

IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCH 'A', HYDERABAD

BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI CHANDRA POOJARI ACCOUNTANT MEMBER

ITA No.186/Hyd/2009 : Asstt. Year 2003-04
ITA No.187/Hyd/2009 : Asstt. Year 2004-05
ITA No.188/Hyd/2009 : Asstt. Year 2005-06

M/s Syndicate Realtors, Vs ITO, Ward 5 (3), Hyderabad
Hyderabad
(PAN AAWF 8337 C)
(Appellant) (Respondent)

Appellant by : Shri A. Srinivas
Respondent by : Shri G. Malligarjuna DR

ORDER

Per Chandra Poojari, Accountant Member:

These three appeals preferred by the assessee are directed against the different orders passed by the CIT(A)-V Hyderabad and pertains to the assessment years 2003-04, 2004-05 and 2005-06. Since common issues are involved in these appeals, they are clubbed together, heard together and disposed of by the common order for the sake of convenience.

2. Now we will take up the appeal of the assessee in ITA No.188/Hyd/2009.

3. The assessee raised the following grounds:

The CIT(A) in holding that the stock of land is to be valued at Market price against the value adopted by the assessee firm.

The assessee submits that the ratio laid down by the Hon'ble Andhra Pradesh High Court in the case of Rajlaxmi Trading Co. Vs. CIT (250 ITR 581) is not applicable to the case of the assessee. The case before the Hon'ble jurisdictional court is u/s 45(4) and with respect to capital

assets and has no application to stock in trade which is not a capital asset.

The assessee submits that the business of the firm is continued by the partner and that the assessee firm has taken the value property and the same is in mutual understanding between the partners, which fact should have been appreciated both by the assessing officer as well as the first appellate authority.

4. Brief facts of the case are that the addition of Rs.80,06,803 made towards under valuation of the closing stock. The assessee is a firm, which was engaged in business in real estate. For the assessment years 2005-06, it has filed return of income on 1.11.2005 showing income of Rs.4,16,280. The same was processed u/s 143(1) of the act. There was a survey conducted in the case of the assessee on 21.10.2005, and therefore the case was selected for scrutiny of assessment. During scrutiny, the assessing officer noticed that there was dissolution of the firm at the end of accounting year and following closure of the business of the firm on 31.3.2005, the assets including the closing stock in trade, was transferred to the capital account of one of the partners viz., the managing partner Mr. S. Ibrahim. In the balance sheet filed with the return, the value of closing stock of the plots/lands styled as work in progress was shown at Rs.20,14,197. Since there was dissolution of the firm at the end of the accounting year, in the opinion of the assessing officer, the assessee ought to have valued the closing stock of the lands, which were transferred to the managing partner at their fair market value.

4.1. The assessee had undertaken two ventures viz., (i) Syndicate Dream City (ii) Syndicate Dream City Phase-I. The total area of the plots in sq. yards at the beginning as on 1.4.2001 in both the ventures were at 23,787 and 21,879 sq. yards respectively. After sale of plots made during financial years 2001-02 to 2004-05, the balance unsold plots in both the ventures as on 31.3.2004 remained at 1,040 and 8,981 sq. yards respectively totaling to 10,021, sq. yards. During

the previous year 2004-05 the assessee has sold plots measuring 6,705 sq. yards in both the ventures for a total consideration of 67,04,727 which gives an average selling price of Rs.1000 sq yard. Since there was dissolution of the firm at the end of the accounting year, after referring to the decision of the Hon'ble Supreme Court in the case of ALA Firm Vs. CIT (1991) (189 ITR 285) and of the Hon'ble AP, HC in the case of Rajlaxmi Trading Co.Vs. CIT and Another (2001) (250 ITR 581), the assessing officer, vide letter dated 20.12.2007 has asked the assessee to explain as to why the closing stock of plots as on 31.3.2005 should not be valued at their market rate, and thus, consequential addition should not be made to the income in the hands of the assessee firm. In response to this, the assessee has submitted that though there has been dissolution of the firm on retirement of partners, there is no discontinuance of the business. The same is being carried on by the managing partner in his individual capacity. Stating that there is no cessation of the business, the assessee contended that there is no question of taking any other value for the stock in trade and consider the said value for the purpose of determination of tax for this assessment year. In this regard, the assessee relied on the decision in the case of Sakthi Trading Co. Vs. CIT (2001) (250 ITR 871 He noted that in that case on death of a partner the firm was dissolved and the same was reconstituted with effect from the next day with the remaining partners. He clearly mentioned that in the case of assessee there was dissolution and discontinuance of the business of the firm. He further noted that the facts in the case of the assessee are similar to that in the case of Rajlaxmi Trading Co. Vs. CIT cited supra decided by the Hon'ble jurisdictional HC. With these observations after referring to the provisions of section 45(4) of the Act, definition of fair market value as per clause (22B) of Section 2 of the Act, and relying on the decision of the Hon'ble SC in the case of ALA Firm he held that the closing stock of plots measuring 10,021 sq. yards are to be valued at their market rate

for the purpose of determination of the profit, and thus the taxable income which is to be assessed in the hands of the assessee for the assessment years. Adopting the average selling rate of 1000 per sq. yard as the fair market value as on 31.3.2005, he determined the value of the closing stock of the plots at Rs.80,06,803. Since the assessee has shown the value of the closing stock of land at 20,14,197 the assessing officer added the differential amount of Rs.80,06,803 towards under valuation of closing stock to the income of the assessee and thus completed the assessment on a total income of Rs.85,96,110 vide order dated 28.12.2007 passed u/s 143(3) of the Act. Being aggrieved by the assessment, the assessee has filed this appeal contesting the above addition.

5. On appeal to CIT(A), observed that there was dissolution of the firm on retirement of the partners at the end of the accounting year. Upon such dissolution and closure of business of the firm on 31.3.2005, the assets including the stock in trade, closing stock of plots were transferred to Sri S.Ibrahim, who was earlier the managing partner of that firm. Since there was dissolution two other ventures undertaken by the assessee Viz., Syndicate Dream City and Syndicate Dream City Phase-I ceased to exist and the business of S. Ibrahim after dissolution of firm by taking all the assets of the erstwhile stock entry including the new firm said to be distinguished and separate from the earlier firm. Under the circumstances, CIT(A) applied the ratio laid down by the Hon'ble Supreme Court in the case of A L A Firm Vs. CIT (189 ITR 285) and also of the Hon'ble Andhra Pradesh High Court in the case of Rajalaxmi Trading Company Vs. CIT (250 ITR 581) wherein it was held that the closing stock of plots are to be valued at the market rate for the purpose of determination of the profit and thus, the taxable income which is to be assessed in the hands of the assessee for this assessment year. Aggrieved by this, the assessee is in appeal before us.

6. The Authorized Representative of the assessee submitted that there is no discontinuance of the business in the assessee's case and one of the partner continuing the business of the firm as such the ratio laid down by the judgement of the of the Supreme Court in the case of A L A Firm, and of the Hon'ble jurisdictional High Court in the case of Rajalakshmi Trading Company cited supra is not applicable to the assessee's case and he contended that the closing stock of assets to be valued on market price/cost price whichever was lower on the basis of the established principles of commerce and accountancy. He placed reliance on the Gujarat HC in the case of Quality Steel Suppliers Vs. CIT (271 ITR 40) wherein it was held:

"That once the position was accepted that the business continued, the ratio enunciated by A L A Firm (189 ITR 285) apply with full force and the closing stock had to be valued at the cost or market price, whichever was lower, on the basis of the established principles of commerce and accountancy. Hence, the Tribunal was not right in law in upholding the exercise of revisional jurisdiction u/s 263 of the Act. The Tribunal was also not right in law in holding that the closing stock had to be value at market price on the basis of the ratio of the decision of the Supreme Court in A L A Firm though the business was continued after the dissolution of the firm."

7. The DR relied on the order of the CIT(A).

8. We have heard from both the parties and perused the material on record. Admittedly in this case, there was dissolution of the firm on retirement of partners at the end of the accounting year relevant to assessment year 2005-06. Upon such dissolution and closure of the business of the firm on 31.3.2005, the assets including the stock in trade, i.e. closing stock of plots were transferred to Sri S. Ibrahim who was earlier the managing partner in that firm. According to the assessee this is continuation of business of the firm.

8.1. The Hon'ble Supreme Court in the case of ALA Firm Vs. CIT have held that on dissolution of the firm, valuation of stock in trade has to be made at market price for mutual adjustment of partners shares and surplus is profit liable to tax. The relevant decisions of the Hon'ble Supreme Court in this case is held as under:

"There can be no manner of doubt that in taking accounts for purposes of dissolution, the firm and the partners, being commercial men, would value the assets only on real basis and not at the cost or at their other value appearing in the books. The real rights of the partners cannot be mutually adjusted on any other basis".

8.2. In the case of Sakthi Trading Co. Vs. CIT (250 ITR 871) there was a dissolution of the firm following death of one partner. However, as the firm has been reconstituted with the remaining partners and there was no discontinuance of business of the firm, the Hon'ble SC have held that the closing stock of the firm has to be valued at the cost or market price whichever is lower. However, it is pertinent to mention here that in this case the Hon'ble SC while indirectly approving the decision in the ALA Firms case, have clearly noted that the facts in their earlier decision in ALA Firm's case is different. In this context, it is pertinent to reproduce the following observations made in the said decision:

"From the above, it is evident that in A L A Firm's case (189 ITR 285), the Court was considering the question of valuation of closing stock at market value in a case where there was dissolution and also discontinuance of the business of the firm. In that case after dissolution, two groups were carrying on separate businesses with the assets and liabilities which fell to their shares from the dissolution of the firm".

8.3. In the case of Rajlaxmi Trading Co. Vs. CIT cited supra which was before the Hon'ble jurisdictional HC, the assessee which was a registered firm, was dissolved on 31.8.1990. Upon such dissolution, one of the partners took over its assets at the book value of Rs.2,17,555. Applying the provisions of S.45(4) of the Act, the

assessing officer held that the fair market value of the transferred property has to be taken into account as determined by the District Registrar at Rs.5,36,100. He thus added the different amount of Rs.3,18,545, in the hands of the assessee firm as short term capital gains. The said assessment was upheld both by the CIT(A) and Hon'ble ITAT. On further appeal by the assessee the Hon'ble Jurisdictional High Court held that the Tribunal was right in taking the market value as the full value of the consideration received or accruing for the purpose of computing the capital gains and thus upheld the addition made in the assessment. The decision of the Hon'ble jurisdictional High Court as per the head note is as held under:

“ that the provisions of section 45(4) clearly show that on distribution of capital assets, as a result of dissolution of the firm for the purpose of section 48, the fair market value of the asset on the date of transfer should be taken as the full value of consideration received or accruing as a result of transfer. Therefore, the Tribunal was right in taking the market value as determined by the District Registrar as the full value of the consideration received or accruing for the purpose of computing the capital gain”.

8.4. The assessee's counsel tried to distinguish the above judgements stating that there is no discontinuance in assessee's business. This argument is totally misconstrued because on dissolution of assessee firm, the firm ceased to exist and its operations were stopped. The proprietorship concern of the S. Ibrahim cannot be equated with the assessee's partnership firm. The carrying on the business by Shri S. Ibharim as a proprietor does not amounts to carrying on business of the assessee's firm. The assessee counsel strongly relied on the judgements of the Hon'ble Gujarat High Court in the case of Kwaliti Steel Suppliers Vs. CIT (271 ITR 40). In that case Hon'ble Gujarat High Court dealing with the similar issue passed u/s 263 of the Act. Wherein it was categorically observed by the High Court that it is not possible to stay that order of the assessing officer was in any manner prejudicial to the interest of the Revenue there being no error in the assessment order. In view of this, it is not possible to state that

the view taken by the assessing officer is unsustainable in law. Even if the stand of the Revenue, that of the decision in the case of A LA Firm represents the view of the Revenue is considered, there is another view as canvassed by the decision of the assessee, on the basis of the decision in the case of Sakthi Trading Company. If that be so, the respondent could not have exercised revisional jurisdiction u/s 263 of the Act. Considering the entire facts and circumstances of the case, the Hon'ble High Court held that the Tribunal accepts the fact that the business has been continued but misdirects itself in law by harping upon automatic dissolution of the firm and goes on to hold that "mere fact that business has been continued" cannot lead to the inference that there has been only a change in the constitution. Further, there is a jurisdictional High Court judgement in the case of Rajalakshmi Trading Company cited supra which is against the assessee, hence we are of the opinion that when the firm was dissolved, thereafter, one of the partners taking all the assets and liabilities of the firm, the valuation of closing stock of the business taken over by the one of the partner to be valued at market price only. Accordingly we confirm the order of the CIT(A) and hence the appeal of the assessee in ITA No.118/Hy/ stands dismissed.

9. Now coming to ITA No.187/Hyd/2009, the assessee raised the following grounds:

1. The CIT(A) erred both on facts and in law in sustaining the addition of Rs.1,81,278 on account of gift made to the son of managing partner and addition of Rs.4,64,400 (being aggregate of two amounts i.e. Rs.3,59,800/- and 1,03,600). The aggregate of the additions made is Rs.6,44,528/-.

2. The assessee submits that the gift having made to the partners son and debit to the extent of the stated value having been given to the credit of the partners capital account no further addition is called for in this regard as this in reality is not a sale but a drawing by a partner.

3. The assessee submits that the gift made to partner's from out of the stock of the business the closing stock in the business would be reduced to that extent with a debit to the partner's capital account and the CIT(A) ought to have deducted the said sum of Rs.1,81,278 from the value of closing stock

declared by the assessee rather than sustaining the addition of the said amount as understatement of sale. The assessee submits that there has been actually overstatement of income to that extent originally itself.

4. The CIT(A) erred in observing that the sale deed produced before him is of no evidentiary value because the said 500 square yards comprises of two sale deeds of 200 square yards each, a fact that has been brought to the notice of the CIT(A) in the course of the appellate proceedings. The learned first appellate authority failed to appreciate the evidence on record.

5. The CIT(A) to observe that there is no documentary evidence in support of the sale despite the presence of the sale deed in respect of the sales.

6. The CIT(A) sustained the addition by remarking that it has to be construed that the assessee has actually sold those plots/lands at the rate of Rs.524 per sq. yard which is baseless.

7. The CIT(A) in sustaining the same missed the fact that the assessee in his revised return offered an additional income of Rs.29 lakhs and assuming that there is in fact understatement of sales the same should have been taken as covered in the said additional income.

8. On the basis of the above grounds the additional grounds if any that may be permitted to be filed in the course of the appellate proceedings the assessee prays that the addition of Rs.6,44,528/- be deleted.

10. Brief facts of the case are the assessee is a firm and it derives income from business in real estate. For the assessment years 2004-05, it has filed the return of income showing income of Rs.2,20,200. The same was processed u/s 143(1) of the Act. Latter, a survey operation u/s 133A of the act was conducted in the business premises of the assessee on 21.10.2005. After the survey operation, the assessee has filed a revised return on 30.11.2005 showing income of Rs.31,20,200. During the assessment proceedings, the assessing officer noticed that the claim made under office expenses includes a sum of Rs.5000 paid as donation which is not allowable. He thus disallowed the said amount. On ground of personal element involved in the user of the telephone he disallowed a sum of Rs.9,529/- under telephone expenses. The assessing officer further disallowed a sum of Rs.42,297 towards excess claim made under partners remuneration. Further, here was sale of plots made during the previous year, showing the extent of land sold in square yards, rate per square yard and total sale

consideration received from each transaction. The assessing officer noticed in that two instances, plots measuring 1400sq. yards and 400 sq yards are shown as sold at the rates of Rs.267 per sq. yard and Rs.265 sq. yard respectively. The assessee further shown sale of land measuring 1119 sq. yards on two instances at a rate of Rs.130 per sq. yard. The assessing officer further noticed that the assessee has valued the closing stock of land/plots at Rs.292 per sq. yard. As per the statement, the assessee has shown sale of plots at a very low rate, during the assessment proceedings, the assessing officer has asked the assessee to explain the reasons for the same along with documentary evidences for the same. However, as noted by the assessing officer in response to such query, the assessee could not furnish any cogent documentary evidences for showing sale of those plots at lesser rates. He noted that the plots shown have been sold to one Mohd. Yasin who is the son of the managing partner of the assessee firm. For the other two instances of sales, the assessee merely furnished the names and address of the concerned two persons. It could not furnish any documentary evidence in support of claim of sale at lower rates. Since land measuring 1119 sq. yards have been sold to the son of the managing partner at a rate less than the cost price per sq. yard the assessing officer estimated the understatements in sale consideration in respect of those two plots at Rs.1,81,278. ($\text{Rs.}292 - 130 \times 1119 \text{ sq. yards}$).

10.1. In the absence of any documentary evidence furnished by the assessee in respect of the other two sales, after taking into account the minimum sale price of land shown at Rs.524 per sq. yard the assessing officer computed the understatement in sale consideration in respect of such sale of land measuring 1400 sq. yards at Rs.3,59,800 ($1400 \times (524 - 267)$). Similarly, adopting the same sale price of Rs.524 he computed the understatement in sale consideration in respect of the

other sale of land measuring 400 sq. yards at Rs.1,03,600 (400 X (524 – 265). He thus, computed the total understatement in sale consideration at Rs.6,44,528. Against the addition of Rs.6,44,528/-, the assessee is in appeal before us.

11. The contention of the assessee counsel is that the assessing officer erred in adding back an amount of Rs.4,64,250 as understatement in sales merely because the rates of those plots were lesser than the rates for the other plots. It was stated that the assessee had to sell those plots at a lower rate due to certain outside pressures and the place where those plots are situated were also not good. It was further submitted that the lower rates were on a small portion of the total sales. Any business will entail given discounts and concessions on certain transactions. These are business decisions and cannot be taken as understatement of sales. The assessee has transferred under gift 1119 sq. yards to the son of the managing partner and the rate taken for the same should not be treated as understatement of sales. He also furnished a photo copy of the sale deed dated 29.10.2004 for plot No.91 measuring 200 sq. yards and a copy of the gift settlement deed executed on 14.7.2003. He drew our attention to the letter dated 14.7.2003 wherein Shri Ibharim sold land measuring 1119 sq.y to S. Mohd. Yaseen who happens to be the son of the managing director of the assessee company. There was endorsement at the back of the gift deed stating that market value of the property estimated at Rs.1,45,500 for the purpose of Stamp Duty. The said Gift deed bearing No.8848/03 dated 14.7.2003 was registered at the District Registrar office, R.R District.

12. The DR relied on the order of the CIT(A).

13. We have heard both parties and perused the material on record. The assessee sold land measuring 1119 sq. yards to Mohd. Yaseen, son of the managing director of the assessee company at a lower rate of 130 sq yard. The cost price of the land Rs.292 per sq. Yard as evident from the valuation of the closing stock as on 31.3.2004 furnished by the lower authorities. The assessee itself has estimated the value of the said property measuring 1119 sq. yards at Rs.292 per sq. yards. However, there was no reason given by the assessee for valuing the property at such lower rate when assessee itself valued the property of the closing stock valuation at Rs.292 per sq. Yard. Hence in our opinion in the absence of valid reasons, the valuation of the property considered by the lower authorities at 292.sq yard is confirmed. The assessing officer not adopted any outside value, the value adopted by the assessing officer is as per the valuation of the close stock as on dated 31.3.2004 and the assessee failed to produce any cogent documentary evidence in support of his claim of sale made at a very low at Rs. 130 sq yards. Hence, we are inclined to uphold order of the CIT (A). Further, regarding the sale value of property at S.No.8 measuring 1400 sq. yards at Rs.267 per sq. yards and other property at Sl. No.18 measuring 400 sq. yards at Rs.265, the assessee has not filed any documentary evidence in supports of his claim. The copy of sale deed furnished by the assessee before the lower authorities dated 29.10.2004 i.e. after expiry of the previous year 31.3.2004 and this sale deed pertains to sale of plot measuring 200 sq. yards only, whereas the area of the plot of land shown at Sl.No.18 of the list reproduced by the assessing officer at page No.4 of the assessment order is 400 sq. yards. Since the assessee failed to furnish any evidence to show that it has actually sold those two plots at such lower rates, in our opinion the lower authorities justified in considering at Rs.524 per sq. yards. Accordingly, the addition of Rs.3,59,800 and Rs.1,03,600

towards understatement of sale consideration in respect of property at Sl.No.8 and 18 confirmed.

14. Now we will take up the case in ITA No.186/Hyd/2009

15. The assessee raised the following grounds:

1. **The CIT(A) ought to have deleted the addition of Rs.3,00,000 made by the assessing officer under section 69 of the income tax act, 1961.**
2. **The CIT(A) ought to have appreciated that the amount of Rs.75,000 each introduced by the partners is reasonable in terms of savings considering the age and status of the partners and particularly in the case of the two ladies in whose case the spouses who are in senior positions of employment have given confirmation letters.**
3. **The CIT(A) as well as the assessing officer was explanation with respect to a cash credit in the books of assessee firm and this being so taxing the same after explanations have been provided by the assessee firm as unexplained investment under section 69 is erroneous and ought to be deleted.**
4. **For the above and for further grounds that may be permitted to be raised in the course of assessee proceedings the assessee prays that the addition of Rs.3,00,000 made under section 69 for the assessment years 2003-04 be deleted.**

16. The AR submitted that during the assessment, the assessing officer noticed that there were capital introduction the partners accounts aggregating to Rs.12,05,000 which includes sum of Rs.75,000 each shown in the names of Rs.4 partners, namely Viz., Sri Ibne Sattar, Sri Moh. Masebuddin Jaweed, Smt. T. Saraswati and Smt J. Raja Latha. During the assessment proceedings, the assessing officer has asked the assessee to explain the source of such capital introduced in the accounts of these partners with supporting evidences. The assessee could not furnish any confirmation nor furnish any explanation with regard to capital introduced in the accounts of Sri Ibne Sattar and Sri Md. Masebuddin Jaweed. Under the circumstances, he thus held that the amounts shown in their accounts shall be added to the income of the assessee treating the same as unexplained investment u/s 69 of the Act. As regards the capital amount shown in the accounts of Smt. T

Saraswathi and Smt. J. Raja Latha are concerned, though the assessee has filed confirmations from them, the assessing officer noted that the said letters do not indicate the sources and manner in which the amounts were invested in the firm. Subsequently though the assessee has filed further confirmation letters from the spouses of these two lady partners, in absence of any copy of bank account filed by Sri Vara Prasad, husband of Smt. Raja Latha and since from the copy of bank account furnished by Sri T. Mangapathi Rao, husband of Smt. T. Saraswathi, the assessing officer found that only small amounts were withdrawn for maintenance of his family, he held that no credence can be given to such statements. He thus, rejected the contention of the assessee and added the amount of Rs.75,000 each shown in the accounts of the said lady partners treating the same as unexplained investment u/s 69 of the Act. The assessing officer thus made total addition of Rs.3,00,000 towards unexplained investments in the accounts of the partners and completed the assessment accordingly.

17. On appeal, the CIT(A) confirmed the same.

18. We have heard from both the parties and perused the material on record. In the present case, four partners Viz., Sri Ibne Sattar, Sri Moh. Masebuddin Jaweed, Smt. T. Saraswati and Smt J. Raja Latha have invested Rs.75,000 each in the assessee company. During the assessment proceedings they were asked to explain the source of such capital introduced in the accounts of these partners with supporting evidences. The assessee could furnish any confirmation nor could furnish any explanation with regard to capital introduced in the accounts of Sri Ibe Sattar and Sri Md. Masebuddin Jaweed. Hence the assessing officer added treating the amount as unexplained investment in their accounts u/s 69 of the Act, 1961. However, in the case of Smt. T. Saraswathi and Smt J. Raja Latha, the assessee has filed confirmation

letters received from the spouses of the two lady partners, copy of the bank account furnished by Sri J. Vara Prasad, husband of Smt. J. Raja Latha and Sri T. Mangapathi Rao, husband of T. Saraswathi. Since these two partners have confirmed investment in the firm in the form of capital of Rs.75,000/- each, the addition cannot be made either u/s68 or u/s 69 of the Act. However in the case of other two partners, there is no confirmation hence the assessing officer made addition u/s 69 of the Act since the onus on the assessee not discharged, to explain the nature and source of such credit in a satisfactory manner. There is no distinction between a credit entry appearing in the capital account of a partner and the credit entry in the account of third party in the books of the firm as far as section 68 is concerned. As such, the firm has to prove the capacity of the partner concerned to give the amount in question and also genuineness of the transactions. Hence in the case of a firm, when there is no satisfactory explanation regarding the credit appearing in the capital accounts of the partner or the explanation offered is not supported by the requisite evidence, such credits may be charged to tax u/s 68 as income of the firm. If such a case it cannot be said that the cash credit should be considered only in the hands of the partners for which reason that the partners are not proved to have owned the funds so credited. However, section 69 is not attracted in such circumstances. In the present case, the addition has been made by the lower authorities by invoking the Section 69 of the Act. The provisions of section 68 and S.69 are mutually, exclusively in their operation, prima facie. S. 68 is applicable only where any sum is found credited in the books maintained by the assessee. Section 69 apply in respect of investments not recorded in the books if any maintained by the assessee. Where the books of account maintained and an investment appears thereon, there is no question of application of section 69. The assessing officer has to proceed u/s 68 as regards the cash credits if any covering the source of such investments or has to

proceed u/s 69B if need be. Where section 68 is applicable, the unexplained cash credit would be the income of the previous year in which the credit appears in the books maintained. The unexplained investment coming within the clutches of the section 69 would be treated as the income of the financial year immediately preceding assessment year in which the said investments have been made a clause reading of both these sections make it clear that in section 68, there should be a credit entry in the books of account whereas in section 69 there may not be an entry in the books of account. This is the fundamental difference between these two provisions. In case section 69, only where investment has been made but has not been satisfactorily explained, the income should be treated to the income of the assessee. Whereas in Section 68, there should be a book entry if that book entry is not satisfactorily explained, then it should be treated as income of the assessee. Hence in our opinion, invoking section 69 in respect of the impugned credit is not justified and the same is deleted.

19. In the result, the appeals of the assessee in ITA Nos.187 & 188/Hyd/2009 are dismissed and in ITA No.186/Hyd/2009 is allowed.

Order pronounced in the open Court on 29.1.2010

Sd/-

N.R.S. GANESAN
JUDICIAL MEMBER

sd/-

CHANDRA POOJARI
ACCOUNTANT MEMBER

Dated the 29th January, 2010

Copy forwarded to:

1. Shri Mamu & Ravi, CAs, 814, 8th Floor, Ragavendra Towers, Chirag Ali Lane, Hyderabad-500 001.
2. ITO, Ward No.5 (3), Hyderabad
3. CIT(A)-V Hyderabad.
4. CIT, Hyderabad
5. The D.R., ITAT, Hyderabad.

Np