

**आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, बी.मुंबई।**

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCHES, 'B' MUMBAI**

**श्री जोगिन्दर सिंह, न्यायिक सदस्य एवं  
श्री रमित कोचर लेखा सदस्य, के समक्ष**

**Before Shri Joginder Singh, Judicial Member, and  
Shri Ramit Kochar, Accountant Member**

**ITA No.1484/Mum/2013  
Assessment Year: 2009-10**

Nexus Builders & Developers Pvt. Ltd. House, 02 <sup>nd</sup> Floor, 11/A, Nathalal Parekh Marg, Colaba, Mumbai-400039	<b>बनाम/ Vs.</b>	ACIT-OSD-2(2), Aayakar Bhavan, M.K. Road, Mumbai-400020
(निर्धारिती /Assessee)		(राजस्व /Revenue)
<b>PAN. No.AAACN2071P</b>		

निर्धारिती की ओर से / Assessee by	Shri S.C. Tiwari & Ms. Rutuja Pawar
राजस्व की ओर से / Revenue by	Smt. Ramapriya Raghvan-DR

सुनवाई की तारीख / <b>Date of Hearing :</b>	<b>24/01/2017</b>
<b>आदेश की तारीख /Date of Order:</b>	<b>31/01/2017</b>

**आदेश / O R D E R**

Per Joginder Singh (Judicial Member)

The assessee is aggrieved by the impugned order dated 10/12/2012 of the Ld. First Appellate Authority, Mumbai. The assessee has filed concise grounds of appeal, wherein, the first ground pertains to treating the amount of Rs.8,55,000/- as undisclosed income of the assessee by way of alleged suppression of receipts from Mr. Devendra Singh Tomar.

2. During hearing, Shri S.C. Tiwari, ld. counsel for the assessee along with Ms. Rutuja Pawar, explained that, as per Revenue, one CD was found and large number of letters (219 letters) to buyers of flats were issued asking them to make the payments. Mr. Tiwari, explained that in one case, the amount mentioned was towards higher side on the basis of which letters were issued to all the buyers. Our attention was invited to the observation made at page-2 of the assessment order and reply of the assessee at page-3. It was asserted that there was no co-relation made in the prices and reminder was send at the rate which was cancelled. The ld. counsel invited our attention to the affidavit of the buyer (page17 of the paper book) and affidavit of director (page-12 of the paper book) along with page-4 (letter of cancelation) and pages 23 & 24 (bank statement showing the amount returned to earlier buyer- Milind Bhingare). It was explained that the letter is merely a reminder and not a formal document like agreement. It

was contended that there was no other material found for justifying the addition. The ld. counsel further contended that the explanation of the assessee is supported by bank account, books of accounts, registered sale deed, etc. It was explained that the price, which was quoted by the assessee to the new buyer is supported by valuation report of Sub-registrar (page-63 of the paper book). The crux of the argument is that there was no evidence found against the assessee and no enquiry was carried out by the Assessing Officer, so the addition made on hypothetical basis is not justified. So far as, reliance made upon the decision in the case of CST vs H.M. Esufali H.M. Abdulalm 90 ITR 271 (SC) is on different facts by asserting that the basis of addition is very shaky. Reliance was placed upon the decision from Hon'ble jurisdictional High Court in CIT vs Dr. M.K. E. Menon (2001) 248 ITR 310 (Bom.) and CIT vs Aero Club (2011) 336 ITR 400 (Del.). It was contended that no fruitful enquiry was made by the Assessing Officer into the facts of the case, whereas, voluminous record was maintained by the assessee and produced before the Assessing Officer. The sale were claimed to be supported by registered documents. So far as, prices of the flat is concerned, the ld. counsel explained that the prices depends upon so many factors like demand and supply, market conditions, location, side of the flat, like sea facing, park facing, or slum facing, etc. The ld counsel contended that the apparent state of facts is true unless rebutted by material. For which, reliance was placed upon the decision in

COMMISSIONER OF INCOME TAX vs. DAULAT RAM RAWATMULL 87 ITR 349 (SC), COMMISSIONER OF INCOME TAX vs. U.M. SHAH, PROPRIETOR, SHRENIK TRADING CO. 90 ITR 396 (Bom.) and COMMISSIONER OF INCOME TAX vs. BEDI & CO. PVT. LTD. 230 ITR 580 (SC).

2.1. On the other hand, the ld. DR, Ms. Ram Priya Raghvan, contended that statement was recorded for which our attention was invited to page-6 of the paper book and there was no evidence on record that Mr. Tomar negotiated the price on such a down payment and there was no reason of sharp fall in prices. It was contended that there was no evidence, put on record by the assessee, contravening the stand taken in the assessment order.

2.2. In reply, the ld. counsel for the assessee, asserted that the Assessing Officer did not record the statement of any person/buyer even after affidavit was filed by the assessee by contending that unless and until actual money is given/transacted, there is no evidence on record on the basis of which addition can be made.

2.3. We have considered the rival submissions and perused the material available on record. The facts, in brief, are that the assessee declared income of Rs.10,70,74,750/- along with required annexure on 26/09/2009. The case of the assessee was selected for scrutiny; therefore, a detailed questionnaire was issued to the assessee for compliance. The assessee filed the necessary details, information and

explanation called for by the Assessing Officer. A search action u/s 132 of the Act was carried out in the case of 'Gala Sharma Siddhi' group on 28/08/2008. Along with the search, one of the premises of the assessee was covered u/s 133A of the Act. As per the Revenue, one CD, comprising various correspondences, books of accounts and documents, was impounded and later on during the course of assessment, its contents were viewed. On perusal of the CD, as per the Revenue, amongst others, one letter in respect of sale transaction with Mr. Devendra Singh Tomar (Flat Purchaser) was found. According to the Assessing Officer, the letter dated 08/08/2008, return to Mr. Devendra Singh Tomar, by the assessee, showed that the sale price, payable by Mr. Devendra Singh Tomar is Rs.57,73,000/- towards the purchase of flat, whereas, the agreement value with reference to the same was Rs.49,18,000/- and thus the assessee was called to explain as to why:-

(i) why the difference of Rs.8,55,000/- in the sale price as project herein before in the case of Shri Devendra Singh Tomar should not be added to the total income of the assessee and

(ii) further the same proportion should not be adopted for the other flats sold during the year 2008-09 .

2.4. In reply, the assessee vide letter dated supported by an affidavit of Shri Gautam G. Kabra, inter-alia

explaining the discrepancy, letter dated 19/12/2011, annexed with affidavit of Mr. Devendra Singh Tomar, reinforced the stand of the assessee and letter dated 23/12/2011 enclosing therein letter dated 30/05/2008 and bank statement towards receipt of booking money and the refund of the same on cancelation of flat by erstwhile/former flat purchaser Ms. Milind Bhingare explained the factual matrix. However, the ld. Assessing Officer did not countenance the argument of the assessee, brushing aside the affidavits, averments of the assessee and made the addition of Rs.8,55,000/- , pertaining to Shri Devendra Singh Tomar and further made addition of Rs.2,97,34,980/-, pertaining to other flats sold during the assessment year under consideration.

2.5. The aggrieved assessee challenged the matter before the Ld. Commissioner of Income Tax (Appeal). However, the Ld. Commissioner of Income Tax (Appeal) affirmed the stand taken in the assessment order. The assessee is in appeal before this Tribunal.

2.6. If the observation made in the assessment order, leading to addition made to the total income, conclusion drawn in the impugned order, material available on record, assertions made by the ld. respective counsel, if kept in juxtaposition and analyzed, we find that the assessee vide letter dated 16/12/2011 made certain submissions and the part of which has been reproduced at page-3 onwards of the assessment order. As per the reply, flat no. 101 was

booked by Mr. Devendra Singh Tomar in July, 2008 and the terms and conditions of all the buyers are same as per the policy of the assessee company. Building no. D2 was under construction and the assessee asked the purchaser for instalments at certain stages as laid down in Maharashtra Ownership Flats Rules 1964. As per the assessee, on completion of each stage, the purchasers are informed in writing with respect to instalments to be paid by them along with the details, like stage of completion, amount due, outstanding dues, total dues, etc. It is noted that the addition of Rs.8,55,000/- was made by the Assessing Officer in the case of Shri Devendra Singh Tomar and accordingly proportionate addition in the cases of remaining buyers. During assessment proceedings, the assessee was asked to clarify/explain the differential amount mentioned in the said letter vis-a-vis mentioned in the agreement. The assessee explained the difference and also filed an affidavit of Shri Gautam Kabra. An affidavit was also filed from Shri Devendra Singh Tomar explaining the factual matrix. The relevant extract of the contents of the letter of Shri Gautam Kabra are reproduced hereunder:-

*"6. I had negotiated flat no. 101 in wing D-2 with one Mr. Milind Bhingare for a sum of Rs. 59,34,000/-. The said party paid token money of Rs.1,00,000/- on or around 16.05.2008. However, he cancelled the booking on the ground that the price agreed was much higher than the rate prevailing in the surroundings. We repaid the sum of Rs.1,00,000/- on or around 30.05.2008.*

*7. Mr. Devendra Singh Tomar approached us somewhere in July 2008 and inquired for three bed room hall kitchen (3 BHK) flat in our project at a reasonable value. He was not too inclined for higher floor and probably 1st floor suited his requirement.*

8. He negotiated with us for some time and after several meetings the price for the flat was agreed at Rs.49,18,000/- with terms and conditions as applicable in general to all the parties. He agreed to pay token of Rs.1,00,000/- which was paid by him immediately.

9. As a policy, we communicate to all the flat owners on completion of each stage and call for the instalment next due with outstanding amount, if any. Accordingly, we sent the letters to all the flat holders including Mr. Tomar. In the letter we inadvertently, mentioned the price agreed with the erstwhile buyer.

10. Mr. Tomar approached our office inquiring about the contents of the letter. We explained to him the mistake committed from our office and requested him to ignore the letter. However, before we could amend the letter and send fresh letter, there was survey at our premises and documents and data were seized.

11. Mr. Tomar requested 2 months time to make full payment in the month of March 2009 as he had to obtain bank loan. The agreement with Mr. Tomar was signed and registered with Sub Registrar, Thane.

12. Mr. Tomar paid the balance amount of Rs. 48,18,000/- in three instalments in the month of May 2009.

13. I also state that we have not received any amount towards sale consideration on our abovementioned flat over and above Rs.49,18,000/- as agreed mutually with Mr. Tomar."

2.7. The letter of Mr. Devendra Singh Tomar along with affidavit was filed. The relevant extract of the affidavit are reproduced hereunder:-

"3. I say that I purchased residential flat admeasuring around 1290 square feet at Thane in the building named Hyde Park, Building NO D-2, Flat NO 101 on the 1<sup>st</sup> floor from M/s. Nexus Builders & Developers Pvt. Ltd. ("the company") for a lumpsum consideration of Rs. 49,18,000/-.

4. I had approached the said company somewhere in July 2008 to inquire the price of the flat. After several meetings and discussion we agreed at a price of (Rs.49,18,000/-. I paid a sum of Rs. 11,000/- on or around 08.07.2008 and Rs.89,000/- on or around 15.06.2008 aggregating to Rs.1,00,000/- as token money for booking of the said flat.

5. The terms and conditions which included, amongst others, schedule of payment and percentage of payment on completion of slabs and certain

*events were discussed and agreed upon.*

*6. On or around August 08,2008, I received letter from the company, demanding Rs.4,31,000/- as an instalment for completion of top slab and outstanding amount of Rs.51,00, 000/- till date aggregating to Rs. 55,31, 000/-. I informed the company about our agreed price and was informed to ignore the letter as the figures appearing in the letter pertained to their erstwhile deal.*

*7. The agreement was signed and registered with Sub Registrar, Thane, I further state that, I have not paid any amount towards purchase consideration of my above mentioned flat over and above Rs. 49, 18, 0001- as agreed mutually by me with the company.*

*8. As agreed I paid the total consideration of the balance amount in three instalments vis-a-vis Rs.1,18,000/- on or around 06.05.2009, Rs.20,00,000/- on or around 07.05.2009 and Rs.27,00,000/- on or around 10.05.2009 aggregating to Rs. 48,18,000/-."*

2.8. The Id. Commissioner of Income Tax (Appeals) A) was of the view that mere filing of an affidavit is not enough; therefore, he sustained the addition. Shri Kabra explained the factual matrix by saying that he negotiated flat no.101 with Mr. Milind Bhingare for a sum of Rs.59,34,000/- and the party paid token money of Rs.1 lakh on or around 16/05/2008. The booking was cancelled on the ground that the agreed price was much higher than prevailing in the market. The amount of Rs.1 lakh was repaid on or around 30/05/2008. Shri Devendra Singh Tomar approached the assessee in July 2008 and he too was no inclined for higher floor. Shri Tomar negotiated with the assessee after several meetings and the flat was agreed to be sold for Rs.49,18,000/- with terms and conditions as applicable to the remaining all parties and he paid Rs.1 lakh immediately. The price mentioned in the letter of Mr. Tomar was explained to be inadvertently issue mentioning

the price with the erstwhile buyer. Mr. Tomar requested for time till March 2009 as he has obtained bank loan. The agreement with Mr. Tomar was signed and registered with sub-registrar, Thane. Mr. Tomar paid the balance amount of Rs.48,18,000/- in three instalments in the month of 2009. In the affidavit, it was specifically sworn that no underhand amount was received except the total amount of Rs.49,18,000/- as mutually agreed with Mr. Tomar. Mr. Tomar also filed an affidavit substantiating the factual matrix as discussed hereinabove. The totality of facts clearly indicates that the assessee discharged his onus and the Assessing Officer neither recorded the statement of Mr. Tomar nor brought on record any evidence in support of the addition. It was the duty of the Assessing Officer to support his view either by bringing any evidence, proving that the market rate at a particular time was much higher or any evidence either from the same building or from the nearby building that any identical flat was sold/purchased at a higher value. Even the Assessing Officer never recorded the statement from any of the remaining buyers to substantiate his addition. The value mentioned in the registered sale document was neither found to be false nor any other document was brought on record contradicting the claim of the assessee. When the assessee explained the factual matrix supported by evidences like registered sale deed, supported by the affidavits, then it was the duty of the Assessing Officer either to contradict the same or to bring any evidence in support of the presumptive addition

made by him. We are of the view that presumption cannot take the shape of the evidence, however strong it may be. Even otherwise, a single case cannot be the basis for making the addition in the cases of remaining buyers. Rather, the situation is in favour of the assessee because in the cases of remaining buyers, the value/price mentioned in the registered documents has to be accepted in the case of one single buyer i.e. Mr. Devendra Singh Tomar, who negotiated with the assessee at the price, which was mentioned in the registered sale deed. The remaining buyers also made the payments as mentioned in the registered sale deeds. The earlier person, Mr. Milind Bhingare, who found the rate at the higher side, therefore, he cancelled the agreement. Thus, the onus cast upon the assessee was duly discharged. Rather, the onus cast upon the Assessing Officer was never discharged and he picked up one letter from 219 buyers and made proportionate addition in the hands of the assessee for the remaining buyers also. This type of approach cannot be said to be justified unless and until the same is substantiated with evidence. Our view finds support from the decision from Hon'ble Apex Court in COMMISSIONER OF INCOME TAX vs. DAULAT RAM RAWATMULL 87 ITR 349 (SC), wherein, it was held as under:-

"Held :

*Findings on questions of pure fact arrived at by the Tribunal are not to be disturbed by the High Court on a reference unless it appears that there was no evidence before the Tribunal upon which they, as reasonable men, could come to the conclusion to*

*which they have come; and this is so, even though the High Court would on the evidence have come to a conclusion entirely different from that of the Tribunal. In other words, such a finding can be reviewed only on the ground that there is no evidence to support it or that it is perverse. Further, when a conclusion has been reached on an appreciation of a number of facts, whether that is sound or not must be determined, not by considering the weight to be attached to each single fact in isolation, but by assessing the cumulative effect of all the facts in their setting as a whole. When a Court of fact acts on material partly relevant and partly irrelevant, it is impossible to say to what extent the mind of the Court was affected by the irrelevant material used by it in arriving at its finding. Such a finding is vitiated because of the use of inadmissible material and thereby an issue of law arises. Likewise, if the Court of fact bases its decision partly on conjectures, surmises and suspicions and partly on evidence, in such a situation an issue of law arises.— Sree Meenakshi Mills Ltd. vs. CIT (1957) 31 ITR 28 (SC) : TC54R.211#1, Dhirajlal Girdharilal vs. CIT (1954) 26 ITR 736 (SC) : TC54R.297, Mehta Parikh & Co. vs. CIT (1956) 30 ITR 181 (SC) : TC54R.300 **followed**; Edwards (Inspector of Taxes) vs. Bairstow (1955) 36 Tax Case 207 : (1955) 28 ITR 579 (HL) **applied**.*

Conclusion :

*Findings on questions of pure fact arrived at by the Tribunal are not to be disturbed by the High Court on a reference unless it appears that there was no evidence before the Tribunal upon which they, as reasonable men, could come to the conclusion to which they have come; and this is so, even though the High Court would on the evidence have come to a conclusion entirely different from that of the Tribunal.*

***Benami—Benami property fixed deposit in the name of son of partner—Merely because the explanation was found false, it cannot be held that the firm which operated an overdraft account against security of such deposit owner the money***

Held :

*The falsity of B's explanation in the opinion of the High Court, did not warrant the conclusion that the amount of Rs. 5,00,000 belonged to the assessee. There is no flaw or infirmity in the above reasoning of the High Court. The question which arose for determination in this case was not whether the amount of Rs. 5,00,000 belonged to B but whether it belonged to the respondent-firm. The fact that B has not been able to give a satisfactory explanation regarding the source of Rs. 5,00,000 would not be decisive even of the matter as to whether B was or*

*was not the owner of that amount. A person can still be held to be the owner of a sum of money even though the explanation furnished by him regarding the source of that money is found to be not correct. From the simple fact that the explanation regarding the source of money furnished by A, in whose name the money is lying in deposit, has been found to be false, it would be a remote and far-fetched conclusion to hold that the money belongs to B. There would be in such a case no direct nexus between the facts found and the conclusion drawn therefrom. There is also no cogent ground to take a view different from that of the High Court that the other circumstances, namely, the transfer of the amount of Rs. 5,00,000 from Calcutta to Jamnagar for fixed deposit in the name of B and the use soon thereafter to the said fixed deposit receipt as security for the overdraft facility to the respondent-firm did not justify the inference that the amount belonged to the respondent. The material on record indicates that the facility of overdraft on the security of the fixed deposit receipt in the name of B was enjoyed by the assessee firm for a little over a year. The concept of security and ownership are different and it would be a wholly erroneous approach to hold that a thing offered in security by a third person to guarantee the payment of debt due from the principal debtor belongs not to the surety but to the principal debtor. The Tribunal has also referred to the fact that no consideration passed to B for offering the fixed deposit receipt as security for the overdraft facility to the respondent-firm. This circumstance, is of a neutral character and has no material bearing for determining the ownership of the amount in fixed deposit. Sureties quite often offer security without receipt of consideration from the principal debtor. So far as the present case is concerned, one cannot be oblivious of the fact that B offered security for the overdraft facility to a firm of which his father was a partner. In the circumstances, the fact that B received no consideration for offering the fixed deposit receipt as security for the overdraft facility would not result in any inference against the respondent.*

*The onus to prove that the apparent is not the real is on the party who claims it to be so. As it was the Department which claimed that the amount of fixed deposit receipt belonged to the respondent firm even though the receipt had been issued in the name of B, the burden lay on the Department to prove that the respondent was the owner of the amount despite the fact that the receipt was in the name of B. A simple way of discharging the onus and resolving the controversy was to trace the source and origin of the amount and find out its ultimate destination. So far as the source is concerned, there is no material on the record to show that the amount came from the coffers of the respondent-firm or that it was tendered on behalf of the respondent. As regards the destination of the amount there is nothing to show that it went to the coffers of the respondent. On*

*the contrary there is positive evidence that the amount was received by B on 22nd Jan., 1946. It would thus follow that both as regards the source as well as the destination of the amount, the material on the record gives no support to the claim of the Department. The AAC also took into account the fact that the office of the Central Bank, is in the same building in which there are the business premises of the respondent-firm. This was, a wholly extraneous and irrelevant circumstances for determining the ownership of Rs. 5,00,000 which had been deposited in fixed deposit in the name of B. There should, be some direct nexus between the conclusion of fact arrived at by the authority concerned and the primary facts upon which that conclusion is based.*

Conclusion :

*Merely because the surety's explanation regarding source of deposit held by him was found false, it cannot be held that the principal debtor (firm) which operated an overdraft account against the security of such deposit owned the money.*

2.9. In another case, in COMMISSIONER OF INCOME TAX vs. U.M. SHAH, PROPRIETOR, SHRENIK TRADING CO. 90 ITR 396 (Bom.), the Hon'ble jurisdictional High Court held as under:-

Held :

*The Tribunal took the view that upon the material or evidence which had been produced by the assessee before the ITO, and it was over-whelming and clinching material, the only conclusion which the ITO could come to was that the loans were genuine loans. The Tribunal set forth these circumstances which can be only enumerates to show how their conclusion is only a pure finding of fact. The Tribunal found that the following circumstances had been established :*

*(1) That all the hundi loans taken by the assessee were through crossed cheques which had passed through recognized banks.*

*(2) That those hundi loans were obtained through a broker whose name had been disclosed, namely, M & Co.*

*(3) That the brokerage was paid to this broker through a crossed cheque which had also passed through a bank.*

(4) That the interest on the loans was also paid through the respective bankers by cheques.

(5) That the assessee had given the complete names and addresses of all the bankers who had advanced moneys to him and the amounts borrowed from them. All these bankers were themselves income-tax assesseees and the present assessee had also given their G.I.R. numbers as recorded in the IT Office.

(6) Summonses to those hundi bankers as also the brokers were duly served.

(7) Those bankers had submitted confirmatory letters before the ITO confirming having made the advances to the assessee.

Now the conclusion which the Tribunal reached was that upon this material there was absolutely no suspicion or doubt regarding these loans and that they were perfectly genuine and could not be held to be the undisclosed income of the assessee. This finding given by the Tribunal was a pure finding of fact. The Tribunal also remarked that the ITO had not brought on record any evidence to show that the evidence which the assessee had adduced was incorrect or untrue in any manner. That again shows that the finding arrived at by the Tribunal was based purely upon appreciation of evidence and that no question of law arises out of that finding.

Conclusion :

Tribunal upon appreciation of evidence taking the view that upon the material or evidence which had been produced by the assessee before the ITO, and it was overwhelming and clinching material, the only conclusion which the ITO could come to was that the loans were genuine loans, no referable question of law arose.

2.10. Likewise, Hon'ble Apex Court in COMMISSIONER OF INCOME TAX vs. BEDI & CO. PVT. LTD. 230 ITR 580 (SC) observed as under:-

Held :

*There cannot be any doubt that High Court will not address itself to recording findings of facts unless the subject-matter of the question referred to it by the Tribunal, either under sub-s. (1) or sub-s. (2) of s. 256, relates to the perversity of the*

*findings arrived at by the Tribunal. That sort of question has to be distinguished from a mixed question of facts and law, which also requires consideration and discussion of facts but does not warrant returning findings of facts inconsistent with the findings recorded by the Tribunal while giving its opinion on the question referred to the High Court. In answering the question, in this case, the High Court had to deal with various facts on record to determine whether the amount in question was loan or income. If such discussion of facts has led to arriving at the conclusion that the amount was loan but not income, it cannot be urged that the High Court disturbed the finding of fact recorded by the Tribunal. Here the Tribunal did not find any material to record specific finding that the amount in question is in the nature of commission paid by P to the assessee; it took note of the fact that the loan was advanced by agreement dt. 15th Nov., 1958 and that the Reserve Bank of India had accorded permission for obtaining the loan. The High Court in regard to the loan agreement observed that the agreement provided that the amount would be utilised for purposes of purchasing shares in the paper mills and that the shares were accordingly purchased and they were treated as belonging to the assessee-company. The High Court also referred to a letter of the foreign creditor addressed to the ITO in November, 1970 in response to his query letter and opined that the foreign collaborator maintained that the transaction was loan as late as in November, 1970. It also noticed the reasoning of the Revenue as reflected in the orders of the ITO and the AAC. The High Court is also justified in its comment that without recording any finding that the amount was commission or business receipt, the Tribunal was not justified in coming to the conclusion that it could be assessed as income. The High Court has rightly held that the circumstances taken singly or cumulative did not justify the conclusion that the amount was not received as loan as it purported to be but was anything in the nature of commission or any receipt of business. In arriving at the conclusion to which it did, it was necessary for the High Court to refer to the facts and discuss them to answer the mixed question of facts and law and that is what the High Court had done. The facts on record apparently indicate that the transaction was one of loan. The circumstances relied upon by the Revenue, namely, that the loan had been advanced without security, that the loan had not been repaid and no interest on the loan was paid by the assessee and that the agreement of loan was executed contemporaneously with other two agreements with regard to supply of machine and construction of building for the paper mill cannot, without any further material, lead to the inference that the amount was not loan but business income. It appears that the last mentioned circumstance supports the plea of the assessee that the said amount was received as loan. For the aforementioned reasons there is no illegality in the judgment of the High Court under*

*appeal.—Bedi & Co. Pvt. Ltd. vs. CIT (1983) 144 ITR 352 (Kar)*  
**affirmed**

**(Paras 5 & 6)**

Conclusion :

*Amount in question received by the assessee from a foreign creditor was loan and not commission or business income; facts that loan was advanced without any security, it was not repaid and no interest was paid, cannot without any further material, lead to inference that the amount was not loan but business income.*

***Reference—Finding of facts—Interference by Court—High Court will not address itself to recording findings of facts unless the subject-matter of the question referred to it by the Tribunal relates to the perversity of the findings arrived at by the Tribunal—That sort of question has to be distinguished from a mixed question of facts and law, which also requires consideration and discussion of facts but does not warrant returning findings of facts inconsistent with the findings recorded by the Tribunal while giving its opinion on the question referred to the High Court—In the present case, High Court rightly held that the circumstances taken singly or cumulative did not justify the conclusion that the amount was not received as loan as it purported to be but was anything in the nature of commission or any receipt of business—High Court could not be said to have recorded its own findings***

Conclusion :

*High Court rightly held that the circumstances taken singly or cumulative did not justify the conclusion that the amount was not received as loan as it purported to be but was anything in the nature of commission or any receipt of business; and it could not be said to have recorded its own findings.*

2.11. In the case of CIT vs Dr. M.K. E. Menon (2001) 248 ITR 310 (Bom.) held that the Assessing Officer was not right in applying the peak income of the later period to the entire block period of 1986 to 1996 for estimating the undisclosed income. The relevant portion from the order is reproduced hereunder for ready reference:-

*"6. The assessee is a general physician. He is on the panel of the embassies of Saudi Arabia, Qatar and Kuwait. He has a clinic, where the candidates going abroad are registered for medical check-up and then it is his duty to issue fitness certificates. The registration books, which were seized, related to the period November, 1993, onwards. During the course of the search operation it was noticed that the cash book of the assessee was prepared on the basis of the cash deposits in bank and on the basis of paying-in-slips. When the cash book was compared with the registration book, it was noticed that the number of candidates reflected in the cash book and the corresponding fees received were not fully reflected in the cash book. However, in the return of the income filed for the block period, the amount of undisclosed income offered for taxation has been given both for the pre-November, 1993 and post-November, 1993. The question before this Court briefly on the facts which has been raised is whether the AO was right in estimating the undisclosed income by applying the post-1993 weighted average rate of income to the period 1983 upto November, 1993. In this connection it is stated that the assessee was registered as a panel doctor for Saudi Consulate in 1984. In 1986 and 1991, he was registered as a panel doctor for Qatar and Kuwait Consulates, respectively. The case of the assessee before the Tribunal was that during the earlier period of his practice the work relating to the medical screening of candidates for the Gulf countries was less as compared to the work which he got after November, 1993. Moreover, the assessee contended before the Tribunal that the Gulf war in 1991 also adversely affected his income. On facts the Tribunal found that the assessee's income under the above block period increased from November, 1993 onwards and, therefore, the AO was not right in applying the peak income of post-November, 1993 period to the entire period of the block assessment commencing from 1st April, 1986 to 11th Dec., 1996. We agree with the finding of the fact recorded by the Tribunal. While estimating the undisclosed income under Chapter XIV-B, the AO cannot apply a rule of thumb. The AO cannot estimate the undisclosed income on an arbitrary basis. We cannot lose sight of the fact that the assessee is a professional. It is highly improbable that his professional income remained constant from 1983-84 (when he was put on the panel) right upto 1996. It is highly improbable that the fees which he was charging in 1993 were the same also during the period 1984 upto November, 1993. We agree with the contention advanced on behalf of the Department that in matters under Chapter XIV-B the AO is required to estimate the undisclosed income. We agree with the contention of the Department that this estimation involves guess work. However, the AO under Chapter XIV-B cannot act arbitrarily, while estimating the undisclosed income. In the present case, the AO has not*

considered the adverse impact of the Gulf war. In the present matter the AO has not considered the fact that the fees of the professional in ordinary course could not have remained static for the entire period commencing from 1st April, 1986 to 11th Dec., 1996. The AO has also not considered that the assessee used to take a deposit of a fixed amount from each candidate. That on screening, if the assessee found the candidate to be unfit he used to retain Rs. 100 and return the balance amount. It is pointed out to us that if on preliminary examination a candidate was suffering from a serious ailment then there was no necessity of the candidate undergoing further tests and in which event the assessee used to retain Rs. 100 and return the balance amount. None of the explanations have been considered by the AO and therefore, the Tribunal held that the estimation of income by the AO was without any evidence/basis. This is a pure finding of fact. We also agree with the said finding.

**7. Before concluding we may mention that in all matters of block assessment, the Department heavily relies upon the judgment of the Supreme Court in the case of CST vs. H.M. Esufali H.M. Abdulali 1973 CTR (SC) 317 : (1973) 90 ITR 271 (SC). That was a case in which unreported sales were detected for a period of 19 days in a year. The AO estimated the turnover for the entire period of one year on the basis of the unreported sales for the period of 19 days. The question that arose before the Supreme Court is as to whether the AO was right in doing so. It was held by the apex Court that in a matter involving unreported sales, the AO has to proceed on the basis of estimation which involves some amount of guess work. The apex Court, accordingly, upheld the order of the AO in estimating the turnover on the basis of the unreported sales for a shorter period. However, in the present matter, we are concerned with the block assessment of ten years. Ultimately, the said judgment of the Supreme Court must be seen in the context of the facts of each case. In the present matter, the assessee is a professional. It is highly improbable that the rate of the fees charged by a professional in 1983 would remain static for the entire block period of 10 years. The proportionate amount of refund also could not have remained static for the entire period of ten years. The assessee further pointed out that during the Gulf war the number of persons who went to the Gulf countries stood substantially reduced. These facts should have been considered by the Department. On the other hand, in the present matter, the Department has applied the peak income rate of post-1993 period to the entire block period commencing from 1st April, 1986 up to**

**11th Dec., 1996. Hence, the Tribunal was right in coming to the conclusion that an arbitrary method has been adopted by the AO in estimating the income of the assessee under Chapter XIV-B.”**

2.12. It is noticed that while coming to a particular conclusion, the Hon'ble jurisdictional High Court distinguished the decision from Hon'ble Apex Court in CST vs H.M. Esufali H.M. Abdulali (1973) 90 ITR 271 (SC) and the Tribunal was held to be right in coming to conclusion that an arbitrary method has been adopted by the Assessing Officer in estimating the income of the assessee. Identical is the situation in the present appeal before us, as mentioned earlier, the ld. Assessing Officer made addition arbitrarily on presumptive basis that too without bringing any evidence on record. Likewise, in the case of Mehta Parikh & Company vs CIT (1956) 30 ITR 181(SC). The relevant portion from the aforesaid order is reproduced hereunder for ready reference and analysis:-

*“8. Both the ITO and the AAC discounted this suggestion of the appellants by holding that it was impossible that the appellants had on hand on 12th Jan., 1946, the 61 high denomination currency notes of Rs. 1,000 each, included in their cash balance of Rs. 69,891-2-6. The calculations, which they made involved taking into account all payments received by the appellants from and after 2nd Jan., 1946, which were either multiples of Rs. 1,000 or were over Rs. 1,000. There was a cash balance of Rs. 18,395-6-6 on hand on 2nd Jan., 1946, which could have accounted for such notes. The appellants received thereafter as shown in their cash book several sums of monies of monies aggregating to over Rs. 45,000 in multiples of Rs. 1,000 or sums over Rs. 1,000, which could account for 45 other notes of that high denomination, thus making up 63 currency notes of the high denomination of Rs. 1,000 and these 61 currency notes of Rs. 1,000 each, which the appellants encashed on 18th Jan.,*

1946, could as well have been in their custody on 12th Jan., 1946. This was, however, considered impossible by both ITO and the AAC as they could not consider it within the bounds of possibility that each and every payment received by the appellants after 2nd Jan., 1946, in multiples of Rs. 1,000 or over Rs. 1,000 was received by the appellants in high denomination notes of Rs. 1,000 each. It was by reason of their visualisation of such an impossibility that they negated the appellants' contention.

**It has to be noted, however, that beyond these calculations of figures, no further scrutiny was made by the ITO or the AAC of the entries in the cash book of the appellants. The cash book of the appellants was accepted and the entries therein were not challenged. No further documents or vouchers in relation to those entries were called for, nor was the presence of the deponents of the three affidavits considered necessary by either party. The appellants took it that the affidavits of these parties were enough and neither the AAC, nor the ITO, who was present at the hearing of the appeal before the AAC, considered it necessary to call for them in order to cross-examine them with reference to the statements made by them in their affidavits. Under these circumstances, it was not open to the Revenue to challenge the correctness of the cash entries or the statements made by those deponents in their affidavits."**

2.13. In another case, Hon'ble Delhi High Court in CIT vs Aero Club (2011) 336 ITR 400 (Del.) held as under:-

**"21.** Thus, even assuming for the sake of argument that the assessee's P&L a/c was rightly discarded by the AO, it is for this Court to examine whether a rational basis was adopted by the AO. The answer is our opinion must be an emphatic no. In our opinion, the CIT(A) and the Tribunal rightly set aside the "best judgment" assessment of the AO on the ground that the AO had "not brought on record any comparable case wherein the net profit declared by a taxpayer in the similar business was higher than the one declared by the assessee." We also concur with the findings of the Tribunal that the profit margins of a taxpayer as declared by him, could be varied and disturbed only if the profit margins in the case of other assessee engaged in similar business are higher. In the instant case, the assessee has brought on record evidence that in the case of a company having similar business, the declared profits were in fact lower than the profits declared by the assessee. The AO in his remand report was also unable to

*comment on the comparable case of M/s Bata India Ltd. and Aero Traders relied upon by the assessee. In the circumstances, we are of the view that the Tribunal rightly held that the net profit as declared by the assessee was not required to be disturbed."*

During hearing, the ld. DR relied upon the decision from Hon'ble Apex Court in CST vs H.M. Esufali H.M. Abdulali (1973) 90 ITR 271 (SC), we find that this case has been deliberated upon in various cases and was distinguished by Hon'ble jurisdictional High Court and even by Delhi High Court in various cases including some of the them are discussed above like CIT vs Aero Club by Hon'ble Delhi High Court and in CIT vs Dr. M.K.E. Menon by Hon'ble jurisdictional High Court (supra). Considering the totality of facts and the circumstances and various judicial pronouncements, we delete the addition made by the Assessing Officer arbitrarily and on presumptive basis. The appeal of the assessee is allowed.

Finally the appeal of the assessee is allowed.

This Order was pronounced in the open court in the presence of ld. representatives from both sides at the conclusion of the hearing on 24/01/2017.

**Sd/-**

(Ramit Kochar)

लेखा सदस्य / ACCOUNTANT MEMBER

**Sd/-**

(Joginder Singh)

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 31/01/2017

*Shekhar, P.S./नि.स.*

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant (Respective assessee)
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai,
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,  
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

**आदेशानुसार/ BY ORDER,**

सत्यापित प्रति //True Copy//

**उप/सहायक पंजीकार (Dy./Asstt. Registrar)****आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**