gupta, CIT-DR
Date of Hearing	03/12/2024
Date of Pronouncement	16/01/2025

आदेश / O R D E R

PER BIJAYANANDA PRUSETH, AM:

These cross appeals by the assessee and Revenue emanate from the order passed under section 250 of the Income-tax Act [in short, 'the Act'] of the Learned Commissioner of Income-tax (Appeals) - 4, Surat [in short, 'the Ld. CIT(A)'], dated 05.05.2022 for the assessment year (AY) 2017-18.

2. Since facts are same, with consent of the parties, the appeals were heard together and a common order is passed for the sake convenience and brevity.

3. The grounds of appeal raised by the assessee in ITA No.197/Srt/2022 are as follow:

> *"[1] On the facts and the law on the subject, the Learned CIT(A)-4, Surat has failed to appreciate that the statement recorded u/s.131(1A) was under coercion and duress which has no evidentiary value in absence of any cogent evidence.*
>
> *[2] On the facts and law on the subject, the Learned CIT(A)-4, Surat ought to have deleted the entire addition of Rs.36,17,00,112/- made by the learned Asst. Commissioner of Income Tax Central Circle - 2, instead of retaining the addition of Rs.4,00,00,000/- on the basis of PEAK AMOUNT found from the bank of M/s. Nirav & Co. treating as unexplained deposit made by the appellant and Mr. Nirav Shah in collusion with each other.*
>
> *[3] On the facts and law on the subject, the Learned CIT(A)-4, Surat failed to appreciate the fact that the appellant has not made any sort of use of the bank account pertaining to Nirav R Shah.*
>
> *[4] On the facts and law on the subject, the Learned CIT(A)-4, Surat erred in dismissing the following grounds raised before him:*
>
> > *(a) On the facts and in the circumstances of the case, as well as law on the subject, the learned Asst. Commissioner of Income Tax Central Circle - 2, erred in treating the appellant as 'BENIFICIAL OWNER' without any cogent evidence. [Ground No. 10 of Form 31*
> >
> > *(b) On the facts and in the circumstances of the case, as well as law on the subject, the learned Asst. Commissioner of Income Tax Central Circle - 2, erred in initiating the provisions of section 115BBE of the I.T. Act, 1961 [Ground No. 11 of Form 35]*
> >
> > *(c) On the facts and in the circumstances of the case, as well as law on the subject, the learned Asst. Commissioner of Income Tax Central Circle - 2, erred in initiating the provisions of section 271AAC of the I.T. Act, 1961. [Ground No. 12 of Form 35]*
>
> *Your appellant therefore, prays that looking to the fact and law on the subject, the appropriate relief may please be granted in the interest of legal justice.*
> *Your appellant further reserves it's right to add, alter or to amend any of the aforesaid grounds at the time of hearing of an appeal."*

4. The grounds of appeal raised by the Revenue in ITA No.224/Srt/2022 are as follows:

"[i] On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in restricting the addition of Rs.36,17,00,112/- made by the Assessing Officer on account of receipts from M/s. Nirav & Co. under Sec.69 of the Act to the peak credit of Rs.4,00,00,000/- by presuming that the assessee has done purchase and sale of Bullion during the period of demonetization without appreciating that the demonetized currency was deposited in the Bank Account of M/s. Nirav & Co. and the same were transferred through RTGS/Cheques to the Bank Accounts of the assessee-firm and hence, the peak credit of these deposits cannot be applied instead of entire deposit which represents unexplained investment of Rs.36.17 Crores.

[ii] On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in restricting the addition of Rs.36,17,00,112/- made by the Assessing Officer on account of receipts from M/s. Nirav & Co. under Sec.69 of the Act to Rs.4,00,00,000/- by presuming that these transactions were pertaining to the purchase and sale of Bullion and also presuming the modus operandi of the transactions undertaken by the assessee, even though the assessee has neither made any such claim during the course of assessment proceedings nor has submitted any evidences in respect of such presumption.

[iii] On the facts and in the circumstances of the case and in law. the Ld. CIT(A) has erred in restricting the addition of Rs.36.17,00,112/- made by the Assessing Officer on account of receipts from M/s. Nirav & Co. under Sec.69 of the Act to Rs.4,00,00,000/-. without appreciating the fact that mere payments made by cheque or RTGS to wholesale bullion dealers does not establish that the gold bars were received immediately by the assessee-firm and the same was serially sold to unknown purchasers against the demonetized currency and, therefore, the pattern of entries reflected in the bank account of M/s. Nirav & Co. and that of the assessee was nothing but an attempt to convert the hoarded undisclosed income of the assessee into stock of gold for future sales.

[iv] On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in restricting the addition of Rs.36,17,00,112/- made by the Assessing Officer on account of receipts from M/s. Nirav & Co. under Sec.69 of the Act to Rs.4,00,00,000/- ignoring the admissions of the partner of the assessee in the statement recorded on oath as well as his own findings that the bank account of M/s. Nirav & Co was controlled by the partner of the assessee-firm viz., Shri Himanshu Shah and the same was used for depositing substantial amount of cash from sources which remained unexplained.
[v] On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in restricting the addition of Rs.36,17,00,112/- made by the Assessing Officer on account of receipts from M/s. Nirav & Co. under Sec.69 of the Act to Rs.4,00,00,000/- by taking the peak amount of the 17 transactions, ignoring the

own finding that the sale proceeds recorded in the name of M/s. Nirav & Co are false as unaccounted sales were made to M/s. Nirav & Co.

[vi] On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs,13,36,00,000/- made by the Assessing Officer under Sec.68 of the Act in respect of the funds received from M/s. S. R. Traders through RTGS, without appreciating that the amounts were credited in the bank account of the assessee and the onus was cast upon the assessee to explain these transactions but the assessee-firm has failed to furnish any details or explanation in respect of the same.

[vii] On the facts and in the circumstances of the case and in law, the Ld.CIT(A) has erred in deleting the addition of Rs.13,36,00,000/ - made by the Assessing Officer under Sec.68 of the Act in respect of the funds received from Shri Sunil Rupani, Prop. of S. R. Traders through RTGS on the ground that the AO has completed an ex-parte assessment in the case of Shri Sunil Rupani. Prop. of S. R. Traders, an entity /person whose identity or existence was not established even though the assessee has failed to furnish any explanation or details in respect of the credit entries found in its bank account.

[viii] On the facts and in the circumstances of the case and in law, the Ld.CIT(A) has erred in deleting the addition of Rs,13,36,00,000/- made by the Assessing Officer under Sec.68 of the Act in respect of the funds received from Shri Sunil Rupani, Prop. Of S. R. Traders through RTGS, without considering the fact that the Bank Account in the name of S. R. Traders was opened during the period of demonetization only that too without proper KYC documents and hence, its existence was also in doubt and the assessee has also failed to furnish any details or evidences to prove the genuineness of these transfer entries found in its bank account.

[ix] On the facts and in the circumstances of the case and in law, the Ld.CIT(A) has erred in deleting the addition of Rs.13,36,00,000/- made by the Assessing Officer under Sec.68 of the Act in respect of the funds received from Shri Sunil Rupani, Prop. Of S. R. Traders through RTGS, without considering the fact that an ex-parte order under Sec.144 of the Act has been passed in the case of Shri Sunil Rupani, Prop. Of S. R. Traders and the substantive addition made in that case has not yet reached its finality.

[x] On the facts and in the circumstances of the case and in law, the Ld.CIT(A) has erred in deleting the addition of Rs.76,00,000/- made by the Assessing Officer on account of disallowances of claim of purchases from M/s. Marshi Traders without appreciating the fact that the partner of the assessee has failed to explain the details of purchase of Silver from M/s. Maharshi Traders and its sale to Nirav & Co., with supporting documents even during the course of survey proceedings or during the course of assessment/appellate proceedings.

[xi] On the facts and in the circumstances of the case and in law, the Ld.CIT(A) has erred in deleting the addition of Rs.76,00,000/- made by the Assessing Officer on

account of disallowances of claim of purchases from Ms. Marshi Traders by observing that this amount also covers the total amount of Rs.36.17 Cr. being the sales made to M/s. Nirav & Co and considered while deciding the issue of addition of Rs.36.17 Cr.

[xii] In addition and in alternate to Ground No. 1 to 11, on the facts and in the circumstances of the case and in law. the Ld.CIT(A) has erred in deleting all the additions made by the Assessing Officer, without appreciating the fact that the documents/bank statements based on which additions were made, were found during the course of survey proceedings under Sec.133A of the Act at the business premises of the assessee and the assessee has failed to furnish details/evidences to explain the entries found therein, and hence the AO was empowered to make presumption that the documents belonged to the assessee and contents therein are true and correct as per the provisions of Section 292C of the I.T. Act.

[xiii] In addition and in alternative to Ground No. 1 to 12, on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the additions made by the Assessing Officer ignoring the principles of "Human Probability Test" i.e. preponderance of probabilities which is applicable for Income Tax proceedings.

[xiv] It is, therefore, prayed that the order the Ld. CIT(A)-4, Surat may be set aside and that of the AO may be restored to the above extent.

[xv] The appellant craves leave to add, alter, amend and/or withdraw any ground(s) of appeal either before or during the course of hearing of the appeal."

5. The facts of the case in brief are that assessee filed his return of income on 26.07.2017, declaring total income of Rs. 'Nil'. The assessee is engaged in the business of trading of gold and silver bars. A survey was conducted on the assessee u/s. 133A of the Act on 23.12.2016 in consequence of a survey in case of M/s S. R. Traders. The assessee had received Rs. 13.36 crores by cheque/RTGS out of total cash deposit of Rs.24.35 crores in bank account of M/s R. S. Traders during demonetization period. During the survey, several documents and evidences were collected and impounded. The statement of Shri Himanshu R. Shah, partner of assessee firm, was recorded u/s. 131 of the Act on 23.12.2016. It was also found that the assessee-firm had carried out similar transactions with another concern by

the name M/s Nirav & Co. The bank account of M/s Nirav & Co. with Surat Peoples Co-Operative Bank was found to be controlled and managed by Shri Himanshu R Shah. Cash of Rs.36.17 crore was deposited in the said bank account during demonetization period (*10.11.2016 to 05.12.2016*) in old high denomination notes of Rs.500/- and Rs.1,000/-. The AO issued show-cause notice to the assessee on 21.11.2019 wherein it was mentioned that Shri Nirav Rashmikant Shah, proprietor of M/s Nirav & Co., is a small time employee of Shri Maharishi Chokkas who provided essential documents of Shri Nirav R. Shah to Shri Himanshu R Shah for opening the bank account. Shri Nirav R Shah filed police complaint that his bank account was fraudulently used by someone else. In view of the above, assessee was asked to explain the nature and source of cash deposit in the bank account of M/s Nirav & Co. The assessee was also asked to explain about purchase of 176 kgs. silver worth Rs.76 lakh from M/s Maharishi Traders. The assessee was also asked to explain entries in the impounded books A/1 to A/3 found from the assessee's premises. The show-cause and reply of the assessee are reproduced at 2.3 and 2.4 of the assessment order. In the reply, the assessee stated that the bank account of M/s Nirav & Co. was opened at least two years before the demonetization period. The bank account was opened and operated by Shri Nirav R Shah, proprietor of M/s Nirav & Co. The assessee further replied that the cash was deposited in account of M/s Nirav & Co under instruction and guidance of Shri Nirav R Shah. Only because Shri Nirav R Shah is backing out from his acts and misleading the Department, the assessee cannot be blamed. It was further submitted that the

assessee sold gool to M/s Nirav & Co. against the payment received from M/s Nirav & Co. from its bank account. The assessee-firm had purchased gold bullion from various bullion merchants at Ahmedabad by making payment through account payee cheques. As against the said purchases, assessee had sold gold bullion to M/s Nirav & Co. It was also submitted that cash was deposited in the bank account of M/s Nirav & Co on the instruction of Shri Nirav R Shah and Shri Nirav R Shah had himself issued cheques/RTGS from his bank account with his signatures on the cheques. Regarding the silver of 176 kgs., it was submitted that Shri Himanshu R Shad had purchased the above silver from M/s Maharishi Traders on 22.11.2016 for total consideration of Rs.76 lakh and same was sold directly to M/s Nirav & Co on the same day.

6. The AO considered the reply of the assessee and noted at para-4.1 that there were 17 transactions for total of Rs.36,17,00,112/- in the period 10.11.2016 to 05.12.2016. The assessee received the funds through RTGS/cheque immediately after cash deposits were made in the bank account of M/s Nirav & Co. The AO remarked that assessee had only relied upon the fact that the account of M/s Nirav & Co was opened two years before the demonization. The assessee has not rebutted the sworn statement of Shri Himanshu R. Shah u/s 131 of the Act wherein he admitted that he was actually controlling the said bank account of M/s Nirav & Co and was using it as per the requirement. In fact, assessee is the only beneficiary of cash deposits made during the demonetization period. Shri Nirav R. Shah was a small time salaried employee who had no means and capacity to effect such huge

transactions. He was only a facilitator but the actual control of the bank account was exercised by Shri Hinanshu R. Shah. When Shri Nirav R. Shah realized the mistake, he filed a police complaint which shows that he was not the actual person who had undertaken the transactions. The AO further mentioned that notice u/s 133(6) of the Act issued to M/s Nirav & Co could not be served at the two addresses found from the ITD database. The invoices prepared by assessee giving address of M/s Nirav & CO as "M/s Nirav & Co. Nanpura, Surat" is a vague address. The AO at para-4.7 has summarized the findings which are as follows: (i) all cash transaction were during demonetization period, (ii) there are no substantial transactions before and after demonetization period and (iii) the only account to which funds were transferred is that of the assessee. In view of the above, the assessee was held to be beneficiary owner of the cash of Rs.36,17,00,000/- which was added u/s 69 of the Act to the total income of assessee.

7. The AO also noted that the assessee had received funds of Rs.13,36,00,000/- during the year from the bank account of M/s S.R. Traders which was opened during the demonetization period on 15.11.2016. The total deposits in the said account was Rs.24,35,98,500/- out of which Rs.13,36,00,000/- was transferred to the assessee. The AO issued show-cause notice in response to which assessee made submission which is at para-4.2 and 5.3 in assessment order. The assessee submitted that it had sold gold to M/s S.R. Traders against the payment received from its bank account. The assessee sold goods out of its purchases of gold bullion from various bullion merchants at Ahmedabad to whom payments

were made through account payee cheques. The assessee has maintained month-wise quantitative details of bullion and as well as month-wise purchase and sale both in quantity and in rupees. The explanation of the assessee was not accepted because M/s S.R. Traders was a non-existing entity. The address of M/s S.R. Traders was found to be non-existent. The assessee was accordingly treated as eventual beneficial owner of cash of Rs.13,36,00,000/- and accordingly the said amount was added on protective basis u/s 68 of the Act to the total income of the assessee.

8. During the survey, it was also found that the assessee had also received 176 kgs of silver worth Rs.76 lakh which was claimed to have been purchased from M/s Maharshi Traders. Since the stock was not found, Shri Himanshu Shah, partner of the assessee-firm, stated that it was still lying in the premises of M/s Maharshi Traders. When he was informed that no stock was found with M/s Maharshi Traders, he stated that silver had been sold to different customers for which no bills were prepared. The sales were in cash in the range of Rs.1.05 lakhs to Rs.2 lakhs per transaction. Subsequently, the assessee stated that silver was sold to M/s Niirav & Co directly and it produced the copy of invoice. This was held to be an afterthought because no such evidence was found during the survey operation. Moreover, Shri Himanshu Shah had also not stated that the silver was sold directly to M/s Nirav & Co. He had stated that it was sold to various customers. Hence, AO disallowed the purchase and added it to the total income of assessee.

9. The AO also added 3 per cent of shortage of stock of Rs.56,53,787/- being 832.703 gms. of gold. The value of such stock sold outside book wasRs.20,75,928/- and 3% of this amount i.e., Rs.62,278/- was added to the total income of assessee. Accordingly, total income was assessed at Rs.50,29,62,390/-. Aggrieved by the above additions, assessee filed appeal before CIT(A).

10. Before CIT(A), the assessee had taken the ground that the statement recorded during survey u/s 131(1A) of the Act was under coercion and duress and hence it has no evidentiary value. This issue has been discussed and decided at para-7 of the appellant order. Since no specific details or evidences were produced during appellate proceedings, the ground was dismissed by CIT(A).

10.1 Regarding addition of Rs.36,17,00,112/-, the CIT(A) observed that the appellant sold bullion during demonetization period and demonitized currencies were deposited in the bank account of M/s Nirav & Co. The funds in the bank account of M/s Nirav & Co. were transferred by RTGS/cheques to bank account of appellant and such funds in the bank account of appellant were used to purchase bullion. This cycle of purchase and sale of bullion continued during the period of demonetization till the date of survey. The CIT(A) has reproduced the findings of Special Judge CBI Court No.5 Ahmedabad at para 8.4 and he observed that the bank account was operated by Shri Nirav R Shah since 2014 but he lodged complaint with the police on 26.12.2016, after the date of survey u/s 133A of the Act in the premises of assessee on 23.12.2016. The CIT(A) held that deposit of cash in the bank account of M/s Nirav & Co by Shri Himanshu Shah was in connivance

with Shri Nirav R Shah. He noted that there were 17 transactions over a period of 25 days where cash deposited was first used to buy bullion, the said bullion was sold, cash was generated, the said cash was again deposited to buy the bullion and such cycles continued for 17 transactions. Hence, only the peak credit of these deposits can be brought to tax as "unexplained investment" u/s 69 of the Act and not the total deposit of Rs.36.17 crore. He further held that sale proceeds recorded in the books of account in the name of M/s Nirav & Co. are false as no sales were made to M/s Nirav & Co. The appellant sold the bullions to customers for cash and actual sales were never recorded in the books. The CIT(A) observed that after announcement of demonetization, the gold bullion was sold at a premium of 10-25% depending upon the demand and supply. However, appellant has shown gross profit of 1.57% only against actual gross profit rate of 10 to 15%. Therefore, the CIT(A) directed the AO to add peak credit of Rs.4 crores as evident from transactions from 10.11.2016 to 15.11.2016 instead of addition of entire deposit of Rs.36.17 crore.

10.2 Regarding the protective addition of Rs.13,36,00,000/- u/s 68 of the Act, the CIT(A) observed that the impugned addition was made because AO concerned had not completed the assessment of M/s S.R. Traders. During appellate proceedings, he verified assessment order of M/s S.R. Traders and found that the AO has assessed total income at Rs.24,36,28,500/- by making addition of total cash deposits in bank account of M/s S.R. Traders. As substantive addition of cash

deposit has been made in the hands of Mr. Sunil R Rupani, Prop. M/s S.R.Traders, the protective additions in the hands of appellant was deleted.

10.3 Regarding addition of Rs.76 lakh towards purchase of silver bullion of 176 kgs., the CIT(A) observed that assessee itself sold the silver for cash and billed it to M/s Nirav & Co. He held that the sales of 36.17 crores shown to have been made to M/s Nirav & Co. includes sale of silver as well. Since peak credit has been added, this addition of Rs.76 lakh was deleted.

11. The CIT(A) dismissed the ground of assessee and held that beneficial owner of the bank account of M/s Nirav & Co. was the appellant firm though its partner, Mr. Himanshu Shah.

11.1 The CIT(A) held that provisions of Section 115BB are attracted because the addition of Rs.4 crore cannot be treated as normal business income because the same has been taxed u/s 69 of the Act. Aggrieved by the order of CIT(A), assessee as well as revenue filed appeal before the Tribunal.

12. Learned Commissioner of Income-tax – Departmental Representative (Ld. CIT-DR) has strongly supported the order of AO and argued that the order of CIT(A) is not correct. The Ld.CIT-DR submitted that the partner of assessee firm, Shri Himanshu R. Shah, admitted on oath in reply to question No. 3 of his statement that he deposited an aggregate sum of Rs.34 crore in the bank account of M/s Nirav & Co on various dates post-demonetization in old high denomination notes of Rs.500/ - & 1000/-. He also submitted that there was not a single cash deposit in the bank account of M/s Nirav & Co after demonetization period. This clearly

shows that the assessee firm was either having undisclosed income/money as on 08.11.2016 or accepted and deposited unaccounted old notes of Rs.1000/Rs.500 beyond the prescribed time limit which otherwise was not allowable as per Law. The assessee failed to explain as to how almost all the cash deposited in the bank account of M/s Nirav & Co were immediately transferred to bank of the assessee firm. Also, Shri Nirav R. Shah has no capacity to deposit and transfer such huge sums to the assessee. In the invoices prepared by the assessee, the address of M/s Nirav & Co is mentioned as “M/s Nirav & Co, Nanpura Surat” which is quite vague. The party was not found to be in existence at such address. The ld. CIT-DR also submitted that CIT(A) failed to appreciate the fact that there were huge cash credits in the bank accounts of M/s Nirav & Co which was operated by the partner of assessee firm, Shri Himanshu R. Shah, but the CIT(A) simply held that only peak credit is to be taxed. The rationale behind "Peak credit theory" is to avoid double addition and to bring only the actual income of the assessee to tax. However, in this case, amount of Rs.36.17 crore was deposited in the account of M/s Nirav & Co *via* 17 transactions. No corroborative evidence has been presented by the assessee to actually show that the amount transferred from the account of M/s Nirav & Co. to the account of the assessee was actually put to use for purchase of bullions. Hence, no question of double taxation arises in this case and, therefore, the rationale behind peak credit theory applicability in present case is not justifiable.

12.1 The Ld. CIT-DR further submitted that CIT(A) has deleted the protective addition without appreciating the fact that M/s S.R, Traders was not found to be an existent entity. The huge sums cash that were deposited in bank account of M/s S.R. Traders during the demonetization period were immediately transferred to assessee's and others' bank accounts. The partner of assessee firm, Shri Himanshu R Shah also stated on oath in his statement that the silver worth Rs.75 lakhs in question had been purchased from M/s Maharishi Traders but when confronted about said silver, he stated said silver is lying at the premises of M/s Maharshi Traders. Further, the assessee stated that the said silver was sold to M/s Nirav & Co directly and produced copy of invoices. However, M/s Nirav *& Co* was found to be a non-existent party and no invoice was found during survey. In this regard, the CIT(A) had deleted the addition considering amount of Rs.75 lakhs to be a part of sale of Rs.36.17 Crore. However, the assessee has neither during the survey proceeding nor during the assessment proceedings, stated that the said silver is part of sale of Rs.36.17 crore and the assessee had failed to furnish documentary evidences regarding purchases of silver from M/s Maharishi Traders. Without prejudice to above, it was argued that even if the addition based on peak credit is upheld by ITAT, then also the peak credit should be shown as not highest balance but as the highest single day deposit, which in this case is higher than highest balance. It is also seen from assessee's paper book page no.201, which is the account opening form of M/s Nirav & Co., that account was introduced by Himanshu Shah; hence, it clearly establishes link between these parties. The

account of M/s Nirav & Co has been opened by Shri Himanshu Shah acting as an introducer. The cash was handled as well as deposited by Mr. Himanshu Shah, as admitted in his statement. Almost all of the cash from M/s Nirav & Co and majority of the cash from M/s SR traders were immediately transferred to the account of the assessee firm. The Ld. CIT-DR submitted that, as admitted by Mr. Maharishi Chokas in his statement, the account was opened in the name of M/s Nirav & Co for the purposes of Mr. Himanshu Shah and his firm. Besides the money transferred from M/s Nirav & Co to the assessee firm, Rs.1 crore rupee was also routed through M/s DN Traders into the balance sheet of assessee firm. The Ld. DR submitted that gold in the form of bullion is purchased in the units of 100 grams and at the then prevailing rate, these units would cost above 3 lakhs. The assessee has admitted in statement that the sales in the name of M/s Nirav & Co. have actually been sold to the retail customers in cash. The firm could not have sold to the retail customers in cash for a bill of 3 lakhs rupees. In order to have turnover of about Rs.34 crores, the assessee would have to sell to more than 2200 customers and that too after breaking the 100 gr. gold units into units of less than 70 gr. per unit (value less than Rs.2 lakhs) which is physically impossible. Hence, it can be safely concluded that the money deposited into the accounts of M/s Nirav & Co. and M/s SR Traders is nothing but the uncounted cash/Specified Bank Notes (SBN) which have been deposited into these accounts and then transferred to the assessee firm. In absence of any details or the sources of such cash deposits

submitted by the assessee, the presumption of the law is very strong that the money belonged to the assessee firm only.

12.2 The ld. CIT-DR also submitted that M/s S.R. Traders belongs to the brother-in-law of Mr. Maharishi Chokas who had come from abroad during the demonetization period and his bank account was opened on 14th November during demonetization period and similar transactions were carried out as explained in the case of M/s Nirav & Co., and hence, both the cases are on the same footing. If one removes the fragment of imagination of this bank accounts, the ultimate beneficiary for all the money deposited in M/s Nirav & Co and more than half of the money deposited in M/s S.R. Traders is the assessee firm. Even the profit/commission earned by M/s S.R. traders of Rs.1 crore has been, as admitted by Mr. Maharshi Chokas, transferred to M/s H. H. Traders, which is another sister concern of the assessee firm. The ld. CIT-DR stated that CIT(A) has grossly erred in application of peak theory, while taxing the uncounted income of the assessee since the modus operandi of the transactions carried out by the firm with respect to M/s Nirav & Co, as described by the CIT(A) is nothing but a figment of imagination as this has neither been claimed by assessee during the assessment or appellate proceedings, nor any submission to such effect has ever been made in this regard. The ld. CIT-DR again emphasized that the assessee has deposited close to Rs.50,00,00,000/- in SBN through two accounts of M/s Nirav & Co. and M/s S.R Traders and no source of such cash has been explained by the assessee. The theory of selling it to the retail customers (about 2200 customers) in cash is practically

impossible to execute, as has been explained earlier. Further, admittedly assessee had only 2.6 kg. of gold worth Rs.75 lakhs on 8th November 2016, while on 10th of November, more than Rs.10 crore of cash has been deposited. The cycle of such transactions would take at least 3 to 4 days but total of almost Rs.20 crore have been deposited in first four days in the account of M/s Nirav & Co which is not possible. The whole amount deposited in the accounts of M/s Nirav & Co and M/s S.R Traders, were immediately transferred to the account of assessee firm which represents the unaccounted income of the assessee firm and needs to be taxed as unexplained investment u/s 69 r.w.s. 115BBE of the Act in absence of any further details submitted by the assessee. Reliance was placed on the decision in case of Vaishnavi Bullion (P) Ltd. vs. ACIT, [2022] 145 taxmann.com 197 (Hyderabad). The ld. CIT-DR submitted that facts of the present case are similar to the facts of Vaishnavi Bullion (P.) Ltd. (supra). In the said case, huge cash deposits in the bank account of the assessee were found after demonetization was announced. The assessee had initially claimed that it had received advances of less than Rs. 2 lakhs each from 2153 customers for purchase of gold bullion on the date of demonetization. It was held by the Tribunal that in absence of availability of gold with the assessee, it was difficult to infer sale agreement between assessee and anonymous buyers. Further, bank account was opened only after demonetization on 10.11.2016. Till KYC was complete, there was disability of assessee to deposit more than Rs.50,000/-. Further, no sales or purchases could be made either tendering or accepting SBN (old Rs.500/1000 notes) by any person after cut-off

date on 08.11.2016, save on assets, the services/products exempted from it. In any case, there was complete prohibition from sale and purchase of gold in SBN after 08.11.2016 as SBN ceased to be valid legal tender. The Ld. CIT-DR strongly argued that facts being similar, the order of AO may be upheld in entirety.

13. On the other hand, Learned Authorized Representative (Ld. AR) for the assessee partly supported the order of CIT(A) and has filed paper book enclosing various details, submissions etc. He submitted that the CIT(A) was not correct in dismissing the ground relating to lack of evidentiary value of statement recorded u/s 131(1A) of the Act under coercion and duress. The CIT(A) was also not correct in retaining addition of Rs.4 crore as peak credit instead of deleting the entire addition of Rs.36,17,00,112/-. He also erred in treating the appellant as beneficial owner without any cogent evidence. The CIT(A) also erred in upholding the provisions of u/s 115BBE of the Act. Regarding addition of Rs.36.17 crore on account of cash deposits in bank account of M/s Nirav & Co., the Ld. AR of the assessee submitted that assessee received Rs.34.82 crores from Nirav & Co. as sales consideration. The balance amount of Rs.1.35 crores was paid by Nirav & Co. to other parties. The high denomination notes were deposited by Nirav Shah in his bank account and he paid the amount of Rs.34.82 crores through RTGS against sale of bullion made to him. Regarding the assessee's admission through the statement of Shri Himanshu R. Shah that he used the bank account of Nirav & Co., it is submitted that the statement of assessee was recorded under coercion and duress. The assessee has correctly shown the income on sales made to M/s Nirav

Co. in his return of income. Shri Nirav R Shah filed the police complaint against Shri Maharishi Chokas against the unauthorized opening of his bank account by the accused. So, at best, it can be said that the transaction in the bank account of the M/s Nirav & Co. was made under connivance. The bank account of M/s Nirav & Co. was already in existence since 06.06.2014 and assessee had given only the introduction and nothing more for last 2 years. The Investigation Team recorded the statement of bank official, Shri Jyotindra Gajiwala on 26.12.2016 and in reply to Q. No. 9 he stated that the account of M/s Nirav & Co. was operated on 15.09.2014 and 10.11.2014 and assessee was not concerned with the transactions on these dates. The Investigation Wing and the AO have not examined Mr. Nirav Shah on these credit entries. In the course of the proceedings before CIT(A), assessee filed the affidavit of Shri Himanshu R. Shah executed on 18.01.2020 retracting the admission made his statement recorded at the time of the survey. Even otherwise, the statement on oath u/s. 131(1A) cannot be taken in the course of the survey and hence the statement made by Shri Himanshu R. Shah do not carry evidentiary value. Reliance was placed on the following decisions: (i) CIT vs. S. Khader Khan Son - 25 taxmann.com 413 (SC); (ii) CIT vs. S. Khader Khan Son - 300 ITR 157 (Mad) and (iii) Paul Mathews & Sons vs. CIT - 129 Taxman 416 (Ker). The ld. AR submitted that in the statement recorded at the time of the survey, assessee clearly stated Shri Nirav Shah was coming from M/s Nirav & Co. for taking the delivery of the goods (i.e., gold bullion). Further, in reply to Q. No. 12, assessee stated that the goods of the firm were sold in cash after 08.11.2016 in retail

through M/s Nirav & Co. Even if it is assumed that cash received against the sales from different customers was deposited in the bank account of M/s Nirav & Co., it does not make any difference as assessee has shown the amount of Rs.34.82 crores as sales in its books of account. The statement of the assessee recorded at the time of the survey cannot be partially accepted; it should be either rejected or accepted fully.

13.1 The Ld. AR also submitted that the Revenue has not doubted the purchases made by the assessee except purchases of Rs.76 lacs from Maharishi Traders of silver bullion. In the course of the survey, no excess stock of others valuables were found. Further, no evidence was found that assessee earned Rs. 34.82 crores to deposit the same in the bank account of M/s Nirav & Co. So it is beyond doubt that the assessee made the sales against Rs. 34.82 crores which was sourced out of the genuine purchases made by assessee.

13.2 The assessee is a regular dealer of the purchase and sales of the gold and silver bullion for last many years. He has shown the gross margin of 1.57% during the year which is far more than margin of preceding year where assessee earned gross margin of 0.21% only. In fact, even at the time of demonetization, assessee's sale is lower compared to last several years. Assessee has also duly paid the VAT on the sales made by it.

13.3 The purchase and sales are supported by the complete stock tally and the AO did find any defects in the stock records maintained by the assessee. The AO accepted the books of account of assessee. The margin of profit in the case of

bullion is always low as there is no value addition. The assesses has included all the credits received from the M/s Nirav & Co. as part of the sale. The Ld.AR relied on the decision of Hon'ble Gujarat High Court in case of CIT vs. Vishal Exports Overseas Ltd. - Tax Appeal No. 2471 of 2009 (Guj.) where it was held that when the assessee had already offered sales realization and such income is accepted by AO to be the income of the assessee, addition of the same amount once again u/s 68 of the Act would tantamount to double taxation of the same income.

13.4 The ld. AR also submitted that AO in fact didn't make the addition u/s 68 of the Act but he invoked section 69 observing that that there are enough circumstantial evidences to suggest that the assessee was the actual beneficiary of the cash deposit made in the bank account of Nirav & Co. He submitted that the Section 69 is attracted only when the investments found are not recorded in the books of account, if any, maintained by the assessee and assessee doesn't offer explanation about nature and source of the investment. Here, the amount received from the Nirav & Co. was properly recorded in the books of account of the assessee firm and there is no question of applicability of Section 69 of the Act.

13.5 The ld. AR relied on the decision of Hon'ble Supreme Court in case of Sreelekha Banerjee vs. CIT, 49 ITR 112 and submitted that the department cannot by merely rejecting unreasonably a good explanation, convert good proof into no proof. He also relied on the following decisions of the Hon'ble Supreme Court where the additions were deleted as they were made on basis of the surmises and conjecture: (i) Umacharan Shaw & Bros, vs. CIT, [1973] 37 ITR 271 (SC); (ii)

Lalchand Bhagat Ambica Ram vs. CIT, [1959] 37 ITR 288 (SC) and (iii) Dhakeswari Cotton Mills Ltd. vs. CIT, [1954] 26 ITR 775 (SC).

13.6 The Ld. AR also submitted that assessee is entitled to receive cash after the demonetization as window period up to 31.12.2016 was allowed for deposit of cash. Even if it is held that assessee cannot receive cash against sales after demonetization, so far as the income tax law is concerned, the tax should be levied on real income of the assessee ignoring the infringement of other laws. For this, he relied on the decision of in case of Sri Bhageeratha Pattina Sahakara, in ITA No. 646/Bang/2020 (Bang. - Trib.)

13.7 Regarding decision of Vaishanavi Bullion Pvt. Ltd. vs. ACIT, 145 taxmnann.com 197 (Hyd. - Trib.) relied upon by the ld. CIT-DR, it was submitted that the said decision is not at all applicable in case of the assessee as in that case assessee initially accepted such income and agreed to deposit taxes as per scheme of Pradhan Mantri Garib Kalyan Yojna, 2016. Further, in that case, as per the report of the CFS and forensic analysis of computers, it was found that the system was shut down on 08.11.2016 but the receipts were dated of 08.11.2016. Further, in that case the gold was also not available with the assessee. In the instant case, the assessee initially admitted that the cash deposited in the bank account of the M/s Nirav & Co., represented the cash sales made by him and the AO didn't doubt the purchases against the alleged sales. The purchases made by the assessee were found to be genuine and even in the statement recorded u/s. 131 of the Act at the

time of the survey, assessee stated that he made purchases from the parties of Ahmedabad.

13.8 The ld. AR submitted that CIT(A) confirmed addition of Rs. 4 crores on the basis of the peak of the cash deposits made in the bank account of Nirav & Co., on the ground that the assessee sold the bullion to the customers for cash for which he earned the abnormal profit because during demonetization, gold bullion was sold at the premium of 10 to 25%. In this connection, he submitted that that there is no unexplained investment involved as cash deposits are represented in the sales made by the assessee which is duly reflected in the assessee's books of account. In case of the bullion, it cannot be said that assessee would receive the abnormal profit as margin of profit involved in trading of bullion is very low of about 1% only. The assessee actually showed the overall gross profit of 1.57%.

13.9 In view of the above discussion, the ld. AR submitted that even if the statement of the assessee carries evidentiary value, the assessee has shown the correct affairs in its audited books of account regarding the income earned on sale of the bullions. The statement recorded u/s. 131 at the of the survey cannot be used partially and it should be accepted in *toto* meaning thereby that deposits in the bank account of M/s Nirav & Co. represented the sales made by the assessee or M/s Nirav & Co. In the course of the survey no evidence was found to conclude that assessee earned more income which can be deduced on the basis of the materials found at the time of the survey. After the transfer of various sums from bank account of the M/s Nirav & Co., the amounts were used by the assesses to

purchase bullion which was not doubted by the revenue. This fact indicates that that no undisclosed investment was unearthed by the revenue in the course of the survey conducted against assessee after demonetization. The business transactions of the assessee were never doubted in past and also in the current year. The Ld. AR placed reliance on the detailed written submission filed before the CIT(A) through various letters as placed in the paper book.

13.10 Regarding addition of Rs.13.36 crore on account of fund received from M/s. S. R. Traders, the ld. AR submitted that AO made the addition of Rs.13.36 crore u/s. 68 of the Act on protective basis of on account of the amount received from M/s. S. R. Traders. The Id. CIT(A) deleted the said addition on the ground that in case of S. R. Traders, substantive addition was made by AO. Further, there is no finding that the account of the S. R. Traders was operated by the partner of the assessee firm. On the contrary, the AO has given the finding at para no. 5.5.2 to the effect that the account of M/s. S. R. Traders was operated by somebody else. The ld. AR relied on the finding of the CIT(A) as summarized above given at para no. 9.1 & 9.2 of his order.

13.11 As regards addition of Rs. 76 lacs for purchases made from M/s Maharishi Traders, ld. AR submitted that in reply to Q. No. 48 of statement recorded during survey proceedings, assessee stated that silver in question was sold to M/s. Nirav & Co. and the amount from the same was already received from M/s Nirav & Co. Even if it is treated that both purchase and sale are bogus, no addition can be made as the assessee cannot be treated to have made any investment for bogus

purchase of the goods. The purchases and sales both are required to be omitted in such case and as assessee has shown the profit on this transaction, there cannot be any addition. The CIT(A) deleted this addition on the ground that he already confirmed the addition of Rs.4 crores relating to the sales shown to M/s. Nirav & Co. In this connection, the ld. AR submitted that the CIT(A) has erred in confirming part addition of Rs.4 crores u/s. 69 of the Act as pointed earlier. As assessee has shown profit of Rs.3,77,576/- on this transaction, the addition is required to be deleted.

13.12 Regarding invocation of section 115BBE, the ld. AR submitted that M/s. Shah Maganlal and Gulabchand Choksi is a partnership-firm which is engaged in the business of trading of gold bullion and silver bullion only and the assessee firm has not got any other source of income. The assesses-firm has always earned only business income and has always shown returned income from business u/s. 28 of the Act. Therefore, the amount deposited in the bank account is required to be considered as business income only and there is no question of presuming to have any other source of income and hence, provision of Section 115BBE cannot be attracted. For this, ld. AR relied on the following decisions: (i) J.K. Chokshi vs. ACIT-Tax Appeal 149 of 2003 (Guj.); (ii) Green Associates vs. PCIT - Tax Appeal No. 1199 of 2018 (Guj.); (iii) DCIT v/s. Radhe Developers India Ltd. - 329 ITR 1 (Guj.) and (iv) CIT vs. Mhaskar General Hospital in Tax Appeal No. 1474 of 2009 (Guj.)

13.13 Without prejudice, the ld. AR submitted that the amendment to section 115BBE was made through Taxation Laws (2nd amendment Act, 2016) which

received the assent of the President on 15.12.2016 and was published vide gazette dated 15.12.2016. The law is well settled that the Income-tax Act, 1961 as it stands amended on the 1st day of April of any financial year apply to the assessments of that year. Any amendments in the Act which come into force after the 1st day of April of financial year would not apply to the assessment to that year, even if the assessment is actually made after the amendments came into force. He relied on the following decisions: (i) Karimtharuvi Tea Estate Ltd. vs State of Kerala, 60 ITR 262 (SC); (ii) CIT vs. Vatika Township (P.) Ltd., 367 ITR 466 (SC); (iii) Samir Shantilal Mehta vs, ACIT, ITA No. 42/Srt/2022 (Sit Trib.); (iv) Rajendra Ramanlal Desai vs ITO, ITA No. 293/Srt/2022 (Srt Trib.) and (v) ACIT vs Sandesh Kumar Jain, ITA No. 41/Jab/2020 (Jab. Trib.).

13.14 The ld. AR also submitted that provisional attachment of the properties of the partner of the firm, Shri Himanshu R. Shah, was made by the Assistant Director, Directorate of Enforcement, which were confirmed by the adjudicating authority. On Writ Petition before Hon'ble Gujarat High Court, the R/Special Criminal Application No. 9001 of 2021, darted 28.03.2022 was allowed in favour of the assessee and the respondent authorities were directed to release the properties including the FDR and restore the actual possession of the petitioners.

14. We have heard rival submission of both the parties and perused the material available on record. We have also deliberated on the decisions relied upon by both parties. Facts of the case has already been discussed in the earlier part of the order. The AO has made four additions i.e., (i) Rs.36,17,00,112/- u/s 69

of the Act, (ii) Rs.13,36,00,000/- u/s 68 on protective basis, (iii) Rs.76,00,000/- being purchase of silver disallowed and (iv) addition of GP of Rs.62,728/-. We find that before ld. CIT(A), the assessee had raised 12 grounds of appeal of which ground nos. 1, 6, 7, 8 and 9 were not pressed and hence they were dismissed.

14.1 Ground No.1 was regarding statement recorded u/s 131(1A) under coercion and duress. The CIT(A) has dismissed the ground in para 7 of the order by holding that the assessee and Mr. Nirav & Co. operated the impugned bank account for mutual benefit and hence statement of assessee was not under any coercion or duress. No specific details or evidences were given to the CIT(A) to support the above ground.

14.2 The next ground was addition of Rs.36,17,00,000/- u/s 69A of the Act. The CIT(A) has discussed this issue at para 8 to 8.8 of his order. At para 8.7, the CIT(A) observed that sale proceeds recorded in the books of account in the name of M/s Nirav & Co. are false because no sales were actually made to Nirav & Co. The assessee sold bullion to customers in cash and the actual sales were never recorded. Sale invoices were raised in the name of Nirav & Co. because money was transferred to the bank account of assessee from Nirav & Co. Entire operation of sale in cash, collection of cash from customers, deposit of cash in the bank account of Nirav & Co. has been done by Shri Himanshu R. Shah, partners of the appellant-firm. The CIT(A) has allowed relief of Rs.32,17,00,112/- and sustained addition of Rs.4,00,00,000/-, being peak credit as unexplained investment in bank deposit.

14.3 Ground No.4 was addition of Rs.13,36,00,000/- u/s 68 on protective basis. The addition was deleted because substantive addition was made in case of M/s S. R. Trader in whose bank account cash of Rs.24,35,98,500/- was made out of which Rs.13,36,00,000/- had been transferred to the bank account of the appellant.

14.4 Ground No.5 was addition of bogus purchases of 176 kgs of silver worth Rs.76,00,000/- purchased from M/s Maharishi Traders. The CIT(A) deleted this addition by treating sale consideration of this purchase as part of cash deposit of Rs.36,13,00,112/- in the bank account of Nirav & Co. on which peak credit was held to be taxable.

14.5 In Ground No.10, the CIT(A) has held that beneficial owner of the bank account of Nirav & Co. was the appellant-firm through its partner Shri Himanshu R. Shah.

14.6 Ground No.11 was also dismissed by the CIT(A) by holding that peak credit of Rs.4,00,00,000/- cannot be treated as business income and once the amount is brought to tax u/s 69 of the Act, provisions of section 115BBE of the Act are attracted.

15. The main issue in the present appeal is addition of Rs.36,17,00,112/- made u/s 69 of the Act. The CIT(A) has partly allowed the issue by observing as under:

> *"8.8 On page 6 & 7 of the assessment order, the AO has given the details of 17 transactions date-wise. On perusal of the said transactions, it is quite clear that the peak credit is Rs. 4 crore which is evident from transaction dated 10.11.2016 and also on 15.11.2016. All the other transaction are smaller than Rs.4 crore. In view of the above, the AO is directed to tax the peak credit of Rs. 4 crore as unexplained investment in bank deposit in the bank account of M/s Nirav & Co. The appellant gets relief of rs.32,17,00,112/-. The ground No.3 is partly allowed."*

15.1 It is clear from the decision of CIT(A) that he has adopted the theory of peak credit to sustain the addition of Rs.4,00,00,000/- and allowed relief of Rs.32,17,00,112/-. The peak credit theory applied by the CIT(A) is not acceptable since the CIT(A) has not brought on record the peculiar facts of the case which compelled him to apply peak credit theory in picture. The CIT(A) has simply taken the amount of highest balance in the bank account and has treated it as "peak credit", which is not correct. The CIT(A) failed to take note that from the 17 date-wise transactions, it can be observed that cash deposits were made and then cheques were issued. It is not the case that cash was first deposited from which cash was withdrawn and the same remained unutilized for subsequent deposit. The determination of peak credit cannot be applied in case of the appellant because of the following reasons:

(i) where there are cash deposits but withdrawals are through cheques then benefit of peak credit cannot be allowed for the cash deposit so made in the bank account. In assessee's case, against cash deposits cheques were issued to some other entities. For above view, reliance is placed on the decisions of Hon'ble Allahabad High Court in case of CIT vs. Vijay Agricultural Industries 294 ITR 610 (All) and Hon'ble Delhi High Court in case CIT vs. D.K.Garg ITA No.115/2005 dated 04.08.2017.

(ii) As the amount of cash credits were standing in the names of different persons which all along the assessee had been claiming as genuine deposit, withdrawal / payment of amount to different set of persons would not at all

entitle the applicant to claim benefit of peak credits. It has been so held in the case of Bhaiyalal Shyam Behari vs. CIT, 276 ITR 38 (All.).

15.2 While determining the peak credit, the withdrawal of cash, if not utilized elsewhere, is considered as available for making deposits. The highest unexplained cash deposit is considered as the peak credit. The determination of the peak credit reduces the taxable income. However, where withdrawal are through cheques, the benefits of those withdrawals will not be available to explain the deposits. Therefore, the decision of CIT(A) to allow peak credit to assessee was not correct.

15.3 The appellant claimed to have sold the bullion during the demonetization period and the demonetized currency was deposited in the bank account of Nirav & Co. The CIT(A) has formed a hypothesis to decide the case on peak credit principle and restrict the addition to Rs.4,00,00,000/- and delete addition of Rs.32,17,00,112/-. However, on the facts of the case nowhere the assessee had been able to conclusively establish that he had made genuine sales during demonetization period from 10.11.2016 till the date of survey on 23.12.2016 nor the names have been furnished by the assessee before the AO/CIT(A)/CBI/ED. Significantly, neither the revenue nor the appellant have requested to apply the principle of peak credit in the instant case. In fact, assessee itself has raised a ground before us to delete the addition of Rs.4,00,00,000/- based on peak credit principle.

15.4 The ld. CIT-DR took the plea that the survey by the Department has established that falsification of accounts had happened because sale invoices were

booked in the name of M/s Nirav & Co. which was proved to be a bogus entity during survey proceedings and in the subsequent proceedings before the department. Further, mere payments made by cheques or RTGS does not establish that the said gold was received immediately and same was serially and genuinely sold to unknown 2200 purchasers against demonetized currency notes. Even survey could not find evidence of such series of sale by assessee or commensurate stock of gold and silver at the known business premises. The net effect of cash deposited in the bank account of M/s Nirav & Co. and subsequent cheques/RTGS payment is nothing but attempt to convert hoarded undisclosed income of assessee into stock of gold for future sales. Under these circumstances, granting benefit of peak credit to assessee is not warranted.

15.5 The CIT(A) has considered that the transaction in the bank account of M/s Niriav & Co. relates to assessee and has accordingly, given benefit to the assessee by restricting the addition in the case. The assessee has not been able to explain as to how almost all the cash deposited in the bank account of M/s Nirav & Co. were immediately transferred to the bank account of the assessee.

15.6 The CIT(A), whose powers are co-terminus with that of the AO should have examined the facts of the case, which he failed to do. Considering the totality of the facts and circumstances of the case and once it is established that the assessee cannot be allowed benefit of peak credit, the cash deposited in the bank account of the assessee remains unexplained as the assessee has not been able to explain

the nature and source of such cash deposits along with documentary evidence either before the AO or CIT(A).

16. The assessee has been changing his stand with respect to the cash deposits in the impugned bank account so as to shift the onus of ownership. The assessee has claimed that cash deposits represent cash from bullion business. The assessee's cash deposits of a single day is huge and as per the extant rules, purchase/sales of golds above Rs.2,00,000/- have to be accompanied with a valid PAN. The assessee has not furnished the details of the parties from whom it has made the so called purchases and the corresponding sales. Neither the requisite details were furnished nor the stock was presented before the survey party. In absence of corroborative details and evidence; which would be in possession of assessee, if the assessee is claiming that the source of cash deposits is from sale of gold and silver bullion, the amount of Rs.36,17,00,112/- cannot be accepted as explained.

17. The survey team of the Investigation Wing and the AO have made detailed enquiry in the case. It is not the case that assessee was prevented to explain the source of such cash deposits in the bank account. The onus was upon the assessee to prove cash deposits in the bank account. The assessee got sufficient opportunities before the Department as well as other agencies such as ED, CBI etc. but it failed to conclusively prove the nature and source of such deposits and that the same are not unexplained.

18. There is no dispute regarding the fact that there were cash deposits of Rs.36,17,00,112/- and Rs.24,35,98,000/- in the bank account of M/s Nirav & Co. and M/s S. R. Traders respectively. Out of the said cash deposits, Rs.34.82 crore and Rs.13.36 crore were transferred to the bank account of the assessee through RTGS. The AO has added the whole cash deposit in the account of Nirav & Co. u/s 69 of the Act and added Rs.13.36 crore (total deposit of Rs.24.35 crore) transferred from account of M/s S. R. Traders u/s 68 of the Act (protective basis). It is evident from the assessment order that the additions were made on the basis of statements recorded and the evidence gathered during survey u/s 133A of the Act in case of the assessee and inquiry conducted by the Investigation Wing of Surat. Shri Himanshu R. Shah, one of the partners of the assessee-firm admitted in his statement recorded u/s 131 during survey that he was controlling the bank account of Nirav & Co. and the account was used by the assessee-firm. The address of Nirav & Co. was vague and it was not found during the post-survey and assessment proceedings. The party was not in existence. Therefore, the question of independently effecting sales of Rs.36.17 crore in a short period of 26 days from 10.11.2016 to 05.12.2016 is ruled out. Hence, finding of CIT(A) that sale proceeds recorded in the books of assessee in the name of Nirav & Co. are false and names of actual purchasers were not entered into in the books of accounts of the assessee has merit.

19. As regards, the transaction with M/s S. R. Traders, it may be mentioned that its bank account with Bank of India was opened during the demonetization period

on 15.11.2016. In a very short period of only 7 days, i.e., 23.11.2016 to 30.11.2016, cash of Rs.24,35,98,500/- was deposited out of which Rs.13,36,00,000/- (almost 55%) was transferred to the account of the assessee. Thus, assessee was the major beneficiary of the cash deposited in the newly opened bank account. The AO has given a categorical finding that the said firm i.e., M/s S. R. Trader was a non-existent party and there was no shop/ establishment in the address provided by the said firm in the bank KYC. Hence, genuineness of the transaction is not established. Therefore, the finding of fact of CIT(A) at para 8.7 of his order i.e., falsification of sales is equally applicable for transactions with M/s S. R. Traders. The sale proceeds recorded in the name of M/s S. R. Traders are false and no sales were actually made to M/s S. R. Traders. The assessee sold bullions to other customers and actual sales were never recorded in the books of assessee.

20. From the facts discussed above, it is clear that assessee had deposited Rs.36.17 crore and Rs.13.36 crore in the bank accounts of M/s Nirav & Co. and M/s S. R. Traders during post-demonetization period from 10.11.2016 to 05.12.2016 and from 23.11.2016 to 30.11.2016 respectively. The AO had added these amounts based on the statement of one of the partners of the assessee-firm, namely, Shri Himanshu R. Shah. He also relied on the report of the Investigation Wing, Surat. He has, however, not conducted any inquiry and verification on various issues which have been mandated by the Central Board of Direct Taxes (CBDT) in its standard operating procedure (SOP), Instruction and guidelines issued from time to time for Operation Clean Money (OCM) cases. We find that the CBDT issued the following

SOP/Instruction/guidelines: (i) Instruction No.3/2017, dated 21.02.2017 issued vide F.No.225/100/2017ITA-II, (ii) Instruction No.4/2017 dated 03.03.2017 issued vide F.No.225/100/2017ITA-II, (iii) SOP dated 15.11.2018 issued vide F.No.225/363/2017/ITA-II, (iv) SOP dated 03.03.2019 issued vide F.No.225/363/2017/ITA-II and (v) Internal Guidance Note dated 13.06.2019 issued vide F.No.225/145/2019/ITA-II.

20.1 The CBDT has issued the above SOPs/Instructions/Internal guidelines note for handling cases related to demonetization. A verification check list - cash deposit was given for providing assistance to AO for verification of cash deposits and framing of assessment in demonetization related cases. It is found from the assessment order that the AO has not followed the above SOP/Guidelines/Instruction issued by the CBDT while passing the assessment order. It is well-settled that the Instruction /Circulars issued by the CBDT are binding on all officers and persons employed in the CBDT. The Hon'ble Supreme Court in case of Navnitlal C. Jhaveri vs. K. K. Sen, (1965) 56 ITR 198 (SC) held that Circulars issued by CBDT are binding on all officers and persons employed in execution of the IT Act, even if they deviate from the provisions of the Act. In case of K. P. Varghese vs. ITO, (1981) 7 Taxman 13 (SC), it was held that not only are the Circulars and Instructions issued by CBDT in exercise of power u/s 119 of the Act are binding on the authorities administering tax department, but they are also clearly in the nature of *contemporanea expositio* furnishing legitimate aid to the construction of the Act since it is well-settled principle of interpretation that

Courts, in construing a statute, will give much weight to the interpretation put upon it, at the time of its enactment and since, by those whose duty it has been to construe, execute and apply it. Hence, the AO was bound to frame the assessment based on the SOP, guidelines and instructions etc. issued by the CBDT cited supra, which he failed to do.

21. As stated earlier, the AO has made various additions primarily on the basis of statement of Shri Himanshu R. Shah, one of the partners of the assessee-firm, and the survey/inquiry report of the Investigation Wing. He has not followed the SOP / Instruction / Guidelines issued by CBDT. In order to ensure uniformity in approach of AOs in handling OCM cases, it was incumbent upon the AO to follow such SOP/Instruction etc. The Co-ordinate Bench of ITAT, Bangalore in case of M/s Bhavana Co-operative Credit Society Niyamita vs. ITO, in ITA No.739/Bang/2021, dated 16.09.2022 has, under similar circumstances, set aside the matter to the AO for verification and to pass fresh assessment after hearing the assessee. The relevant part of the said order is reproduced below for ready reference:

> *"9.1 We have carefully gone through the various standard operating procedures laid down by the central board of direct taxes issued from time to time in case of operation clean. The 1st of such instruction was issued on 21/02/2017 by instruction number 03/2017. The 2nd instruction was issued on 03/03/2017 instruction number 4/2017. The 3rd instruction was in the form of a circular dated 15/11/2017 in F.No. 225/363/2017-ITA.II and the last one dated 09/08/2019 in F.no.225/145/2019-ITA.II. These instructions gives a hint regarding what kind of investigation, enquiry, evidences that the assessing officer is required to take into consideration for the purpose of assessing such cases.*
>
> *10. In 1 of such instructions dated 09/08/2019 speaks about the comparative analysis of cash deposits, cash sales, month wise cash sales and cash deposits. It also provides that whether in such cases the books of accounts have been rejected or not where substantial evidences of vide variation be found between these statistical analyses. Therefore, it is very important to note that whether the case of*

the assessee falls into statistical analysis, which suggests that there is a booking of sales, which is non-existent and thereby unaccounted money of the assessee in old currency notes (SBN) have been pumped into as unaccounted money.

10.1 The instruction dated 21/02/2017 that the assessing officer basic relevant information e.g. monthly sales summary, relevant stock register entries and bank statement to identify cases with preliminary suspicion of back dating of cash and is or fictitious sales. The instruction is also suggested some indicators for suspicion of back dating of cash else or fictitious sales where there is an abnormal jump in the cases during the period November to December 2016 as compared to earlier year. It also suggests that, abnormal jump in percentage of cash trails to on identifiable persons as compared to earlier histories will also give some indication for suspicion. Non-availability of stock or attempts to inflate stock by introducing fictitious purchases is also some indication for suspicion of fictitious sales. Transfer of deposit of cash to another account or entity, which is not in line with the earlier history. Therefore, it is important to examine whether the case of the assessee falls into any of the above parameters are not.

10.2 The assessee is directed to establish all relevant details to substantiate its claim in line with the above applicable instructions. We are aware of the fact that not every deposit during the demonetisation period would fall under category of unaccounted cash. However the burden is on the assessee to establish the genuineness of the deposit in order to fall outside the scope of unaccounted cash. The Ld.AO shall verify all the details / evidences filed by the assessee based on the above direction and to consider the claim in accordance with law. Needless to say that proper opportunity of being heard must be granted to the assessee. The assessee may be granted physical hearing in order to justify its claim.

Accordingly, the appeal in ITA No.739/Bang/2021 stands allowed for statistical purposes."

22. Similar decisions have been given in cases of M/s Bhoopalam Marketing Services Pvt. Ltd. vs. ACIT, ITA No.375/Bang/2022, dated 15.09.2022 and Sasanur Hospital vs. PCIT, ITA No.415/Bang/2022, dated 27.09.2022. Since the AO has not followed the SOP, Guidelines etc. issued by the CBDT while passing the impugned assessment order, we deem it proper to set aside the order of CIT(A) and restore the matter to the file of AO for verification of all the details and evidences as mandated under the said SOP/ Guidelines etc. The AO is also directed to verify all details filed by the assessee before the lower authorities and the Tribunal and to

consider claim of the assessee in accordance with law. We make it clear that we are not giving any opinion on the merits of the addition made by the AO. We have only held that the theory of peak credit is not applicable in the present case. We also make it clear that the verification by AO would extend to assessee's transaction with both Nirav & Co. and M/s S. R. Traders. The CIT(A), in his appellate order, has referred to the finding of the Special CBI Court No.5, Ahmedabad (Application No.355 of 2017) and the ld. AR has referred the decision of Hon'ble Gujarat High Court cited supra. The AO may consider findings of the Hon'ble High Court, CBI Court, orders of various authorities for the purpose of bringing taxable income in the hands of assessee. Accordingly, the ground is allowed for statistical purpose.

23. Since, we have set aside the order of CIT(A) and restored the matter to the file of AO, the other grounds are academic in nature and hence not adjudicated.

24. In the result, appeals of assessee are allowed for statistical purpose.

Order pronounced on 16/01/2025 in the open court.

Sd/-	**Sd/-**
(PAWAN SINGH)	**(BIJAYANANDA PRUSETH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Surat
दिनांक/ Date: 16/01/2025
SAMANTA
Copy of the Order forwarded to:

1. The Assessee
2. The Respondent
3. The CIT(A) / PCIT
4. CIT
5. DR/AR, ITAT, Surat
6. Guard File

By Order

// TRUE COPY //

Assistant Registrar/Sr. PS/PS
ITAT, Surat