

आयकर अपीलीय अधिकरण "I" न्यायपीठ मुंबई में।

**IN THE INCOME TAX APPELLATE TRIBUNAL "I" BENCH, MUMBAI
BEFORE SHRI C.N PRASAD, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No. 2135/Mum/2013
(निर्धारण वर्ष / Assessment Year : 2009-10)

आयकर अपील सं./I.T.A. No.4896/Mum/2015
(निर्धारण वर्ष / Assessment Year : 2008-09)

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|--|-------------------------------------|-----------------------------------|
| Shri. Iqbal Ahmed Khalil Ahmed Subedar, Shop no. 1, Jamnabhai Chawl, Opp. Navel Depot, Chirag Nagar, Ghatkopar(W), Mumbai- 400086 | बनाम/ v. | ITO 22(1)(2) Mumbai |
| स्थायी लेखा सं./ PAN : AGPPS6788L | | |
| (अपीलार्थी / Appellant) | .. | (प्रत्यर्थी / Respondent) |
| Assessee by: | Shri. S.C. Tiwari & Ruteja Pawar | |
| Revenue by : | Shri B.C.S. Naik(CIT-DR) | |
| | | |

सुनवाई की तारीख /**Date of Hearing** : **06.07.2017**

घोषणा की तारीख /**Date of Pronouncement** : **04.10.2017**

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member

These two appeals, filed by the assessee, being ITA No. 2135/Mum/2013 & I.T.A. No. 4896/Mum/2015 for assessment year 2009-10 and 2008-09 respectively are directed against two separate appellate orders dated 22.01.2013 and 25-02-2015 respectively passed by learned Commissioner of Income Tax (Appeals)-33, Mumbai (hereinafter called "the CIT(A)") and learned CIT(A)-25,Mumbai respectively, for assessment years 2009-10 & 2008-09 respectively, appellate proceedings had arisen before learned CIT(A) from two separate assessment orders firstly dated 30-12-2011 passed by learned Assessing Officer (hereinafter called "the AO") u/s

143(3) of the Income-tax Act, 1961 (hereinafter called "the Act") for assessment year 2009-10 and secondly dated 26-03-2013 passed by AO u/s 143(3) r.w.s.147 of the 1961 Act for assessment year 2008-09.

2. At the outset with respect to A.Y 2008-09 , it was submitted by learned counsel for the assessee at the outset that appeal was filed late by 123 days beyond the time stipulated u/s 253(3) for filing this appeal and prayer was made for condonation of delay of 123 days in filing this appeal which is supported by an application for condonation and the affidavit executed by the assessee. It was submitted that the assessee was suffering from huge financial losses and shock due to this huge demand raised against the assessee. It was submitted that huge demands raised against the assessee wherein additions of more than Rs. 30 crores have been made in the case of the assessee for AY 2008-09 and 2009-10 are in itself evidence that the assessee is facing huge financial difficulties. Reliance was placed on the decision of the Hon'ble Supreme Court dated 09-06-2010 in the case of Investment Trust v. Ujagar Singh in Civil Appeal No. 2395 of 2008 and it was submitted that there is no malafide on the part of the assessee in filing this appeal later beyond the time stipulated u/s 253(3). Learned DR objected to the condonation of delay of 123 days in filing of this appeal late beyond the time stipulated u/s 253(3). It was submitted by learned DR that there was a delay of 123 days in filing this appeal beyond the time stipulated u/s 253(3) which should not be condoned . It was submitted that no evidences has been produced to prove the financial difficulties as there is no financial statement/balance sheet on record to prove that the assessee is in financial difficulties and it was prayed that the delay should not be condoned and appeal be dismissed. We have observed that high pitched assessments have been framed by Revenue vis-a-vis returned income in the case of the assessee for AY 2008-09 and 2009-10 , wherein additions of more than Rs. 30 crores has been made by Revenue. The learned CIT(A) has also dismissed the appeal of the assessee . The assessee has filed an appeal for AY 2009-10 in time while appeal for AY 2008-09 is filed late by 123 days.The assessee has sighted huge financial difficulties due to these huge demands created by Revenue and shock arising from these huge demands as reasons for non-filing of appeal for AY 2008-09 in time. The assessment for AY 2008-09 was framed at later point of time on 26-03-2013 while for AY 2009-10,

assessment was framed on 30-12-2011. Similarly learned CIT(A) adjudicated appeal for AY 2008-09 on 25-02-2015 while learned CIT(A) adjudicated appeal for AY 2009-10 on 22.01.2013. Thus, appeal for AY 2008-09 with tribunal ought to have been filed later in point of time than appeal for AY 2009-10. The appeal for AY 2009-10 with tribunal was filed in time. Pain and agony of the assessee is understandable more-so for AY 2009-10 the income of Rs.17.99 crores is assessed under deeming fiction created for computing income by Section 40A(3) and 40A(3A). Relying on decision of Hon'ble Supreme Court in the case of Ujagar Singh(supra) ,we could not see any malafide on the part of the assessee in filing this appeal late by 123 days beyond the time stipulated u/s 253(3) as the assessee is not going to be benefitted in any way by filing this appeal late by 123 days. Rather it will be travesty of justice if the doors of justice are shut to this assessee on technical breach of filing an appeal late by 123 days by not condoning this appeal as then assessee will be left remediless in the midst of huge additions to the income to the tune of Rs.13.67 crores made for AY 2008-09 against returned income of only Rs.7.72 lacs. Hence, we order condonation of delay of 123 days in filing this appeal late by the assessee beyond the time stipulated u/s 253(3). We admit this appeal in ITA no. 4896/Mum/2015 for AY 2008-09 which was filed late by the assessee by 123 days than the time prescribed u/s 253(3). We order accordingly.

Appeal No. ITA no. 2135/Mum/2013-Assessment Year 2009-10

3. First we shall take the appeal of the assessee in ITA no. 2135/Mum/2013 for assessment year 2009-10. The grounds of appeal raised by the assessee in the memo of appeal filed with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called "the tribunal") read as under:-

1. *"The learned Commissioner of Income Tax, (Appeals)-33, Mumbai erred in confirming the addition made by the learned A.O. without appreciating the fact that your appellant has purchased the materials from various parties and sold to various parties and as such, it cannot be stated that the purchases are not genuine.*

1.1 Your appellant submits that your appellant has given the details as well as various judgments of High Courts which the learned CIT(A) ought to have considered.

1.2 Your appellant submits that while passing the order the learned A.O. has accepted the sales made by your appellant without considering the fact that the sales cannot be effected in the absence of purchases.

1.3 Your appellant, therefore, submits that the addition made by the learned A.O. and confirmed by the learned CIT(A)-33, Mumbai be deleted.”

4. The assessee has raised additional grounds of appeals, detailed as under:-

“ 1. That Ld. CIT(Appeals) has erred in sustaining the disallowance u/s.40A(3) of the Act in spite of the fact that the Assessing officer has rejected the appellant's books of accounts u/s. 145 of the Act and made disallowance u/s. 69C of the Act.

2. That, without prejudice to the ground of appeal 3 above, on the facts and in the circumstances of the case of the appellant and in law Ld. CIT-A has erred in not deleting the disallowance u/s. 40A(3) of the Act as made in the assessment order.”

5. The learned counsel for the assessee submitted that the books of accounts of the assessee were rejected u/s 145(3) for AY 2009-10 and submitted that there is no dispute as to the rejection of books of accounts by the authorities below . The assessee took recourse to Rule 11 of Income-tax Appellate Rules, 1963 and submitted that additional grounds of appeal raised for AY 2009-10 are purely legal grounds and they go to the root of the matter which should be admitted in the interest of justice. It is claimed that these additional grounds of appeal are entirely on legal issue and do not requires investigation of fresh facts /fresh evidences and can be decided on the basis of material already available on record. The ld. Counsel for the assessee submitted that once books of accounts are rejected u/s 145(3) , the AO cannot invoke provisions of Section 40A(3). It is accepted that quantum

of addition is not challenged by the assessee but a challenge is made on legal ground that the entire addition is bad in law because the AO rejected books of accounts u/s 145(3) and hence AO has to necessarily estimate profits after rejection of book results but the AO cannot have recourse to the rejected books of accounts by invoking Section 40A(3)/40A(3A) to make additions. The assessee made prayer for admission of the additional grounds of appeals.

The Ld. D.R raised preliminary objection to the raising of the additional grounds of appeal and prayed that the same may not be admitted.

We have heard both the rival parties and perused the material on record. We are of the considered view that these grounds are legal grounds and goes to the root of matter for adjudication of this appeal . We have observed that adjudication of these additional grounds of appeal does not also require investigation of fresh facts and can be adjudicated based on material on record . Hence we are hereby directing these additional grounds to be admitted in the interest of substantial justice and thereafter to be adjudicated on merits keeping in view ratio of decision of Hon'ble Supreme Court in the case of National Thermal Power Corp. Ltd. v. CIT (1998) 229 ITR 383(SC). We order accordingly.

6. The Brief facts of the case are that the assessee is in the business of fabric and garments export in the name of M/s. SAI and declared net profit of Rs. 7,85,615/- on turnover of Rs. 7.50 crores in the previous year relevant to the assessment year 2009-10, as against profit of Rs. 7,50,786/- on turnover of Rs. 13.41 crores declared in the assessment year 2008-09 . The case of the assessee for AY 2009-10 was selected for the scrutiny for framing assessment u/s 143(3) r.w.s. 143(2). Several notices were issued to the assessee during the course of assessment proceedings as under:-

| S.No | Notices u/s. | Date | Hearing date | Compliance Status |
|------|-----------------|----------|--------------|-------------------|
| i. | 143(2) & 142(1) | 29/09/10 | 11/10/10 | Non compliance |
| ii. | 142(1) | 18/01/11 | 17/02/2011 | -do- |
| iii. | 142(1) | 29/07/11 | 08/08/11 | -do- |
| iv. | 142(1) | 28/08/11 | 06/09/11 | -do- |

| | | | | |
|-------|---|----------|----------|---|
| v. | Show cause for initiation of penalty and exparte assessment | 12/09/11 | 22/09/11 | -do- |
| vi. | Order Sheet on appearance of accountant | 18/10/11 | 24/10/11 | Partial compliance in tapal |
| vii. | 142(1) | 31/11/11 | 09/11/11 | Non compliance |
| viii. | Accountant appeared | 21/11/11 | 24/11/11 | Attended but without details |
| ix. | Order sheet | 24/11/11 | 25/11/11 | Non compliance |
| x. | Assessee appeared on dated 09/12/11 without any paper or details | 09/12/11 | 12/12/11 | Non compliance |
| xi. | Assessee appeared on dated 16/12/11 without any paper or details except purchase register print out | 16/12/11 | 19/12/11 | Non compliance |
| xii. | Showcause for addition of Rs.53,82,379/- for peak unexplained purchases and Rs.17,99,90,677/- u/s. 40A(3) | 22/12/11 | 27/12/11 | Attended without any reply to showcause submitted certain primary details |
| xiii. | Adjournment | 27/12/11 | 28/12/11 | Non compliance |

As per A.O several notices were issued to the assessee during course of assessment proceedings as detailed above wherein proper opportunity of being heard was provided to the assessee but the assessee did not either attended the hearing nor necessary documents were filed by the assessee. The A.O observed that assessee has deliberately delayed the proceedings and took it to the fag end till the time barring date i.e. 31st December 2011 so that proper enquiry could not be made by the Revenue. The assessee , however, produced copies of return of income filed, computation of income , Balance Sheet , Profit and Loss account , Tax audit report in form no. 3CB and 3CD , Party wise sale and purchase details were also submitted by the assessee before the AO during the course of assessment proceedings . However , books of accounts with bills and vouchers were not produced but

certain ledger accounts were produced. The assessee was asked by the AO to submit details of purchase parties, the assessee submitted following details:-

| Sno | Name | Address | Closing amount |
|-----|--------------------|--|----------------|
| 1 | Advance Finstock | Plot no 122, Sector no 10. Juhu Gaon Panvel Dist. Raigad - 410206 | 42,48,075/- |
| 2 | Ajay Impex | 98/100, Progressive Bldg, Near Voltas House Byculla (E) | 2,00,000/- |
| 3 | B K Enterprises | Plot no 150, Nehru Road, Near Vishal Hall, Borivali(E) Mumbai-400092 | 4882000/- |
| 4 | Classic Trading | 26/1, Daji colony, Vijay Nagar Road, Narangpura, Ahmedabad- 3800013 | 58,33,524/- |
| 5 | Devam Impex | Off no 185, Jain Bldg Lajpat Nagar, Surat - 395536 | 21,86,712/- |
| 6 | Durga Trading | 311, Gr Floor, Raoji House, Kalbadevi, Mumbai 400 002 | 7,95,000/- |
| 7 | Elegance Trading | Off no ^l 50, 4th floor, Maya apartment, Dahisar E, Mumbai 400 068 | 3,00,000/- |
| 8 | Jayes Corporation | D -281, Shiv Market, Ring Road, Surat -395002 | 3,22,134/- |
| 9 | J K Textiles | 12, Pardiwala Chawl, Opp Sidhivinayak, Nivara SJ Marg, Lower Parel(W) | 13,09,680/- |
| 10 | JMDE Pack Real Ltd | Shop No.13 Gate no 5, Shanghai naqar', Pateli Surat -394540 | 25,66,500 |
| 11 | Kalapna Textiles | Shop no 7, Laxmi College, Dr Ambedkar Road, Parel Mumbai | 13,31,139/- |
| 12 | Karnimata Emporium | Laxmi Bhawan Bldg Gokhale Road, Dadar(W), Mumbai - 28 | 44,80,627/- |
| 13 | Keshav Enterprises | 325, Ground Floor, Kalbadevi Road, Kalbadevi, Mumbai-400002 | 22,67,000/- |

| | | | |
|-----|------------------------|--|-------------|
| 14. | KV Impex | 98, Mangal Sadan Junction, Opp 7 th Road, SV Road, Khar, Mumbai | 15,28,110/- |
| 15. | Maruti Enterprises | S-07, City Arcade, Near DSP Bunglow, Jamnagar-361008 | 18,95,551/- |
| 16. | Mateshwari Enterprises | Raj complex Gr. Floor Off no. | 17,37,000/- |

| | | | |
|-----|---------------------|---|---------------|
| | | 8 Plot no.8/18, Vapi-396165 | |
| 17. | Mittal Trading Co | Guru Chambers, 1 st floor, Off no. 19, Soman Nagar, Surat-395002 | 7,62,000/- |
| 18. | Mittal Enterprises | 57/75, ShivShakti, Opp Krishna Zerox, Market Road, Vashi | 7,20,000/- |
| 19. | Om Textiles | Kapadia Mention, 322, Sir JJ Road, Opp JJ Hospital Mumbai 400008 | 5,80,255/- |
| 20. | Pawan Sheth Traders | Shreeji Mention, 3 rd floor, Off no 21, Gurudwara Lane, Kandivali(E) | 36,00,000/- |
| 21 | Raju Traders | 9,Ram Niwas Opp B P PetroPump, Dr Ambedkar Road, Parel Mumbai | 14,40,000/- |
| 22 | Ratan Enterprises | 47,Astavinayak, Sai Marg, Old Hanuman Lane, Malad E | 56,03,500/- |
| 23 | R Dhanlaxmi Traders | Progressiv Apartment, A Wing, off no 12, Jogeshwari West | 9,24,000/- |
| 24 | Real Trading | Suryakant Apartment Second fl Off no 11, Off Cafe Paradise, Chembur | 975000/- |
| 25 | Sampat Traders | 48/82, Janta Chambers, Shantaramm Road, Near Sagar Hotel, Panvel | 8,40,000/- |
| 26 | Sona Traders | 53/23, Jeevan jyot Apartments, Near Vashi Rly Station, Navi Mumbai | 25,19,000/- |
| 27 | Shubh Trading Co | Sapna Hsg CHS, 1st floor, Off 19, M F Road O Ganesh Libr Mulund(E) | 47,94,900/- |
| 28 | Soni Brothers | 346-A, Seffroan House,Link Road, Khar (West). Mumbai -52 | 19,55,242/- |
| 29 | Vijay Laxm' Traders | Mahalaxmi Bldg 1st floor, Off no 14, Near Durga Hotel, Ram Nagar, Mira Road | 1,00,98,483/- |
| 30 | Vora Traders | Suvijay Bldg, Ground Floor, Off no 08, Fish Market, NM Joshi Marg, Kurla- W | 16,34,320/- |

The assessee was asked to submit details of all purchases above Rs. 2 lacs with sample purchase bill copy. But the assessee did not submitted the desired details despite repeated reminders by the A.O. . The A.O issued notices under 133(6) on 25th Oct, 2011 to following ten parties wherein following details were called from these purchase parties:-

“I Your return of income, computation, Balance sheet and Profit & Loss account for A.Y 2009-10

II Confirmed ledger account copy of the above named assessee relevant for A.Y 2008-09, 2009-10 and 2010-11(F.Y 2007-08, 2008-09 and 2009-10)

III Your bank accounts statement details and relevant statement wherein financial transactions are taken place. (Highlight my assessee’s transaction)

IV Copy of purchase bill/ sale bills and transportation documents.”

The above ten parties to whom notices u/s 133(6) were issued by the AO are as under, wherein all speed post envelopes containing notices u/s 133(6) were returned back by postal department with the following remarks:

| S no | Purchase party name | Remark |
|------|---------------------|-----------------------|
| 1 | B K Enterprises | Not known |
| 2 | Vijay Laxmi Traders | Not known |
| 3 | Advance Finstock | Try vashi Post office |
| 4 | Soni Brothers | Not Known |
| 5 | Shubh Trading Co | Not Known |
| 6 | Karnimata Emporium | Not known |
| 7 | Ratan Enterprises | Not Known |
| 8 | Keshav Enterprises | Not known |
| 9 | Sona Traders | No remark |
| 10 | Pawansheth traders | No remark |

Thereafter, A.O issued notices to the remaining 20 purchasing parties u/s. 133(6) which envelopes containing notices u/s 133(6) also returned unnerved by the postal department with the following remarks.

| No | Purchase party name | Remark |
|----|---------------------|--------------------|
| 1 | Sampat Traders | Incomplete address |
| 2 | Om Textiles | Not known |
| 3 | Durga Trading | Not known |
| 4 | Raju Traders | Not known |
| 5 | R Dhanlaxmi Traders | Not Known |
| 6 | J K Textiles | Not known |
| 7 | Vora Associates | No remark |
| 8 | Elegance Tr-ading | Not known |
| 9 | K V Irnpex | Left |
| 10 | Maruti Enterprises | Unclaimed |
| 11 | Classic Trading | Not known |
| 12 | Mitul Enterprises | Incomplete address |
| 13 | Kalpana Textites | Not known |

| | | |
|-----|------------------------|---------------------------|
| 14. | Ajay Impex | Not known |
| 15. | Real Trading | No remarks |
| 16. | Mittal Trading | No remarks |
| 17. | Jayesh Corpotation | No remarks |
| 18. | JMDE Pack Real Ltd. | No remarks |
| 19. | Mateshwari Enterprises | Remark not understandable |

However, with respect to one party M/s. Devam Impex, Surat neither envelops nor acknowledgment were received by the A.O. Thus, the A.O observed that despite enquires being made with all the 30 parties not even single party were served notice. Thereafter , AO deputed Ward Inspector to conduct filed enquiries with respect to these purchase parties and to report on nature of premises, area, godowns , delivery modes, type of product in which these parties deals and financial status of these parties. The inspector submitted his report as under:-

| S no | Name of party | Inspector's remark |
|------|---|--|
| 1 | Durga Trading, 311, Gr floor, Raoji House, Kalbadevi, Mumbai 400002 | There is no such Raoji House on 311 Kalbadevi and no such concern known at 311 Kalbadevi |
| 2. | Karnimata Emporium Laxm Building Gokhale Road Kalbadevi Mumbai 02 | There is no Gokhle Road in Kalbadevi area |
| 3 | Keshav Enterprises 325 Ground floor, Kalbadevi Road Mumbai 02 | No such concern at 325 Kalbadevi Road |
| 4 | Ajay Impex | Address not located |
| 5 | J K Textiles | Address not located |
| 6 | Kalpana Textile | Incomplete address |
| 7 | Om Textiles | Address not located |
| 8 | Raju Traders | Address not located |
| 9 | Real Trading | Incomplete address |
| 10 | Shubh Trading Co | Address not located |
| 11 | Vora Associates | Address not located |
| 12 | Vijay laxmi Trader | Address not located |
| 13 | B K Enterprises | Address not located |

Thus, it was observed by the A.O that not even a single party was found conducting business on the address provided by the assessee. The A.O

observed as from the ledger account of one purchase party M/s. Vijay Laxmi Traders the assessee has recorded following payments to the said party:-

| S no | Particulars | Vch type | Vch no | Credit |
|---------|---|----------|--------|--------|
| 1/12/08 | To The North Canara GGB co op Bank Ltd | Payment | 372 | 325000 |
| | -do- | | 373 | 325000 |
| | -do- | Payment | 374 | 350000 |
| | -do- | Payment | 375 | 200000 |
| | -do- | Payment | 376 | 200000 |
| | -do- | Payment | 377 | 100000 |
| | -do- | Payment | 378 | 200000 |
| | -do- | Payment | 379 | 200000 |
| | | | | |

The A.O made enquiries with the bank North Canara GGB Co. Op. Bank Ltd. and it was observed that these payments are only cash withdrawal from bank account. Similarly, it was observed that 10 cheques which were issued for an amounts of Rs. 81,98,483/- were not account payee cheques and have been deposited in some other bank accounts in the name of M/s. Shubh Impex which is a non genuine business entity. The A.O obtain copies of cheques issued by the assessee from his bankers Union Bank of India favouring Vijay Laxmi Traders and it was observed that cheques were for more than Rs.20,000/- and none of the cheques were account payee cheques as are required u/s. 40A(3). It was observed by the A.O that these cheques were presented in clearing by Rajkot Nagrik Sahakari Bank, Kaladevi branch through clearing house member HDFC Bank , Fort Branch. The AO made enquiries with RNS bank who submitted that they do not have any bank account in the name and style of M/s. Vijay Laxmi Traders . On enquiry with the bankers RNS Bank it was found that these cheques were deposited in the other bank account maintained by Shubh Impex proprietor Mr. Suhel Parvez Ansari Current Account no. 1054 which is a third party account for the assessee. It was observed by the A.O that cheques has been deposited in the third party bank accounts because the same were not marked as account payee cheques.

The A.O called for the bank account opening form and bank statement of M/s. Shubh Impex from RNS bank and it was observed it was open only on 17th July, 2008 and was closed on 6th March, 2009 which means it was in

existence for part of the financial years and huge entries of big amounts with no small amount transactions in the said bank account led AO to conclude that the bank accounts were used for accommodation entries. The AO observed that the said bank account was having good daily turnover but suddenly on 6th March, 2009 it was closed.

Summons were issued u/s. 131 to Shubh Impex but the said summons returned unserved by postal authorities with remarks 'left'. The inspector was deputed to verify the address and he reported that Mr. Suhel Parvez Ansari was not staying in the address . The occupant of the address submitted to the inspector that Mr. Suhel Parvez Ansari was their relative and now left the place. Thus, A.O concluded that Shubh Impex was a fly by night operator and no genuine business was conducted . It was observed that the assessee has given these cheques to accommodation entry operator in lieu of cash. Similar enquiry were made with respect to the other parties from whom assessee purchased the material namely K C Fab, Jain Trading Company, B K Enterprises which are detailed in the assessment order page no. 10-12 wherein similar findings were there that the cheques issued by the assessee were not account payee cheques which were deposited in some third party bank accounts which were operated by fly by night operators.

The assessee admitted before the A.O that cheques issued were not account payee cheques and complete purchase bills and supporting vouchers are not available . It was submitted by assessee during the course of hearing before the A.O as under:

“ Shri Iqbal Subedar assessee attended without any paper or details or/explanation. He submitted that he does not have complete purchase bills and other supporting vouchers as all the bills were managed by one Mr Pramod who is now not traceable. He submitted that as all purchases were made through Mr Pramod. Cheques against these purchases were prepared and handed over to Mr Pramod. He made to purchase parties payments through cheques but not account payee cheques. He further submitted that Mr Pramod is not traceable. He is again asked to go through order sheet showcase dated 21/11/2011 and comply.. He is asked to produce I books of accounts,

purchases sale bills transportation documents up to port for AY 2008-09 and 2009-10 ii purchase parties should not be treated non genuine iii section 40A(3) should not be made applicable in view of non account payee cheques- cheques favouring of B K Enterprises, Vijay Laxmi Traders and K C Fab shown to him. Hearing is fixed on 12/12/2011 at 11 AM.”

The assessee categorically submitted that he did not have purchase bills and supporting . The assessee also submitted that he did not issued account payee cheques.

Statement was recorded on 15.12.2011 wherein the assessee admitted that some time bearer cheques were issued and no account payee cheque were issued. The assessee in reply of question no 32 and 33 submitted as under:-

“Q no. 32 Whether the cheques were issued as bearer cheque?

Ans. Sometimes the cheque were issued bearer but mostly crossed cheque were issued.

Q no. 33 Whether the cheques for purchases were issued account payee?

Ans As far as I remember, the cheques were crossed only because as per my understanding, as and when cheque is crossed, it goes in the account for which name the cheque is issued”.

Show cause notices were issued by the A.O to the assessee with respect to the proposed addition of Rs.53,82,379/- u/s. 69C for peak unaccounted expenditure and addition of Rs.17,99,90,677/- u/s. 40A(3) of the Act .The content of the notice is as under:-

“

No.ITO 22(I)-2/scrutiny/shocause/20 I 1-12/64

Dated: 22/12/2011

PAN: AGPPS 6788L

Mr Iqbal Ahmed Khalil Ahmed Subedar
Shop no I, Jamnabai Chawl,
Opp Naval Depot, Chirag Nagar,
Ghatkopar W, Mumbai 86

*Sub: Final showcause notice for proposed additions in assessment proceedings in your case for A Y
2009-10 - reg.*

Please refer to the above.

2. In your case, you have filed e return of income in ITR - 4 declaring total income at Rs.7,00,675/- on 26/8/2009. The return of income was selected for scrutiny after getting approval of the CCIT - XII, Mumbai. Notice u/s 143(2) and 142(1) with questionnaire were served on you on 30/9/2010 through notice server with hearing date 11/10/2010. But you did not comply. Notice u/s 142(1) with detailed questionnaire was again issued on 18/01/2011 and served on 04/02/2011. But you did not comply on hearing date on 17/02/2011. You did not file any adjournment letter ALSO. Third notice u/s 142(1) was issued on 29/7/20 11 with hearing date on 8/82011 but you did not comply in any manner again. Fourth notice u/s 142(1) was issued on 24/8/2011 with hearing date on 6/9/2011 but you did not comply or file any adjournment. On 12/09/2011, you were issued a showcause notice for initiation of penalty proceedings u/s.271 (1)(b) of the Act, 1961 and completion of assessment proceedings on ex parte basis. Hearing was fixed on 22/9/2011. But there was no response to the showcause notice on hearing date. For the first time, on 18/10/2011 Mr Md Iqbal Md Hussain, an accountant for you, appeared with letter of authority and submitted some details through a letter signed by the assessee. Vide order sheet dated 10/11/2011, Mr Hussain was called for to submit balance details and sample purchase and sales bills copies with some other details. Hearing was fixed on 24/10/2011. On this date some details were filed in tapal but purchases sales bills copies were not submitted except two sales bill copies. On 27/10/2011, information u/s 133(6) were called for from ten purchase parties. But all of these notices returned back by the postal department unserved with mostly" not known" remarks. On 31/10/2011, fifth notice u/s 142(1) with questionnaire was issued in order to collect required details. Hearing was fixed on 09/11/2011. But there was no compliance. On 21/11/2011, the LA holder accountant Mr Md Iqbal appeared and submitted

some ledger account copies of some purchase parties and on this date through order sheet noting the following show cause was issued:

I please explain as to why assessment should not be completed on ex parte basis u/s 144 as details are not complete.

II Please explain as to why penalty proceedings u/s 271(1)(b) should not be initiated.

III Notices u/s 133(6) for purchase verification issued the following parties but returned unserved by the postal department:

M/s B K Enterprises; M/s Vijay Laxmi Traders; M/s Soni Brothers; M/s Shubh Trading Co; M/s Karnimata Emporium; M/s Ratan Enterprises; M/s Keshav Enterprises; M/s Sana Tradings and M/s Pawan Sheth Traders.

Please explain as to why there purchase parties should not be treated as the parties who did not supply any material to assessee and the transactions are non genuine transactions. Please provide names and addresses (latest/ changed) of all purchase parties with purchase amounts for A Y 2008-09 and 2009-10.

IV He is confronted UBI letter dated 16/11/2011 enclosing copy of cheque issued to M/s Vijay Laxmi Trader wherein the cheque is not crossed and letter from Rajkot Nagrik Sahakari Bank dated 18.11.2011 wherein the presenter bank of the cheque favouring M/s Vijay Laxmi Trader stated that the presenter bank does not have account of M/s Vijay Laxmi Trader. Please explain as to why total purchase amount of Rs.1,00,98,483/- should not be added to assessee's income as per section 40A(3).

V. Please submit details as per letter dated 31.10.2011."

Hearing was fixed on 24.11.2011 to file reply to this showcause. On 24.11.2011, you attended without any submission or explanation any yourself was asked to go through showcause issued vide order sheet dated 21.11.2011 and submit your contentions by 25.11.2011. But you did not file any contention. On 09.12.2011, you again appeared without any written submission or details or explanation. Vide order sheet dated 09.12.2011, your explanation was recorded as under:-

Shri Iqbal Subedar assessee attended without any paper or details or explanation. He submitted that he does not have complete purchase bills and other supporting vouchers as all the bills were managed by one Mr Pramod

who is now not traceable. He submitted that as all purchases were made through Mr Pramod. Cheques against these purchases were prepared and handed over to Mr Pramod. He made to purchase parties payments through cheques but not account payee cheques. He further submitted that Mr Pramod is not traceable. He is again asked to go through order sheet showcause dated 21/11/2011 and comply. He is asked to produce I books of accounts, purchases sale bills transportation documents up to port for A Y 2008-09 and 2009-10 ii purchase parties should not be treated non genuine iii section 40A(3) should not be made applicable in view of non account payee cheques - Cheques favouring of B K Enterprises, Vijay Laxmi Traders and K C Fab shown to him. Hearing is fixed on 12/12/2011 at 11 AM.

Again when you attended office information was collected in form of statement on 15/12/2010. Relevant part is reproduced as under:

Q no 16 What items did you exported?

Ans I was exporting man made fabric with or without embroidery and clothes and readymade garments.

Q no 17 What was sales turnover of the concern ?

Ans Approx Rs.13.40 Crores, Rs.7.80 Crores and Rs.1.5 crores (appro) for A Y 2008-09, 2009-10 and 2010-11.

Qno 18 Please give details of the persons who were helped to you in this business

Ans I was having three four person on salary basis.

Q no 19 What were name and addresses of these employees

Ans Farooq, Yaseen and Vazir, I am not having addresses of these persons now.

Q no 20 To whom you were exporting!

Ans I was exporting to different parties in Dubai, Saudi Arab, Lagos (SA) etc

Qno 21 How was you procuring orders for the export?

Ans There was one person from our residential area Chirag Nagar Mr Javed Manjuti who was working in Dubai. Besides working as salesman for some garment trading firm, he was also working as part time commission agent for garment traders in Dubai. I contacted him and he was used to provide me sample of required material with rate and quantity through courier to my office address.

Q no. 22 What were you doing after getting the orders?

Ans. Mainly the orders were received for ladies items which require fabric with embroidery or stitching. There was one person Mr Pramod in the local Garment market at Kalbadevi. Mr Pramod were used to make arrangement for fabric purchases on credit basis. After getting fabric, embroidery and stitching work was arranged by me at Govandi on the basis of sample. The sample was packed at there and exported through CFA M/s Merchant & Sons. In case, readymade items were available as per sample, Mr Pramod make arrangement for purchase of these items.

Qno 23 Please provide the name and address of Mr Pramod?

Ans The person left the market and I did not know anything about his where about.

Qno 24 What was his shop no in Kalbadevi Market?

Ans I did not remember the shop no but I can identify the shop on actual visit However, the person left the market.

Q no 25 How did you transfer fabric from Kalbadevi to Govandi?

Ans Throgh Tempowalas.

Q No 26 Do you have L R gor the same?

Ans The payments were made in cash and there was no challans or receipts are issued by these tempowalas.

Q no 27 To whom did you engage (or stitching and for embroidery work?

Ans , In Govandi area, the work o(stitching and embroidery is done in residential units and there are no organized units. People work from their houses on independent basis. I and my employees were used to visit Govandi area in order to supervise the job.

Qno 28 For the first purchase of fabric how did you made arrangement of funds?

Ans With a few lacs from my personal sources, I started the business. Mr Pramod was the main person who made arrangement for purchase of fabric and credit (or the purchases till export realization).

Q no 29 Were you purchasing out of Mumbai?

Ans Supply of fabric were made through Mr Pramod. He had to made supply on credit basis from wherever the material available whether it is Mumbai or Surat or Jamnagar. He made all deliveries of used fabric at Mumbai only.

Q no 30 Whether Mr Pramod provided purchase bills against the cheques issued by you?

Ans Yes, but as my all business was dependent on credit system provided by Mr Pramod. I did never verified genuineness of the bills with cheques. Furthermore, this is the market practice. Trader is issues cheque in the name of purchase party.

Q no 31 To whom you were made payments out of your sale proceeds or receipts and what was mode of payment?

Ans In order to make payment against purchases credits, cheques were filled up and handed over to Mr Pramod according to his requirements and he was the person who made actual payments to purchase parties.

Q no32 Whether the cheques were issued as bearer cheques?

Ans Sometimes the cheques were issued bearer but mostly crossed cheques were issued.

Q no.33 Whether the cheques for purchases were issued account payee?

Ans As far as I remember, the cheques were crossed only because as per my understanding, as and when cheque is crossed, it goes in the account (or which name the cheque is issued).

Qno 34 Do you have any labour bills for Govandi labour parties?

Ans In order to be cost effective, the stitching or embroidery jobs were completed through Govandi household parties and these person works from their home and they did not issue any bill.

Q no 35 How did you make payment to these parties?

Ans Payments to all the stitching or embroidery workers from Govandi area were made in cash only.

Q no 36 How did you make arrangement (or the cash as your bank statement does not show cash withdrawal)?

Ans Mainly, the required cash was arranged against cheques through Mr Pramod.

Qno 37 What is the status of duty draw back and DEPB receivable?

Ans DEPB had been sold out and duty draw back had also been received from the Customs Department .

Qno 38 Please provide return of income, Balance sheet and tax audit report for A Y 20 10-11 and 2011-12?

Ans Please give me one days time for submission of these documents for AY 2010-11. As far as return of income for AY 2011- 12 is concerned, it is not filed till date as the business is closed and I have no income and therefore no accounts maintained.

Qno 39 Please give name of the auditor?

Ans My auditor is Shri R H Mehta, C/62, Sector 5, Shanti Nagar, Mira Road E. Mumbai.

Qno 40 Please go through your audit report and submit your auditors remark for relevant coloumn (or section 40(A)(3)?

Ans The auditor submitted that "It is not possible for us to verify whether any payment in excess of Rs.20,000/- have been made through bank otherwise than by crossed cheque or bank draft as the necessary evidence is not in the possession of the assessee."

3. In view of the above proceedings, details collected from various banks and Inspectors inquiries and information collected in the form of your statement and unserved notices u/s 133(6) of the IT Act, 1961:

i. You were repetitively requested to produce purchase bills but you admitted vide order sheet dated 09/12/2011 that you did not have these documents. Information was called for u/s 133(6) for all thirty purchase parties list through postal department, but twenty two notices has been returned back by the postal department with mostly marked as "not Known". Remaining eight were also not served as no acknowledgement received from the postal department. Not a single party submitted any response. Inspector conducted inquiries on sixteen parties party addresses but he submitted that either the addresses are incorrect or the parties are not known at these addresses.

ii. On bank inquiries, from Rajkot Nagrik Sahakari Bank Kalbadevi and your banker Union Bank of India, Kalbadevi branch, it is seen that you have issued cheques (not account payee) in the name of M/s Vijay Laxmi Traders for a consideration of Rs.81,97,983/- dated: 23/12/2008. These cheques are deposited in Current Deposit account no 1054 of M/s Shubh Impex Prop Shri Suhel Parvez Ansari maintained in Rajkot Nagrik Sahakari Bank Kalbadevi. Summon u/s 131 was issued to Mr Suhel Parvez Ansari at his address Hanif Building no 19/21, Ist floor, R No 13/A, 210, M A Road, Madanpura, Mumbai 400 008 through speed post. Postal department returned with the remark "left". Inspector inquiries revealed that Mr Suhil Ansari is not staying at the address. On perusal of the bank account of M/s Shubh Impex (Prop Mr Ansari), it is found that the account was opened on 17/7/2008 and closed on 06/03/2009. Nature of entries in the bank account shows that the account was used to give accommodation entries and the account was operated fly by night operators and no genuine business was conducted by M/s Shubh Impex. Furthermore, you have shown payment of Rs.19,00,000/- to M/s Vijay Laxmi Traders through your North Canara GSB Co op Bank, Ghatkopar W Branch. But on perusal of your bank statement with the bank, it is seen that you yourself withdrawn cash amount from the bank account and no cheque payment was made. This is a purely cash withdrawal transaction. This again shows that M/s Vijay Laxmi Traders was nothing but only accommodation entry provider.

iii Similar inquiries were conducted in another party M/s B K Enterprises from which you shown purchases of Rs.48,82,000/-. You issued five cheques (not account payee) in the name of M/s B K Enterprises. On inquiries from AX'S Crawford Market branch and your banker Union Bank of India, Kalbadevi branch, it is found that these cheques were credited in account of M/s B K Enterprises account no 255610200012032 maintained with Prince Anwar Shah Road, Kolkata, West Bengal with AXIS Bank. On perusal of the bank account, it is seen that it was opened on 23/9/2008 and closing balance becomes zero on 31/03/2009. In the bank account, account holder's address is shown at 39/1, Sir Hariram Goenka Street, Kolkata- 700007. Perusal of the account statement, it is found that the account transaction does not show genuine business transactions and with these circumstantial facts, it can be safely concluded that the bank account of M/s B K Enterprises was used for providing accommodation entries to the assessee.

iv. In your ledger account maintained for M/s K C Fab, you shown cheque payment of Rs.3,30,580/- (cheque no 713820), Rs.3,22,980/-(cheque no 713821), Rs.3,33,470/-(cheque no 713819), Rs.2,67,104/- (cheque no 713823) and Rs.3,28,820/-(cheque no 713822) to M/s KC Fab on 28/03/2009. But these cheques were presented in clearing by Rajkot Nagrik Sahakari Bank Kalbadevi. When the banker was asked in which account these cheques were deposited. The banker vide its letter dated 12/12/2012 submitted details which shows that these cheques were deposited in M/s Shivom Trading Co.(Prop Shri Hastimal Nathmal Khandelwal), Ground floor, S S Wag Marg Dadar Mumbai 400014.

v. In your ledger account maintained for M/s Jain Trading Company, you shown payment of Rs.3,43,280/- (cheque no 713816), Rs.3,50,000/- (cheque no 713814), Rs.2,42, 120/- (cheque no 713818) Rs.2,16,000/- (Rs.3,48,600/- cheque no 713815) on 28/03/2009. But these cheques were deposited in above mentioned account of M/s Shivom Trading Co through clearing by Rajkot Nagrik Sahakari Bank Kalbadevi Branch. On perusal of bank account statement of M/s Shivom Trading Co, it is seen the account was opened on 16/02/2009 and closed on 10/09/2009 and the transaction are similar to

accommodation entry provider. The account is operated by fly by night operators not by a genuine business man.

vi. It is pertinent to brought on record the fact that your return of income and your initial two consecutive submissions dated 18/10/2011 and 24/10/2011 states that you made purchases from the 30 parties whose list with purchase amount was provided in your submission dated 18/10/2011 and 24/10/2011. You did not claim any brokerage or commission expenses in your P&L account. These submissions do not say anything about any broker or mediator or commission agent in making purchases. But when inquiries from all modes started and you were showcaused vide order sheet dated 21/11/2011 and 24/11/2011, you changed your stand in planned manner and vide order sheet dated 09/12/2011, you submitted that these purchases were arranged through Mr Pramod. Furthermore, in order to lead the inquiries to dead end, you strategically submitted that Mr Pramod left the business and you do not know anything about him.

4. With these facts, it is found that you purchased the material on cash basis and used accommodation entry operators to encash the cheques (not account payee) issued in the name of incorrect and bogus suppliers. Please explain as to why all purchases should not be treated as cash purchases and treated as unaccounted expenditure u/s 69C of the Income tax Act, 1961 after credit of cheques debited in your account. In order to give you credit for cheque debited in your account and received cash from the accommodation entry providers, a working sheet is prepared and provided to you alongwith the showcause notice. As per the enclosed working, maximum of negative cash balance arrives at Rs.53,82,379/- on 19/05/2008. Therefore, an addition of Rs.53,82,379/- is proposed for A Y 2009-10 for peak unexplained cash credit.

5. On sample basis test checking of cheques issued by you, it is found that you issued all cheques without marking "Account payee" in your Union Bank of India Bank account with Kalbadevi Branch which is violation of provision of section 40A(3) of the Income tax Act, 1961. Please explain as to why addition of Rs.17,99,90,677/- should not be made u/s 40(A)(3) of the Income tax Act, 1961 equivalent to cheques debited in your account above Rs.20,000/-.

6. Please also explain as to why your books of accounts should not be rejected u/s 145(3) being incomplete in view of non production of your books with bills and vouchers as well as incorrect in view of the accommodation entries.

7. You are requested to submit your contention or explanation on 27/12/2011 at 11.00AM. This may be treated last and final opportunity.

Encl. Peak statement 4 pages

(ADEESHWAR MEENA)

ITO WD 22(1)(2), MUMBAI”

Despite several opportunities granted by the AO pursuant to issue of above show cause notice, there was no compliance to above said SCN by the assessee. The A.O observed that the assessee have made actual purchases in cash above of Rs.20,000/- without bills which are not accounted for in its books of accounts and in order to generate required cash, the assessee handed over cheques which were not account payee cheques and party name were also left blank to the accommodation entry providers and received cash payment in lieu of such cheques and these accommodation entry parties were shown as purchase parties. The AO observed that these books of accounts did not reflect actual picture of business and hence books of accounts were rejected by the AO u/s. 145(3) being incorrect and incomplete books of accounts.

The A.O considered all the purchases as cash payments reducing cash balance and similarly all cleared cheques in the bank account of the assessee i.e. Union Bank of India , Kalbadevi branch were considered as sources of cash. The A.O did not accepted purchases on credit basis as there were no genuine parties from whom purchases were made and there is no confirmations from these parties who could confirm that they sold goods to the assessee. The A.O worked out peak statements of the assessee for A.Y 2009-10 which was worked out to negative cash balance of Rs. 53,82,379/- on 19th May, 2008 and the assessee was show caused about the same. The assessee in reply produced purchase register for relevant period for A.Y 2008-09 and A.O on that basis arrived at peak statement of negative cash balance for A.Y 2008-09 and 2009-10 which worked out to be Rs.13,67,62,973/- on 26th Jan, 2008 which pertain to the assessment year 2008-09 . Since for the current previous year relevant to A.Y 2009-10 ,

negative peak balance of Rs. 53,82,379/- was below Rs.13,67,62,973/- , no addition for A.Y 2009-10 was made by the AO u/s. 69C of the Act. The A.O held that appropriate action for peak balance of Rs. 13,67,62,973/- for A.Y 2009-10 will be taken separately.

Additions u/s. 40A(3) and 40A(3A) – AY 2009-10- it was observed by the A.O that assessee has issued cheques without writing name of the party and without marking it 'account payee cheque' which were issued from Union Bank of India account with Kalbadevi branch . Sometime cheques were crossed and sometime cheques were issued without being crossed but in all cases these cheques were not account payee cheques nor the name of the party is written on the cheques at the time of issue of cheques . The AO observed that these cheques were issued to accommodation entry providers in lieu of cash and hence the assessee was not having genuine purchase bills from these parties. It was observed by the AO that every cheque is written by two different persons in two different hand writings. During the year , the AO observed that the assessee has issued cheques of Rs.17,99,90,677/- of which details were given by the A.O vide annexure attached to the A.O assessment order without marking account payee by the assessee. The A.O observed that there is no business expediency or any other factor for issuing cheques other than account payee cheques. The AO also observed that the assessee works in Mumbai and banking facilities are excellent. The A.O observed that it has infringed section 40A(3) and 40A(3A) of the Act and hence additions were made to the tune of Rs. 17,99,90,677/-, vide assessment order dated 30-12-2011 passed by the AO u/s 143(3).

7. Aggrieved by the assessment order dated 30-12-2011 passed by the AO u/s 143(3) , the assessee filed first appeal before learned CIT(A) who dismissed the appeal of the assessee . During the course of appellate proceedings before learned CIT(A), the assessee submitted that it has maintained books of accounts which are audited and copy of balance sheet, profit and loss account , capital accounts were submitted before learned CIT(A). It was submitted that although A.O failed to verify the purchases as notices u/s133(6) returned unserved and purchase parties could not be traced but sales were accepted by the A.O and there cannot be sales unless the purchases have been made by the assessee. The assessee relied upon the

various case laws which are listed in learned CIT(A) appellate order on page no. 12 to 15. The assessee also submitted its audited accounts along with audit report u/s 44AB for the succeeding year i.e. 31-03-2010. The assessee submitted that normal gross profit in this business is 2 to 4% and it was submitted that G P Ratio of 2-4% be adopted in the case of assessee. The assessee also referred to various decisions of the courts which are listed in page 15 to support its above contentions .

The learned CIT(A) rejected the contentions of the assessee. The learned CIT(A) observed that A.O has made detailed enquires after giving several opportunities to the assessee and assessee did not comply or made partial compliance to such opportunities granted by the AO. The learned CIT(A) observed that the A.O has made detailed enquiries after giving number of opportunities to the assessee and the assessee has on majority of dates did not appeared before the AO or made partial compliances. The learned CIT(A) observed that field enquiries in the case of 30 parties were conducted wherein information were called u/s. 133(6) . The learned CIT(A) observed that the AO deputed Inspector to verify the purchase parties and it was observed that not even a single party was conducting business at the addresses provided by the assessee . The learned CIT(A) observed that information was called by the AO from various banks with respect to the purchase parties and it was observed that payments were either made in cash to these parties as there were cash withdrawal from the assessee bank accounts or that the cheques issued to various parties were not account payee which were deposited in some other their party bank accounts of the parties which are not business entities and were engaged in providing accommodation entries. The learned CIT(A) observed that the assessee admitted before the AO that the assessee has not issued account payee cheques to these purchasing parties. The learned CIT(A) observed that books of accounts were rejected by the AO u/s. 145(3) as the same did not reflect actual business of the assessee. The learned CIT(A) observed that the AO treated all purchases in cash while taking source of cash as cheques which were deposited in bank , highest negative cash balance of Rs. 52,82,379/- on 19-05-2008 was worked out by the AO for AY 2009-10 while based on purchase register for AY 2008-09 , the peak negative was worked out by the AO to be 13,67,62,973/- on 26-01-2008 and since peak negative cash

balance worked out pertained to assessment year 2008-09 wherein appropriate action were proposed by the AO to be taken for A.Y 2008-09 for making additions u/s 69C and no additions were made on this ground for AY 2009-10, which decision of learned AO was held to be correct by learned CIT(A) , vide appellate order dated 22-01-2013.

The learned CIT(A) based on factual matrix of the case confirmed additions to the tune of Rs.17,99,90,677/- u/s 40A(3)/40A(3A) for AY 2009-10 as the cheques were issued in favour of third parties without marking it account payee in infringement of Section 40A(3) and 40A(3A) , vide appellate order dated 22-01-2013.

8. The assessment order for A.Y 2008-09 was consequential in nature to the assessment order passed for AY 2009-10 wherein all the discussions as to negative peak cash was made in assessment order for AY 2009-10 , an addition of Rs. 13,67,62,973/- were made u/s 69C for AY 2008-09 on account of negative peak cash balance on the grounds that the assessee has purchased material from other parties in cash , vide assessment order dated 26-03-2013 passed by the AO u/s 143(3) r.w.s. 147. The assessee carried the matter in appeal before learned CIT(A) who confirmed the additions for AY 2008-09 ,vide appellate order dated 25.02.2015 which was later on rectified by learned CIT(A) u/s. 154 vide orders dated 16.02.2017. The learned CIT(A) rectified the appellate order by holding that disallowance in the impugned assessment year is to be made u/s. 69C and not u/s 40A(3) and 40A(3A) as were done by learned CIT(A) in his original appellate order dated 25-02-2015 for AY 2008-09, by holding as under :-

Findings in Original Appellate Order dated 25-02-2015- AY2008-09

“Since the facts of the case and issues in the year under consideration remaining the same, respectfully, following the order of my predecessor, the disallowance made by the Assessing Officer is hereby confirmed by invoking sections 40A(3) and 40A(3A) of the I.T. Act,1961. Grounds raised by the appellant are accordingly dismissed”

The learned CIT(A) made the following amendments by holding as under vide **rectification order dated 16-02-2017 passed u/s 154 by learned CIT(A) for AY 2008-09:-**

“ Since the facts of the case and issues in the year under consideration remaining the same, respectfully, following the order of my predecessor, the disallowance made by the A.O is hereby confirmed by invoking section 69C of the I.T. Act, 1961, Grounds raised by he appellant are accordingly dismissed.”

9. Aggrieved by appellate order for assessment years 2008-09 and 2009-10 passed by learned CIT(A), the assessee has come in appeal before the tribunal.

10. The Ld. Counsel for the assessee submitted that these are the appeals of the assessee for two years i.e. assessment year 2008-09 and 2009-10 . It was submitted that for A.Y 2009-10 books of accounts were rejected by the A.O u/s. 145(3) of the Act and there is no dispute as to the rejection of the books of accounts by the AO u/s. 145(3) and the assessee does not want to challenge the rejection of books of accounts which as per learned counsel for the assessee had been validly done by the authorities below . It was also submitted by learned counsel for the assessee that even quantum of disallowance made of Rs.17,99,90,677/- for AY 2009-10 by invoking Section 40A(3) and 40A(3A) is also not challenged by the assessee. It was submitted that legal contention which is raised by the assessee is that when the books of accounts were rejected by the AO u/s. 145(3) , then Section 40A(3)/40A(3) cannot be invoked by the AO and he is bound to frame best judgment assessment u/s 144 by computing /estimating profits and after rejection of books of accounts u/s 145(3) , the AO cannot then have recourse to same rejected books of accounts and he is bound to estimate profits only. It was submitted that quantum of addition made by the AO is also not challenged in A.Y 2009-10. It was submitted that no additions has been made on account of estimation of profits after rejection of books of accounts. It was submitted that after rejection of books of accounts only trading additions can be made by estimating profits and Section 40A(3)/40A(3A) cannot be invoked as the AO cannot have recourse to same rejected books of accounts

for making additions u/s 40A(3)/40A(3A) which he himself has rejected. Our attention was drawn to assessment order and also our attention was drawn to the annexure to assessment order where the AO has given working details of the disallowance on account of Section 40A(3)/40A(3A) as well working out peak negative cash balance. It was submitted that there is no dispute so far as quantum is concerned . Our attention was drawn to annexure 1 and 2 to the assessment order of the A.O wherein the peak negative cash balance has been worked out to be of Rs. 13,67,62,973/- as on 26th January, 2008 , while total cheques issued from 01.04.2008 to 31st March, 2009 were to the tune of Rs.17,99,90,677/- which were not account payee cheques. It was submitted that A.O has alleged that there are purchases from undisclosed sources in cash and hence addition has been made of the peak negative cash balance and it was found by the AO that peak negative cash balance was of Rs. 13,67,62,973/- as on 26-01-2008 which was added in AY 2008-09 u/s 69C while no additions were made in AY 2009-10 towards peak negative cash balance . It was submitted that assessee has started his business on 02.07.2007. It was submitted that books of accounts were rejected for A.Y 2009-10 u/s 145(3) . It was submitted that once the AO has rejected the books of accounts , then he cannot have recourse to the same books of accounts and make additions u/s. 40A(3)/40A(3A) . It was submitted that no additions has been made by the AO u/s. 69C for the A.Y. 2009-10. It was submitted that Section 40A(3)/40A(3A) cannot be invoked in case books of accounts are rejected. The Ld. Counsel of the assessee relied upon the decision of Hon'ble Bombay High Court in the case of Ranka Jewellers v. ACIT (2011) 238 CTR 153 (Bom). He also relied upon the decision of Hon'ble Punjab & Haryana High court in the case of CIT v. Santosh Jain (2008) 296 ITR 324(P&H) , the decision of Hon'ble Allahabad High Court in the case of CIT v. Banwarilal Banshidar (1998) 0229 ITR 229(All.) and decision of Hon'ble Rajasthan High Court in the case of CIT v. G.K. Contractor (2009)19 DTR 0305(Raj. HC) . It was submitted that once Section Section 145(3) is applied then it is alternative method of computation of income and then books of accounts cannot be looked into for making disallowance u/s 40A(3)/40A(3A) as then AO is debarred from resorting to the same books of accounts. It was submitted that Section 40A(3)/40A(3A) is deeming provision of Income Tax wherein income is being computed by fiction . It was submitted that G.P rate is to be applied by A.O after invoking Section 145(3)

but AO erroneously went on to make additions u/s. 40A(3)/40A(3A). Without prejudice and without conceding, it was submitted that the disallowance as made by the A.O u/s.40A(3)/40A(3A) is absurd. It was submitted that the total turnover of the assessee is Rs. 7.5 crore for previous year relevant to the assessment year 2009-10 while disallowance is made u/s. 40A(3)/40A(3A) of Rs. 17.99 crores. It was submitted that there is basic flaw in the working of the A.O wherein the AO has applied 40A(3)/40A(3A) even if the payments are not for expenses. He referred to Rule 6DD of Income-tax Rules, 1962 and submitted that no account payee cheque were issued and only crossed cheques were issued without naming the party as the seller parties wanted to hide their identities. The assessee sought protection under rule 6DD(g) and (j) of the 1962 Rules. It was submitted that principles of Real Income will apply and holistic view of the matter is to be taken. The learned counsel for the assessee relied upon the decision of Hon'ble Supreme Court in the case of CIT v. Smt. P.K. Noorjahan (1999) 237 ITR 570(SC) and also decision of the Hon'ble Supreme Court in the case of Godhra Electricity Company Ltd. v. CIT (1997) 225 ITR 746(SC).

Assessment Year 2008-09

It was submitted by learned counsel for the assessee that additions has been made u/s 69C as purchases could not be explained by the assessee and addition were made u/s. 69C towards peak negative cash balance which was worked out at Rs. 13.67 crores as on 26-01-2008 as it was held by the AO that actual purchases have been made in cash . It was submitted that learned CIT(A) rightly rejected the books of accounts u/s 145(3). The learned CIT(A) has confirmed the disallowance u/s. 40A(3)/40A(3A) which was later being rectified by an order passed by learned CIT(A) dated 16-02-2017 u/s 154 wherein additions have been affirmed u/s 69C. It was submitted that the books of accounts were rightly rejected u/s 145(3). It was further submitted that Section 145(3) does not allow the A.O power to make assessment in the manner done by the A.O. as after rejecting books of accounts, the AO has to estimate profits and he cannot have recourse to Section 69C. The Ld. Counsel for the assessee submitted that parties could not be produced before the authorities below as assessee does not have control over purchasing parties . It was submitted that books of accounts

could not be produced before the authorities below. It was submitted only ledger accounts were produced and even purchase bills were not submitted . It was submitted that notices u/s 133(6) were issued to various parties by the A.O but the said parties did not existed at the known addresses.

11. The Ld. D.R on the other hand submitted that the A.O asked for books of accounts but assessee did not produced the books of accounts. The Ld. D.R relied upon the orders of the authorities below. It was submitted that all efforts were made by the A.O to make enquiries but these purchasing parties are not traceable . Notices u/s. 133(6) were issued by AO to all the 30 purchasing parties from whom purchases has been made but none of the party responded and notices returned unserved. It was submitted that even inspector was deputed to verify the purchasing parties and it was found these parties are non-existing parties . It was submitted that these are non existing parties. It was submitted it is shown by the AO that purchases have been shown to have been made from 'X' party while payments have been made to 'Y' party and it was submitted that the purchasing parties are not available . Our attention was also drawn to page no. 7-18 of the AO order where in the detail of the creditors are placed. It was submitted that the A.O rejected books of accounts and invoked section 145(3) for AY 2009-10. It was submitted that the additions have been rightly made u/s. 40A(3)/40A(3)(a) of Rs.17.99 crores during AY 2009-10. The assessee has not submitted details before the A.O. and wrong averments are made that documents were furnished before AO . It was submitted by learned DR that assessee has claimed that it has filed documents before learned CIT(A) and A.O , which is wrong contentions made by the learned counsel for the assessee and a wrong certificate is given by the assessee before tribunal . It was submitted that Section 40A(1) has a non-obstante clause and it is clearly stated in Section 40A(1) that it will be operative notwithstanding anything to contrary contained in any other provisions in this Act . It was submitted that Section 40A(1) is not restricted to Chapter IV-D dealing with income from profits and gains from business or profession and it was claimed that Section 40A(1) is an overriding section. It was submitted that there is no merit in the arguments of the assessee and the income has been computed u/s. 144 under the head profits or gains from business or profession to the best of judgment of the A.O. . It was submitted that assessee has not disclosed

identity of purchasing parties and has wrongly invoked protection under rule 6DD(g) and (j) which has no application as no evidences has been produced before the A.O. that the bank were closed due to holidays or the bank were situated in remote areas/villages . It was submitted that Section 40A(3) and 40A(3A) being deeming provision which creates fiction and income is to be deemed under certain situation and as real income cannot be brought to tax then deeming provision will come into picture and income will be brought to tax under deeming fiction. It was submitted that no disallowance has been made under Section 69C for A.Y 2009-10. Our attention was drawn to rectification order passed by learned CIT(A) u/s 154 on 16.02.2017 where in disallowance has been confined to section 69C for AY 2008-09 instead of Section 40A(3) / 40A(3A) as was earlier upheld by learned CIT(A). It was submitted that the purchasing parties from whom assessee made purchases were not genuine and only purchase register was produced. It was submitted that for A.Y 2008-09 books of accounts were not rejected. It was submitted the entire addition u/s. 69C for A.Y 2008-09 be upheld and he relied upon the decision of ITAT-Ahmedabad in the case of Vijay Proteins Ltd. v. ACIT reported in (1996) 58 ITD 428(Ahd.) . The learned DR also relied upon decision of Hon'ble Karnataka High Court in the case of P.M Abdula v ITO reported in (2015) 60 taxmann.Com 52(Kar.) and also decision of Hon'ble Supreme Court in the case of N.K Proteins Limited v. DCIT reported in 2017-TIOL-23-SC-IT.

12. Ld. Counsel of the assessee in rejoinder submitted that additions has been made u/s. 69C for AY 2008-09 while additions have been made u/s 40A(3) and 40A(3A) for AY 2009-10 which has led to double additions . It was submitted that in AY 2008-09 , the entire purchases to the tune of Rs.13.67 crores stood added wherein Rs 10.82 crores was outstanding for payment as on 31-03-2008 as creditors , while for AY 2009-10, the Revenue has invoked Section 40A(3)/40A(3A) wherein disallowance of Rs 17.99 crores were made on the ground that payments made during the year were made otherwise than by account payee cheques which payments during AY 2009-10 included opening creditors of Rs. 10.82 crores as on 01-04-2008 which can be verified by the AO and it was submitted that it led to double jeopardy which is not permitted as the same amount of purchase suffered taxation twice.

18. We have considered rival contention and perused material on record including case laws relied upon. First we will proceed to decide appeal for assessment year 2009-10. We have observed that the assessee is stated to be engaged in business of trading and exporter in fabric and cloth. The assessee achieved turnover of Rs.7.50 crores in the previous year relevant to the assessment year 2009-10, while turnover was 13.41 crores in the immediately preceding assessment year 2008-09. The assessee case was selected for scrutiny and several notices u/s 143(2) /142(1) were issued by the A.O to the assessee during the course of assessment proceedings under 143(3) r.w.s. 143(2) for AY 2009-10. The notices issued u/s 143(2) and 142(1) are tabulated below:-

| S.No | Notices u/s. | Date | Hearing date | Compliance Status |
|-------|---|----------|--------------|-------------------------------|
| i. | 143(2) & 142(1) | 29/09/10 | 11/10/10 | Non compliance |
| ii. | 142(1) | 18/01/11 | 17/02/2011 | -do- |
| iii. | 142(1) | 29/07/11 | 08/08/11 | -do- |
| iv. | 142(1) | 28/08/11 | 06/09/11 | -do- |
| v. | Show cause for initiation of penalty and exparte assessment | 12/09/11 | 22/09/11 | -do- |
| vi. | Order Sheet on appearance of accountant | 18/10/11 | 24/10/11 | Partial compliance in tapal |
| vii. | 142(1) | 31/11/11 | 09/11/11 | Non compliance |
| viii. | Accountant appeared | 21/11/11 | 24/11/11 | Attended but without details |
| ix. | Order sheet | 24/11/11 | 25/11/11 | Non compliance |
| x. | Assessee appeared on dated 09/12/11 without any paper or details | 09/12/11 | 12/12/11 | Non compliance |
| xi. | Assessee appeared on dated 16/12/11 without any paper or details except purchase register print out | 16/12/11 | 19/12/11 | Non compliance |
| xii. | Showcause for addition of Rs.53,82,379/- for | 22/12/11 | 27/12/11 | Attended without any reply to |

| | | | | |
|-------|--|----------|----------|---|
| | peak unexplained purchases and Rs.17,99,90,677/- u/s. 40A(3) | | | showcause submitted certain primary details |
| xiii. | Adjournment | 27/12/11 | 28/12/11 | Non compliance |

The assessee did not either attended during the dates fixed for hearing or did not submitted details in compliance of the said notices or submitted partial replies . The assessee did not produced purchase bills nor produced books of accounts including vouchers before the authorities below . The assessee however produced party wise purchase and sale details and also produced purchase register before the authorities below. In order to verify the purchases, the assessee was asked to give current addresses and details of purchases parties from whom purchases were made . The assessee did not gave purchase bills but gave following details . Certain ledger accounts of the purchasing parties were also submitted . The A.O observed that the assessee has made purchases from following 30 parties :-

| Sno | Name | Address | Closing amount |
|-----|-------------------|--|----------------|
| 1 | Advance Finstock | Plot no 122, Sector no 10. Juhu Gaon Panvel Dist. Raigad - 410206 | 42,48,075/- |
| 2 | Ajay Impex | 98/100, Progressive Bldg, Near Voltas House Byculla (E) | 2,00,000/- |
| 3 | B K Enterprises | Plot no 150, Nehru Road, Near Vishal Hall, Borivali(E) Mumbai-400092 | 4882000/- |
| 4 | Classic Trading | 26/1, Daji colony, Vijay Nagar Road, Narangpura, Ahmedabad- 3800013 | 58,33,524/- |
| 5 | Devam Impex | Off no 185, Jain Bldg Lajpat Nagar, Surat - 395536 | 21,86,712/- |
| 6 | Durga Trading | 311, Gr Floor, Raoji House, Kalbadevi, Mumbai 400 002 | 7,95,000/- |
| 7 | Elegance Trading | Off no ^l 50, 4th floor, Maya apartment, Dahisar E, Mumbai 400 068 | 3,00,000/- |
| 8 | Jayes Corporation | D -281, Shiv Market, Ring Road, Surat -395002 | 3,22,134/- |

| | | | |
|----|--------------------|--|-------------|
| 9 | J K Textiles | 12, Pardiwala Chawl, Opp Sidhivinayak, Nivara Marg, Lower Parel(W) | 13,09,680/- |
| 10 | JMDE Pack Real Ltd | Shop No.13 Gate no 5, Shanghai naqar', Pateli -394540 | 25,66,500 |
| 11 | Kalapna Textiles | Shop no 7, Laxmi College, Dr Ambedkar Road, Parel Mumbai | 13,31,139/- |
| 12 | Karnimata Emporium | Laxmi Bhawan Bldg Gokhale Road, Dadar(W), Mumbai - 28 | 44,80,627/- |
| 13 | Keshav Enterprises | 325, Ground Floor, Kalbadevi Road, Kalbadevi, Mumbai-400002 | 22,67,000/- |

| | | | |
|-----|------------------------|---|-------------|
| 14. | KV Impex | 98, Mangal Sadan Junction, Opp 7 th Road, SV Road, Khar, Mumbai | 15,28,110/- |
| 15. | Maruti Enterprices | S-07, City Arcade, Near DSP Bunglow, Jamnagar-361008 | 18,95,551/- |
| 16. | Mateshwari Enterprices | Raj complex Gr. Floor Off no. 8 Plot no.8/18, Vapi-396165 | 17,37,000/- |
| 17. | Mittal Trading Co | Guru Chambers, 1 st floor, Off no. 19, Soman Nagar, Surat-395002 | 7,62,000/- |
| 18. | Mittal Enterprises | 57/75, ShivShakti, Opp Krishna Zerox, Market Road, Vashi | 7,20,000/- |
| 19. | Om Textiles | Kapadia Mention, 322, Sir JJ Road, Opp JJ Hospital Mumbai 400008 | 5,80,255/- |
| 20. | Pawan Sheth Traders | Shreeji Mention, 3 rd floor, Off no 21, Gurudwara Lane, Kandivali(E) | 36,00,000/- |
| 21 | Raju Traders | 9,Ram Niwas Opp B P PetroPump, Dr Ambedkar Road, Parel Mumbai | 14,40,000/- |
| 22 | Ratan Enterprises | 47,Astavinayak, Sai Marg, Old Hanuman Lane, Malad E | 56,03,500/- |
| 23 | R Dhanlaxmi Traders | Progressiv Apartment, A Wing, off no 12, Jogeshwari West | 9,24,000/- |
| 24 | Real Trading | Suryakant Apartment Second fl Off no 11, Off Cafe Paradise, Chembur | 975000/- |
| 25 | Sampat Traders | 48/82, Janta Chambers, Shantaramm Road, Near Sagar Hotel, Panvel | 8,40,000/- |
| 26 | Sona Traders | 53/23, Jeevan jyot Apartments, Near Vashi Rly Station, Navi Mumbai | 25,19,000/- |
| 27 | Shubh Trading Co | Sapna Hsg CHS, 1st floor, Off 19, M F Road Ganesh Libr Mulund(E) | 47,94,900/- |
| 28 | Soni Brothers | 346-A, Seffroan House,Link | 19,55,242/- |

| | | | |
|----|---------------------|---|---------------|
| | | Road, Khar (West). Mumbai -52 | |
| 29 | Vijay Laxm' Traders | Mahalaxmi Bldg 1st floor, Off no 14, Near Durga Hotel, Ram Nagar, Mira Road | 1,00,98,483/- |
| 30 | Vora Traders | Suvijay Bldg, Ground Floor, Off no 08, Fish Market, NM Joshi Marg, Kurla- W | 16,34,320/- |

In order to verify purchases from the said parties , notices u/s 133(6) were issued by the AO to these purchasing parties asking for details but the said notices u/s 133(6) could not be served on these parties and most of the notices returned unserved as the said parties were not existing at those addresses . Enquiries were also made through ward inspector who also reported that these purchasing parties are not existing at the given addresses.

The A.O , then proceeded to verify various payments stated to be made to these purchasing parties . Ledger accounts were submitted by the assessee of these parties and with respect to one of the party M/s. Vijay Laxmi Trader payments was shown to the said purchasing party by cheques of Rs. 19,00,000/- as under:-

| S no | Particulars | Vch type | Vch no | Credit |
|---------|--|----------|--------|--------|
| 1/12/08 | To The North Canara GGB co op Bank Ltd | Payment | 372 | 325000 |
| | -do- | | 373 | 325000 |
| | -do- | Payment | 374 | 350000 |
| | -do- | Payment | 375 | 200000 |
| | -do- | Payment | 376 | 200000 |
| | -do- | Payment | 377 | 100000 |
| | -do- | Payment | 378 | 200000 |
| | -do- | Payment | 379 | 200000 |
| | | | | |

The A.O made enquiries with the bank North Canara GGB Co. Op. Bank Ltd. and it was observed that these payments are only cash withdrawal from bank account. Similarly, it was observed by the AO that 10 cheques which were issued for an amounts of Rs. 81,98,483/- were not account payee cheques and have been deposited in some other bank accounts in the name of M/s. Shubh Impex which is a non genuine business entity. The A.O obtain copies of cheques issued by the assessee from his bankers Union

Bank of India favouring Vijay Laxmi Traders and it was observed that cheques were for more than Rs.20,000/- and none of the cheques were account payee cheques as are required u/s. 40A(3). It was observed by the A.O that these cheques were presented in clearing by Rajkot Nagrik Sahakari Bank, Kaladevi branch through clearing house member HDFC Bank , Fort Branch. The AO made enquiries with RNS bank who submitted that they do not have any bank account in the name and style of M/s. Vijay Laxmi Traders . On enquiry with the bankers RNS Bank it was found by the AO that these cheques were deposited in the other bank account maintained by Shubh Impex proprietor Mr. Suhel Parvez Ansari Current Account no. 1054 which is a third party account for the assessee. It was observed by the A.O that cheques has been deposited in the third party bank accounts because the same were not marked as an account payee cheques.

The A.O called for the bank account opening form and bank statement of M/s. Shubh Impex from RNS bank and it was observed that it was open only on 17th July, 2008 and was closed on 6th March, 2009 which means it was in existence for part of the financial years and huge entries of big amounts with no small amount transactions in the said bank account led AO to conclude that the bank accounts were used for accommodation entries. The AO observed that the said bank account was having good daily turnover but suddenly on 6th March, 2009 it was closed.

Summons were issued by the AO u/s. 131 to Shubh Impex but the said summons returned unserved by postal authorities with remarks 'left'. The inspector was deputed to verify the address and he reported that Mr. Suhel Parvez Ansari Prop Shubh Impex was not staying at the address . The occupant of the address submitted to the inspector that Mr. Suhel Parvez Ansari was their relative and now left the place. Thus, A.O concluded that Shubh Impex was a fly by night operator and no genuine business was conducted . It was observed by the AO that the assessee has given these cheques to accommodation entry operator in lieu of cash. Similar enquiry were made with respect to the other parties from whom assessee purchased the material namely K C Fab, Jain Trading Company, B K Enterprises which are detailed in the assessment order page no. 10-12 wherein similar findings were there that the cheques issued by the assessee were not account payee

cheques and were deposited in some third party bank accounts which were operated by fly by night operators.

The assessee admitted before the A.O that cheques issued were not account payee cheques and complete purchase bills and supporting vouchers are not available . It was submitted by assessee during the course of hearing before the A.O as under:

“ Shri Iqbal Subedar assessee attended without any paper or details or/explanation. He submitted that he does not have complete purchase bills and other supporting vouchers as all the bills were managed by one Mr Pramod who is now not traceable. He submitted that as all purchases were made through Mr Pramod. Cheques against these purchases were prepared and handed over to Mr Pramod. He made to purchase parties payments through cheques but not account payee cheques. He further submitted that Mr Pramod is not traceable. He is again asked to go through order sheet showcause dated 21/11/2011 and comply.. He is asked to produce I books of accounts, purchases sale bills transportation documents up to port for AY 2008-09 and 2009-10 ii purchase parties should not be treated non genuine iii section 40A(3) should not be made applicable in view of non account payee cheques- cheques favouring of B K Enterprises, Vijay Laxmi Traders and K C Fab shown to him. Hearing is fixed on 12/12/2011 at 11 AM.”

The assessee categorically submitted that he did not have purchase bills and supporting . The assessee also submitted that he did not issued account payee cheques.

Statement was recorded on 15.12.2011 wherein the assessee admitted that some time bearer cheques were issued and no account payee cheque were issued. The assessee in reply of question no 32 and 33 submitted as under:-

“Q no. 32 Whether the cheques were issued as bearer cheque?

Ans. Sometimes the cheque were issued bearer but mostly crossed cheque were issued.

Q no. 33 Whether the cheques for purchases were issued account payee?

Ans As far as I remember, the cheques were crossed only because as per my understanding, as and when cheque is crossed, it goes in the account for which name the cheque is issued”.

Show cause notice was issued by the AO to the assessee but the assessee did not submit any reply before the A.O to the SCN issued by the AO despite several opportunities being granted by the AO to the assessee .The A.O observed that the assessee have made actual purchases in cash above of Rs.20,000/- without bills which are not accounted for in its books of accounts and in order to generate required cash, the assessee handed over cheques which were not account payee cheques and party name were also left blank to the accommodation entry providers and received cash payment in lieu of such cheques and these accommodation entry parties were shown as purchase parties. The AO observed that these books of accounts did not reflect actual picture of business and hence books of accounts were rejected by the AO u/s. 145(3) being incorrect and incomplete books of accounts.

The A.O considered all the purchases as cash payments reducing cash balance and similarly all cleared cheques in the bank account of the assessee i.e. Union Bank of India , Kalbadevi branch were considered as sources of cash. The A.O did not accepted purchases on credit basis as there were no genuine parties from whom purchases were made and there is no confirmations from these parties who could confirm that they sold goods to the assessee. The A.O worked out peak statements of the assessee for A.Y 2009-10 which was worked out to negative cash balance of Rs. 53,82,379/- on 19th May, 2008 and the assessee was show caused about the same. The assessee in reply produced purchase register for relevant period for A.Y 2008-09 and A.O on that basis arrived at peak statement of negative cash balance for A.Y 2008-09 and 2009-10 , which worked out to be Rs.13,67,62,973/- on 26th Jan, 2008 which pertained to the assessment year 2008-09 . Since for the current previous year relevant to A.Y 2009-10 , negative peak balance of Rs. 53,82,379/- was below Rs.13,67,62,973/- , no addition for A.Y 2009-10 was made by the AO u/s. 69C of the Act. The A.O

held that appropriate action for peak balance of Rs. 13,67,62,973/- for A.Y 2009-10 will be taken separately.

Additions u/s. 40A(3) and 40A(3A) – AY 2009-10- it was observed by the A.O that assessee has issued cheques without writing name of the purchasing party and without marking it 'account payee cheque' which were issued from Union Bank of India account with Kalbadevi branch . Sometime cheques were crossed and sometime cheques were issued without being crossed but in all cases these cheques were not account payee cheques nor the name of the party is written on the cheques at the time of issue of cheques . The AO observed that these cheques were issued to accommodation entry providers in lieu of cash and hence the assessee was not having genuine purchase bills from these parties. It was observed by the AO that every cheque is written by two different persons in two different hand writings. During the year , the AO observed that the assessee has issued cheques of Rs.17,99,90,677/- of which details were given by the A.O vide annexure attached to the A.O assessment order , which cheques were issued without marking account payee by the assessee. The A.O observed that there is no business expediency or any other factor for issuing cheques other than account payee cheques. The AO also observed that the assessee works in Mumbai and banking facilities are excellent. The A.O observed that it has infringed section 40A(3) and 40A(3A) of the Act and hence additions were made to the tune of Rs. 17,99,90,677/- by the AO. Later learned CIT(A) dismissed the appeal of the assessee and confirmed the additions made by the AO for AY 2009-10 for which detailed discussions are there in preceding para's of this order which are not repeated here for sake of brevity.

The books of accounts of the assessee were rejected u/s 145(3) of the Act for AY 2009-10, the assessee is not disputing the action of Revenue in rejection of the books of account u/s.145(3) of the Act and the assessee is submitting before the Bench that books of accounts were rightly rejected by the AO and it was submitted that there is no dispute as far as rejection of books of accounts by Revenue for AY 2009-10 is concerned. The assessee is also not disputing that he issued cheques to the so called purchasing parties which were not account payee cheques and rather bearer cheques or crossed cheques were issued which infringed Section 40A(3) and 40A(3A) , which

violation of Section 40A(3) and 40A(3A) stood accepted by the assessee. It is also accepted by the assessee that cheques were cleared in the name of third parties as against the purchasing parties from whom the material is shown to have been purchased as the cheques were never issued in the name of the so called purchasing parties. It is also not disputed by the assessee that the assessee does not have purchase bills. The assessee's main line of argument and defense is that once books of accounts are rejected by the AO u/s. 145(3), then no resort can be made to the said rejected books of accounts and additions cannot be made u/s. 40A(3)/40A(3A) of the Act, and the only recourse available with the A.O is to estimate profits of the assessee's business to compute income under the Act. This is the main line of argument /defense of the assessee before the tribunal. Before adjudicating this ground , it is important to reproduce following relevant Section 40A(1), 40A(3), 40A(3A), 145(3) and 144 as they stood at relevant point of time which held the field for deciding the controversy which has arisen in this appeal.

“Expenses or payments not deductible in certain circumstances.

40A. (1) The provisions of this section shall have effect notwithstanding anything to the contrary contained in any other provision of this Act relating to the computation of income under the head “Profits and gains of business or profession”.

[(3)(a) Where the assessee incurs any expenditure in respect of which payment is made in a sum exceeding twenty thousand rupees otherwise than by an account payee cheque drawn on a bank or account payee bank draft, no deduction shall be allowed in respect of such expenditure;

(b) where an allowance has been made in the assessment for any year in respect of any liability incurred by the assessee for any expenditure and subsequently during any previous year (hereinafter referred to as subsequent year) the assessee makes payment in respect thereof, otherwise than by an account payee cheque drawn on a bank or account payee bank draft, the payment so made shall be deemed to be the profits and gains of business or profession and accordingly chargeable to income-tax as income of the subsequent year if the amount of payment exceeds twenty thousand rupees:

Provided that no disallowance shall be made and no payment shall be deemed to be the profits and gains of business or profession under this sub-section where any payment in a sum exceeding twenty thousand rupees is made otherwise than by an account payee cheque drawn on a bank or account payee bank draft, in such cases and under such circumstances as may be prescribed, having regard to the nature and extent of banking facilities available, considerations of business expediency and other relevant factors.]

The following sub-sections (3) and (3A) shall be substituted for sub-section (3) of section 40A by the Finance Act, 2008, w.e.f. 1-4-2009 :

(3) Where the assessee incurs any expenditure in respect of which a payment or aggregate of payments made to a person in a day, **otherwise than by an account payee cheque drawn on a bank or account payee bank draft**, exceeds twenty thousand rupees, no deduction shall be allowed in respect of such expenditure.

(3A) Where an allowance has been made in the assessment for any year in respect of any liability incurred by the assessee for any expenditure and subsequently during any previous year (hereinafter referred to as subsequent year) the assessee makes payment in respect thereof, otherwise than by an account payee cheque drawn on a bank or account payee bank draft, the payment so made shall be deemed to be the profits and gains of business or profession and accordingly chargeable to income-tax as income of the subsequent year if the payment or aggregate of payments made to a person in a day, exceeds twenty thousand rupees:

Provided that no disallowance shall be made and no payment shall be deemed to be the profits and gains of business or profession under sub-section (3) and this sub-section where a payment or aggregate of payments made to a person in a day, otherwise than by an account payee cheque drawn on a bank or account payee bank draft, exceeds twenty thousand rupees, in such cases and under such circumstances as may be prescribed, having regard to the nature and extent of banking facilities available, considerations of business expediency and other relevant factors.”

“Best judgment assessment.

144. [(1)] If any person—

- (a) fails to make the return required [under sub-section (1) of [section 139](#)] and has not made a return or a revised return under sub-section (4) or sub-section (5) of that section, or
- (b) fails to comply with all the terms of a notice issued under sub-section (1) of [section 142](#) [or fails to comply with a direction issued under sub-section (2A) of that section], or
- (c) having made a return, fails to comply with all the terms of a notice issued under sub-section (2) of [section 143](#),

the [Assessing] Officer, **after taking into account all relevant material which the [Assessing] Officer has gathered**, [shall, after giving the assessee an opportunity of being heard, make the assessment] of the total income or loss to the best of his judgment and determine the sum payable by the assessee [* * *] on the basis of such assessment :

[Provided that such opportunity shall be given by the Assessing Officer by serving a notice calling upon the assessee to show cause, on a date and time to be specified in the notice, why the assessment should not be completed to the best of his judgment :

Provided further that it shall not be necessary to give such opportunity in a case where a notice under sub-section (1) of [section 142](#) has been issued prior to the making of an assessment under this section.]

[(2) The provisions of this section as they stood immediately before their amendment by the Direct Tax Laws (Amendment) Act, 1987 (4 of 1988), shall apply to and in relation to any assessment for the assessment year commencing on the 1st day of April, 1988, or any earlier assessment year and references in this section to the other provisions of this Act shall be construed as references to those provisions as for the time being in force and applicable to the relevant assessment year.]”

“ [Method of accounting.

145. (1) Income chargeable under the head “Profits and gains of business or profession” or “Income from other sources” shall, subject to the provisions of sub-section (2), be computed in accordance with either cash or mercantile system of accounting regularly employed by the assessee.

(2) The Central Government may notify in the Official Gazette from time to time accounting standards to be followed by any class of assessee or in respect of any class of income.

*(3) Where the Assessing Officer is **not satisfied about the correctness or completeness of the accounts of the assessee**, or where the method of accounting provided in sub-section (1) or accounting standards as notified under sub-section (2), have not been regularly followed by the assessee, the Assessing Officer **may make an assessment in the manner provided in [section 144.](#)**”*

Before analyzing these Sections and their inter-play , it is important to see how the Courts have interpreted these provisions of the 1961 Act. The assessee has placed reliance on following case laws which were brought to the attention of the Bench during the course of hearing:

- a) First decision relied upon by the assessee is a decision of Hon’ble Bombay High Court in the case of Ranka Jewellers (supra) wherein issue before Hon’ble Court was with respect to invocation of Section 263 w.r.t. Block assessment framed u/s 158BC pursuant to a search u/s 132. Thus, it was not a case of regular assessment but a case of Block assessment wherein the objective is to compute undisclosed income as stipulated under Chapter XIV-B. The undisclosed transactions from business which was outside books were held to be outside the purview of Section 40A(3).It was also held that in view of consolidated figure of purchases available from seized material, it is not possible to find out disallowances of individual transactions which have

infringed provisions of Section 40A(3). The AO did not invoke Section 40A(3) under said circumstances relying on decision of the tribunal, while learned CIT invoked revisionary powers u/s 263 proposing to revise the assessment on the grounds that the AO did not consider the applicability of Section 40A(3), wherein Hon'ble Bombay High Court held that the revisional jurisdiction cannot be exercised by learned CIT as the AO has taken a possible view based on the decisions of the tribunal. This case has absolutely no relevance to the instant appeal as the fact situation are materially different as we are concerned with regular assessment and not with Block assessment and in the instant appeal before the Bench, the detailed enquiry has been made by the AO as to infringement of Section 40A(3)/40A(3A) committed by the assessee which also is admitted by the assessee.

- b) The assessee has also placed reliance on the decision of Hon'ble Punjab and Haryana Court in the case of CIT v. Smt. Santosh Jain(supra). It is a case where there was some part of the business which was conducted outside books of accounts which was unearthed during the course of search by Revenue. The AO computed income from said business by applying GP rate and the Hon'ble Courts held that the application of GP rate will take care of the expenditure otherwise than by way of crossed cheques in violation of Section 40A(3) r.w.r. 6DD(j) of Income-tax Rules, 1962 as no deduction was allowed to and claimed by the assessee in respect of the purchases. It was held that when GP rate is applied, that would take care of everything and there is no need to make scrutiny of the amount incurred on the purchases by the assessee. The Hon'ble High Court relied upon decision of Hon'ble Allahabad High Court in the case of CIT v. Banwarilal Banshidar(supra) for coming to aforesaid conclusion. But in the instant case before us, the AO after rejecting books of accounts u/s 145(3) has not applied GP Ratio to estimate income rather Section 40A(3)/40A(3A) were invoked to estimate income which is to be tested by us on the threshold of statutory provisions, their interpretation by Courts and factual matrix of the case.
- c) The assessee has also placed reliance on the decision of Hon'ble Allahabad High Court in the case of CIT v. Banwarilal Banshidhar(supra). In this case the AO rejected books of accounts and applied GP ratio. The AO also made additions u/s 40A(3). The Hon'ble Court held that when income is

computed applying Gross Profit ratio and when no deduction was allowed in regard to the purchases of the assessee, there was no need to look into provisions of Section 40A(3) as no deduction was claimed and allowed w.r.t. purchases. It was held that when G P Ratio is applied , that would take care of everything and there was no need for the AO to make scrutiny of the amount incurred on the purchases by the assessee. But in the instant case before us, the AO after rejecting books of accounts u/s 145(3) has not applied GP Ratio to estimate income rather Section 40A(3)/40A(3A) were invoked to estimate income whose validity is to be tested by us on the threshold of statutory provisions , their interpretation by Courts and factual matrix of the case.

- d) The assessee has also placed reliance on decision of Hon'ble High Court of Rajasthan in the case of CIT v. G.K.Contractor(supra) is a case where AO estimated income by applying a higher net profit after rejection of books of accounts by invoking Section 145(3) , it was held that no separate addition can be made on account of cash credit u/s 68 . But in the instant case before us, the AO after rejecting books of accounts u/s 145(3) has not applied GP Ratio to estimate income rather Section 40A(3)/40A(3A) are invoked to estimate income whose validity is to be tested by us on the threshold of statutory provisions , their interpretation by Courts and factual matrix of the case.
- e) The assessee has also placed reliance on the decision of Hon'ble Supreme Court in the case of CIT v. Smt P. K. Noorjahan(supra) wherein Hon'ble Supreme Court has held that the AO is not obliged to invoke Section 69 and treat unexplained source of investment as income in each and every case while discretion has been vested with AO in invoking provisions of Section 69 by treating unexplained source of investment as income depending upon facts and circumstances of the case. We will apply this proposition of law as laid down by Hon'ble Supreme Court to the factual matrix of the instant case before us in succeeding para's of this order.
- f) The assessee has also placed reliance on the decision of Hon'ble Supreme Court in the case of Godhra Electricity Co. Ltd v. CIT(supra) wherein Hon'ble Supreme Court has held that only real income which has accrued to the assessee can be brought to tax. We will apply this proposition of law as laid down by Hon'ble Supreme Court to the factual matrix of the instant case before us in succeeding para's of this order.

The learned DR has relied upon decision of Hon'ble High Court of Gujarat in the case of Rajmoti Industries v. ACIT(supra) wherein it is held that if payment exceeding Rs 20000/- was made otherwise than by account payee cheque or draft, Section 40A(3) stood infringed even if payment is made by crossed cheque after amendment to Section 40A(3) w.e.f. 13-07-2006. The learned DR also relied upon decision of Hon'ble Supreme Court in the case of N K Proteins Limited (Supra) wherein Hon'ble Supreme Court has upheld additions to the tune of 100% of bogus purchases. The learned DR also relied upon decision of Hon'ble High Court of Karnataka in the case of P M Abdulla (supra) wherein the Hon'ble Court held that in case of a trader Section 68 and 69C would be squarely applicable to sundry creditors as credit purchases are nothing but expenditure and if the sundry creditors are not proved, additions can be made by resorting to Section 69C. The Hon'ble High Court of Gujarat in the case Rajmoti Industries(supra) have discussed in details about the distinction between account payee cheques and crossed cheques and have held that it is only account payee cheques issued by the tax-payer shall meet the compliance of Section 40A(3) and 40A(3A) under the amended provisions, wherein Hon'ble High Court has held as under:

“9. Previously the language used in the said provision was "a crossed cheque drawn on a bank or by a crossed bank draft". Such provision was amended with effect from 13.7.2006 to substitute the expression "an account payee cheque drawn on a bank or account payee bank draft". Thus there was a conscious change in the phraseology used in the said provision and the expression "a crossed cheque drawn on a bank" was replaced by "an account payee cheque drawn on a bank". Likewise, expression "a crossed bank draft" was replaced by "an account payee bank draft". The reasons for such amendments were explained in CBDT [Circular No.1 of 2007 dated 27.4.2007](#) providing inter alia that a crossed cheque or a crossed bank draft is not a non-negotiable instrument. This, at times, results in crossed cheques being endorsed making it difficult to trace final payee and thus defeating the provisions of section 40A(3). As per RBI instructions to banks, an account payee cheque or account payee bank draft cannot be credited to any account other than the account of the payee. The Act was accordingly amended to substitute the said expressions.

10. It is true that the terms "an account payee cheque" or "account payee bank draft" have not been defined either in the Act or under the Negotiable Instruments Act. This by itself would not mean that the term is not possible of specific understanding nor would a statutory provision cease to have effect merely because an important term contained therein is not defined under the Act. The terms are defined to the extent the legislature intends to give them specific meanings defining important terms either in inclusive, expansive or

exhaustive manners or even giving rise to deeming fictions. It is not mandatory that every term used in the statute must carry its definition under the Act itself. Terms which are not defined would be open to interpretation in its ordinary sense of the term.

11. *It is indisputable that the term "an account payee cheque" is well understood and signifies cheque which carries a mandate to have the amount mentioned in the cheque to be paid to the drawee of the cheque. In common parlance and as per RBI directives, it would, thereafter, not be open to the drawee of the cheque to endorse the cheque in favour of another person. In this context, we may refer to RBI directives contained in its circular dated 23.1.2006 to the banks.*

12. *Though this circular was not presented before the Tribunal, the Tribunal did take note of RBI directives in this respect. We notice that the circular provides as under:—*

"As banks are aware an account payee cheque is required to be collected for the payee constituent. As regards, account payee cheques drawn in favour of the banks, it had been indicated, vide our circular DBOD.No.BC.23/21.01.001/92 dated September 9, 1992, that banks which credit cheques drawn in their favour by other banks marked 'A/c. Payee' to the accounts of constituents who are not named payees therein, without proper mandate of the drawer do so at their own risk and will be responsible for the unauthorized payment.

2. In view of the recent misuse of Initial Public Officer (IPO) process by certain individuals/entities and reports received in this regard from SEBI, the Reserve Bank of India took up detailed investigations at some banks to ascertain the modus operandi adopted by different parties in manipulating the system. It was observed that despite the abovementioned instructions, banks had credited the proceeds of individual account payee refund orders into the accounts of the brokers instead of to the individual accounts on the request of the associates of DP providers. This has resulted in manipulation of the payment system and has facilitated the perpetration of irregularities. This manipulation would not have taken place but for the banks deviating from the procedure for collection of account payee cheques. The deviations can also not be sanctified as a prudent market practice since it has the potential to expose the banks to various risks.

3. Being satisfied that in consonance with the legal requirements and in particular the intent of the Negotiable Instruments Act, and with a view to protect the banks being burdened with liabilities arising out of unauthorized collections, and in the interest of the integrity and soundness of the payment and banking systems, and in order to prevent recurrence of deviations observed in the recent past, the Reserve Bank has considered it necessary to prohibit the banks from crediting 'account payee' cheque to the account of any person other than the payee named therein. The Reserve Bank accordingly directs the banks that they should not collect account payee cheques for any person other than the payee constituent.

4. Where the drawer/payee instructs the bank to credit the proceeds of collection to any account other than that of the payee, the instruction being contrary to the intended inherent character of the 'account payee' cheque,

bank should ask the drawer/payee to have the cheque or the account payee mandate thereon withdrawn by the drawer. This instruction would also apply with respect to the cheques drawn by a bank payable to another bank. Instructions contained in the Bank's circular DBOD No.BC.23/21/01.001.92 dated September 9, 1992 shall stand modified to that extent.

5. These directions are issued in exercise of the powers conferred under section 35A of the Banking Regulation Act, 1949."

13. *This circular was issued by RBI in exercise of powers under section 35A of the Banking Regulations Act, 1949, which empowers the Reserve Bank of India to give directions where it is satisfied that in the public interest or in the interest of the banking policy or to prevent the affairs of any banking company being conducted in a manner detrimental to the interests of the depositors or in a manner prejudicial to the interests of the banking company or to secure the proper management of any banking company generally. Thus in exercise of statutory powers such directions came to be issued. Such directions clearly mandate that the banks would be prohibited from crediting account payee cheque to the account of any person other than the payee named therein. RBI further directed the banks that they should not collect account payee cheques for any person other than the payee constituent. It is further provided that where the drawer/payee instructs the bank to credit the proceeds of collection to any account other than that of the payee, the bank must ask the drawer/payee to have the cheque or the account payee mandate thereon withdrawn by the drawer.*

14. *These directions thus in no uncertain terms mandate the banks to credit the amount of an account payee cheque only in the account of the payee and no other person and conversely not to accept any cheque from any source other than the person named in the account payee cheque except after requiring the drawer of the cheque to withdraw the mandate in this respect.*

15. *Thus, by virtue of the clear understanding of an account payee cheque in commercial parlance further amplified by RBI guidelines noted above, it cannot be said that there is no distinction between a crossed cheque and an account payee cheque. The concept of an account payee cheque which is even otherwise well known in banking circles and commercial parlance; with specific unambiguous directives by RBI gets further amplified. The banks are duty bound to carry out such directions issued by the RBI in exercise of powers under section 35A of the Banking Regulations Act.*

16. *As we have noted, previously the expression used in section 40A(3)(a) was a crossed cheque or a crossed bank draft. With specific purpose in mind, the same was amended by the legislature to be replaced by the expression "an account payee cheque or account payee bank draft". This was done in the background of the experience that even crossed cheques were being endorsed in favour of a person other than the drawee making it difficult to trace the constituent of the money. To plug this possible loophole the requirement of*

section 40A(3) was made more stringent. If we accept the contention of the counsel for the assessee that there was no distinction between a crossed cheque and an account payee cheque, we would be obliterating this amendment brought in the statute with specific purpose in mind.

17. Learned Senior Counsel Mr. Soparkar further contended that in law, Courts have recognized no such distinction. Our attention was drawn to the decision of Privy Council in the case of *Universal Guarantee (P.) Ltd. v. National Bank of Australasia Ltd.* [1965] 2 ALL ER 98 in which it was observed that addition of the words "A/c Payee" or "A/c. Payee only" referred to the payee named in the cheque and not the holder at the time of the presentation and that would not prevent further negotiability of the cheque. For the same purpose reliance was also placed on the decision of the Calcutta High Court in the case of *Tailors Priya v. Gulabchand Danraj* AIR 1963 Cal. 36. In the three Judge Bench judgment, Justice D.N. Sinha in separate concurring judgment touched the aspect of negotiability of an account payee cheque and observed as under:—

'18. This curious position in law is not known to the public at large. It is generally believed that by crossing a cheque with the words "a/c payee only", it is made non-negotiable. Indeed, such endorsements are made in order to render it non-negotiable, and as a measure of safety. In my opinion, the law on the point should be reconsidered and there is no reason why we should blindly follow the English law on the point. However, the position seems to have been so uniformly accepted by text book writers, both in England and India, that I am unable to depart from that view on the strength of my own feelings about it. The matter should however be corrected by legislation. I therefore hold that according to the law as it stands at present, a cheque payable to order or bearer and crossed "a/c payee" or "a/c payee only" but without the endorsement, "not negotiable", is a negotiable instrument, and may be negotiated, but the collecting banker has a duty to put the money, when collected, into the account of the payee indicated, and into no other account.'

18. It may be that insofar as legal implication is concerned, even an account payee cheque may still retain its negotiability unless it carries a further endorsement "non-negotiable". To this aspect of the matter we are neither called upon nor intended to give any conclusive opinion. We, however, cannot resist referring to the decision of the Calcutta High Court in the case of *Tailors Priya* (supra). In such decision also it was observed that a law on the point should be reconsidered and it is generally believed that by crossing a cheque with the words "a/c. Payee only", it is made not negotiable. It is clarified that according to the law as it stands at present a cheque even if it is account payee without the endorsement "not negotiable" would still be negotiable instrument.

19. In the present case, when RBI directives command the banks not to deposit the cheque amount in favour of any person other than the drawee of the cheque and correspondingly prohibit the banks from accepting any cheque, which is account payee cheque from a source other than the drawee, lack of

any distinction between a crossed cheque and an account payee cheque without a further endorsement " not negotiable" would be of no further relevance.

20. *For the purpose of section 40A(3) of the Act, thus there is really a clear distinction which exists, must be recognised and implemented as required in the plain language used therein."*

The claim and contentions of the assessee is that once books of accounts are rejected by the AO u/s 145(3) , there will be absolute embargo on the AO and he cannot have any recourse to such rejected books of accounts to compute income and the AO will be left with no choice but to compute income by estimating profits. Thus as per assessee, rejection of the books of accounts by the AO will disable the AO to take benefit of any enquiry or investigation made by the AO which resulted in unearthing incriminating material and there is prohibition to use such material against the assessee under such situations . We have carefully gone through the cited judgments and perusal thereof but we could not find any absolute bar on the AO to use incriminating material unearthed as a result of an enquiry and / or investigation while computing income while framing best judgment assessment after rejecting books of accounts rather relied upon judgments by the assessee itself have held that only when AO chooses to estimate profits while framing best judgment assessment , then there is no need to apply provisions of Section 40A(3), 68 and 69 but it is not so otherwise round that when books of accounts are rejected by the AO u/s 145(3) and he did not estimate income by applying profitability, then there is embargo on applying section 40A(3), 68 and 69. Herein the instant case, the AO has not applied the profitability rates to compute income. It is important at this stage to refer to following important judicial pronouncements on the relevant subject:

- a) Hon'ble Supreme Court in the case CST v. H.M.Esufali H.M.Abdulali reported in (1973) 90 ITR 271(SC) has explained the distinction between regular assessment and best judgment assessment as under:

" ...The distinction between a "best judgment" assessment and assessment based on the accounts submitted by an assessee must be borne in mind. Sometimes there may be innocent or trivial mistakes in the accounts maintained by the assessee. There may be even certain unintended or unimportant omissions in those accounts ; but yet the accounts may be accepted as genuine and substantially correct . In such cases , the assessments are made on the basis of the accounts

*maintained even though the assessing officer may add back to the accounts price of the items that might have been omitted to be included in the accounts. In such a case , the assessments made is not a best “best judgment” assessment . It is primarily made on the basis of the accounts maintained by the assessee. **But, when the assessing officer comes to the conclusion that no reliance can be placed on the accounts maintained by the assessee, he proceeds to assess the assessee on the basis of his “best judgment”. In doing so , he may take such assistance as the assessee’s account may afford ; he may also rely on other information gathered by him as well as the surrounding circumstances of the case.** The assessment made on the basis of the assessee’s accounts and those made on “ best judgment” basis are totally different types of assessments.*

.... So long as the estimate made by him is not arbitrary and has nexus with facts discovered , the same cannot be questioned. In the very nature of things the estimate made may be an over-estimate or an under-estimate. But, that is no ground for interfering with his “best judgment”. It is true that the basis adopted by the officer should be relevant to the estimate made. The High Court was wrong in assuming that the assessing authority must have material before it to the prove the exact turnover suppressed . If that is true, there is no question of “best judgment” assessment. The assessee cannot be permitted to take advantage of his own illegal acts. It was his duty to place all facts truthfully before the assessing authority. If he fails to do his duty, he cannot be allowed to call upon the assessing authority to prove conclusively what turnover he had suppressed. That fact must be within his personal knowledge. Hence, the burden of proving that fact is on him.

The law relating to “best judgment” assessment is the same both in the case of income-tax assessment as well as in the case of sales tax assessment. ”

Reference is also drawn to decision of Hon’ble High Court of Lahore in the case of Seth Gurmukh Singh v. CIT reported in (1944) 12 ITR 393 |(Lah), wherein Justice Mohammad Munir writing his separate judgment held in context of Income-tax Act, 1922 as under:

“When an assessee produces books of account either in support of his return or as special evidence on a point specified by the Income-tax Officer, the Income-tax Officer has to examine the books in the same way as he would examine any other evidence produced by the assessee under rub-section (3) of Section 23. If the objection to the books is merely one of method or if the books are unreliable merely in the sense that, though they are a correct record of the assessee’s transactions, they have been kept in such a manner that they do not ex facie

reveal the true result of the assessee's trading activity during the previous year, and the Income-tax Officer can, in some manner, make them the basis of computation of the assessee's income for the previous year, he must proceed under the proviso to Section 13. If, however, the books are false, fictitious or "cooked" for the purposes of assessment to income-tax, the Income-tax Officer must reject them, as he must reject any other false evidence, and make the assessment on the other material before him provided the attention of the assessee is drawn to that material**Even where the books are held to be false, there is nothing to prevent the Income-tax Officer from using and acting on any admissions that they might contain.** For instance, the Income-tax Officer may accept the figure of sales and estimate the profits without accepting the trading account as a whole or he may accept the expenditure and on this basis estimate the sales. While proceeding in this manner the Income-tax Officer is not acting under the proviso to Section 13 but on general rules of reasoning and independently of Section 13. I do not, therefore, think that unless, the proviso to Section 13 is applied to such cases there would be a hiatus in the Act and that sub-section (3) of Section 23 would not work. As I have already pointed out, sub-section (3) of Section 23 does not specify or define the material on which the Income-tax Officer may base his finding. **While making the assessment under that sub-section any material which tends to show the assessable income of the assessee is good material on which assessment may be based,** provided the assessee's attention has been drawn to that material....”

Hon'ble Kerala High Court in the case of CIT v. Nathekkattu Constructions reported in (2004) 269 ITR 346(Ker.) held as under:

“5. We have considered the rival submissions. We have also perused the orders of the Assessing Officer and the two appellate authorities. As we have already stated, the Assessing Officer did not accept the books of account of the assessee which was subjected to a special audit provided under section 45AD of the Act. The main reason for rejecting the books of account was that the Assessing Officer, after considering the statements and depositions of the seven sub-contractors, was of the view that they were only name lenders. It is in the above circumstances the claim of deduction of a sum of Rs. 68,43,650 was not allowed as deduction from the gross receipt. The Assessing Officer was also of the view that there was nothing to be deducted from the gross receipt of the sum of Rs. 87,51,092 received under the award of the Arbitrator. It is in that view of the matter he has treated the entire sum of Rs. 87,51,092 as income. The first appellate authority had adverted to the contentions of the assessee with reference to the payments made to the sub-contractors. However, the first appellate authority has taken the view that this is at the most a case for rejection of the accounts and that if the accounts are rejected the income has to be estimated. The first appellate authority was of the view that when the income is being estimated there is no question of making separate additions in the light of certain decisions of the other courts. The first appellate authority, therefore, after rejecting the books, had resorted to the

estimation of income on percentage basis. **Here, it must be noted that the first appellate authority did not thereafter make any reference to the books of accounts and other documents relied on by the assessee for the purpose of estimation of income. In other words he had totally discarded the materials available in the form of books of accounts and other documents. He had resorted to the estimation on percentage basis.** On an overall view with regard to the profit that can be derived from a contract business, the first appellate authority felt that it is strange to think that out of the total contract receipt of Rs. 1,15,47,373 there may be a profit to the tune of Rs. 87,51,092, which will come to more than 75 per cent of the contract receipt. According to us the first appellate authority was not justified on the facts of this case to totally discard the books of accounts and other documents relied on by the assessee in the matter of estimation of income. **As held by the Supreme Court in CST v. Girja Shanker Awanish Kumar [1997] 104 STC 130, even after rejection of the books of account for technical and other reasons, it is for the Assessing Officer on the facts of each case to consider the materials disclosed to ascertain as to what extent the books of account can be relied on for determination of the turnover.** The Tribunal in the instant case has adverted to the findings of the Assessing Officer and the first appellate authority. However, in paragraph 16 of the appellate order, which we have already extracted, the Appellate Tribunal did not consider this aspect of the matter even though the Tribunal found it difficult to accept the case of the assessee regarding payment to the sub-contractors. We notice that the Tribunal has adverted to the award passed by the Arbitrator and found that the amount awarded represents the value of the extra work done, which also represent interest at the rate of 12 per cent. The Tribunal was of the view that even if the additional work was not got done through sub-contractors, it might have been done by the assessee itself, which aspect has not been considered. The Tribunal however, observed that it is not possible to say that the entire amount of award is a profit to the assessee and taxable as contended by the Department. In such circumstances, according to us it was for the Tribunal to remit the matter to the Assessing Officer or at any rate the first appellate authority to consider the matter afresh. However, what we find is that the Tribunal has agreed with the first appellate authority that this is a case which calls for estimation of the profit on percentage basis. We do not find any reason stated by the Tribunal for justifying the estimate made on profit basis. We note that apart from the general observations made by the Tribunal on the merits of the matter, there is no due consideration of the case of the assessee or of the Department in regard to the acceptance of the books of accounts or the estimation of the income with reference to all the materials available on record including the books of account and documents.

6. The question on which notice was issued in the departmental appeal relates to the justification for interfering with the order of the Assessing Officer in estimating the income with reference to the books of accounts and other documents by substituting it with determination of profit on percentage basis. As we have already noted the first appellate authority, without considering the case of the assessee based on the books of accounts and other records, had straightaway thought that this is a fit case for estimation of profit on percentage basis. We do not think that on the facts of this case the first

appellate authority was justified in adopting such a course. The Tribunal has also committed the mistake in approving the estimation of income adopted by the first appellate authority. In these circumstances we are of the view that the question of estimation of income from the contract receipt is a matter to be considered by the Assessing Officer himself in accordance with law in the light of the observations made in this judgment. In the above circumstances we decline to answer the questions of law on which notice is ordered in the appeal filed by the Department.”

The above judgments clearly stipulates that there is no bar on taking recourse to incriminating material unearthed by the AO during the course of enquiry and/or investigations during assessment proceedings even after rejecting the books of accounts and in our considered view this is the settled position of law and the AO could not be restricted to only estimate income based on profitability and the AO can also not be restricted not to use the incriminating material unearthed during enquiry/investigation to compute income of the assessee but the AO should act honestly to estimate income of the assessee . In the instant case, it has emerged that the assessee has issued bearer cheques or crossed cheques not in favour of purchasing parties but in favour of third parties who were in the opinion of the Revenue merely an accommodation entry providers not doing any genuine business as against the so called purchasing parties from whom the assessee showed purchases . Thus, the whole edifice of the purchases and the business of the assessee was doubted by the AO keeping in view factual matrix of the case. The assessee even did not produced purchase bills and in-fact admitted that there was infringement of Section 40A(3)/40A(3A) which is an admitted position by the assessee. The enquiries made by the AO with these purchasing parties as well with the third parties in whose favour cheques were issued revealed that none of these parties existed as they could not be traced and it was concluded that they were mere accommodation entry operators . Section 40A(3) and 40A(3) are deeming provisions which brings fictional income to tax and it could not be said that the said income has not accrued to the assessee. Thus, the contention of the assessee that once books of accounts are rejected then the AO cannot have recourse to incriminating material gathered from books of accounts during assessment proceedings to frame assessment is rejected. It is for the AO to frame best judgment assessment in the manner laid down in Section 144 of the Act. The courts shall not normally interfere with the best judgment of the AO in framing best judgment assessment to compute income of the tax-payer unless perversity is

shown to have occurred in the decisions of the AO or it could be shown that AO did not acted honestly in computing income of the assessee after taking recourse to best judgment assessment. The assessee has also raised a feeble plea to seek protection u/r 6DD(g) and (j) of the 1962 Rules but no material is placed on record as to how the assessee is covered by said rule and this contention is merely a bald condition as no material on record supports the contention of the assessee.

Perusal of Section 144 clearly reveals that in case the AO is not satisfied with the correctness or completeness of the accounts of the assessee, or where the method of accounting provided in sub-section (1) or accounting standards as notified under sub-section (2), have not been regularly followed by the assessee, the Assessing Officer may make an assessment in the manner provided in [section 144](#).

Perusal of Section 144 would clearly reveals that the AO, **after taking into account all relevant material which the AO has gathered, shall**, after giving the assessee an opportunity of being heard, make the assessment of the total income or loss to the best of his judgment and we donot find any limitation on the powers of the AO not to take recourse to the incriminating material gathered during enquiry/investigation during assessment proceedings to compute income of the assessee while framing best judgment assessment. From the perusal of Section 144 we donot also find any restriction on the powers of the AO to only estimate income based on profitability after rejecting books of accounts. There is no equity under taxing statute and if the provision of the statute are clear and unambiguous , full effect is to be given to them to compute income of the assessee. There is no scope of adding or deleting any word in taxing statute if the language is clear, simple and unambiguous. We donot find any restricting words in Section 144 restricting the AO to only assess profitability after rejecting books of accounts to compute income of the assessee.

Further perusal of Section 40A(1) also clearly reveals that it has a **non obstante clause which clearly stipulates that Section 40A(which includes 40A(3)/40A(3A)) has an overriding effect notwithstanding anything to the contrary contained in any other provision of the 1961 Act relating to the computation of income under the head 'Profit and gains of business or profession'** . Section 28 deals with computation of

income from profits and gains of business or profession which is to be computed in accordance with the provisions contained in Section 30 to 43D which included Section 40A(3)/40A(3). Section 40A(1) has a non obstante clause 'notwithstanding anything to the contrary contained in any other provision of the 1961 Act relating to the computation of income under the head 'Profit and gains of business or profession'' as is contained in Section 40A(1) and in our considered view even if accounts are rejected u/s 145(3) , the AO can estimate income of the assessee by taking recourse to Section 40A(3) which has an overriding effect over Section 145(3) r.w.s. 144. The assessee in the instant case has admitted that books of accounts were rightly rejected by the AO u/s 145(3) and hence in our considered view, the AO has rightly framed assessment for AY 2009-10 which was upheld by learned CIT(A) which we are not inclined to interfere and hence we uphold/sustain the appellate order of learned CIT(A) and the additions are confirmed. The assessee fails in this appeal. We order accordingly.

19. In the result appeal of the assessee in ITA no. 2185/Mum/2013 for AY 2009-10 is dismissed .

20. So far as appeal of the assessee in ITA no. 4896/Mum/2015 for AY 2008-09 is concerned, we are of the considered view that our decision in ITA no.2185/Mum/2013 for AY 2009-10 shall apply mutatis mutandis to the appeal for AY 2008-09 as facts situation are similar in both the appeals and the AO shall work out disallowance in the similar manner as for AY 2008-09 as was done for AY 2009-10 by invoking applicable provisions of Section 40A(3)(a) and (b). We also have noticed that assessment for AY 2008-09 was framed by the AO by invoking Section 69C wherein all purchases stood dismissed , while for framing assessment for AY 2009-10 , the AO invoked Section 40A(3)/40A(3A) wherein disallowance has been made based on payments made to the so called purchasing parties in excess of Rs. 20000/- otherwise than by account payee cheque or account payee draft which has led to double jeopardy to the assessee as the assessee has opening creditors on 01-04-2008 of Rs. 10.82 crores who virtually got disallowed twice , once when entire purchases were disallowed for AY 2008-09 u/s 69C and secondly when payments against those purchases were made against preceding year outstanding's in AY 2009-10 which has led to double jeopardy . However, this figure of double jeopardy needs to be worked out by the AO and in any case since now we have directed the AO to compute disallowance with reference to Section 40A(3)(a) and (b)

even with respect to AY 2008-09, this double jeopardy will automatically get eliminated. The assessee also fails in the appeal for AY 2008-09 for the reason cited in our order. We order accordingly.

21. In the result, the appeal of the assessee for the A.Y 2009-10 is dismissed and appeal for A.Y 2008-09 is also dismissed in the manner indicated above

Order pronounced in the open court on 04.10.2017

आदेश की घोषणा खुले न्यायालय में दिनांक: 04.10.2017 को की गई ।

Sd/-

(C.N PRASAD)
JUDICIAL MEMBER

Sd/-

(RAMIT KOCHAR)
ACCOUNTANT MEMBER

Mumbai, dated: 04.10.2017

copy to...

1. The appellant
2. The Respondent
3. The CIT(A) – Concerned, Mumbai
4. The CIT- Concerned, Mumbai
5. The DR Bench, E
6. Master File

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BY ORDER

DY/ASSTT. REGISTRAR
ITAT, MUMBAI