

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "C": NEW DELHI
BEFORE I.C.SUDHIR, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER**

ITA No.1155/Del/2013
(Assessment Year: 2007-08)

Inder Pal Singh Wadhawan, E/1/7, II nd Floor, East Patel Nagar, New Delhi PAN: AARPS6904L	Vs.	JCIT, Circle-33, New Delhi
(Appellant)		(Respondent)

ITA No.952/Del/2013
(Assessment Year: 2007-08)

ACIT, Circle-33(1), Room No.1505, 15 th Floor, Dr. Shyama Prasad Mukherjee Civil Centre, New Delhi	Vs.	Inder Pal Singh Wadhawan, E/1/7, II nd Floor, East Patel Nagar, New Delhi PAN: AARPS6904L
(Appellant)		(Respondent)

ITA No.1589/Del/2013
(Assessment Year: 2008-09)

Inder Pal Singh Wadhawan, E/1/7, II nd Floor, East Patel Nagar, New Delhi PAN: AARPS6904L	Vs.	ACIT, Circle-33, New Delhi
(Appellant)		(Respondent)

ITA No.1489/Del/2013
(Assessment Year: 2008-09)

ACIT, Circle-33(1), Room No.1505, 15 th Floor, Dr. Shyama Prasad Mukherjee Civil Centre, New Delhi	Vs.	Inder Pal Singh Wadhawan, E/1/7, II nd Floor, East Patel Nagar, New Delhi PAN: AARPS6904L
(Appellant)		(Respondent)

Assessee by :	Sh. Ajay Wadhwa, Adv
Revenue by:	Sh. Vijay Verma, CIT DR
Date of Hearing	11/05/2016
Date of pronouncement	08/07/2016

ORDER**PER PRASHANT MAHARISHI, A. M.****Assessment Year: 2007-08**

1. These cross appeals are filed against the order of Id CIT (A)-XXVI dated 29.11.2012.
2. The brief facts of the case are that the assessee is an individual carrying on business of export of readymade garments. He filed his return of income on 11.09.2000 showing total income of Rs. 1625060/-. Assessment u/s 143(3) of the Income Tax Act was made on 24.06.2010 determining total income of assessee at Rs. 239662002/-. During the course of assessment proceedings audit u/s 142(2A) of the Income Tax Act was directed and assessee furnished the special audit report of M/s. SBG and Co. The Id Assessing Officer has made various additions and it were challenged before the Id CIT (A). The Id CIT (A) deleted some of the additions and confirmed the balance against which the parties are in appeal.

ITA No.952/Del/2013
(Assessment Year: 2007-08)
By Revenue

3. The revenue has raised the following grounds of the appeal in ITA No. 952/Del/2013 as under:
 - “1 The CIT(A) has erred in deleting the addition of RS 3,60,08,930/- made by the Assessing Officer on account of bogus purchases.
 2. The CIT (A) has erred in deleting the addition of Rs.12,00,49,800/- made by the Assessing Officer on account of unexplained unsecured loans.
 3. The CIT(A) has erred in deleting the addition of Rs.62,88,700/- made by the Assessing Officer on account of outstanding unexplained loans and creditors.
 4. The CIT(A) has erred in deleting the addition of Rs.80,40,000/- made by the Assessing Officer on account of profit from sale of property no-19, West AVENUE Punjabi Bagh by treating it as income from business.
 5. The CIT(A) has erred in deleting the addition of Rs.29,53,215/- on account of short term capital gain from sale of "property no-67 Punjabi Bagh and addition of Rs.13,93,010/- on account of under valuation of closing stock.

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6. *The CIT(A) has erred in deleting the addition of Rs.20,00,000/- made by the Assessing Officer on account of extra profit on sale of half share of property no-23/42, Punjabi Bagh.*
 7. *The CIT(A) has erred in deleting the addition of Rs.27,00,000/- made by the Assessing Officer on account of unexplained cash credit.*
 8. *The CIT(A) has erred in deleting the addition of Rs.2,78,57,777/- made by the Assessing Officer u/s 68 of the I. T. Act, 1961 on account of unexplained cash credit.*
 9. *The CIT(A) has erred in deleting the addition of Rs.1,28,88,504/- made by the Assessing Officer u/s 68 of the I.T. Act, 1961 on account of unexplained cash credit.*
 10. *The CIT(A) has erred in deleting the addition of Rs.50,00,000/- made by the Assessing Officer on account of understatement of sale consideration of property no-67, Road no-41, Punjabi Bagh.*
 11. *The CIT(A) has erred in deleting the addition of Rs.40,00,000/- made by the assessing Officer on account of unexplained cash credit received from alleged sale of TWO cars.*
 12. *The CIT(A) has erred in admitting additional evidences in violation of Rule 46A of the Income Tax Rules, 1962 which were neither produced before the special auditor nor before the AO despite several opportunities.*
 13. *The CIT(A) has erred in admitting additional evidences without providing further opportunities to the AO for cross examining the alleged suppliers who had given affidavits despite the facts that the AO had specifically requested for the same in his remand report.”*
4. The first ground of appeal is against the deletion of addition of Rs. 36008930/-. This addition has been by the Assessing Officer on account of bogus purchases. During the year, assessee has shown purchase of Rs. 120029767/- from 14 parties listed at para No. 3.1 of the assessment orders. The Id Assessing Officer doubted the veracity of the purchases regarding the signature on the bills, the printing of the bills, gross profit of the assessee vis-à-vis export incentive, the address verification of the parties, the bank accounts of the parties and the manner of payment to the parties through pay orders. Therefore, the Id Assessing Officer relying on the decision of the Hon'ble Delhi High Court in case of CIT Vs. La Medica 250 ITR 575 and on the decision of Gujarat High Court in case of Sanjay Oil Cake Industries Vs. CIT 316 ITR 274 disallowed 30% of the purchase shown by the assessee amounting to Rs. 36008930/- on account of inflated purchases. The Id CIT(A) deleted the addition vide para No. 15 of his order and therefore revenue is in appeal before us.

5. Ld DR submitted that this ground of appeal is identical to the grounds of appeal on the similar issue in case of Vardaan Fashion for AY 2007-08. He further submitted that nature of addition, parties involved, the alleged modus operandi and all other features of the addition are same except the amount of addition. Therefore, he submitted that similar arguments are pressed by revenue for this ground.
6. Ld Authorized representative confirmed the similarity of the ground in this appeal with the appeal for AY 2007-08 in case of M/s. Vardaan Fashion and therefore he has also pressed the same arguments, which were advanced before us in that appeal.
7. We have carefully considered the rival contentions and we have perused that this ground is similar to the matter decided by us in ITA 950/Del/2013 in case of Vardaan Fashion. Ld CIT (A) has also deleted the addition in this appeal of the assessee on the similar lines for which he deleted the addition in case of Vardaan fashions appeal before him. On appeal before us we have decided this issue in ITA No 950/Del/2013 as under:-

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19. *We have carefully considered the rival contention and perused the material placed before us. The assessee is a merchandise exporter who purchases the goods and export them as it is. For the year, ended 31.03.2007 the assessee has turnover of Rs. 229039928/- from export sales and duty drawback of Rs. 15486387/- was received as export incentive. To export these goods assessee has shown purchases of Rs. 230034993/-. Assessee does not have any opening or closing stock for the year. Therefore, assessee has earned gross profit of Rs. 14491322/-, resulting into GP ratio of 6.32%. On the same result the assessee has earned net profit of Rs. 3016485/-. During the year assessee has shown quantitative details of goods as under:-*

ITEMS	OPENING BALANCE	RECEIPTS (in Nos)	ISSUE (in Nos)	CLOSING BALANCE
LADIES BLOUSE	Nil	6933	6933	Nil
Ladies Skirt	Nil	4248	4248	Nil
Men's lower	Nil	12936	12936	Nil
Pajamas	Nil	13040	13040	Nil
Shawls	Nil	30528	30528	Nil

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T-Shirt	Nil	1290950	1290950	Nil
Vest	Nil	28080	28080	Nil

20. *The above stock tally is given at annexure-E of the Tax Audit Report and annexure-B of the Tax Audit Report shows that the assessee maintains stock register. The quantitative details as well as the maintenance of stock register has also been mentioned by Special Auditor in his Report u/s 142(2A) of the Income Tax Act in Form-6B at Sl. 1 of the Annexure. In view of this, it is an undisputed fact that assessee maintains day-to-day stock register and further neither the Assessing Officer nor the Special Auditor has found any defect in the stock register as well as the quantitative tally maintained and submitted by the assessee.*
21. *The Id Assessing Officer has raised one of the reasons that the sales bill are prepared in the handwriting of three persons with respect to all the suppliers. The Id Assessing Officer has tabulated that in case of 12 suppliers listed at Sl No. 3.2 of the assessment order bills are prepared in handwriting of one person and in case of the eight parties listed at sl. No. 3.2.1 of the order in the handwriting of another person. Further, similarly, four parties listed at sl. No. 3.2.2 of the order it is mentioned that bills of these parties are in the handwriting of third person. We have carefully noted the finding of the Assessing Officer and we find that there is a contradiction in the finding of the Assessing Officer. Firstly, M/s. Surya Fabrics, listed in para No. 3.2 as well as para No. 3.2.1, secondly, M/s. Pawan Fabrics appears in the list of parties at para No. 3.2, 3.2.1 and 3.2.2 i.e. in all three classification made by the Assessing Officer. Thirdly, M/s. Hanuman Enterprise is also appearing in all the three lists, M./s. Arun Textiles also appears in para NO. 3.2 as well as para No. 3.2.1, same way M/s. Shiva Enterprise and M/s. Kartik Agencies also appears in two different set of lists. Therefore, the allegation of the Assessing Officer that bills are prepared in handwriting of three different persons shows contradiction as stated above. Be that it may be. However, from the handwriting of the bills nothing can be proved. Therefore, the finding of the special auditor about the handwriting is an observation which does not have any sanctity and that creates doubt and suspicion in the mind of the Id. AO.*
22. *The next contention of the Assessing Officer that printing of all the bills are in same fashions and that assessee has bought the blank printed bills from a stationery shop and deputed three persons to fill up the name and address of the assessee as a buyer of such bills mentioning description of goods with quantity and rate to match with the export made by the assessee during the year. The above allegation made by the Id Assessing Officer at para No. 3.3 of the Assessment order is made based on the observation of the special auditor. We find that this allegation is unfounded. Firstly, because the bills are not prepared by three different persons as already held by us pointing out*

inconsistency in the finding of the Assessing Officer at para No. 3.2 of the assessment order. Further, printing of the bill in similar fashion cannot be the reason to doubt that the bills are bogus and we further found that the bills are also not printed in manner suggested by auditor and Ld AO. Before us at page No. 91 to 156 of the Paper Book assessee has given copies of the bills. On perusal of those we do not find that they are printed in the similar fashion. The bill of Arun Textile and the Bills Harpik Agencies and the bills of Rupsraft Inc. and Shri Hanuman Enterprises do not show that they are similarly printed. Contrary to this even the bill Shri Hanuman Enterprise at Page No. 153 and Bill of same party at page NO. 155 itself shows that even they are not similar. In view of this, the finding of the Assessing Officer on this ground based on special audit report is also not correct.

23. *The Assessing Officer has stated that the assessee has produced three photocopies of the duplicate bills showing different invoice no. The allegation made by the auditor and repeated by the Assessing Officer that assessee has photocopies the bill after filling name of the buyer and goods etc. leaving blank bill no. and afterwards, invoice no on those bills have been written. The Auditor has made this allegation at page No. 9 in para No. C of the audit report and same is ad verbatim mentioned by the Assessing Officer in para No. 3.4 of the order. Surprisingly, if that be the case the stock register maintained by the assessee could have been verified and that could have been corroborated with the copy of the account of the supplier. The copy of the account of the above party is at annexure-C page No. 193 of the Special Audit Report. On perusal of the copy of the account we find that the assessee has purchased the goods from this party through sixteen bills and all the bills have been paid out showing Nil opening and closing balance. Neither the auditor nor the Assessing Officer could point out which are these three similar bills having the same quantity and the same rate. In the audit report three bills of the above parties are attached at page No. 153 to 155 which is in all for 45000 units of fabric T-shirts purchased @170/ T-shirt amounting to Rs. 2550000/- per bill for export. During the year the assessee has exported T-shirt 1290950 nos. If there is any doubt about the material then it is apparent that there would not have been export of these materials. In these circumstances, the allegation made by the Special Auditor and the ld Assessing Officer remains unfounded.*
24. *It is further stated that certain enquiries were made about the identity and existence of the suppliers from whom the assessee purchased the goods and they were not found at the given address. The auditor has mentioned this and therefore the ld Assessing Officer also deputed Inspector for the verification. The facts are mentioned by the auditor at page No. 9 para No. F of the report. Further at para No. 3.19 it is stated that the AO did an independent verification of the address of the suppliers in some cases on test check and it has been reported by the Inspector that the suppliers do not exist at the addresses given in the list. However, no such finding has been recorded by the Assessing Officer about which parties address were verified by the Inspector and*

what is the report. The fact of this enquiry is silent in the assessment order as well as in the remand report submitted before the ld CIT(A). It is also apparent that no such inspector report was confronted by the ld AO to the assessee. Therefore it is apparent that ld Assessing Officer has proceeded on the same line of enquiry which was done by the auditor. We have carefully perused provisions of section 142(2A), Rule 14A of the Income Tax Rules and Form No. 6B along with the annexure, we do not find any reason which prompted the auditor to proceed with 'investigation' of the accounts when the only mandate given to him was to 'audit' the account. In the annexure submitted before us of the special audit, we do not find any adverse comment on 15 points prescribed by the Rule making Authority including maintenance of books of accounts and stock register showing quantitative details. The quantitative details of purchases have been certified by the auditor as correct and contradicting that it is stated that purchases made from parties are bogus. The Special Auditor has commented the statement of facts on these points which matches exactly with the audit report of the assessee including the quantitative details of the goods traded. If that be the case we failed to understand that if the mandate was to investigate the accounts of the assessee, what stopped the Auditor in verifying the bank accounts of the suppliers, the money trail also about the payments made by the assessee and how they have been withdrawn. It could have been further investigated about wherefrom the good have been procured by the assessee from export. Ld Assessing Officer has not carried on his duties of issuing 133(6) enquiry letter or summons u/s 131 of the Income Tax Act to the parties, brokers and the partners of the firm, and has blindly relied on the enquiry made by the auditor. The issue arises that the ld Assessing Officer does not have the address which are correct, therefore how such enquiry could have been done. The answer lies in the fact that bank account of those parties are available with the Assessing Officer, we see no reason that why neither the auditors nor the Assessing Officer has written a single letter to the bankers of the suppliers and obtained information about the correct address of the parties, who introduced them to the bank, copy of the bank accounts of the parties, trail of withdrawal from the bank account of the parties and the instruments used for alleged transfer of money to the assessee, if in case the purchases are bogus and modus operandi presumed by the auditor and the Assessing Officer is to be proved. We are pained to say that the auditor as well as the ld Assessing Officer has failed to conduct these general enquiries and in absence of this has presumed that purchases are bogus. We are of the opinion that unless this enquiry is done the opinion expressed by the auditor and followed by the ld Assessing Officer is fallacious.

25. The ld Assessing Officer has further stated that the suppliers do not have the VAT registration or the VAT has not been paid. The audit report at page No. 11 has stated that fact. The issue before us is not whether the VAT has been paid by the suppliers or not the issue is whether the purchases are bogus or genuine. If the suppliers has not

paid VAT it may be the responsibility of the suppliers and not the assessee and in any case it may be a default under the local VAT act. Merely because the TIN are not stated on the bills and VAT is not charged by the suppliers the purchases cannot be held to be bogus in absence of any enquiry with the VAT authority about the dealers/suppliers. It is surprising that one revenue authority i.e. Assessing officer did not share the information of violation of VAT law with other authority i.e. VAT department. In any case the auditor who conducted the special audit as well as the assessing officer are not the expert on VAT matters. Therefore the view expressed by them should have been further enquired from the VAT authorities which the ld. AO has failed to do.

26. Ld. assessing officer further noted that that in case of 3 suppliers mentioned in para No. 3.10 of the assessment order their bankers are Punjab National bank and Indian overseas bank at Punjabi Bagh and Rajouri Garden, whereas the suppliers are situated at Ghaziabad or Gurgaon. According to the assessing officer the location of their banks are far away from their business addresses. Ld. assessing officer was also of the view that that assessee was also having the bank account in those bank branches. Therefore , it was observed by the Ld. assessing officer that the assessee is paying to the creditors through pay orders and not through account payee cheques. Assessee has paid out of the total purchases of Rs. 23 crores , Rs 5.43 crores through pay orders and has incurred bank charges. According to the Ld. assessing officer, any prudent businessman would have paid by the account payee cheque and would not have incurred such bank charges by making payment through pay orders. We have carefully examined this reason given by the assessing officer as well as the special auditor. However it remains uncontroverted fact that out of the total purchases of Rs. 23 crores the assessee has made payment of only Rs. 5.43 crores through issue of pay orders. The balance amount of almost Rs. 18 crores have been paid by the assessee through account payee cheque. This fact further gets support from the view that that the Ld. assessing officer has made disallowance under section 40A (3) of the act on payment of Rs. 5.43 crores only. That means assessee has made a substantial payment that is almost Rs. 18 crores for purchases of goods through regular banking channel which is acceptable to ld AO. According to us the manner of the payment of these purchase invoices through the Pay order is also an accepted method of payment. In view of this merely because the bank account of the suppliers and buyer assessee are in the same bank branch and assessee has made payment of Rs. 5.43 crores out of total purchases of Rs. 23 crores through pay orders does not prove in any manner that that the purchases booked by the assessee is bogus. In fact it proves that the purchases have been made by the assessee and for which the suppliers have been paid through regular banking channels by cross account payee cheques and by the bank pay orders. It is also not the case of the assessing officer that the money has not been credited into the bank account of those suppliers. The amount of bank charges

paid by the assessee for issue of pay orders etc cannot go against the assessee because the payments by the pay orders is also an accepted method of payment and are more secured. Therefore this reason given by the Ld. assessing officer and the special auditor cannot be accepted to hold that purchases are bogus.

27. Ld. assessing officer was also of the view that some of the suppliers have deposited sum with the assessee and no prudent supplier will deposit money with the buyer without any commercial expediency. The amount of deposit made by some of the suppliers amounting to Rs. 6.15 crores has already been dealt with by the assessing officer by making the addition under section 68 as unexplained credit in the hands of the assessee therefore we will deal with this issue as and when we deal with the addition made by the Ld. assessing officer which has been deleted by the Ld. CIT (A). In any case, this is a separate transaction which is required to be treated according to the provisions of the Income Tax Act separately which Ld. assessing officer has also dealt with separately. Therefore, the amount of loan advanced by the suppliers to the assessee cannot lead to any credence to the theory that the purchases are bogus which are made from those parties.
28. One of the arguments raised by the Ld. assessing officer for making the addition is that the assessee is doing business of export of goods and only export incentive is the real profit/ income of the assessee and therefore no businessperson would do business at the loss. The auditor has also expressed the similar view. The view of the auditor and the Ld. assessing officer is based on the fact that during the year the gross profit earned by the assessee is negative if export incentives are ignored and only because of export incentive received by the assessee it has made gross profit positive. We do not agree with this view. The reasons for our disagreement is the that whenever the assessee is engaged in an export business every prudent businessman quote the prices of the goods to be exported after considering the benefit of export incentive that it will receive, which is also his business income. Only this can make the export of goods competitive. The export benefits are nothing but the reimbursement of cost of duties and taxes suffered by the assessee when the goods are exported. Therefore, the gross profit must take into consideration the export benefit receivable by the assessee. Therefore, for this reason it cannot be said that the assessee is doing the business incurring the losses. It is not the case of the assessing officer or the auditor that even after the export benefit considered by the assessee it has incurred losses. Hence, we reject this argument of the revenue.
29. Furthermore the Ld. assessing officer has relied upon the decision of the Hon'ble Delhi High Court in case of CIT vs La Medica 250 ITR 575 as well as the decision of Hon'ble Gujarat High Court in case of Sanjay Oil cake Ind versus CIT 316 ITR 274. In the decision before the Hon'ble Delhi High Court it was held that that the suppliers were of no means or were found to be incapable of doing business of that scale. Further, in that case there was a finding by the Ld. assessing officer that the

rates on which purchases made by the assessee were on the higher side. Further the bank account of the supplier was also operated by one of the persons introduced by the partner of the firm and it was alleged that the bank account was also being operated by the assessee firm. In the present case there is no such allegation that the rates at which the purchases are being booked by the assessee are higher than the market rate and further the bank account of the suppliers are also being operated by the assessee. Therefore there is material difference between the facts found by the Hon'ble Delhi High Court and the facts in the present case. Decision of Hon'ble Gujarat High Court cited before us in CIT versus Sanjay oil cake industries limited 316 ITR 274 facts were where certain additions were made on account of inflated purchase price and alleged sellers were not traceable and though payments had been made by account-payee cheques, entire amounts so deposited had been withdrawn by bearer cheques, the Hon'ble high court upheld the addition confirmed by the tribunal. In the present case the fact of purchases made by the assessee are at inflated prices as well as the withdrawal of the amount deposited in the bank account of the suppliers are absent. Therefore reliance by the Ld. assessing officer on both these decisions is misplaced.

30. Before us the Ld. DR during the course of hearing further relied on the decision of coordinate bench in case of Vijay proteins Ltd versus ACIT [58 ITD 428]. We have carefully considered the facts of that decision. In that particular case the assessee was said to have purchased material from 33 parties which were not found genuine. During the course of assessment proceedings, the assessee could not produce the suppliers, the brokers and transporters in spite of specific opportunities provided to the assessee. The documents pertaining to the brokers were also provided before the 1st appellate authority only. In that particular case certain transactions were totally denied by the parties and amount was collected through cheques by almost all parties through the bank account in the name of one person who has close link between that person and the assessee company which was established and therefore the transactions were found to be fictitious. The transporters also either did not exist or denied having done any such transportation work. The cheques issued in this behalf were never received by the suppliers or the brokers and were in fact collected back by the assessee through the bank account of 'P' operated under the control and direction of the managing director of the assessee. In these facts and circumstances the contentions raised by the assessee that the transactions are made through the brokers was not believed and therefore the provisions of section 145 (2) was attracted and then 25% of the purchase price accounted through such fictitious invoices is disallowed. The entire amount of freight paid for purchase of those was also disallowed. The assessee was also asked to produce the brokers before the assessing officer which assessee failed to produce. In the present case the provisions of section 145 (2) were not at all invoked. Secondly the payments made by the assessee

to the supplier are through banking channels and same were deposited in the bank account of the suppliers only. Thirdly, there is no evidence that the payment has come back to the assessee which was made to the supplier. In present case the assessee has specifically submitted that the purchases have been made through brokers and affidavit of the brokers were also submitted. None of brokers were ever examined by the assessing officer even in the remand proceedings also. In view of these facts of the present case as well as the case of coordinate bench cited before us we are of the view that they are not similar. In view of this the reliance placed by the Ld. departmental representative on that case is misplaced.

31. Over and above the three cases discussed above, it will be worthwhile to mention that the learned representatives of both sides had cited several judgments during the course of hearing and written synopsis filed. We have carefully gone through all those judgments and have borne in mind the principles of law laid down by different courts in the various decisions cited by them. It is neither proper nor necessary to discuss the ratio laid down in various cases and its applicability or otherwise on the facts and circumstances of the present case.
32. It is also very important to note that despite there being a special audit under section 142 (2A) and Ld. assessing officer reaching to the conclusion that the purchases and recorded by the assessee are from non-existent parties and therefore bogus, the Ld. assessing officer did not invoke the provisions of section 145 (2) of the act. It's also pertinent to note that assessee has maintained the day-to-day stock register and also the regular books of accounts along with the quantity tally of the goods purchased and exported books of accounts of the appellant have not been rejected, in the decision cited before us by the Ld. DR in almost all cases the books of accounts have been rejected and the gross profit by disallowing the part of the purchases have been added. When the books of accounts are not rejected by providing latent, patent and glaring mistakes in accounts we are of the view that ld. Assessing officer does not have any power to tinker with the book results.
33. To justify that the gross profit rate earned by the assessee is proper assessee has given 3 comparable cases wherein the gross profit earned by those comparables are in the range of 3.23 percentages to 2.41 percentages whereas the gross profit earned by the assessee is 5.93%. The Ld. assessing officer has not commented on the comparables given by the assessee. In view of this it cannot be said that the gross profit earned by the assessee is less than what the industry standard. Further surprisingly it is also found that that in case of 1st comparable the gross profit including export incentive was Rs. 5.36 crores and the export incentive was 11.02 crores. In the 2nd comparable will instance given by the assessee the gross profit earned by the company was 3.27 crores whereas the export incentive was Rs. 9.05 crores. In the 3rd comparable the gross profit was Rs. 3.75 crores whereas the export incentive was Rs. 12.52 crore. All these result of

the comparable also supports our view that in the export market the export incentive is one of the profit driver which cannot be excluded while working out the gross profit of the assessee who is engaged in the business of the export.

34. *Regarding admission of additional evidences the ld CIT (A) has dealt with this issue as under :-*

“10.2 From the above, i.e. the Assessing Officer's letter it becomes evident that most of the necessary documents and details which were not filed before the special auditor, in the absence of which the special auditor had pointed out various discrepancies, were filed before the Assessing Officer in response to show cause letter dated 12.05.2010. From the above letter dated 08.06.2010 it is evident that the Assessing Officer was not left with much time to complete the assessment. As the matter was getting barred by time to complete the assessment, the Assessing Officer could not provide sufficient opportunity to the appellant to furnish any further evidence, other than what he had submitted in response to the Assessing Officer's show cause notice dated 12.05.2010. I have also perused the fresh evidences that consisted of a) affidavits of brokers, b) details of creditors/depositors with confirmatory letters, c) copy of the ledger account of the partner and d) copies of cash book and ledger of the appellant and its partner Sh. Satvinder Singh. The affidavits are statements on oath which are legal documents constituting evidence in respect of purchases. The other evidence as mentioned above are also relevant evidences for the purpose of deciding the related issues. Therefore, these documents which are filed as additional evidences are required to be admitted in the interest of natural justice.

10.3 In view of the above, it is considered that the appellant was not given sufficient time and opportunity, except a show cause letter dated 12.05.2010, inter alia to furnish the evidences which the appellant has now produced before me in the form of additional evidence. In this situation the objection of the Assessing Officer against admission of fresh evidence is rejected and the additional evidences are admitted, in the interest of natural justice, as they are relevant and vital evidences in deciding the issues arising from the grounds of appeal.”

35. *On perusal of the assessment order we note that the appellant was directed on 29/12/2009 for getting his accounts audited which was submitted on 30/04/2010. Based on the observation of the auditor show cause notice was issued on 12th may 2010 which was replied by the assessee on 31/5/2010 & 04/06/2010. Based on this assessment order was passed on 24th of June 2010. During the course of appellate proceedings before the Ld. CIT (A) additional evidences in the form of affidavit of the brokers, details of the creditors and their confirmatory letters and ledger account of the partner and copy of the*

cash book of the appellant was submitted. The application for the additional evidences were sent by the Ld. CIT (A) to the assessing officer vide letter dated 25/10/2011 for furnishing the remand report and on additional evidences. The ld assessing officer submitted his remand report vide letter dated 5th June 2012 wherein the assessing officer intentionally choose not to verify the contents of the additional evidences filed by the appellant despite specific direction by the ld. CIT (A) dated 25/10/2011 for the comments of the assessing officer and for verification of the additional evidences. In para No. 10.1 of the order Ld. CIT (A) has noted that the letter dated 08/06/2010 by the Ld. assessing officer to the special auditor wherein the Ld. assessing officer has asked the special auditor to attend the office of the Ld. assessing officer on 18/06/2010. Therefore the Ld. CIT (A) was of the view that that there was no sufficient time left for the assessing officer to make further enquiry and to ask assessee to submit further details on the relevant issues. Further as the additional evidences submitted by the assessee were vital to decide that issues in appeal the LD CIT (A) has rightly admitted the additional evidences. We do not find any irregularity in the order of the Ld. CIT (A) in admitting those additional evidences.

36. On the issue of the disallowance on account of bogus purchases , Ld CIT (A) has dealt with this addition while deleting it as under :-

“15 I have considered the facts of the case, written submissions filed by the appellant in the course of appellate proceedings, supported with additional evidences, Assessing Officer's comments thereon in his remand report and the appellant's rejoinder thereto and adjudicated the issues raised in the grounds of appeal on merit. The impugned addition of Rs.6,90,10,4987- to the total income of the appellant has been made by the AO by disallowing 30% of the total purchases by treating the same as bogus and inflated purchases relying on the report of the special auditor. On perusal of the material on record, I find that the Assessing Officer, except for the report of special auditor, has not brought on record any material on his own for arriving at the conclusion that the purchase price has been inflated. I consider it necessary to refer here to the letter of the Assessing Officer dated 8.6.2010 written to the special auditor, which has been reproduced above. In this letter, the Assessing Officer has clearly stated that the appellant furnished most of the relevant documents and details which were not filed before the special auditor and in the absence of the same, the special auditor had pointed out various discrepancies. It was also stated by the Assessing Officer in the same letter that the special auditor pointed out various discrepancies in the absence of the documents and details which the appellant could not submit before the special auditor. I have also gone through the reply dated 31.5.2010 filed by the appellant in response to the Assessing Officer's show cause notice dated 12.5.2010. From the

assessment order, it is noted that the Assessing Officer has not made any observations as to why the reply filed by the appellant dated 31.5.2010 was not acceptable to him. On the basis of the special auditor report, the Assessing Officer conducted enquiries through the Inspector and found that the suppliers were non-existent. Thereafter, I also find from the assessment order that the Assessing Officer has not confronted the appellant with the report of his Inspector in which he reported that the suppliers mentioned in his report did not exist at the given addresses. The Assessing Officer ought to have confronted the appellant with the Inspector's report with regard to the non-existent suppliers at the given addresses, Had this opportunity been given to the appellant in the course of the assessment proceedings by the Assessing Officer the appellant would not have filed the affidavits of the brokers as additional evidence in the course of the appeal proceedings. Even during the remand proceedings, the Assessing Officer did not examine these affidavits pertaining to the suppliers despite of the letter dated 25.10.2011 and asked the appellant's version on this issue. This is a denial of opportunity to the appellant. The Assessing Officer has recorded his findings such as "nature of the bills is bogus" and "transactions are highly doubtful" and "the modus operand! appears to be that similar to those used by the accommodation entry operators", without bringing any adverse any material on record to rebut the appellant's version. He has also not identified any such entry operators who provided the inflated bills of purchases to the appellant. According to the Assessing Officer, in the instant case, the appellant procured the fictitious inflated purchase bills through entry operators. But he has not identified the so called entry operators nor gave a finding that the alleged suppliers were the entry operators. While accepting that the export sale is genuine, the Assessing Officer doubted the suppliers from whom the alleged inflated purchases were made and stated that the alleged suppliers were apparent sellers and the actual suppliers were some other parties. However, he has not given a clear finding, as to who were the actual sellers and brought any material on record to say who were the actual sellers to whom he made a reference in his order. In this situation, the Assessing Officer did not give a categorical finding pertaining to the alleged suppliers except for some vague observations based on surmises and conjectures. In such situation, the Assessing Officer's finding is nothing but a vague statement in a casual manner.

15.1 After the considering the material on record, I find that the Assessing Officer accepted the fact that the appellant is a merchandise exporter of readymade garments. He did not dispute the total export sale shown by the appellant in his return of income. All the export sales were made through the banking channels after proper clearance from the custom authorities on

verification/examination of the shipping and airways bills and payments were received by the appellant through banking channels. The bankers have also sanctioned the packing limit for the export business. Reference is made to the case reported in 134 ITJ 167 Delhi CTR volume 52 part vi page 39 where it was held that purchases cannot be disallowed due to non-filing of confirmations from the suppliers, especially when the assessee furnished certificates from the bank stating that cheques were cleared and no defect in the books of accounts was pointed by the Assessing Officer. When the appellant furnished the details of purchases, simply because the bank account of the seller and the purchaser are maintained in the same bank and without proving that the amount had come back to the appellant in some form the addition on account of bogus purchases cannot be made in the case of the purchaser of goods. If the Assessing Officer considered that the purchases were bogus he ought to have examined the suppliers who furnished their affidavits on oath. Reliance is also placed in the judgment in the case of CIT vs. M.K. Bros. 163 ITR 249 (Guj.) where it was held that if the payment was paid by an account payee cheque, and the same has not been received back in any form, even if the seller declares that simply he has issued the bill and he has not sold the goods still nothing can be added in the case of the assessee. The appellant exported goods and furnished various expenses in the form of purchase bills, affidavits of the sellers, evidence of payment made through the banking channels. This evidence was sent on remand to the Assessing Officer. However, the Assessing Officer did not conduct a complete verification of such persons. No material was brought on record to suggest that purchases were bogus and audited accounts of the appellant were accepted by him. The Assessing Officer also did not identify the purchases that were found outside the books of accounts. After obtaining all the pieces of the evidence furnished by the appellant, the Assessing Officer is duty bound to bring further material on record before making an addition on account of bogus/inflated purchases. Reliance is also placed in the judicial pronouncement in the case of CIT vs. Hilux Automotive Pvt. Ltd. 23 DTR Delhi 383 wherein it was held that the appellant furnished sufficient material namely bank account of each parties to show payment, the finding of fact arrived by the Tribunal that the said parties were genuine supplier and the received payment by an account payee cheque is plausible and based on evidence. In view of all these evidences the Assessing Officer has not disputed the genuineness of the export sales rather he has admitted the export sale as genuine.

15.2 From the material on record, I find that the purchases were made by the appellant through brokers and since there was no dispute about the quantity and quality of goods supplied, the appellant did not enquire about these suppliers. The affidavits of

the brokers which have been admitted as additional evidence have also been provided to the Assessing Officer to offer his comments subsequent to verification / examination. The Assessing Officer in his remand report has merely reiterated and reproduced what he already stated in the assessment order, dated 24.6.2010. As mentioned above the Assessing Officer was given another opportunity in the course of appellate proceedings to examine the affidavits and submissions filed by the appellant and to give his version on the issue of estimated disallowance of inflated purchases made vide order dated 24.6.2010. The Assessing Officer on 29.11.2012 appeared and stated that the Assessing Officer's order was correct with reference to the special auditor's report and comments in remand report. In the affidavits on oath, the brokers have confirmed having supplied the readymade garments to the appellant. In the remand proceedings too, the Assessing Officer did not issue summons to the brokers (who confirmed through affidavits) from whom the appellant made purchases. In the affidavits the brokers have confirmed having supplied the readymade garments to the appellant. Therefore in light of the judicial pronouncements in the cases of Hanutram Ramprasad vs. CIT (1978) 114 ITR 19 (GAU), Sri Krishna Vs. CIT (1983) 142 ITR 618 (All) & CIT Vs. Birbal Khanna & Co. (1983) 33 CTR 240 (MP), I have no reason to disbelieve the affidavits filed as additional evidence during the course of the appellate proceedings. The Assessing Officer did not give any categorical finding that the appellant purchased goods at inflated prices from the apparent seller and he did not bring out any comparable cases to substantiate his stand and also did not bring on record any material that would support the purpose of the appellant by indulging in the modus operandi of procuring inflated purchases while accepting the entire exports sale as genuine. The Assessing Officer did not bring any material on record to show that the appellant derived any benefit or gain by procuring inflated purchases which is not found recorded in the books of accounts of the appellant. The Assessing Officer did not question the rate of purchase in comparison to/ market price. Therefore, the Assessing Officer's finding that the appellant made inflated purchases is without any supporting material on record. On the contrary, the appellant furnished the complete details like purchase bills and payment made through banking channels to these alleged non-existent sellers.

15.3 As pointed out above, there is no dispute regarding the goods exported by the appellant and the Assessing Officer has also admitted the same. Once the genuineness of the export is proved it is but natural that the goods were purchased by the appellant. It may be mentioned that neither the special auditor nor the AO has brought on record any cogent material to show that the

appellant had made purchases from the parties other than the parties recorded in the books of accounts.

15.4 On the basis of the special auditor's report in the appellant's case the issue of purchases was identified by the Assessing Officer as an issue of inflated purchases. The appellant declared a GP rate of 5.93% for the year under consideration, which is better than the last year GP rate of 4.52%. The appellant has also filed three comparable cases before the Assessing Officer namely M/s. G.D. Manglam Exim Pvt. Ltd., M/s. Konark Exim Pvt. Ltd. M/s. Sidh Designers Pvt. Ltd. wherein G.P. rate of 3.23%, 2.41% and 3.02% respectively was declared but there was no comment in the assessment order in respect of such comparable cases. This action of the Assessing Officer is contrary to the judgment of the Hon'ble Calcutta High Court in the case of CIT V Eastern Commercial Enterprises 210 ITR 103 (Cal) in which it was held in para 4, "it is the duty of the Assessing Officer to counter the comparative statement cited by the assessee before he can have the option to estimate the Gross Profit. Again it is the comparative instance that alone can be the foundation of such estimate in case the accounts are really found to be unreliable and requiring to be rejected." The GP rate thus shown by the appellant in his own case is comparable with the GP rate declared in other cases of the State engaged in similar trade or nature of business. Reliance is placed in the judgment of the Hon'ble Rajasthan High Court in the case of CIT vs. Kansara Bearing Pvt. Ltd. 270 ITR 235 where it was held that the last year's profit declared by the assessee is the best guide for application of profit rate. The appellant G.P. rate during the year under consideration was far better than the last year. The Assessing Officer has not brought on record any comparable case for showing higher G.P. rate than that which was declared by the appellant for the year under consideration, then the action of the Assessing Officer to disallow the purchases as bogus inflated is not warranted. The Assessing Officer could not point out that any expenditure claimed in the trading or profit and loss account as fictitious or inflated. There must be something more than a mere suspicion to support the estimation. Without finding any defect in the books, addition was simply based on assumptions and presumptions. The Assessing Officer in this case did not disturb the GP rate declared by the appellant but he disallowed on estimate basis Rs.6,90,10,4987- which is 30% of the total purchases of the appellant. If the trading account of the appellant is re-casted on the basis of disallowance of purchases of Rs.6,90,10,498/- and examine the GP rate thereafter, the GP rate would be 34.15% which in the nature of the appellant's business is not practicable. In this case, the AO did not reject the books of accounts of the appellant and invoke the provisions of section 145 of the IT Act, 1961 but by disallowing 30% of the total purchases, the AO has indirectly enhanced the GP rate of the appellant to 34.15%. The disturbance of the GP rate without

rejecting the books of accounts is not justified in the light of the principle laid down by the Hon'ble Supreme Court in the case of *Sargam Cinema vs. CIT* (2010) 328 ITR 513. The Hon'ble Apex Court in this case have held that without rejecting the books of accounts no addition can be made towards the construction on the recommendation of the District Valuation Officer. The quantitative details were furnished by the appellant along with the return of income and was duly reflected in the trading account. Therefore, the Assessing Officer has not pointed out any discrepancy pertaining to the quantitative tally on the basis of the record and without those purchases the appellant could not have exported those goods. The Assessing Officer did not bring on record any comparable purchase price to that of the appellant in the similar trade to show that the appellant inflated his purchases. He also did not bring on record any comparable G.P. rates to that of the appellant in similarly placed business. If there was any claim pertaining to purchase by the appellant that remained unverifiable, the same would constitute a defect in the books of accounts of the appellant and therefore, such books of accounts are liable to be rejected u/s 145(3) of the IT Act, 1961. This view is also supported by the decision of the Hon'ble Supreme Court in the case of *JCIT vs. Kachwala Gems* 288 ITR 10 (SC). Therefore, the action of the Assessing Officer in not rejecting the books of accounts of the appellant and simply disallowing the purchases on estimate basis is unjustified and unwarranted. It is only after the rejection of books of accounts that the appellants profit or loss can be estimated at a reasonable level and after considering the relevant details and documents on record. Non-rejection of books of accounts by the Assessing Officer amply suggests that purchases by the appellant were found recorded correctly as no discrepancy pertaining to the purchases was pointed out by the Assessing Officer nor there was any material brought by the Assessing Officer to establish that purchases were inflated. In his order in para 3.18, the Assessing Officer did not dispute the purchases made by the appellant. However, according to the Assessing Officer the purchase bills furnished by the appellant were not from the actual suppliers but were procured at inflated prices from persons who the Assessing Officer referred as apparent sellers or entry operators. However, in the case of the appellant the export of all the goods purchased were found to be genuine. Thus without purchase of goods there could not be any export. Further, in the appellant's case, there was an evidence by way of bankers certificate that all the payments relating to purchases were credited to the account of the payees, from whom the purchases were made. Concurrent to the special auditor's report, the Assessing Officer referred two case laws namely *CIT vs. La Media* (2001) 250 ITR 575, (Delhi) and *CIT vs. Sanjay Oil Cake Industries* (2009) 316 ITR 274 (Gujarat) and tried to draw a parallel to the facts of the appellant's case. In the cases relied

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upon by the Assessing Officer there was an evidence that their bank accounts were operated by the appellant or their persons, which is not a fact in the present case. Therefore, the case laws relied upon by the Assessing Officer are not applicable to the facts in this case. In this situation, the case laws as relied upon by the AO are not applicable in this case.

15.5 In view of the above facts, the legal provisions and the case laws cited by the appellant and discussed supra, I hold that disturbing the trading account without invoking the provisions of section 145(3) is not justified. I also hold that the disallowance of purchases to the extent of Rs.6,90,10,498/-, which is 30% of the total purchases of Rs.23,00,34,993, by treating the same as inflated purchases from apparent sellers/entry operators is without any cogent and categorical evidence and based on vague surmises and conjectures. The disallowance of purchases of Rs.6,90,10,498/- has also resulted into an enhancement of GP rate to 34.15%, which is neither practicable nor possible in the case of export of readymade garments. In substance, the report of the special auditor, relied upon by the AO, estimating 30% of the total purchases as inflated purchases and disallowance thereof is only on the basis of conjectures, presumptions and surmises. In this situation the total purchases of goods has to be accepted because without these purchases 100% export sale is not possible. In view of these facts and circumstances of the case I hold that the AO was not justified in making the addition of Rs.6,90,10,498/- to the income of the appellant. Hence, the addition made by the AO is therefore deleted.”

37. We find no infirmity in the order of LD CIT (A) in deleting the addition on account of purchases made by the assessee of Rs 69010498/-. The Ld. CIT (A) has also given almost the similar reasons for the deletion of disallowances.
38. A new dimension was given by the LD DR during the course of hearing before us when he submitted that Income Tax Settlement Commission (ITSC) has passed order under section 245D (4) of the act on 29/07/2013 for assessment year 2009 – 10 to assessment year 2011 – 12 in the case of the assessee along with others. In the said petition, the assessee to avoid unnecessary litigation and to have peace of mind offered additional income of 1% of the total purchases shown in the profit and loss account. In para No. 14 of that order the settlement commission has passed the orders where income of the assessee was assessed at a much higher figure. It was also stated by the Ld. departmental representative that the during the course of Inquiry settlement commission has come to a conclusion that that the books of accounts have been maintained by the assessee only to ensure that they get the export incentives from the government and during the course of Inquiry assessee has failed to verify single purchase transactions. Learned settlement commission has further

come to the conclusion that but for getting the cash incentives the assessee would have incurred losses in all the assessment years. Therefore, the settlement commission has come to the conclusion that no prudent businessman would be doing business for incurring losses in successive years. In view of this the result shown in the books of accounts of the applicants are not given any cognizance by the settlement Commission and the income of the assessee was assessed at a much higher figure under section 245D(4) of the act. The Ld. DR further submitted that the during the year the assessee has procured goods from same parties from whom the goods have been purchased for AY 2009-10 i.e. assessment years before ITSC, and therefore the same principle may be applied in this case.

39. Against this the Ld. authorized representative submitted that the settlement petition has been filed for buying peace and based on the orders passed for the assessment year 2007- 2008 in case of the assessee. He further submitted that the settlement is made for a specific year and that does not apply to the assessment year 2007 2008 which is in appeal before us. It was further stated that before the settlement commission the assessee produced all the three brokers who sold the goods and they have confirmed that they have sold the goods to the assessee either from the parties or from sub brokers. In view of this, the purchases cannot be said to be bogus. He further submitted that the order passed by the commission solely based on the presumption that no businessmen would do business at the loss. He further submitted that the settlement commission failed to appreciate the fact that most of the export businesses are being carried on the benefit of export incentive and same is considered as part of the profit. He further argued that settlement commission could not find any single instance where the purchases are found to be inflated or higher than the market rates and in absence of such findings it cannot be said that the purchases are not at the correct rate. Regarding purchases he submitted that the assessee has conclusively established that the material has been purchased by it from the brokers which was stand of the assessee from the day one and not directly from the parties and therefore the assessee produced the brokers before the investigating authorities and they have given their statement and confirmed that they have sold the goods to the assessee. He submitted that as the doubts have been expressed on the bills through the goods procured by the sub brokers and for goods supplied to the assessee and therefore only to buy the peace the assessee has offered 1% of such purchases as additional income of the assessee. That admission before the settlement commission cannot be used again the assessee to presume that the purchases shown by the assessee are bogus. In view of this his submission was that that the order of the settlement commission does not bind the assessee for the assessment year 2007- 2008 and same cannot be applied to the facts of the present case.

40. We have carefully considered the rival contentions on this issue. We have also perused the orders of the settlement commission in case of

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the assessee along with others. The ITSC has decided this issue vide para No. 14 onwards of its order as under:-

“14. Conclusion

We have considered the arguments and the submissions of both the applicants/A.R and CIT(DP)/CJT carefully and have come to the conclusion that the Books of Accounts have been kept by the applicants in both the cases namely Shri Inderpal Singh Wadhawan & M/s. Vardaan Fashion only to ensure that they get the export incentives from the Government. As mentioned earlier, despite of giving several opportunities the applicants have foiled in verifying even a single purchase and in fact the A.R conceded this fact during the course of hearing. Similarly, as regards the cash credits the money has been routed through number of channels and it appears that the accounts are more like running current accounts. Various accounts of the sister also been created for this purpose. This conclusion is further fortified by the fact that but for getting the cash incentives, in cases of the both the applicants they would have incurred losses in all the assessment year under consideration as is evident from the following chart:-

Inderpal Singh Wadhawan

Asst. Year	Purchase	Sales	Loss
2009-10	33,596,736.00	33,575,885.00	20,851.00
2010-11	155,100,604.00	104,700,642.00	50,399,962.00
2011-12 J	111,864,630.00	97,549,684.00	14,314,996.00

M/s. Vardaan Fashion

Asst. Year	Purchases	Sales	Loss
2009-10	214,165,520.00	203,367,697.00	10,797,823.00
2010-11	210,715,897.00	203,163,763.00	7,552,129.00
2011-12	102,981,805.00	102,057,667.00	924,133.00

15. No prudent businessman would be doing business for incurring losses/in successive years. Therefore, on account of admission by all three brokers for just issuing bogus bills and also applicant's own admission in the SOP about the suspicious nature of purchases, we are of the opinion that the Books of Accounts of both the applicants are unreliable and accordingly declared trading results are rejected in all respects as not showing the correct state of affairs of the businesses of the applicants except the export realization. In view of these observations, the results shown in the Books of Accounts of the applicants are not Given any cognizance. "I he amounts of cash incentives received by the two applicants from the Government on export realizations minus deductions under Chapter VI A of IT Act are therefore taken as the taxable income of the applicants for the years under consideration for settling their cases as follows :-

Irdepal Singh Wndhnwan

Asstt. Year	Total income as per return filed	Returned income excluding under Chapter VI-A	Additional income disclosed as per SOF	Total income including income disclosed before settlement commission	Cash incentive received	Addition made u/s 245D(4)
2009-10	710072	813257	335967	1046040	5800070	4650846
2010-11	2155124	2270124	1551006	3706130	8137902	4316772
2011-12	2145059	2260059	1418646	3563710	9265848	5587143

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Total	5010255	5343440	3305619	8315830	23203820	14554761
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Vardhan Fashions

Asstt, tear	Total return income	Additional income disclosed as per SOF	Total income including income disclosed before settlement commission	Cash incentive received	Addition made u/s 245D(4)
2009-10	3644690	2141655	5787345	23206348	17420003
2010-11	4340093	2107159	6747252	20170600	13723348
2011-12	2337789	1029818	3367607	10372439	7004832
Total	10322572	5278632	15601204	53701204	38148183

16. Both the applicants namely Sh. Inderpal Singh Wardhan & M/s. Vardhan Fashion have filed letter dated 23.07.2013 offering additional income of Rs. 145,54,751 and Rs. 3,81,43,183 respectively for Asst. Years 2009-10 to 2011-12. Since the offer made by the applicants as per their letter dated 23.07.2013 is in consonance with the income settled as above, the same is accepted in respect of both the applicants. The computation of income finally settled is as per Annexure *B' to this order.

17. The applicants have requested for waiver of interest u/s. 234 A, 234B and 234C interest u/s. 234A and 234C, wherever applicable, is to be charged as per law. Interest if chargeable u/s, 234B will be charged upto the date of 245D(1) order, as per decision of Hon'ble Supreme Court in the case of Brij Lal & Ors. Vs. CIT (2010) 328 ITR 477 (S.C).

18. The applicants have prayed for immunity from prosecution and imposition of penalties under various provisions of the Income Tax Act. and related sections of I.P.C. Considering the facts and circumstances of the case and the cooperation extended to the commission during proceedings before it, immunity is granted from prosecution and penalty imposable under the IT Act in relation to the issues arising from the application ad covered by this order.

19. The applicants have requested for appropriate capitalization in para 2.6 of SOF and also in their letter dated 23.07.2013. The capitalization is allowed to the extent of additional taxes payable on the additional income as per the computation annexed to this order in Annexure 'B' only.

20. The applicants have also requested for convenient installments for payment of additional taxes in para 2.5 of S.O.F. and also in their letter dated 23.07.2013. This request of the applicants cannot be acceded to and hence rejected.

21. The amount of tax, together with interest, shall be payable in within 35 days of the receipt of this order. In case of failure to make the payment within the prescribed period, the immunity granted under the provisions of Section 245H(1) shall be withdrawn in terms of sub-section (1A) of the said section.

22. Further, the immunity granted to the applicant may at time, be withdrawn if the Commission is satisfied that the applicant had in the course of the settlement proceedings concealed any particular material to the settlement or had given false evidence and thereupon the applicant may be tried for the offence with respect to which the immunity is granted or for any other offence of which the applicant appears to have been guilty in connection with the settlement and the applicant shall also become liable to the imposition of any penalty under the Act to which the applicants would have been liable had such immunity not been granted.

23. This order shall be void, if it is subsequently found by the Settlement Commission that it has been obtained by fraud or misrepresentation of facts."

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41. *we have carefully considered para No. 14 of the order of the settlement commission wherein for the reasons that accounts have been kept by the assessee only to ensure that they get the export incentives from the government, they fail to verify single purchases, but for getting cash incentives they would have incurred losses in all the assessment years. The income of the assessee is enhanced. In the order of settlement commission the fact of enquiry conducted by the CIT is mentioned wherein doubts have been cast based on the time of purchase of stamp paper on which the affidavit of the brokers have been made. The brokers were summoned under section 131 of the income tax act and there their statements were recorded. Mr. Sumit Arora one of the broker admitted in the statement that he procured the material from the sub broker and supplied the same to Surinder Paul Singh was the one from whom the payment has been collected through account payee cheques and pay orders and handed over the same to the firms from which the material has been procured. He also provided the name of parties from whom the materials were procured. However he could not provide the address of any of these firms. Admittedly he also submitted during the course of examination that he does not maintain the books of accounts. In the conclusion column it is mentioned that the broker was signing bills on behalf of all these firms and address of the broker was used by all these firms. Regarding the confirmation his reply was found to be evasive by CIT. Therefore the CIT concluded that the broker was operating 5-6 bogus firms from his own address. The above finding was reached for assessment year 2008-2009. During the course of examination the broker has not stated at all that he has not supplied the goods to the assessee from those parties. All those facts mentioned were about the address of those parties as well as the confirmation of provided by those parties. Furthermore the statement is all about assessment year 2008- 2009 and there is no averment by this broker about not supplying goods to the assessee for assessment year 2007 -2008. Similarly another broker Mr. Rapinder Singh was also examined wherein he stated that he has only facilitated the sale and purchase of material and he used to introduce the seller and purchasing parties and would get the commission. The purchaser used to pay directly to the seller and broker has no role in payment again materials sold. He provided the names of 23 parties who supplied goods to the assessee however he could not provide address of any of these firms. The conclusion about his statement by the CIT were similar to what were made in case of Mr. Sumit Arora. 3rd broker Mr. Savinder Singh Bhatia was also examined wherein also he stated that he has not supplied him goods but he was the broker of the parties who were selling goods to the assessee. His statement was similar to the statement of Mr. Rapinder Singh. In para No. 6.4 it was also noted by the settlement commission that these persons are presented as a broker in the in the current proceedings however during the assessment proceedings for A Y 2008 – 09 they were presented as real sellers. Furthermore as per pair of*

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6.4 of the order of the settlement commission it is to be noted that as in assessment year 2007- 2008 these parties proved to be nonexistence and the purchases are proved to be bogus and therefore it was the opinion of the CIT before ITSC that for this year too the parties are bogus. Further the CIT before ITSC in his letter dated 29th of may 2013 a stated that assessee has declared a very low GP rate and therefore he has given the details of 8 comparables for demonstrating that the gross profit of the assessee is not at all according to the industry and trade standards. We have carefully perused that statement also where in the column No. 5 in the nature of business of the persons are stated. We have perused that column and found that all the 8 comparables that has been cited by the CIT before the settlement commission are manufacturer of garment for export and sale in local market. We find that assessee is a Trader and he is not a manufacturer and therefore the gross profit shown by a manufacturer cannot be compared with the trade. Furthermore the settlement commission was also of the opinion that gross profit of the assessee is negative, if these export incentive received by the assessee is ignored, no prudent businessman would be doing the business in loss. We have already stated earlier that that export incentive receivable by the assessee is always considered to be the part of the profit that an assessee would be earning if the goods are exported and therefore we are of the view that the gross profit of the assessee should be ascertained only after taking the export incentive into consideration. Further in the order of the settlement commission we do not find any assertion/finding by the CIT investigation whether the prices at which the goods are purchased at inflated prices. It is not denied that assessee has not exported the goods and has not earned the export incentives on such exports. It is also not denied that that foreign remittance on export of goods is also received through banking channel. Even otherwise the order of settlement commission in the case of the assessee pertains to assessment year 2009 – 10 to 2011-12 for which the application for settlement of the case was made. Appeal before us is to be adjudicated for assessment year 2007 -2008. It is an admitted position that ‘settlement of case’ and the ‘assessment of the income’ of an assessee operate under two different provisions of the income tax act having their own procedures and statutory rights vested in the parties. Separate benefits are conferred on the assessee in case of settlement of cases and therefore there may be 101 reasons for which assessee opts for that route. However in the process of settlement of the case assessee foregoes several of its rights to get the cases settled, that does not mean that whatever is foregone would go against the assessee for the purpose of assessment of his income for all together different years. For the above stated reason we are of the view that that order passed by the IT SC does not have any implication on the present appeal as (1) it does not deal with the any facts related to the assessment year under appeal, (2) the price paid for the purchase of goods is not found to be inflated, (3) for the purpose of determining the profit from export of goods export incentives receivable by the assessee

have been excluded, which according to us is one of the factors which determines the profitability of the export of goods and (4) the comparables stated are manufacturer and sellers of the garment where as the assessee is a traders in the garments.

42. *For the reasons stated in above paragraphs we do not find any infirmity in the order of Ld. CIT (A) in deleting the disallowance on account of bogus purchases of Rs. 6 9010498/-. We are also of the view that the order of the settlement commission past in case of the assessee for assessment year 2009 – 10 and 2011 – 12 does not have any implication on our decision in confirming the order of the Ld. CIT (A) in deleting the disallowance. In the result ground No. 1 and 4 of the appeal of the revenue is dismissed.”*

8. In views of similar facts, identical reasons for addition by the ld AO, Identical reasons given by the ld CIT (A) for deleting the addition and similar arguments advanced by the parties, we confirm the action of the ld CIT(A) in deleting the addition of Rs. 36008930/- on account of bogus purchases. In the result ground No. 1 of the appeal is dismissed.
9. Ground No. 2 of the appeal is against the deletion of addition of Rs. 120049800/- made by the Assessing Officer on account of unexplained unsecured loans. During the year assessee has accepted interest free loans which were repaid in full or part. On enquiry assessee submitted balance confirmation from few parties. Ld Assessing Officer stated that the PAN quoted by the assessee is invalid in some cases. It was the further the case of the AO that one person is proprietor of many business concerns and without having substantial income large amount of loans is given. The bank account of the depositors also has huge cash transaction in deposit and withdrawal. In one of the account Form No. 60 has been filed with the banker for opening of the account. in view of this the amount of Rs. 120049800/- was added u/s 68 of the Income Tax Act out of total sum of Rs. 240099609/- being 50% of this amount as assessee failed to prove identity, genuineness and creditworthiness of those parties. Against this assessee preferred an appeal before the ld CIT(A), who deleted the addition vide para no 21 of this order and therefore the revenue is in appeal before us.

10. Ld DR submitted that this ground of appeal is identical to the grounds of appeal on the similar issue in case of Vardaan Fashion for AY 2007-08. He further submitted that nature of addition, parties involved, the alleged modus operandi and all other features of the addition are same except the amount of addition. Therefore he submitted that similar arguments are pressed by revenue for this ground.
11. Ld Authorized representative confirmed the similarity of the ground in this appeal with the appeal for AY 2007-08 in case of M/s. Vardaan Fashion and therefore he has also pressed the same arguments which were advanced before us in that appeal. He further stated that only 50% of the amount is added whereas balance 50% of the amount is accepted by the Assessing Officer therefore, the identity, creditworthiness and genuineness of the transaction are established for the whole sum.
12. We have carefully considered the rival contentions. The identical issue has been decided by us in the case of Vardaan Fashions wherein, we have deleted the addition of unexplained and unsecured loans. However, in the present case ld AO accepted 50% of the sum and made addition for only 50% of the balance amount. The ld CIT(A) has dealt with this issue as under:-

“21. I have considered the facts of the case written submissions of the appellant, AOs comments thereon and appellant’s rejoinder thereto. I find that the confirmations of loans y with the PAN No, copy of 1TR. Bank Statements etc. of the parties were filed before Assessing Officer except for two parties with whom some litigation was going on. All loans were received by way of cheques and most of them were also repaid in subsequent year the details of which have also been provided by the appellant. Reliance is placed on judgement of the Hon’ble Calcutta High Court in the landmark case of Shankar Industries Vs. CIT (1978) 114 ITR 689 (cal.) followed in C. Kant & Co. Vs. CIY (1980) 126 ITR 63 (cal.) wherein the Hon’ble Court has laid down three ingredients & conditions to prove the cash credit, i.e. (i) the existence and identity of the creditor, (ii) the genuineness of the loan/deposits received and (iii) the credit worthiness of the creditors. The appellant has proved the identity and existence of the creditors beyond doubt. All the loans/deposits were received through account payee cheques. The maximum loans/deposits have been refunded in next year. In this situation, the conditions No. (ii) & (iii) i.e. genuineness of the loan and credit worthiness of the creditor have also been established, where any sum credited in the books of accounts of the

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assessee maintained for any previous year, and the assessee offers no explanation about the nature and source of the same or the explanation offered by the assessee is not satisfactory in the opinion of the Assessing Officer, the sum so credited may be charged to income tax as the income of the assessee for that previous year. Existence of books of accounts of the appellant is not denied by the Assessing Officer, which is a prerequisite condition for making addition u/s 68. As per section 2(1 2A) of the IT Act, 1961, books include ledgers, day books, cash books, whether kept in written form or as print outs of data stored in floppy, disk, tape or any other electromagnetic data storage device. In *Central Bureau of Investigation vs. V.C. Shukla* (1998) 3 SCC 410, the Hon'ble Supreme Court has held that "book" ordinarily mean* collection of sheets of papers or other material blank or written or printed fastened or bound together so as to form a material as a whole.

- 21.1 In present case, the Assessing Officer did not reject the appellant's books of accounts but levied tax u/s 68. Section 68 is an independent and deeming provision and would be applicable to the appellants case in case he failed to offer an explanation pertaining to the particular receipt / credit appearing in the books of account or if explanation given by the appellant is found to be not satisfactory in the opinion of the Assessing Officer. However, on considering the material on record, I find that the Assessing Officer did not make any enquiries or conduct further enquiries based on the confirmations M by the appellant. Even during the remand proceedings summons u/s 131 were not to the loan creditors Section 68 of the IT Act 1961, empowers the Assessing Officer to make enquiry regarding the credit. If he is satisfied that the entries are not genuine, the Assessing Officer has every right to add these credits as income. But before rejecting the appellant's explanation, and in the absence in the enquiries the addition made by the Assessing Officer cannot be sustained.
- 21.2 Prima facie the onus is always on the appellant to prove the credit entry found in the books of accounts of the appellant. In the present case, the appellant discharged its onus by furnishing the confirmations giving the details like address, PAN, Bank Statement and assessment details. These details itself proves the identity of the creditor, capacity of the creditor and the genuineness of transactions in question. Without making further enquiries, disbelieving the evidence furnished by the appellant is not justified, as the appellant discharged its onus. In the opinion of the Assessing Officer, the explanation offered by the appellant is required to be based on proper appreciation of material .and other attending circumstances available on record. Evidence produced by the appellant cannot be brushed aside in a casual manner. The conditions for applicable for Section 68 are:-
- (a) Existence of books of accounts maintained by the appellant.
 - (b) Credit entry in the books of accounts.
 - (c) The absence of satisfactory explanation by the appellant above the nature and source of the sum credited.

Section 68 requires that the Assessing Officer must be satisfied that the explanation offered by the appellant is genuine. When the law has given the Assessing Officer a discretion and it is this satisfaction upon which the genuineness has to be decided, his inference on the basis of the facts filed by the appellant is finding of fact. In spite of filing the confirmations, the Assessing Officer did not verify the creditors and the explanation offered by the appellant is not a sufficient cause for rejection of explanation.

21.3 It is also found that neither at the time of the assessment proceedings, nor during the remand proceedings the Assessing Officer gave sufficient time and opportunity to the appellant to put forth his version. In tandem with the Special Auditor's report, the Assessing officer issued a show cause letter dated 12.05.2010 asking the appellant to show cause as to why an amount of Rs. 12,00,49,800/- should not be treated as income of the appellant. In this show cause letter, the Assessing Officer did not confront the appellant with the material available in his possession if any. The Assessing Officer is entitled to reject the explanation when he is in possession of some other positive evidence contrary to that to falsify the appellant's case. The Assessing Officer arbitrarily rejected the appellant's explanation without giving an opportunity to the appellant to substantiate his assertions. It is also a point to mention that the Assessing Officer has not rejected the books of Accounts of the appellant. Non-rejection of books of accounts or unchallenged books of accounts are prima facie proof of correctness of entries made therein and in this case, there cannot be a presumption.

In view of the above discussion, it is seen that the appellant has fulfilled all the ingredients and conditions laid down in Section 68 of the IT Act, 1961.

21.4 The appellant further relied on the following case laws: -

- (a) Anil Rice Mills Vs. Commissioner of Income Tax (2006) 282 ITR 236 (All) ,
- (b) Commissioner of Income Tax Vs. Tania Investments (P) Ltd. (2010) 322 ITR 394 (Bom)
- (c) Commissioner of income Tax *s. Micro Melt (P) Ltd. (2010) 327 ITR 70 (Guj.)
- (d) Nemi Chand Kothari Vs. Commissioner of Income Tax & ANR. (2003) 264 ITR 254 (Gau).

21.5 In the light of facts and circumstances of the case, legal provision and case laws cited and discussed in this order, I hold that addition of unsecured loans on ad hoc basis was not justified. Considering the facts of the case and the fact that the loans have been repaid in subsequent years and in view of the judicial pronouncements cited in this order into mind, I hold that there is no scope for addition of unsecured loans to the extent of Rs,12,00,49,800/- on estimate basis. The Special auditor and the Assessing Officer also checked the books of accounts and did not point of any that these transactions were not ground recorded in the books of accounts of the appellant. The provisions of section 68 of the IT Act, 1961, does not provide any room

for disallowances until the credit entries are not found recorded. The specific credit entry has to be identified which remained unexplained to the satisfaction of the Assessing Officer and which was not found recorded by the appellant in its books of account. In the course of the appeal proceedings, the appellant furnished the copies of PAN cards of all the parties with confirmation letters. These were provided to the Assessing Officer for examination and comments. Even in this remand proceedings, the Assessing Officer did not verify/examine the creditors but reproduced the same version which was already stated in the assessment order dated 24.6.2010. In view of this discussion above, the addition made by the Assessing Officer amounting to Rs. 12,00,49,800/-.”

13. In the case of Vardan Fashion we have decided this issue in para No. 47 and 48 of that order in ITA No. 950/Del/2013 as under:-

“47. We have carefully considered the rival contentions. The Ld. that CIT (A) has considered submission made by the assessee dated 31st of May 2010 before the assessing officer and the reasons given by the assessing officer for rejecting such explanation. He further extensively referred to the submission of the appellant dated 06/07/2011 before him as well as the remand report dated 05/06/2012 and rejoinder thereto dated 06/08/2012. He further referred to submission dated 23/10/2012 by the appellant. The Ld. CIT (A) has decided the issue after considering various submission of the assessee as well as the Ld. assessing officer as under:-

“21. I have considered the facts of the case, written submissions of the appellant, AOs comments thereon and appellant's rejoinder thereto. The written submissions as well as the additional evidence produced by the appellant during the appellate proceedings were provided to the Assessing Officer for examination and to offer his comments. However, I find that the Assessing Officer instead of examining the additional evidence produced on the issue merely reiterated and reproduced the assessment order. The remand report is nothing but a repetition of the assessment order and the assessment order is nothing but an incorporation of the special auditor's report. The Assessing Officer did not examine or verify the contents of the additional evidence nor the written submissions and bring out any fresh material on record contradictory to that of the appellant. Under these circumstances, I have to decide the issues raised in the grounds of appeal on the basis of the reasons given out by the Assessing Officer in his order while making the impugned additions, submissions made by the appellant in the course of the appeal proceedings.

21.1 On perusal of the material on record, I find that the appellant filed the list of the creditors along with their confirmations. The Assessing Officer mentioned in his order, that

some of the PANs were invalid but he did not categorically specify as to which creditor's PAN was invalid. The Assessing Officer made a general and vague observation which cannot be made the basis for addition u/s 68 of the IT Act, 1961. Even during the remand proceedings, the Assessing Officer did not point out as to which creditor whose PAN furnished by the appellant was not valid. The Assessing Officer's observation that one particular creditor was shown as proprietor of many business concerns has no relevance to the present case and it is a passing and casual comment without bringing out any material on record in favour of revenue. The law does not bar any person from conducting business in diverse fields or under different names when a person showed to the authorities his status as a "proprietor" and there is nothing unusual or astounding element in it and this cannot be the basis of addition in the case of the appellant. Hence, this observation of the Assessing Officer cannot be made as a basis for the addition in the appellant's case. The Assessing Officer also did not point out any specific name out of the creditors list that did not have the capacity to advance the loan. Without any material on record, the Assessing Officer made a vague observation that many creditors did not have substantial income to extend large amount as loans/advances to the appellant. Without bringing any adverse material on record, or without pointing any specific instance where the appellant did not discharge the onus cast on it the Assessing Officer was not justified to quote vague reasons and to hold that the appellant did not discharge satisfactorily the primary onus cast upon it under u/s 68 of the IT Act, 1961. All the creditors are legal entities and filed their confirmations with their PAN, identity proof and bank statements with proof of filing of their returns. What is required here was that the Assessing Officer ought to have issued summons u/s 131 of the IT Act, 1961 to the creditors and conducted a proper enquiry before making any addition u/s 68 of the IT Act, 1961. On perusal of the details filed by the appellant it is seen that the appellant received the loans and deposits by way of cheques and most of them were repaid in the subsequent years. There may be certain differences like the name, year etc. and the person may be operating his activities in the name of different proprietorship concerns whereas the PAN may be either on the individual name or proprietorship name. The mismatch of details on the PAN cannot be a reason for holding that the parties are non-genuine. When a non-existent PAN is reported then there is a requirement more so on the Assessing Officer to conduct complete verification of such persons. On perusal of the details pertaining to the above six parties mentioned in the order by the Assessing Officer, I find that it is not a case of receipt of loan in the case of M/s. Super Veg. Oil Pvt. Ltd. but a case of recovery of loan. In fact, vide cheque no.486720 dated 15.11.2006 the

appellant extended a loan of Rs.20,00,000/- to M/s. Super Veg. Oil Pvt. Ltd. and it was received back by the appellant on 19.1.2007 through an account payee cheque. In support of the submissions the appellant placed reliance on the judgment of the Hon'ble Calcutta High Court in the landmark case Shankar Industries Vs. CIT (1978) 114 ITR 689 (cal.) followed in C. Kant & Co. Vs. CIT (1980) 126 ITR 63 (cal.) wherein the Hon'ble Court has laid down three ingredients & conditions to prove the credits appearing in the assessee's books of account i.e. (i) the existence and identity of the creditor, (ii) the genuineness of the loan/deposits received and (iii) the credit worthiness of the creditors. The appellant has proved the identity and existence of the creditors beyond doubt. All the loans/deposits were received through account payee cheques. The maximum loans/deposits were also refunded by the appellant in subsequent year. In this situation, the conditions no. (ii) & (iii) i.e. genuineness of the loan and credit worthiness of the creditor have also been established by the appellant. 21.2 According to section 68 of the IT Act, 1961, where any sum credited in the books of accounts of the assessee maintained for any previous year, and the assessee offers no explanation about the nature and source of the same or the explanation offered by the assessee is not satisfactory in the opinion of the Assessing Officer, the sum so credited may be charged to income tax as the income of the assessee for that previous year, Existence of books of accounts of the appellant is not denied by the Assessing Officer, which is a prerequisite condition for making addition u/s 68. As per section 2(12A) of the IT Act, 1961, books include ledgers, day books, cash books, whether kept in written form or as print outs of data stored in floppy, disk, tape or any other electromagnetic data storage device. In Central Bureau of Investigation vs. V.C. Shukla (1998) 3 SCC 410, the Hon'ble Supreme Court has held that "book" ordinarily means a collection of sheets of papers or other material blank or written or printed fastened or bound together so as to form a material as a whole.

21.3 In present case, the Assessing Officer did not reject the appellant's books of accounts but levied tax u/s 68. Section 68 is an independent and deeming provision and would be applicable to the appellants case in case he failed to offer an explanation pertaining to the particular receipt / credit appearing in the books of account or if explanation given by the appellant is found to be not satisfactory in the opinion of the Assessing Officer. However, on considering the material on record, I find that the Assessing Officer did not make any enquiries or conduct further enquiries based on the confirmations filed by the appellant. Even during the remand proceedings summons u/s 131 was not issued to the loan creditors (only six parties). Section 68 of the IT Act, 1961,

empowers the Assessing Officer to make enquiry regarding the credit. If he is satisfied that the entries are not genuine, the Assessing Officer has every right to add these credits as income. But before rejecting the appellant's explanation, and in the absence in the enquiries the addition made by the Assessing Officer cannot be sustained.

21.4 Prima facie the onus is always on the appellant to prove the credit entry found in the books of accounts of the appellant. In the present case, the appellant discharged its onus by furnishing the confirmations giving the details like address, PAN, Bank Statement and assessment details. These details itself proves the identity of the creditor, capacity of the creditor and the genuineness of transactions in question. Without making further enquiries, disbelieving the evidence furnished by the appellant is not justified, as the appellant discharged its onus. In the opinion of the Assessing Officer, the explanation offered by the appellant is required to be based on proper appreciation of material and other attending circumstances available on record. Evidence produced by the appellant cannot be brushed aside in a casual manner. The conditions for applicable for Section 68 are (a) Existence of books of accounts maintained by the appellant. (b) Credit entry in the books of accounts (c) The absence of satisfactory explanation by the appellant above the nature and source of the sum credited. Section 68 requires that the Assessing Officer must be satisfied that the explanation offered by the appellant is genuine. When the law has given the Assessing Officer a discretion and it is this satisfaction upon which the genuineness has to be decided, his inference on the basis of the facts filed by the appellant is finding of fact. In spite of filing the confirmations, the Assessing Officer did not verify the creditors and the explanation offered by the appellant is not a sufficient cause for rejection of explanation.

21.5 It is also found that neither at the time of the assessment proceedings, nor during the remand proceedings the Assessing Officer gave sufficient time and opportunity to the appellant to put forth his version. In tandem with the Special Auditor's report, the Assessing officer issued a show cause letter dated 12.05.2010 asking the appellant to show cause as to why an amount of Rs. 6,15,46,9087- should not be treated as income of the appellant. In this show cause letter, the Assessing Officer did not confront the appellant with the material available in his possession if any. The Assessing Officer is entitled to reject the explanation when he is in possession of some other positive evidence contrary to that to falsify the appellant's case. The Assessing Officer arbitrarily rejected the appellant's explanation without giving an opportunity to the appellant to substantiate his assertions. It is also a point to mention that the Assessing Officer has not rejected the books of Accounts of the appellant.

Non-rejection of books of accounts or unchallenged books of accounts are prima facie proof of correctness of entries made therein and in this case, there can not be a presumption. In view of the above discussion, it is seen that the appellant has fulfilled all the ingredients and conditions laid down in Section 68 of the IT Act, 1961.

21.6 The appellant further relied on the following case laws: (a) Anil Rice Mills Vs. Commissioner of Income Tax (2006) 282 ITR 236 (All) (b) Commissioner of Income Tax Vs. Tania Investments (P) Ltd. (2010)322 ITR 394 (Bom) (c) Commissioner of Income Tax Vs. Micro Melt (P) Ltd. (2010) 327 ITR 70 (Guj.) (d) Nemi Chand Kothari Vs. Commissioner of Income Tax & ANR. (2003) 264 ITR 254 (Gau).

21.7 In the light of the facts and circumstances of the case as discussed above, legal provisions and the case laws cited and discussed in this order. I find that the addition made by the Assessing Officer u/s 68 was on presumption and surmises with vague and general observations. All the transactions were routed through banking channels. Therefore, after considering all the facts on record of the case, I hold that the addition made by the Assessing Officer by treating the above amounts aggregating to Rs.6,15,46,908/- as unexplained credits u/s 68 of IT Act, 1961 is unjustified. The Special auditor and the Assessing Officer also checked the books of accounts and did not point of any that these transactions were not found recorded in the books of accounts of the appellant. The provisions of section 68 of the IT Act, 1961, does not provide any room for disallowances until the credit entries are not found recorded. The specific credit entry has to be identified which remained unexplained to the satisfaction of the Assessing Officer and which was not found recorded by the appellant in its books of account. In the course of the appeal proceedings appellant furnished the copies of PAN cards of all the parties with confirmation letters. These were provided to the Assessing Officer for examination and comments. Even in this remand proceedings, the Assessing Officer did not verify/examine the creditors but reproduced the same version which was already stated in the assessment order dated 24.6.2010. In view of this discussion above, the addition made by the Assessing Officer amounting to Rs.6,15,46,908/- is therefore deleted.”

48. The Ld. CIT (A) has mentioned that all the creditors which are independent legal entities filed their confirmation with their PAN, identity proof and bank statements and proof of filing of the returns. He has further held that out of the above 6 parties no loans have been received by one of the party i.e. super Veg Oil P Ltd but it is a case of recovery of loan already given. For this he extensively referred to the date of giving the loans and the date on which the loan was received

back. Both the transactions are through account payee cheques. Regarding the incorrect mention of the PAN he held that when assessee has rectified the submission by providing the correct PAN from the site of ITD same cannot be doubted. He further held that there is no bar in having more than one proprietor concerns by an individual. He categorically held that that the onus is already been discharged by the assessee by providing the confirmation of the parties and in case of loan transactions the bank account of those parties. All these findings of the Ld. CIT (A) remained unassailed before us. No instances were pointed before us none we could find in the assessment order or in the special audit report where cash has been deposited in the bank account of the suppliers/lenders before issuing cheques to the assessee. The reliance placed by the Ld. AR"s on the decision of jurisdictional High Court regarding low incomes of the lender/depositors/suppliers cannot be the basis for making any addition under section 68 by doubting the genuineness is appropriate. In view of the above facts, we do not find any infirmity in the order of the Ld. CIT(A) in deleting the addition under section 68 of Rs. 6.15 crores. In view of this ground No. 2 of the appeal is dismissed."

43. In views of similar facts, identical reasons for addition by the ld AO, Identical reasons given by the ld CIT (A) for deleting the addition and similar arguments advanced by the parties and our decision in case of Vardaan Fashion we also confirm the order of the ld CIT(A) in deleting the addition of Rs. 120049800/-on account of unexplained cash credit. In the result ground No. 2 of the appeal is dismissed.
44. Ground No. 3 of the appeal is against the deletion of addition of Rs. 6288700/- on account of outstanding unexplained loans from creditors.
45. The ld Assessing Officer found that there are few loan creditors whose outstanding from earlier year and such loan are free of interest. The assessee was asked to furnish the confirmation in response to which confirmation of only three parties were filed and therefore, the ld Assessing Officer made addition of Rs. 6288700/- vide para No. 8.1 of the assessment order. On appeal before the ld CIT(A), he deleted the addition vide para No. 24 of his order. Therefore the revenue is in appeal before us.
46. Ld DR submitted that as the details were not provided in the form of confirmation and therefore the addition was made u/s 68 of the Act. He further relied on the order of the Assessing Officer.

47. Ld AR relied on his written synopsis filed before us wherein he stated that sum was taken as loan from Mrs. Sonia Arora only and other three parties were the supplier and amount represented for outstanding purchase consideration. In case of two parties, he referred that the same amount has been paid during the year and wrongly shown as outstanding. Thereafter he referred to several case laws to submit that in case of carried forward credit balances from previous year addition u/s 68 cannot be made. He further submitted that confirmation, bank statement, PAN No. of the creditor was also filed. In view of this he submitted that Id CIT(A) has rightly deleted the addition.
48. We have carefully considered the rival contentions and noted the facts of the addition. The Id CIT(A) vide para No. 24 has deleted the addition as under:-

“24. I have considered the facts of the case, written submissions of the appellant, Assessing Officer's comments in the remand report dated 5.6.2012 and the appellant's rejoinder dated 6.8.2012. The Assessing Officer in his order dated 24.6.2010 as well as through the remand report accepted the fact that during the year under consideration, the appellant did not receive any fresh loan. In the course of the assessment proceedings, it is seen that the appellant filed certain details in respect of three persons namely Ms. Sonia Arora, M/s. H.K. Narang Hosiery and M/s. Om Nagpal Knitwears. In the appeal proceedings, it was submitted by the appellant that the amount of Rs.62,88,770/- pertain to five parties in two different concerns namely M/s. R.G. Enterprises and Sh. Inderpal Singh Wadhawan. It was also stated that this amount is an aggregate of loan and sundry creditors. It was also stated that the appellant in his personal capacity took a loan of Rs.10,00,000/- from Smt. Sonia Arora and was shown as opening balance as on 1.4.2006. It was also stated that out of the opening balance of Rs.10,00,000/-, the appellant repaid Rs.5,00,000/- on 17.7.2006 and the balance of Rs.5,00,000/- was shown as payable in the balance sheet.

24.1 In respect of the remaining four parties, which were shown as sundry creditors in the books of accounts of the appellant's proprietary concern namely M/s. R.G. Enterprises, the appellant filed copy; of confirmation from M/s. H.K. Narang Hosiery with its PAN and bank statement before the Assessing Officer. In the course of the appeal proceedings, it was clarified by the appellant that M/s. H.K. Narang Hosiery supplied goods during the earlier years and a sum of Rs.5,62,072/- was shown as balance as on 1.4.2006 and the said amount was subsequently paid on 20.5.2006 and 3.11.2006.

Similarly, it was stated that an amount of Rs.2,07,200/- was shown as payable as on 1.4.2006 (opening balance) against the goods supplied in the earlier years and it was cleared on 12.8.2006 in the case of M/s. Om Nagpal Knitwears.

24.2 It was also stated that during the assessment proceedings, the appellant could not file the details like confirmation, etc. in respect or two parties namely IWs S.N. Exports and M/s V.K. Kalara Hosiery Works due to the fact that there was a dispute between them and the appellant. In the course of the assessment, the details pertaining to the two parties was forwarded to the Assessing Officer for examination and verification of contents. On perusal of the details, it is noted that a sum of Rs. 8,00,000/- and Rs. 44,45,500/- was shown as opening balance in the name of M/s. S.N. Export and M/s. V.K. Kalra Hosiery Work, and out of this, the appellant paid a s.um of Rs. 1,70,0007- on 09.06.2006 and an amount of Rs. 42.75.500/- was shown as payable against the supply of goods for the earlier years.

24.3 From the above facts, it is evident that there are two types of transactions involved namely (a) a personal loan and (b) Sundry creditors. However, without appreciating the facts, the Assessing Officer generalized all receipts as credits and applied the provisions of Section 68 of the IT Act and made addition as the income of the year under consideration. A plain stock of the facts clearly show that the outstanding brought forward balances as on 01.04.200c pertain to the earlier years. A part of this liability was discharged during the year. The entries pertaining to the loan as well as the sundry creditors would be available in the books of account of the appellant pertaining to the corresponding years, a fact which was in the knowledge of the Assessing Officer. In the assessment order as well as the remand report, the Assessing Officer accepted that the outstanding balances as on 01.04.2006 pertain to the earlier years. As per section 68, were any sum is found credited in the books of the appellant for any previous year, the sum may be charged to income tax as the income of the appellant for that previous year, if the explanation of the appellant is not found satisfactory. In this section "previous year" is very relevant and important to appreciate the transactions. In case of Smt. Sonia Arora, the liability of payment of loan shown as, brought forward outstanding balance as on 01.04.2005 was discharged by the appellant during the year under consideration. The appellant filed certain details pertaining to this loan in the course of the assessment proceedings. However, if the Assessing Officer had any reasons to doubt the claim of material furnished by the appellant, it was open to him to conduct further enquiries and to take appropriate action as per law. But Assessing Officer was not justified in making the addition of brought forward outstanding balances pertaining to the preceding year as the income of the appellant for the year under consideration.

24.4 In case of the four parties who are sundry creditor, it is noted that the balances n the accounts of the sundry creditors were only

brought forward balances as on 01.04.2006. This was allowed as a liability in the earlier year by the department. The aforesaid sundry creditors i.e. M/s. H.K. Narang Hosiery, M/s. SNK Exports, M/s. V.K. Kalra Hosiery Work, M/s. Om Nagpal Knitwear had business relations with the appellant and supplied goods in the course of carrying on business. Hence, they are not loan creditors as has been categorized in a general way by the Assessing Officer. The Assessing Officer in his remand report has also accepted that the unexplained sundry creditors fall under earlier assessment years. Merely because the appellant did not file the confirmatory letter during the assessment proceedings does not mean that such liability did not exist in the books of accounts of the appellant. The Assessing Officer did not bring any material on record to show that the sundry creditors denied any such liability or the entries recorded in the books of accounts showing such liability showing was found to be false. In the absence thereof, it is not open to the Assessing Officer to make such addition without proving that there was cessation of liability. Addition made under section 68 of the Act was contrary to the facts and law and that since the loan creditors and sundry creditors were old balances pertaining to the earlier years, the Assessing Officer was wrong in treating them as income of the appellant for the year under consideration. Since the liability still existed in the books of accounts, the same cannot be treated as income. The decision of the Hon'ble Apex Court in the case of Baladinram Vs. CiT (1969) 71 ITR 427 and the decision of the Hon'ble Jurisdictional High Court in the case of CIT Vs. Dalmia (R) (1986) 157 ITR 221 supports the appellant's case. Therefore in view of the facts of the case and respectfully following the judicial pronouncements I hold that the AO is not correct in making addition of outstanding balances pertaining to earlier years during the year under consideration as the income of the appellant. The addition of Rs.62,88700/- is therefore deleted and this ground of appeal of the appellant is allowed."

49. We do not find any infirmity in the order of the ld CIT(A) as the amount spending in the beginning of the year cannot be covered u/s 68 of the Act as no sum is found to be credited during the year in the books of the account of the assessee. Further, except in case of two parties the assessee has provided the confirmation and in those two parties the ledger account of the parties were submitted. With respect to these two parties the ld CIT(A) forwarded it to the AO for examination and verification. In view of this we confirm the order of the ld CIT(A) in deleting the addition of Rs. 6288700/- on account of outstanding unexplained loans and creditors. In the result ground No. 3 of the appeal is dismissed.

50. Ground No. 4 of the appeal is against the deletion of addition of Rs. 8040000/- on account of profit from sale of property 19, West Avenue, Punjabi Bagh, treating it as income from business. During the year assessee sold this property on 09.02.2007 having half share of undivided property acquired by the father of the assessee for Rs. 90 lacs. The assessee acquired this property on 11.12.2006 by way of gift deed from his father and his father acquired this property in FY 1967-68. Therefore, for the purpose of capital gain assessee treated fair market value of the property as on 01.04.1981 for the purpose of capital gain which was determined by the assessee at Rs. 6 lacs. Ld Assessing Officer was of the view that assessee is entitled to indexation not from 01.04.1981 but from 2006-07 and therefore the revised computation of capital gain was made and long term capital gain of Rs. 8040000/- was worked out vide para no. 10.3 of the order. Furthermore, the assessee claimed exemption u/s 54 was also denied by the Assessing Officer as assessee converted his immovable property into stock in trade w.e.f. 01.04.2006 and therefore, it was further held that above property sold was chargeable to tax as income from business as the assets transferred is not capital asset. Furthermore, the new property acquired was also doubted to be a residential property. The ld CIT(A) vide para No. 27 held that the assessee is entitled to indexation w.e.f. 01.04.1981, therefore the revenue is in appeal before us.
51. Before us the ld DR relied on the order of AO and ld AR relied on the submission made before the ld CIT(A).
52. We have carefully considered the rival contentions. The ld CIT(A) has dealt with this issue as under:-

“27. I have considered the facts of the case written submissions of the appellant, AOs comments in the remand report dated 5.6.2012 and rejoinder of the appellant. I have also perused the judgments relied upon by the appellant and also the judgments relied upon by the AO. Sub clause-(b) of clause (i) in Explanation I to section 2(42A) of the Act provides as under:

“In determining the period for which any capital asset is held by the assessee in the case of the capital asset which becomes the property of the assessee in the circumstances mentioned in sub

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section (i) of section 49, there shall be included the period for which the asset was held by the previous owner referred to in the said section."

Thus for classification of the capital asset as long term and short term, the period of holding by the previous owner should be included for determining the period for which any capital asset was held by the assessee. Also in terms of section 49(1), the cost of acquisition for computation of capital gains shall be deemed to be the cost for which the previous owner of the property acquired it. Accordingly, it transpires that the indexed cost of acquisition should be taken from the date of purchase of the asset by the previous owner and not from the date of inheritance by the appellant. The definition of indexed cost of acquisition is given in section 48 and there is nothing stipulated in the Act to indicate that for determining the indexed cost of acquisition the provisions of section 2(42A) and section 49(1) should not be followed.

- 27.1 The fiction created by section 49 of the Act, should be carried to its logical conclusion and there is nothing either in section 49 or in section 48 of the Income-tax Act or in any other provision of the Act which prohibits indexation benefit from the year in which it was acquired by the previous owner. There is no fiction also involved in the provisions contained in Explanation to section 2(42A) of the Income-tax Act. Therefore, when the act requires that the period of holding of a capital asset of the previous owner should also be included along with the period for the assessee i.e. the ultimate seller holds the asset to determine the period of its holding, there is no justification for limiting or confining the operation of fiction in section 49 of the Income-tax Act, 1961, ignoring the other facts which are to be taken into account in the light of the Explanation 1(i)(b) to Section 2(42A) of the Income-tax Act.
- 27.2 The right to adopt the "cost of acquisition to the previous owner" of the asset as he is predecessor-in-title as the cost of acquisition to the "new owner" was statutorily recognized and, therefore, whatever facilities and concessions that are given to the previous owner, should as of right be made available to an assessee referred to section 49 of the Income-tax Act.
- 27.3 Thus, a conjoint reading of section 2(42A), section 48 and section 49(1) of the Income-tax Act, 1961 would make it abundantly clear that the benefit of indexation cost of acquisition for the purpose of computing long term capital gains must be made available to the appellant from the date of acquisition by the previous owner and not from the date of inheritance. This is because the Act has allowed the appellant to start the journey from the date on which the ancestor of the appellant acquired the property in case where the cost of the property is required to be ascertained or where the nature of the asset is to be ascertained. However when it comes to the ascertaining the amount of capital gains, it allows the appellant to start journey only from the date on which the appellant acquired the asset. This is inequitable and could not have been the intention of law. This view is expressed in the

decision pronounced by the Chandigarh bench of the ITAT in the case of *Mrs. Pushpa Safat Vs. Income-tax Officer 81, ITD (Chd) (SMC)*. This decision is a direct decision which unequivocally states that the indexation has to start from the year in which the property was acquired by the previous owner in case of inheritance of property and not from the year of inheritance.

27.4 In the case of *DCIT vs. Manjula J Shah* a Special Bench was constituted by the Hon'ble President for considering and deciding the following question as a result of the divergent views expressed by the division benches. The said question also incorporates the solitary issue arising from the appeal of the revenue which is preferred against the order of CIT (appeals)-XII, Mumbai, dated 26.9.2007 where it was observed as under:

"While computing the capital gains in the hands of an assessee who had acquired the asset transferred under gift, whether indexed cost of acquisition was to be computed with reference to the year in which the previous owner first held the asset or the year in which the assessee became the owner of the asset".

27.5 The Hon'ble ITAT, Mumbai Special Bench B-1, Mumbai, after considering the rival submissions and perusing the relevant material on record in their order dated 16.10.2009 have held as under:

"For the reasons given above, we are of the view that for the purpose of computing long term capital gain arising from the transfer of the capital asset which had become the property of the assessee under gift, the first year in which the capital asset was held by the assessee has to be determined to work out the indexed cost of acquisition as envisaged in Explanation - (iii) to Section 48 after taking into account the period for which the capital asset was held by the previous owner. In that view of the matter, we hold that indexed cost of acquisition of such capital asset has to be computed with reference to the year in which the previous owner first held the asset Accordingly, we answered the question referred to us in favour of the assessee and uphold the impugned order of the learned CIT(A) on this issue."

27.6 Before me, the AR of the appellant has submitted copy of the judgement of the Hon'ble Mumbai High Court dated 11.10.2011 passed in the above case (*CiT vs. Manjula J Shah*) wherein the Hon'ble High Court has confirmed the above said order of the ITAT Special Bench holding that:

"While computing the capital gains arising on transfer of the capital asset, acquired by the assessee under a gift, the indexed cost of acquisition has to be computed with reference to the year in which the previous owner first held the asset and not the year in which the assessee became the owner of the asset."

The Hon'ble High Court of Delhi in their judgment in the case of *Arun Shungloo Trust 1,2012) 18 taxmann.com 261* have also held that the

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benefit of indexation cost of improvement by the previous owner in cases covered by section 49 would be allowed.

- 27.7 *In view of the facts and circumstances of the instant case and in the light of the various judicial pronouncements, I hold that while computing the capital gains arising on transfer of capital asset acquired by the appellant by way of inheritance, the indexed cost of acquisition is to be computed with reference to the year in which the previous owner first held the asset and not the year in which the appellant became the owner of the asset. Accordingly, the Assessing Officer is directed to compute the capital gains in the case of the appellant by applying the indexed cost of acquisition in which the previous owner first held the asset in question. The ground is decided in favour of the appellant.*
- 27.8 *As regards denial of exemption u/s 54 of the IT Act 1961, I find that the AO is not justified in disallowing the benefit of the exemption u/s 54 of the IT Act 1961 as claimed by the appellant. The reasons of the AO for disallowing the exemption are not well founded. Firstly, the property in question was inherited much after the date of conversion of appellant's own investment in immovable into stock-in-trade. Further the appellant has sold the property inherited by way of gift within a period of two months from the date of inheritance is also not a valid ground for inferring that the intention of the appellant is trading in properties rather than investment. The AO has, in the computation of the income in his assessment order, himself added long term capital gain on sale of property in question under the head income from capital gains. This shows the contradiction in the AO's conclusion. In view of the above I hold that the AO is not justified in denying the appellant the benefit of exemption u/s 54 of the IT Act 1961. This ground is also decided in favour of the appellant."*
53. We do not find any infirmity in the order of the Id CIT(A) and none was pointed out by the Id DR before us. The Id CIT(A) has decided this issue considering the provisions of section 2(42A) of the Income Tax Act and section 49(1) of the Act. Regarding the treating the same as business income the Id CIT(A) has rightly held that property has been inherited and cannot be considered as stock in trade. In view of this we confirm the order of the Id CIT(A) in deleting the addition of Rs. 8040000/- on account of sale of the property treating it as a business income and not as capital gain and then granting deduction u/s 54 of the Act. In view of this ground No. 4 of the appeal is dismissed.
54. The next ground of appeal No. 5 is against treating the gain on sale of property of Rs. 2953215/- as short term capital gain by the AO and

further addition of Rs. 1393010/- on account of under valuation of closing stock.

55. During the year assessee has sold his share in property No. 67, Punjabi Bagh by two conveyance deed for Rs. 62.50 lacs each. The total purchase price of the property was Rs. 3.4 crores. This was divided into four blocks and out of that one block was already sold in earlier year and the remaining three blocks were converted in stock into trade determining the value at Rs. 14818540/- and assessee has started its real estate business. In AY 2006-07 Rs. 837880/- was incurred as cost of improvement and therefore total cost of acquisition was Rs. 3.32 crores and appellant share was Rs. 1.66 crores. According to the Assessing Officer the total short term capital gain was Rs. 2953215/- u/s 45(2) of the Act. The assessee on appeal before the Id CIT (A) deleted this addition vide para No. 30. Therefore the revenue is in appeal before us.
56. Ld DR relied upon the order of the Assessing Officer and vehemently supported it whereas the Id AR relied upon the order of the Id CIT(A).
57. We have carefully considered the rival contentions. The Id CIT(A) has dealt with this issue extensively from para 30 as under:-

“30. I have considered the facts of the case, written submissions of the appellant, AOs comments in the remand report and the rejoinder of the appellant. I find that there is no dispute about the shape of the plot or the blocks. The appellant apportioned the cost of acquisition of each block on the basis of its area, location, feasibility considering the public demand. The pro-rata basis can be applied, when the property was placed at equal footing and in similar situation. Since all the blocks, i.e. A, B, C & D were not in similar situation, the appellant has valued its cost of acquisition on different rates considering the business necessity and its marketability. For example block A consisted of 500.10 sq.yd. and the cost of acquisition was taken at Rs. 1,08,00,000/-, on the other hand block B consisted of 530.62 sq.yd. and its cost of acquisition was taken at Rs.1,08,00,000/-. It is further pertinent to mention that though the area of block D was more than Block A, even than block D was sold at Rs.1.25 crore similar to block A. Similarly the area of block C was 550.33 sq.yd and its cost of acquisition was taken at Rs.80,37,880/- which was sold at Rs.1.32 core only. The area of block D was at 578 sq.yd and its cost of acquisition was taken as 36,00,000/-only. Further, though, the area of block-D was maximum in comparison of Block A,B, & C yet it was sold

only for Rs.51,00,000/-. This suggests that the ail the blocks were not situated on similar footing and they were not marketable on an average price. That against sale of all the four blocks the GP was shown at Rs.1,00,62,120/- against which GP Rate worked out @23.04%. It is pertinent to mention that the block D was sold in A.Y. 2006-07 and against which the GP was shown at Rs.15,00,0007-, GP @29.41%. Since the GP against block D was shown at better rate than the average of all the four blocks, there was no reason to estimate the cost of acquisition of block D at the time of conversion of investment into Stock-in-trade i.e. as on 31.03.2006. In this way, the working out the cost of acquisition of Blocks A, B, C & D on prorata basis was adopted by the special auditor and the same was applied by the Assessing Officer without any justification. Thus, the addition of Rs.29,53,215/- by way of short term capital gain against the working of cost of acquisition of Block D on prorata basis and Rs. 13,93,0107- on the basis of difference in the value of closing stock of property was not justified and the same is hereby deleted.”

58. On perusal of the order of the Id CIT(A) he has deleted the addition for the reason that assessee has shown better gross profit on sale bock B which is at better rate than average of other blocks and the working of the cost adopted by the AO was without any justification and similarly, the working of the closing stock was also not justified. In view of this we dismiss ground No. 5 of the appeal of the revenue.
59. Ground No. 6 of the appeal of the revenue is against the deletion of addition of Rs. 20 lacs made by the AO on account of extra profit on sale of half share of property at 23/42, Punjabi Bagh, and New Delhi. This property was purchased by the assessee 12.07.2006. The property was sold during the year for Rs. 2.20 crores and assessee has earned profit of Rs. 1.10 crores. However, assessee received one more cheque of Rs. 20 lacs from the buyer which was added into the hands of the assessee. On appeal before the Id CIT(A) same was deleted for the reason that this amount was refunded on 11.06.2007 by the assessee through cheque. The Id CIT(A) found that as the sum has already been returned to the buyer same cannot be taxed. Therefore the revenue is in appeal before us.
60. The Id DR relied on the order of the Assessing Officer whereas the Id AR relied on the order of the Id CIT(A).

61. We have carefully considered the rival contentions the Id CIT(A) has dealt with this issue in para 33 of the order wherein he has mentioned that the assessee has already return the sum to the buyer and same amount have been debited from the bank account of the appellant. He has dealt with this issue as under:-

“33. I have considered the facts of the case, written submissions of the appellant, AOs comments in the remand report dated 5.6.2012 and the rejoinder of the appellant. I have perused the bank account of the appellant and the conveyance deed of the property. I find that Sh. Sikander Lal S/o Mrs. Ved Vati, the buyer, had paid Rs.20,00,000/- by cheque dated 05.10.2006 as mentioned in the conveyance deed. This amount was refunded on 11.06.2007 through cheque no. 344573/- to Shri Sikander Lal. This is evident from copy of bank account of the appellant with Indian Overseas Bank, Rajouri Garden Branch, New Delhi (A/c No. 019301000051952) therefore, it is clear that the transaction has taken place through proper banking channel and the said excess receipt of Rs. 20,00,000/- found credited in the bank statement was refunded to the purchasers son vide the above cheque which was debited to the appellant bank account on 11.06.2007. Hence the actual sale consideration remain at Rs. 1.10crore and not Rs 1.30 crores Since the excess amount of Rs. 20,00,000/- has been refunded to the purchaser, the same cannot be taxed as additional sale consideration. In view of these facts I hold that there is no question of earning of excess profit on sale of the property as held by the AO. The addition of Rs. 20,00,000/- made by the AO is therefore deleted.”

62. We find no infirmity in the order of the Id CIT(A) while deleting this addition. In view of this we dismiss ground No. 6 of the appeal and confirm the finding of the Id CIT(A).

63. Ground No. 7 of the appeal is against the deletion of Rs. 27 lacs as unexplained cash credits.

64. The brief facts of the case is that in the books of the assessee on 03.11.2006 Rs. 27 lacs was found to be received from M/s. Renasonic E-solutions Pvt. Ltd and same was added as unexplained cash credit. On appeal before the Id CIT(A), he deleted the addition.

65. The Id DR relied on the order of the Id Assessing Officer whereas the Id AR relied on the order of the Id CIT(A) who after considering the evidence deleted the addition.

66. We have carefully considered the rival contentions. The appellant has paid Rs. 11 lakhs from his individual account and also paid Rs. 47 lacs from his proprietary concern out of which Rs. 20 lacs were returned. The balance amount was in dispute and there was an out of court settlement based on three compromise deeds accordingly, Rs. 27 lakhs were paid to the proprietary concern at Rs. 10 lakhs to the appellant personal account in cash. Assessee filed affidavit from the witnesses for this transaction. The Id CIT(A) deleted this addition vide para No. 36 of his order as under:-

“36. *I have considered the facts of the case, written submissions of the appellant, AO's comments in the remand report and the rejoinder of the appellant, I have also perused the additional evidence produced during the appellate proceedings such as copies of account of M/s. Renasonic e-Solutions in the books of the appellant namely Sh. Inderpal Singh Wadhawan and in the books of M/s. R.G. Enterprises, proprietary concern of the appellant, copies of the bank statement of the appellant, balance sheet of M/s. R.G. Enterprises as on 31.3.2006, copies of compromise deed and copies of receipts dated 3.11.2006 in proof of full and final payment received by the appellant. From the copies of the accounts and the bank account of the appellant with Punjab National Bank, IBB, Barakhamba Road, New Delhi maintained in the name of Sh. Inderpal Singh, the appellant himself and in the name of M/s. R.G. Enterprises, a proprietary concern of the appellant, I find that the appellant had paid Rs. 11,00,000/- and Rs. 22,00,000/- through cheque nos. 711316 dated 13.5.2002 and 691392 dated 22.5.2005 respectively. These amounts were duly reflected in the books of accounts of the appellant. The appellant filed the balance sheet of M/s. R.G. Enterprises for the year ending 31.3.2006 as an additional evidence, where on the assets side the loans and advances were shown as receivables for an amount of Rs.27,00,000/- from M/s. Renasonic e-Solution Ltd, Copies of compromised deeds and copies of receipts in proof of full and final payment filed during the appellate proceedings also confirmed the cash receipts of Rs.27,00,000/- (17,00,000/- and 10,00,000/-) on 3.11.2006 from M/s. Renasonic e-solution Ltd. In view of all these facts the case of Rs.27,00,000/- shown in the books of R.G. Enterprises as received from M/s. Renasonic e-Solution Ltd. On 3.11.2006 stands explained.*

Regarding the AO's observations that the source from which M/s. Renasonic e-Solution paid the cash to the appellant was not explained by the appellant, it is seen that such a thing can never be within the exclusive knowledge of the debtor to know the source of income of the creditor. Since the appellant has furnished all the documents pertaining to the receipt, it is evident that the cash credit in his books of account is explained and proved.

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In view of the above, the addition made by the AO for an amount of Rs.27,00,000/- is therefore deleted.”

67. We find no infirmity in the order of the Id CIT(A) in deleting the above addition and none was pointed out by the Id DR. in the result we confirm the finding of the Id CIT(A) in deleting the addition of Rs. 27 lakhs on account of unexplained cash credit. In the result ground No. 7 of the appeal is allowed.
68. Ground No. 8 of the appeal is against the deletion of the addition of Rs. 27857777/- u/s 68 of the Act as unexplained cash credit.
69. In the books of the proprietary concern of the assessee M/s. DNK Creation there was an opening credit balance of M/s. Sona Plus Trading Co. LLC of Rs. 40091667/- on account of receipt of advance and amount receivable on account of sale was Rs. 33583728/- during the year the closing balance of the advance received after transactions remained at Rs. 27857777/-. This amount was added u/s 68 of the Act. The Id CIT(A) deleted the addition therefore the revenue is in appeal.
70. The Id DR relied on the order of the AO and submitted that there is no confirmation of the party and therefore the addition has been made. The Id AR relied upon the order of the Id CIT(A) and further stated that the appellant has made the sale in subsequent year of the same amount and therefore now there are no outstanding.
71. We have carefully considered the rival contentions. The Id CIT(A) has deleted this addition vide para No. 39 of his order as under:-

“39. I have considered the facts of the case, written submissions of the appellant, AO's comments thereon and the appellant's rejoinder. I also perused the case laws relied upon by the appellant. From the material on record, I find that the AO has made the addition on the ground that the appellant has not furnished confirmation in respect of this credit from the customer and that the entire transaction defies business norms as according to the AO it is beyond his comprehension as to why a customer sitting in Dubai would advance such a huge amount. This ground of the AO is totally misconceived, the practice of giving advance to supplier is prevalent in businesses of all trades, M/s. Sonaplus Trading Company, LLC is a regular customer of the appellant The appellant is maintaining two accounts with the said party i.e. first for normal trading and second for specific and seasonable items. For specific and seasonable items, the said company gave advances and

on demand the appellant would supply the specific and reasonable items. For readymade garments the appellant supplied the goods in a routine manner and get the payment thereafter as a normal course of business. The balance of Rs.2,78,57,777/-at the end of the year was because the said party did not raise demand for specific and reasonable items. This balance of Rs.2,78,57,777/- was squared up by supplying the goods subsequently in A.Y. 2008-09. The advances are being received by the appellant as per FIRC issued by the bank and exports sales are supported by the documentary evidence such as Airways bills, shipping bills, bills of lading and bank certificates. Therefore, the AO has proceeded on the basis of presumption surmises and conjecture.

The AO has made the impugned addition u/s 68 of the IT Act, 1961 when the said advances were received earlier in F.Y. 2005-06and recorded in the books of the appellant for the A.Y. 2006-07. The AO himself admitted in his order that an amount of Rs.4,00,91,667/- is the outstanding credit balance in the account of M/s. Sona Plus Trading Company, LLC and after the appellant having adjusted advance to the tune of the Rs.1,22,33,890/-, there remains a credit balance of Rs.2,78,57,777/- on account of advance. The AO therefore, is not justified in invoking the provisions of section 68 in respect of the outstanding credit balance on account of trade advances. The decision of the Hon'ble Apex Court in the case of Baladhram Vs. Baladmram Vs. CIT (1969) 71 ITR 427 and the decision of the Hon'ble Jurisdictional High Court in the case of CIT Vs. Dalmia (R) (1986) 157 ITR 221 supports the appellant's case.

Therefore in view of the facts of the case as discussed above and respectfully following the judicial pronouncements in the above cases, I hold that the AO is not justified in making the addition of Rs.2,78,57,777/- as unexplained cash credit u/s 68 of the IT Act 1961. This addition made by the AO is therefore deleted and this ground of appeal is allowed.”

72. We do not find any infirmity in the order of the ld CIT(A) who has deleted the addition as in the subsequent year the same amount of sales has been exported by the assessee to the above parties. In the result the ground No. 8 of the appeal is dismissed.
73. Ground No. 9 of the appeal is against deletion of addition of Rs. 12888504/- on account of unexplained cash credit. During the year in the proprietary concern M/s. RG Enterprise Books assessee passed an entry by debiting a sum of Rs. 12888504/- and crediting the proprietor account an identical reverse entry was passed in the books of the appellant personal books by debiting his proprietary concern. This

amount was added u/s 68 of the Act. The Id CIT(A) deleted the same as the sum was received in AY 2005-06 and goods were supplied in AY 2008-09. Therefore the revenue is in appeal before us.

74. The Id DR relied on the order of the Assessing Officer and Id AR relied on his submission made before the Id CIT(A).
75. We have carefully considered the rival contentions the Id CIT(A) has deleted the addition vide para No. 42 of his order as under:-

“42. I have considered the facts of the case, written submissions of the appellant, AO's comments thereon, the appellant's rejoinder and the case laws relied upon by the appellant in his written submissions dated 6.7.2011. I have also perused the additional evidence filed during the course of appellate proceedings i.e. copies en ledger account of Desert Trip Trading Company in the books of R.G. Enterprises and Sh. Inderpal Singh and ledger account of Anjal Enterprises and Trade Fax Ltd. in the books of M/s. DNK. I find that the AO did not appreciate properly the facts of the case, The advance of Rs.1,28,88,504/- is an aggregate amount of Rs.54,59,751/- and Rs.74,28,753/- received from M/s. Anjal Enterprises Ltd. and M/s. Trade Fax Ltd. respectively. Both M/s. Anjal Enterprises and Trade Fax Ltd. are foreign parties and are closely associated with M/s. Desert Trip Trading Company, another foreign enterprises. These advances were received in foreign currency through banking channels on 30.5.2005 relevant to the A.Y. 2005-06. These advances were received by M/s. R.G. Enterprises, a sole proprietary concern of the appellant from the above two parties, but they being close associates of M/s. Desert Trip Trading Company with whom the appellant had business dealings, the accountant of the appellant by mistake credited both these amounts aggregating to Rs.1,28,88,504/- as advances from Desert Trip Trading Company in the books of R.G. Enterprises. Since R,G. Enterprises has closed its business during the previous year relevant to the A. Y. 2006-07, the goods for which these advances were received were supplied in the A.Y. 2008-09 by M/s. DNK, a partnership firm of the appellant and the advances were adjusted by passing journal entries in the account of R.G. Enterprises to the account of appellant Sh. Inderpal Singh Wadhawan and then to the account of M/s. DNK, a partnership firm in which Sh. Inderpal Singh Wadhawan is one of the partners. On considering all these facts, it is clear that the amount of the advances aggregating to Rs.1,28,88,504/- were received during A.Y. 2005-06 against which the goods were supplied in A.Y. 2008-09. These are the trade advances which were

not received during the year under consideration but were received during the assessment year 2005-06.

In view of the facts as discussed above, I hold that he advanced is aggregating to Rs.1,28,88,504/- stand explained and the AO was not justified in treating these trade advances as unexplained cash credits. He was also not justified in invoking the provisions of section 68 of the IT Act, in respect of the trade advances which were not received during the year under consideration and adding them as unexplained cash credits to the income of the appellant for the year consideration. The addition of Rs.1,28,88,504/- made by the AO is therefore, deleted.”

76. The Id CIT(A) deleted as the sum was earned as trade advance which was not received during the year but in earlier years and the goods were supplied in subsequent years. We find no infirmity in the order of the Id CIT(A) and hence we dismiss ground No. 9 of the appeal.
77. Ground No. 10 of the appeal is against the deletion of addition of Rs. 50 lakhs made by AO on account of understatement of sale consideration of property No. 67 Punjabi Bagh, New Delhi. The assessee has sold the property during the year and received consideration of Rs. 6250000/- whereas in the books of the buyer the sale consideration is booked at Rs. 11250000/- . In the books of the buyer cheque No. 47 of Rs. 50 lakhs was accounted from however, not recorded in the books of the assessee as sale consideration. Assessee submitted that the assessee has returned the amount of Rs. 50 lakhs which was originally received as advance by cheque on 18.07.2007, however, the Id AO made the addition. Id CIT(A) deleted the addition vide para No. 45 of his order. Therefore the revenue is in appeal.
78. We have heard the parties on the issue. The Id CIT(A) has deleted the addition wherein he noted that the above cheque was required to be given to the brother of the assessee but the buyer has by mistake written the name of the assessee. The assessee has returned this cheque on 18.07.2007 to the buyer and confirmation of buyer was also obtained. The Id CIT(A) has dealt with this issue as under:-

“45. I have considered the facts of the case, written submissions of the appellant, AOs comments in the remand report and the rejoinder of the

appellant. I find that as per the conveyance deed the appellant with his brother Mr. Satvinder Singh both having 50% share each sold the said property for a total consideration of Rs.1,25,00,000/-. The appellant received 50% of the sale consideration as his share amounting to Rs. 62,50,000/- out of Rs. Rs.1,25,00,000/-. In addition to this sale consideration, the buyer issued a cheque of Rs.50,00,000/- by mistake to the appellant which was required to be given to his brother Sh. Satvinder Singh. In fact this is an excess payment, which was received by the appellant by mistake from the purchaser which the appellant refunded through account payee cheque dated 18.7.2007 of Rs.50,00,000/-. A confirmation to this effect from Smt. Punni Sanghvi was filed along with her copy of PAN and copy of passport. On considering all the facts of the case and the fact that the repayment was made through the banking channel and the Assessing Officer having not brought on record that the sale consideration as per the conveyance deed is not the actual sale consideration I hold that the assessing Office" is not justified in treating this amount as the deflated sale value of the property. Accordingly, the addition made by the Assessing Officer is deleted."

79. In view of the above finding of the Id CIT(A), we dismiss ground No. 10 of the appeal confirming the finding of the Id CIT(A).
80. Ground No. 11 of the appeal was against deletion of the addition of Rs. 40 lakhs on sale of two cars received by the assessee. During the year the assessee has sold two cars one Maruti Grand Vitara and another Porche for Rs. 40 lakhs and given the name of the buyers/ brokers. Therefore, the addition was made in the hands of the assessee. On appeal before the Id CIT(A) the addition was deleted. Therefore the revenue is in appeal before us.
81. We have heard the rival contentions and also perused the facts of the case. The assessee has two vehicles in the books of account and which were sold and loss was booked in the profit and loss account. The vehicles were sold through brokers and copies of delivery receipts and the cash receipts were produced. The name of the brokers was also given to the Assessing Officer. The Id CIT(A) deleted this addition vide para 48 of his order as under:-

"48. I have considered the facts of the case, written submission of the appellant, the AO's comments in the remand report thereon, appellant's rejoinder there to and the additional evidence on the record. I find that the AO has not appreciated the evidence filed by the appellant before

him in the course of assessment proceedings. The appellant had filed copies of delivery receipts and the cash receipts which bear the details of cars sold. It is a prevalent practice in the market that the deals in respect of sale of old cars made through brokers are generally in cash. There is no legal requirement that the receipt of sale consideration of the second hand cars should be through an account payee cheque or bank drafts. The appellant has booked the loss on account of sale of cars in his P & L account which the AO has not disputed. In view of all these facts and evidences filed by the appellant, the addition made by the AO is not justified. The same is therefore, deleted.”

82. We find no infirmity in the order of the ld ld CIT(A) and therefore confirm the finding and dismiss the ground No. 11 of the appeal.
83. Ground No. 12 of the appeal is against the admission of additional evidence by ld C IT(A) before us no specific grounds were raised, however, it is submitted that it is similar to ground No. 4 decided in ITA No. 950/Del/2013 for AY 2007-08 in case of Vardaan Fashion.
84. WE have already decided this issue in that appeal wherein we have held that ld CIT(A) has rightly admitted the additional evidence after obtaining the remand report from the ld Assessing Officer and recording his reasons for doing so. In the present appeal we find that from Para NO. 5 to para NO. 11 ld CIT(A) has dealt with the admissibility of additional evidences. We do not find any infirmity in that and therefore we dismiss ground No. 12 of the appeal.
85. Ground NO. 13 of the appeal are against not allowing cross examination to the alleged supplier where the AO had specifically requested for the same in his remand report.
86. No specific argument have been advanced by the ld DR on this issue, therefore this ground of appeal is dismissed.
87. In the result appeal of the revenue is dismissed.

ITA NO 1155/DEL/2013

(AY 2007-08)

By Assessee

88. The assessee has raised the following grounds of the appeal in ITA No. 1155/Del/2013 as under :

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- “1. That the Ld. CIT (Appeals) erred on facts and in law in upholding the addition made by the Assessing Officer of Rs.88,39,781/-u/s 40(A)(3) of the Income Tax Act, 1961 and partly allowing the appeal.
2. That the Ld. CIT (Appeal) erred in law and also in fact by upholding the reference made u/s 142(2A) for the Special Audit.”

89. Before us it was submitted that ground No. 2 of the appeal against reference made u/s 142(2A) of the Income Tax Act for the special audit is not pressed and hence same is dismissed.

90. Ground No. 1 of the appeal was against disallowance u/s 40A (3) OF the Act of Rs. 8839781/-.

91. During the assessment proceedings it was noted that payment of Rs. 44198903/- was made to the supplier for purchase of goods through banker's cheque instead of a/c payee cheque or draft and therefore, 20% of the sum amounting to Rs. 8839781/- was made u/s 40A(3) of the Act was made.

92. Before us it was submitted that this issue is identical to the ground No. 2 of the appeal of ITA No. 1143/Del/2013 for the AY 2007-08 in case of Vardaan Fashions. We have also perused the facts of the case and also the facts of the case decided in above referred ITA and found them to be similar. In that appeal we have deleted the addition as the payments have been made by assessee by the banker's a/c payee cheque. Our decision in that appeal in para No. 60 was as under:-

“60. We have carefully considered the rival contentions. We have also carefully perused the copies of the banker's cheques which shows at page No. 34 of the special audit report. The banker's cheque is issued on 31st may 2006 for Rs. 50 Lacs in favour of Penta trade private limited by Indian overseas bank on account of M/s Vardan fashions. This bankers cheque is signed by the manager of a particular bank. It is also not transferable and valid for six months only. We are surprised by the findings of the lower authorities on payment by assessee through these instruments in making disallowance u/s 40A (3) of the act. In fact banker's cheque is issued by the bank of the remitter which is signed by the manager of the bank only if there is adequate bank balance in the account of such person. The bankers cheque is insisted by the parties because of the reason that it cannot be dishonoured. It also goes into the bank account of the person in whose name it is drawn. Payment made by the bankers cheque is akin to payment by the account payee cheques. Bankers' cheque are issued by the Bank to customers for making local payments like payment of telephone / electricity bills, payments to other

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accounts in other banks etc. Banker's Cheques are negotiable instruments payable to order and attract all provisions applicable to an order cheque and are valid for three months from the date of issue and in genuine cases may be revalidated. In view of this we reverse the finding of the Ld. CIT (A) in confirming the disallowance under section 40A (3) of Rs. 1.08 crores. In the result ground No. 2 of the appeal of the assessee is allowed.”

93. Therefore following the same decision we hold that payment through a/c payee banker's cheque made by the assessee fulfills the requirement of section 40A(3) of the Act and therefore we reverse the finding of the ld CIT(A) and allow ground No. 1 of the appeal of the assessee.
94. In the result appeal of the assessee in ITA No. 1155/Del/2013 for AY 2007-08 is partly allowed.
- 95.

ITA No.1489/Del/2013
(Assessment Year: 2008-09)
(By revenue)

96. The revenue has raised the following grounds of the appeal in ITA No. 1489/Del/2013 as under:
- “1. *The CIT(A) has erred in deleting the addition of Rs.3,38,04,830/- made by the Assessing Officer on account of bogus purchases.*
 2. *The CIT(A) has erred in deleting the addition of Rs.17,60,09,875/- made by the Assessing Officer on account of unexplained unsecured loans.*
 3. *The CIT(A) has erred in deleting the disallowance of Rs.1,98,500/- made by the Assessing Officer on account of unsubstantiated construction expense.*
 4. *The CIT(A) has erred in deleting the disallowance of Rs.9,91,352/- out of total disallowance of Rs.10,09,622/- made by the Assessing Officer despite the fact that business expediency of these expenses could not be established in the absence of bills and vouchers or any specific details.*
 5. *The CIT(A) has erred in deleting the disallowance of Rs.36.86.486/- made by the Assessing Officer on account of interest expenses on loans being utilized for non business purpose.*
 6. *The CIT(A) has erred in deleting the addition of Rs.28,25,000/- made by the Assessing Officer on account of unexplained cash credit received from alleged sale of two cars.”*

97. The facts of the case are similar to the facts of the appeal for AY 2007-08, therefore same are not discussed here.
98. First ground of appeal is against the deletion of addition of Rs. 33804830/- on account of bogus purchases.
99. The parties before us submitted that the facts of this ground of appeal are similar to the facts of the ground No. 1 of the appeal of the revenue for AY 2007-08. We have dismissed the ground No. 1 of the appeal of the revenue for the AY 2007-08 and therefore for the same reasons we also dismissed ground No. 1 of the appeal of the revenue.
100. Ground No. 2 of the appeal of the revenue is similar to ground No. 2 of the appeal of the revenue for AY 2007-08.
101. The parties before us submitted that the facts of this ground of appeal are similar to the facts of the ground No. 2 of the appeal of the revenue for AY 2007-08. We have dismissed the ground No. 2 of the appeal of the revenue for the AY 2007-08 and therefore for the same reasons we also dismissed ground No. 2 of the appeal of the revenue.
102. Ground No. 3 of the appeal of the revenue is against deletion of disallowance of Rs. 198500/- on account of unsubstantiated construction expenses. During the year assessee has claimed expenditure of Rs. 198500/- of construction expenditure but no substantial evidences were produced and therefore same were disallowed. On appeal before the ld CIT (A), he deleted the disallowance. Therefore, the revenue is in appeal before us.
103. The ld DR relied on the orders of the Assessing Officer and ld AR relied on the submission made before the ld CIT(A).
104. We have carefully considered the rival contentions and also perused the order of the ld CIT(A) wherein it is noted that assessee has submitted complete details of construction expenses vide letter dated 16.06.2011 and all the payments are made by cheque. In view of this categorical finding of the ld CIT(A) which is not challenged before us we confirm the order of the ld CIT(A) and ground No. 3 of the appeal of the revenue is dismissed.

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105. Ground No. 4 of the appeal is against the disallowance of Rs. 991352/- deleted by the Id CIT(A). The assessee has debited expenditure of Rs. 952310/- in its personal books of account and Rs. 57312/- in DNK Creation which was disallowed by the Id Assessing Officer for the reason that business expediency could not be established. Ld CIT(A) deleted the above addition vide para No. 21 of his order.
106. Ld DR relied on the order of the Assessing Officer and Id AR relied on his submission made before the Id CIT(A).
107. We have carefully considered the rival contentions and also perused the order of the Id CIT(A) wherein he has held that disallowance made by the Id AO is merely on surmises and conjectures and does not have any specific finding on the inadmissibility of the expenses for the purposes of the business. He has analyzed the expenditure and stated the expenditure are incurred for the purpose of the business and are allowable. We find no infirmity in the order of the Id CIT(A) and therefore ground No. 4 of the appeal of the revenue is dismissed.
108. Ground No. 5 of the appeal is against disallowance of Rs. 3686486/- deleted by the Id CIT(A) on account of interest expenses on loan being utilized for non business purposes. During the year the assessee has paid interest of this sum in his proprietary concerns books of account and assessee has also given interest free advanced to various parties amounting to Rs. 88798699/-. The assessee explained that this amount was advanced to the parties and advances are against export business for procuring goods however, Id AO disallowed the sum against which assessee preferred appeal before the Id CIT(A) who in turn deleted the disallowance.
109. Before us the Id DR relied on the order of the Assessing Officer and Id AR relied on his submission made before the Id CIT(A).
110. We have carefully considered the rival contentions. The Id CIT(A) has deleted disallowance on the ground that the payment of interest has been made to the bank and there is no nexus established by the assessee of the borrowed fund diverted for non business purposes. He further submitted that letter dated 16.06.2011 explains the purpose of

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advance to the parties. The advances are given to the parties for purchase of the material. The main reason for disallowance is that the AO has treated the purchases as bogus which are now held to be genuine and therefore advances to the supplier for export business were also held to be genuine. As the advances are given to the supplies from whom the goods have been purchases and same were exported it cannot be said that advances are without any business purposes. In view of this we confirm the finding of the Id CIT(A) in deleting the disallowance of Rs. 3686486/- on account of interest expenditure. In the result ground No. 5 of the appeal of the revenue is dismissed.

111. Ground No. 6 of the appeal of the revenue is against the addition of Rs. 28.25 lakhs made by the Id Assessing Officer on account of unexplained cash credit received from alleged sale of cars deleted by the Id CIT(A).
112. During the year assessee has sold two cars namely one Porsche and one Mercedes and received cash of Rs. 28,25000/- and consequently a loss of Rs. 160977/- was shown. The Id AO made this addition because the sale has been made in cash and no independent confirmation from the broker/ buyer is available. Ld CIT(A) deleted the same. Therefore the revenue is in appeal before us.
113. Ld DR relied on the order of the Id Assessing Officer and the Id AR relied on the order of the Id CIT(A).
114. We have carefully considered the rival contentions. Before the AO for the same motor cars the assessee has filed the delivery receipts and the cars were delivered to the buyer along with Form No. 29. The assessee also submitted the cash receipt of the amount received. Both the cars were appearing in the balance sheet of the assessee as business asset and depreciation against the same was allowed. The appellant has also shown the loss in the books of account and respective registration No. of vehicles were also available. If the AO has any doubt about the buyer of those vehicles independent enquiry could have been made from Road Transport Authorities. However, for the same of the assets of the assessee which are appearing in the balance sheet and from which year

to year depreciation is claimed sum received on sale of those assets cannot be added u/s 68 of the Act. The Id CIT(A) has deleted this addition vide para No. 32 of his order and we find no infirmity in his deleting the addition. In the result ground No. 6 of the appeal of the revenue is dismissed.

115. In the result the appeal of the revenue in ITA NO. 1489/Del/2013 for AY 2008-09 is dismissed.

ITA No.1589/Del/2013
(Assessment Year: 2008-09)
(By Assessee)

116. The assessee has raised the following grounds of the appeal in ITA No.1589/Del/2013 as under:-

- “1. That on the facts and circumstances of the case, the order passed by the Ld. CIT (Appeals) is partially bad both in the eye of law and on facts.
2. That the Ld. CIT (Appeals) erred on facts and in law by upholding the addition made by the Assessing Officer of Rs.6,30,80,000/- u/s 40(A)(3) of the Income Tax Act, 1961 and partly allowing the appeal.
3. That the Ld. CIT (Appeals) erred on facts and in law by upholding the disallowances of Rs.18,270/- being 1/10 of Rs.1,82,700/- in respect of car expenses treating the same as personal expenditure.
4. That the Ld. CIT (Appeals) erred on facts and in law by upholding the disallowances of Rs.1,00,000/- on account of loss suffered on sale of stamp papers.”

117. Ground No.1 general in nature and therefore same is dismissed.

118. Ground No. 2 of the appeal is against the addition of Rs. 63080000/- u/s 40(A)(3) of the Income Tax Act upheld by the Id CIT(A).

119. The brief facts of the case are the appellant has made this payment to its suppliers through Order Bank Drafts instead a/c payee cheques or Bank drafts. Ld CIT(A) confirmed this. Therefore the assessee is in appeal before us. The parties before us submitted that this ground of appeal is identical to ground No. 1 of the appeal of the assessee for AY 2007-0.

120. We have carefully considered the both the grounds and we are of the view that payment by bankers cheque made by the assessee are a kin to the a/c payee cheques and therefore disallowance u/s 40A(3) cannot be made. This ground has already been decided by us in the appeal of the assessee for AY 2007-08 wherein we have deleted the disallowance on account of payment by banker's cheque. Therefore similarly we also delete the disallowance of Rs. 63080000/-u/s 40A (3) of the Act and reverse the finding of the Id CIT(A). In the result ground No. 2 of the appeal of the assessee is allowed.
121. Ground No. 3 of the assessee is against the disallowance confirmed by the Id CIT(A) being 1/10 of car expenses of Rs. 18270/-.
122. No arguments have been advanced before us by the parties and therefore this ground of appeal is dismissed.
123. Ground No. 4 of the appeal is against disallowance of Rs. 1 lakhs on account of loss suffered on sale of stamp papers. The parties did not advance any argument on this ground therefore, it is dismissed.
124. In the result, appeal of assessee is partly allowed.

Order pronounced in the open court on 08/07/2016.

-Sd/-

-Sd/-

**(I.C.SUHIR)
JUDICIAL MEMBER**

**(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER**

08/07/2016

A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

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