

IN THE INCOME TAX APPELLATE TRIBUNAL
“B” BENCH : BANGALORE

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER AND
SHRI S. JAYARAMAN, ACCOUNTANT MEMBER

ITA Nos. 220 to 222/Bang/2014
Assessment Years: 2008-09 to 2010-11

Shri Mallanagouda S. Sankagoudashani, No.222, 2nd Floor, Bhavani Arcade, Near Basav Vana, N.C.M., Hubli – 580 029. PAN: AEUPS 7783Q	Vs.	The Deputy Commissioner of Income Tax, Circle 1(1), Hubli.
APPELLANT		RESPONDENT

ITA Nos. 292 to 294/Bang/2014
Assessment Years: 2008-09 to 2010-11

The Assistant Commissioner of Income Tax, Circle 1(1), Hubli.	Vs.	Shri Mallanagouda S. Sankagoudashani, No.222, 2nd Floor, Bhavani Arcade, Near Basav Vana, N.C.M., Hubli – 580 029. PAN: AEUPS 7783Q
APPELLANT		RESPONDENT

Assessee by	:	Shri Ashok Kulkarni, Advocate
Revenue by	:	Shri G. Kamaladhar, Standing counsel

Date of hearing	:	02.03.2017
Date of Pronouncement	:	05.05.2017

ORDER

Per Bench

These three set of cross appeals are directed against the three separate orders of the CIT(A) for the assessment years 2008-09 to 2010-11. For the assessment year 2008-09 the assessee has raised the following grounds:

1. The order of the CIT(A) is opposed to law and facts of the case.
2. The assumption of jurisdiction u/s. 147 and the issue of notice u/s. 148 are not in accordance with law and therefore the assessment is liable to be annulled.
3. Assuming without admitting that assumption of jurisdiction u/s.147 was proper on the basis of the recording u/s. 148(2) still the order of assessment is invalid because of the terms of the first proviso to section 147 r/w. explanation 3, inasmuch as no income has been brought to tax in respect of contracts on reassessment and the reopening had been done in the light of 148(2) on the premise that contract income had escaped assessment and further income from sources other than contracts as have been assessed in the impugned order is not traceable to any issue coming to the notice subsequent to the issue of notice u/s. 148.
4. Having regard to the prevailing rate of gross profit in this line of business as seen from the Appellate Order itself, the adoption of 9% is too high.

5. The addition on account of cancellation of National Savings Certificate in a sum of Rs.1,21,882/- is not in accordance with law and against the facts, for they represent realization of earlier investments made by the assessee in such certificates not being income.

6. A sum of Rs.60,714/- called miscellaneous receipts is not liable to tax and the explanation offered in this regard ought to have been accepted.

7. The explanation offered in respect of unexplained expenditure of Rs.54,74,482/- should have been accepted and no part of such addition could be made. Even otherwise, the sums ultimately brought to tax appropriately on the basis of entries in the Diary would be available to the extent of expenditure incurred from day to day and due set off should have been given.

8. The invoking of the provisions of Section 40A(3) bringing to tax a sum of Rs.1,41,48,040/- is unjustified because it has not been shown that any part of the payments as reflected in the diary represent expenditure claimed as a deduction in computing income under either the head "business" or "other sources". Every payment per se is not liable to action u/s.40A(3) unless it falls within the realm of claimed expenditure with respect to the above two heads.

9. Without prejudice, and in the alternative, anyway in respect of the purchases and sales of contract material accepted by the Commissioner as the result of dealing outside the books where gross profit has been estimated as held by courts 40A(3) is inapplicable in relation to the expenditure connected there with.

10. The Commissioner ought to have applied his mind to the interest levied u/s. 234(B) especially when there was an earlier communication u/s. 143(1) as regards quantification and interest should have been directed to be quantified from the date of the

communication u/s. 143(1) and not as has been done in the impugned order.

11. The appellant craves for leave to add, to delete from, or amend the grounds of appeal.

RELIEFS CLAIMED

12. For these and other reasons that may be adduced at the time of hearing it is prayed that the order of assessment be annulled or in the alternative without prejudice the following reliefs may be granted:

- a) The adoption of gross profit @ 9% by CIT(A) be suitably reduced.
- b) The addition of Rs.1,21,882/- may be deleted
- c) The addition of Rs. 60,714/- may be deleted
- d) The addition of Rs.54,74,482/- may be deleted
- e) The addition of Rs.1,41,48,040/- u/s. 40A(3) may be deleted
- f) The interest u/s. 234(B) may be directed to be levied as per law and re-quantified accordingly.

2. Ground no. 1 is general in nature and does not require any specific adjudication.

3. Ground nos. 2 and 3 are regarding the validity of reassessment. We have heard the Id. AR as well as the Id. DR and considered the relevant material on record. An identical issue has been considered by us for the assessment year 2007-08 vide order dated 28.04.2017 in ITA Nos. 219 & 291/Bang/2014 wherein we have discussed and adjudicated this issue as under.

"3. Ground nos. 2 and 3 are regarding validity of reopening. There was a survey u/s. 133A of the Act in the case of the assessee on 01.03.2011. During the course of survey certain incriminating documents, diaries were found and impounded. On verification of entries made in the impounded diaries it was observed that the receipts relating to contract business was under stated in the return of income. Hence the AO proposed to reopen the assessment by issuing a notice u/s. 148 on 20.10.2011. In response to notice u/s. 148 the assessee filed a letter dated 21.11.2011 stating that the return of income filed on 30.09.2009 may be treated as return filed in response to the notice u/s. 148. The AO completed the assessment u/s. 143(3) r.w.s. 147 on 19.03.2013 thereby making various additions on account of receipts recorded in the diary as well as unexplained receipts. The assessee challenged the action of the AO before the CIT(A) including the validity of reopening. The CIT(A) rejected the objection of the assessee and upheld the reopening of assessment u/s. 147.

4. Before us the Id. AR of the assessee has submitted that the alleged item of income for escapement of which the assessment was reopened were not brought to tax by the Assessing Officer in the impugned assessment order. Therefore it is submitted that the very exercise of reopening of the assessment is rendered infructuous and unsustainable in law. He has further contended that when the Assessing Officer has not made any addition on the issue for which the assessment was reopened to brought to tax then no addition can be made in the reassessment proceedings.

In support of his contention he has relied upon the decision of Hon'ble Bombay High Court in case of CIT Vs Jet Airways (I) Ltd. (331 ITR 236) and submitted that when the AO has formed a reason to believe that income has escaped assessment and has issued a notice u/s. 148 on certain specific issues however, if after issuing notice u/s. 148 he accepted the contention of the assessee and holds that the income which he has initially formed a reason to believe had escaped assessment, has as a matter of fact not escaped assessment it was not open to him to assess or reassess any other income which may have escaped assessment but which did not form the subject matter of notice u/s. 148. Thus, the Id. AR has contended when the AO has not assessed any income on the issue which was subject matter of notice u/s. 148 then it is not permissible to assess or reassess any other income not subject matter of notice u/s. 148. He has also relied upon the decision of 15/04/2015 of coordinate bench of this Tribunal in case of M/s. A.M. Constructions Vs DCIT in ITA No. 177/Bang/2014 and submitted that the coordinate bench has decided an identical issue in favour of the assessee by following the decision of Hon'ble Bombay High Court in case of CIT Vs Jet Airways (I) Ltd. (supra).

5. On the other hand, the Id. DR has relied upon the decision of Hon'ble jurisdictional High Court in case of N. Govindaraju Vs ITO (377 ITR 243) and submitted that the Hon'ble High Court has held that if the notice issued u/s. 148 was found to be valid then the foundation remains and the proceedings on the basis of such notice can go on. It becomes the duty of the AO to bring to tax the entire income including any other income which may have escaped assessment and come to his notice during the course of proceedings initiated u/s. 147 of the Act. Thus, the Id. DR has submitted that in view of the decision of Hon'ble jurisdictional High Court the reassessment cannot be challenged on this ground.

6. We have considered the rival submissions as well as relevant material on record. The only objection raised by the assessee against the validity of reassessment is that when the AO has not made an addition in respect of the item of income on which the assessment was reopened than the other addition in the reassessment is not sustainable. At the outset, we note that though the assessee has relied upon the decision of Hon'ble Bombay High court in case of CIT Vs Jet Airways (I) Ltd. (supra) however the Hon'ble jurisdictional High Court in case of N. Govindaraju Vs ITO (supra) while dealing with an identical issue has held in para 41 to 44 as under.

“41. Considering the provision of section 147 as well as its Explanation 3, and also keeping in view that section 147 is for the benefit of the Revenue and not the assessee and is aimed at garnering the escaped income of the assessee [viz.

Sun Engg. (supra)] and also keeping in view that it is the constitutional obligation of every assessee to disclose his total income on which it is to pay tax, we are of the clear opinion that the two parts of section 147 (one relating to 'such income' and the other to 'any other income') are to be read independently. The phrase 'such income' used in the first part of section 147 is with regard to which reasons have been recorded under section 148(2) of the Act, and the phrase 'any other income' used in the second part of the section is with regard to where no reasons have been recorded before issuing notice and has come to the notice of the Assessing Officer subsequently during the course of the proceedings, which can be assessed independent of the first part, even when no addition can be made with regard to 'such income', but the notice on the basis of which proceedings have commenced, is found to be valid.

42. *In the end it was vehemently argued by the learned counsel for the appellant that the reason to be given under sub-section (2) of section 148 would be the very foundation of the issuance of notice and if it is false or baseless, then everything goes and the structure erected on such foundation would crumble.*

43. *It is true that if the foundation goes, then the structure cannot remain. Meaning thereby, if notice has no sufficient reason or is invalid, no proceedings can be initiated. But the same can be checked at the initial stage by challenging the notice. If the notice is challenged and found to be valid, or where the notice, is not at all challenged, then in either case it cannot be said that notice is invalid. As such, if the notice is valid, then the foundation remains and the proceedings on the basis of such notice can go on. We may only reiterate here that once the proceedings have been initiated on a valid notice, it becomes the duty of the Assessing Officer to levy tax on the entire income (including 'any other income') which may have escaped assessment and comes to his notice during the course of the proceedings initiated under section 147 of the Act.*

44. *In view of the aforesaid, we answer the first two substantial questions of law in favour of the Revenue and against the assessee."*

Since this issue is now covered by the decision of Hon'ble jurisdictional High Court (supra) which is a binding precedent for us therefore we decide this issue against the assessee. Consequently the ground nos. 2 and 3 of the assessee's appeal are dismissed."

Following the earlier order of the Tribunal in assessee's own case this issue is decided against the assessee.

4. Ground nos. 4 and 7 are regarding the estimation of income by applying the GP at 9% in respect of receipt from sale of material. We have heard the ld. AR as well as ld. DR and considered the relevant material on record. This issue is common to the issue for the assessment year 2007-08 wherein we have dealt with this issue vide order dated 28.04.2017 in ITA Nos. 219 & 291/Bang/2014 as under.

"12.Ground no. 7 is regarding the adoption of 9% Gross Profit in respect of sale of material. The AO made an addition of Rs. 51,08,557/- as receipts recorded in the impounded diaries which are not reflected in the regular books of account. The assessee explained before the AO that the amount was received towards sale of materials. Since the assessee did not furnish the details and supporting documents to prove that the said receipts was received towards sale of material the AO has made an addition of the entire amount of Rs. 51,08,557/-. The assessee challenged the action of the AO before the CIT(A) and contended that the receipts shown in the diary were towards sale of material for civil contract work made outside books which was also explained by the assessee that the corresponding payments made towards purchase of similar material was also recorded in the diary and therefore the entries aggregating to Rs. 1,42,08,990/- are representing both in the diary and in the regular books with identity in names, dates and value total amounting to Rs. 63,03,554/-. Thus the assessee contended that this item of Rs. 63,03,554/- appears in the regular books of account which was left out by the AO while making the addition. The CIT(A) after considering the relevant record as well as submissions of the assessee has directed the AO to take average gross profit at 9% on total sale of material including Jelly and therefore the income has to be computed accordingly. Thus, the CIT(A) has granted substantial relief by restricting the addition only to the gross profit on the sale of material instead of the entire amount added by the AO.

13. Before us the Id. AR of the assessee has submitted that the CIT(A) after taking into consideration the GP ratio on various materials suppliers has directed the AO to take the average GP at 9%. However even if the instances as taken by the CIT(A) are considered the average GP of the comparable parties comes to less than 6% whereas the CIT(A) has arbitrarily adopted the GP at 9%. The Id. AR has further submitted that an identical issue has been considered by this Tribunal in assessee's own case for the assessment year 2006-07 vide order dated 30.11.2015 in ITA No. 904/Bang/2015. Thus the Id. AR has submitted that the average GP should have been taken at 5.5% instead of 9% taken by the CIT(A).

14. On the other hand, the Id. DR has relied upon the order of the AO and submitted that when the assessee has failed to explain the details and particulars of the parties to whom the alleged material were sold then the AO is justified in making the addition of the entire amount.

15. We have considered the rival submissions as well as relevant material on record. We find from the entries in the diary that the receipts as well as payments were recorded simultaneously at the same page of the diary and therefore it is clear that these receipts and payments are representing the purchases and sale of the material. The AO has taken only the receipt part of the diary entries and ignored the payment part. The CIT(A) after considering the relevant record found that these receipts are representing the sale of material for construction work like steel, cement etc and therefore the CIT(A) has asked the assessee to furnish the GP details from the local market which were furnished by the assessee as reproduced by the CIT(A) at page 27 of the impugned order as under.

SI No.	Name Of The Dealer	AY	GP Ratio
1.	Rukmini Solar Systems - Cement dealer	2007-08	5.99%
2.	Rukmini Solar Systems - Cement Dealer	2008-09	6.79%
3.	Rukminin Solar Systems - Cement dealer	2010-11	2.43%
4.	Shree Shakti Enterprises - Cement Dealer	2007-08	4.36%
5.	Shree Shakti Enterprises - Cement Dealer	2008-09	3.33%
6.	Shree Shakti Enterprises - Cement Dealer	2009-10	2.57%
7.	Shree Shakti Enterprises - Cement Dealer	2010-11	2.82%
8.	Shree Shakti Enterprises - Cement Dealer	2011-12	5.01%
9.	Shree Shakti Steels - Steel Dealer	2007-08	7.56%
10.	Shree Shakti Steels - Steel Dealer	2008-09	8.92%
11.	Shree Shakti Steels - Steel Dealer	2009-10	5.25%
12.	Shree Shakti Steels - Steel Dealer	2010-11	6.58%
13.	Shree Shakti Steels - Steel Dealer	2011-12	6.08%

16. Though the CIT(A) has considered the GP details furnished by the assessee however instead of taking the average of these GP details the CIT(A) has adopted the GP at 9%. We find that the said adoption of 9% of GP is without any basis and rather contrary to the material on record / evidence. We further note that the coordinate bench of this Tribunal in assessee's own case for the assessment year 2006-07 vide order dated 30.11.2015 while dealing an identical issue has held in para 11 to 14 as under.

"11. Before the CIT(Appeals), the assessee relied on the order of the CIT(Appeals) for the A.Ys. 2007-08 to 2011-12 and contended that a suitable rate of profit towards sale of material has to be considered and not whole of the receipts. The assessee furnished GP details from the local market which is as follows:-

Sl No.	Name Of The Dealer	AY	GP Ratio
1.	Rukmini Solar Systems - Cement dealer	2007-08	5.99%
2.	Rukmini Solar Systems - Cement Dealer	2008-09	6.79%
3.	Rukminin Solar Systems - Cement dealer	2010-11	2.43%
4.	Shree Shakti Enterprises - Cement Dealer	2007-08	4.36%
5.	Shree Shakti Enterprises - Cement Dealer	2008-09	3.33%
6.	Shree Shakti Enterprises - Cement Dealer	2009-10	2.57%
7.	Shree Shakti Enterprises - Cement Dealer	2010-11	2.82%
8.	Shree Shakti Enterprises - Cement Dealer	2011-12	5.01%
9.	Shree Shakti Steels - Steel Dealer	2007-08	7.56%
10.	Shree Shakti Steels - Steel Dealer	2008-09	8.92%
11.	Shree Shakti Steels - Steel Dealer	2009-10	5.25%
12.	Shree Shakti Steels - Steel Dealer	2010-11	6.58%
13.	Shree Shakti Steels - Steel Dealer	2011-12	6.08%

12. Average Gross Profit for Steel was given at (6.08 to 7.56%), for Cement the Average Gross Profit was given at (3.33 to 5.09%) and for Jelly no average Gross Profit was given. The CIT(A) directed the AO to take average Gross Profit at 9% on total sale of materials including Jelly and compute income accordingly. Thus, this issue was partly allowed by the CIT(A).

13. Aggrieved, the assessee is in appeal before us.

14. We have heard both the parties. We find from the GP details from the local market furnished before the CIT(Appeals) that average GP is 5.5% approximately and hence we are of the opinion that the CIT(A) was not justified in adopting GP at 9% on total sale of materials including jelly. Hence, the AO is directed to work out the GP rate at 5.5% on sale of materials instead of 9% directed by the CIT(A)."

17. In view of the above facts and circumstances of the case as well as the decision of the coordinate bench of this Tribunal in assessee's own case we direct the AO to work out the GP rate at 5.5% on sale of material instead of 9% directed by the CIT(A)."

In view of our finding on this issue for the assessment year 2007-08 this issue stands decided in favour of the assessee and against the revenue.

5. Ground no. 5 is regarding the addition on account of cancellation of NSC of Rs. 1,21,882/-. The assessee purchases NSC before presenting tenders form for government works (civil). A diary entry was found in respect of Rs. 1,21,882/- received on maturity of NSC and also on cancellation of NSC. The AO made an addition of the said amount. The assessee challenged the action of the AO before the CIT(A) but could not succeed. We have heard the ld. AR as well as ld. DR and considered the relevant material on record. At the outset, we note that an identical issue was considered by the coordinate bench of this Tribunal in assessee's own case for the assessment year 2006-07 vide order dated 30.11.2015 in ITA No. 904/Bang/2015 in para 20-23 as under.

"20. The AO was of the view that the assessee has not furnished the details of NSC and how the said investment is reflected in the books, also the said encashment of NSC has not been reflected as receipts in the regular books of account. As regards withdrawal of cash from ATM, the AO observed that the assessee has not explained how the said cash is reflected in the books. According to the AO, the assessee's explanation that there are sufficient withdrawals

was not convincing. Hence the AO assessed the said receipts of Rs. 10,006 as income from unexplained receipts.

21. Before the CIT(Appeals), the assessee reiterated the submissions made before the AO.

22. The CIT(Appeals) held that the assessee has not filed any details in support of his claim of NSC and depended only on ATM drawings and hence in the absence of details, he upheld the addition made by the AO.

23. We have heard both the parties. We are of the opinion that one more opportunity is to be afforded to the assessee to explain his case before the AO as it is stated that the assessee has sufficient withdrawals from his capital account and the source is explained. We therefore restore this issue to the file of the Assessing Officer for fresh examination after giving an opportunity of being heard to the assessee."

6. Following the earlier order of the Tribunal we set aside this issue to the record of the AO for fresh examination and adjudication in same terms of the earlier order dated 30.11.2015.

7. Ground no. 6 is regarding addition of Rs. 60,714/- on account of miscellaneous receipts. The AO has made an addition of Rs. 60,714/- as unexplained miscellaneous receipts based on the diary entry. The assessee challenged the order of the AO before the CIT(A) and contended that this amount of Rs. 60,714/- is not an income assessable to tax as these are the receipts which represents the withdrawal cash receipt on behalf of DDCA, refund of PWD tender corporation etc. The CIT(A) did not accept the explanation of the assessee and confirmed the addition made by the AO.

Before us the Id. AR of the assessee has submitted that out of Rs. 60,714/- a sum of Rs. 53,300/- is return of tender amount on account of unsuccessful bidding. The another sum of Rs. 5,000/- is collected by the assessee on behalf of DDCA. The assessee is president of the Association and in that capacity he has obliged to collect the cash payment from the members. Further a sum of Rs. 2,400/- is on account of encashment of DD. Thus the Id. AR has submitted that no part of this amount is a taxable income or element of income. On the other hand, the Id. DR has submitted that the assessee has not furnished any details or evidence in support of these receipts and further these receipts are not reflected in the regular books of account. Therefore the AO was justified in making the addition of the said amount.

8. We have considered the rival submissions as well as relevant material on record. The AO made an addition of Rs. 60,714/- based on the diary entries the details of which has been reproduced by the CIT(A) at page 20 of the impugned order as under:

22	04-Jun-07	2,400	Cash by DD
31	05-Jul-07	14	Ch of MI Kurkur
25	15-Jun-07	5,000	DDCA Gadag & ---
24	14-Jun-07	53,300	PWD Tender Corporation
		60,714	Total

9. As regards the amount of Rs. 5,000/- received on behalf of DDCA, an identical issue has been considered by us for the assessment year 2007-08 vide order dated 28.04.2017 in ITA Nos. 219&291/Bang/2014 as under.

“33. Ground no. 14 is regarding an addition of Rs. 27,748/- representing the amounts collected for and on behalf of Dharwad District Contractors Association. This amount was found recorded in the diary but not reflected in the books of account therefore the AO has made the addition of said amount of Rs. 27,748/-. The assessee challenged the action of the AO before the CIT(A) and explained that this amount represents the collection for and on behalf of Dharwad District Contractors Association (DDCA) however the CIT(A) was not impressed by the explanation of the assessee and held that the assessee has not filed the details with supporting evidence for incurring such expenditure.

34. Before us the ld. AR of the assessee has submitted that the entries in the diary clearly mention the cheques / cash are collected on behalf of the Association. He has referred to the diary entries and submitted that there is noting against each receipt that cheque by DDCA or cheques issued by other members for DDCA. Thus the ld. AR has submitted that this amount represents only the collection for and on behalf of the DDCA. The assessee being the president of the DDCA has collected this fund contributed by members of the Association therefore this amount cannot be treated as income of the assessee. On the other hand, the ld. DR has relied upon the orders of the authorities below and submitted that when the assessee has not produced any evidence then it was rightly added to the income of the assessee.

35. We have considered the rival submissions as well as relevant material on record. The AO has made the addition of this amount of Rs. 27,748/- on the basis of the diary entries. We find that the entries recorded in the diary also contains the narrations and explanation of nature of transaction. It is manifest from the noting against each entry that these are the receipts collected by the assessee on behalf of DDCA. The AO has not disputed these narrations in the diary. We also find

that the entries in the diaries are self-explanatory and therefore the nature of these entries cannot be disputed when the addition itself is based on the diary entries. The AO is not permitted to take only the amount of the diary entries by ignoring the other details. Therefore if the diary entry is the basis of addition then the entire details of the diary entry is to be taken into account. Accordingly in view of the fact that these diary entries are self-explanatory as collection for and on behalf of DDCA and the assessee being the president of DDCA has collected this amount on behalf of the Association the addition is not justified. Accordingly, the said addition is deleted.”

In view of our finding on this issue for the assessment year 2007-08 we decide this issue in favour of the assessee against the revenue.

10.The next entry is regarding Rs. 2,400/- and as per the description / noting in diary it is mentioned as cash by DD. The assessee has explained that this amount was received in respect of the encashment of DD. When the entry in the diary itself explains the source of encashment of DD then no other explanation or source was required to be proved that this amount was received by the assessee by encashing the DD which was for the purpose of business but could not be used and consequently was encashed by the assessee itself. Therefore it is not a receipt in the nature of income.

11.As regards the entry of Rs. 53,300/- it was written in the diary as receipt towards PWD Tender Corporation. The assessee explained that this amount was received by the assessee as refund on account of unsuccessful

bidding. Therefore this amount which was received due to unsuccessful bidding of tenders cannot be an income of the assessee. The next item is only Rs. 14 on account of cheque MI Kurkur. Except the said meager amount for which the assessee has furnished no explanation all other amounts found in the diary entry cannot be treated as income of the assessee. Accordingly the addition made by the AO to the extent of Rs. 60,700/- is deleted.

12. Ground nos. 8 and 9 are regarding disallowance made u/s. 40A(3). The AO has invoked the provisions of section 40A(3) of the IT Act to make an addition of Rs. 1,41,48,040/- which was found as the payment made by the assessee as per the diary entries. The CIT(A) has confirmed the disallowance / addition made by the AO on this account.

13. We have heard the ld. AR as well as ld. DR and considered the relevant material on record. At the outset we note that this was only the entries in the diary found and impounded in the course of survey action and therefore it was not a claim of expenditure in the books of accounts.

An identical issue has been considered by us for the assessment year 2007-08 vide order dated 28.04.2017 in ITA Nos. 219 & 291/Bang/2014 wherein we have discussed and adjudicated this issue as under.

"26. Ground nos. 11 and 12 are regarding the disallowance made u/s. 40A(3).

27. We have heard the Id. AR as well as Id. DR and considered the relevant material on record. At the outset, we note that an identical issue has been considered by the coordinate bench of this Tribunal in the assessee's own case for the assessment year 2006-07 vide order dated 30.11.2015 in para 24 to 29 as under.

"24. The next ground of appeal is regarding the addition of a sum of Rs.6,16,351 u/s. 40A(3). The AO observed from the details of expenses and party payment towards materials that assessee made cash payments to various parties exceeding Rs.20,000 in contravention of the provisions of section 40A(3). The aggregate of such payments worked out to Rs.30,81,756. The AO was of the view that the said payments are allowed to be set off against unexplained receipts and hence the same are required to be disallowed u/s. 40A(3). Hence disallowance of Rs.30,81,756 was made by the AO u/s. 40A(3). By the rectification order u/s. 154 dated 21.2.14, disallowance u/s. 40A(3) of Rs.30,81,756 was restricted to Rs.6,16,351 being 20% of the payment made in contravention of provisions of section 40A(3).

25. The CIT(A) upheld the addition made by the AO in the absence of details of cash payments to different parties and the circumstances under which the assessee made the cash payment in support of the assessee's claim.

26. The Id. counsel for the assessee reiterated the submissions made before the lower authorities that invoking of the provisions of section 40A(3) and the addition of Rs.6,16,351 is unjustified since it has not been shown that any part of the payments as reflected in the diary represents expenditure claimed as a deduction in computing income under the head of "business" or "other sources". It was submitted that every payment per se is not liable to action u/s. 40A(3) unless it falls within the realm of claimed expenditure with respect to the above two heads.

27. The Id. counsel for the assessee relied on the decision of the Hon'ble Allahabad High Court in the case of CIT v. Banwari Lal Banshidhar, 229 ITR 229 (All) at page 232. He also relied on the decision of the Hon'ble Andhra Pradesh High Court in the case of Indwell Constructions v. CIT, 232 ITR 776 (AP) wherein it was held as under:-

“... The question arises whether in such a case any deduction on account of purchases is at all allowed to the assessee, though it may be true that a gross profit rate of 15 per cent was fixed keeping in view all relevant facts including the purchases

made by the assessee. Inasmuch as we are of the view that no deduction as such having been allowed to the assessee on account of purchases, we hold that no question of any disallowance on account of purchase can be made in this case under section 40A(3)."

28. The Id. DR objected to the submission of the assessee stating that with respect to both contract and trading, estimate was u/s. 40A(3) and assessee's claim that sec. 40A(3) would be inapplicable can be restricted only to the trading portion, whose GP was determined at 9%, cannot be accepted. He argued that section 40A(3) would apply to the contract and trading receipts.

29. We have heard both the parties. We agree with the claim of assessee that once there has been an estimate, all the deductions are deemed to have been taken into account while making such estimate and hence no separate addition can be made. However, whether the estimate is only for trading part of the assessee's business or it is also towards contract part of the business is to be verified by the AO. In these circumstances, we deem it fit to set aside the issue to the file of the Assessing Officer with a direction to redo the assessment following the decision in the case of Indwell Constructions (supra)."

28. The Id. AR of the assessee has submitted that though the matter was set aside by the Tribunal to the record of the AO for reconsideration of the issue in the light of the decision of Hon'ble Andhra Pradesh High Court in the case of Indwell Constructions v. CIT, 232 ITR 776 (AP), however the latest decision of Madras High Court in case of CIT Vs Amman Steel and Allied Industries (377 ITR 568) is directly on the point. He has relied upon the said decision of Hon'ble Madras High Court. In view of the facts and circumstances of the case as well as the decision of the coordinate bench of the Tribunal we set aside this issue to the record of the AO with similar directions as given by the coordinate bench for the assessment year 2006-07. The AO is further directed to reconsider this issue by considering the order of the Tribunal as well as the decision of the Hon'ble Madras High Court in case of CIT Vs Amman Steel and Allied Industries (supra).

Accordingly by following the earlier order of this Tribunal we set aside this issue to the file of the AO with the direction to reconsider the same.

14. Ground no. 10 is regarding levy of interest u/s. 234B which is mandatory and consequential.

ITA No. 292/Bang/2014 Revenue's appeal for the assessment year

2008-09:-

15. The revenue has raised the following grounds.

- 1) The order of CIT(A) is opposed to law and facts of the case.
- 2) Whether in the circumstances and facts of the case and in law, the CIT(A) is right in holding that unexplained receipts of Rs. 54,93,725/-- represents sale of materials?
- 3) Whether on the circumstances and facts of the case and in law, the CIT(A) is right in holding that only GP at 9% is liable to tax when the said unexplained receipts of hand loans Rs.54,93,725/- are allowed to set off against unexplained expenditure?
- 4) Whether in the circumstances and facts of the case and in law, the CIT(A) is right in allowing set off of repayment of hand loans of Rs. 1,76,500/- against unexplained receipts of hand of Rs. 21,34,000/-.
- 5) Whether in the circumstances and facts of the case and in law, the CIT (A) is right in allowing relief on account of set off repayment of loans against unexplained receipts of hand loans when the said unexplained hand loan receipts are already considered for set off against unexplained expenditure?
- 6) Any other ground that may be taken during the appeal.
- 7) The appellant craves leave to add, alter, amend and delete any of the grounds.

16. Ground no. 1 is general in nature and does not require any specific adjudication.

17. Ground nos. 2 and 3 are common to the ground nos. 4 and 7 of the assessee's appeal. In view of our finding on this issue in assessee's appeal ground nos. 2 and 3 of the revenue's appeal stand dismissed.

18. Ground nos. 4 and 5 are regarding addition on account of hand loan and repayment of hand loan. We have heard the Id. DR as well as Id. AR and considered the relevant material on record. An identical issue has been considered by us in revenue's appeal for the assessment year 2007-08 vide order dated 28.04.2017 in ITA Nos. 219 & 291/Bang/2014 which we have adjudicated as under.

39. Ground nos. 4 and 5 are regarding the set off unexplained receipts of hand loan against the unexplained repayment of hand loan. The AO had made an addition of Rs. 4,12,435/- on account of unexplained hand loans. The assessee challenged the action of the AO before the CIT(A) and explained that the contract work of the assessee was undertaken at work sites which are in the interior and not easily accessible. Therefore to facilitate the engineers and staff at work site the requisite fund for incurring certain expenditure for the purpose of business, the head office remits the money. However since the engineers and staff at site cannot wait for the receipt of money from the head office they used to take local temporary hand loan from the known people by noting down their names and amounts to be repaid once the funds from the head office are received. The assessee explained before the CIT(A) that the names have been submitted to the AO from whom the hand loans were taken and subsequently repaid. These hand loans were used towards the business expenses incurred by the local staff and therefore this cannot be treated as income of assessee. The CIT(A) accepted the contention of the assessee and directed the AO to take the differential amount of Rs. 87,565/- instead of the total amount.

Thus the CIT(A) has allowed the set off the receipt and payment. Aggrieved by the order of the CIT(A) the revenue has filed this appeal.

40. Before us the Id. DR has contented that when the assessee has failed to produce any evidence that these hand loans are representing the unexplained expenditure and therefore it justify the adjustment against the repayment then the addition of the entire sum is warranted. He has relied upon the order of the AO. On the other hand, the Id. AR has submitted that the AO has ignored the fact that these hand loans are taken only for the purpose of business expenditure and therefore the repayment amount of hand loan has to be taken into consideration. He has further pointed out that for the assessment year 2006-07 the CIT(A) has decided this issue in favour of the assessee and the revenue has not challenged the order for the assessment year 2006-07.

41. Having considered the rival submissions as well as relevant material on record we find that the CIT(A) has dealt with this issue at page 34 of the impugned order as under.

I have gone through the facts of the case, contents of the assessment order and written submissions filed by the assessee. The transactions of Rs. 4,12,435/- the receipts of hand loans and Rs. 5,00,000/- repayment of hand loan is concerned, in the normal course of contract business at the site level which is located at remote places, site staff in case of emergency to make the labour payments adjust the funds from their own known neighbors in their individual capacity to mobilize, by means of taking hand loans and later repaying the same. In this connection transactions were made without involving assessee, however to have the control over the funds diary notings were made. These hand loans are running accounts being repayments have been made for the current year as well as for the earlier years. As the receipt is Rs. 4,12,435 and repayment is Rs. 5,00,000/- the difference amount to Rs. 87, 565/-. AO is directed to include the difference amount of Rs. 87, 565/- to the total income of the assessee, instead of both receipts and payments of Rs. 5,00,000/- and Rs. 4,12,435 respectively. Accordingly the tax has to be calculated. **Hence this ground of appeal is partly allowed.**

42. It is clear from the impugned order of the CIT(A) that the transaction of hand loan and repayment of hand loan was found recorded in the diary. Therefore once the facts recorded in the diary are not in dispute then the set off given by the CIT(A) is justified. We further find that for the assessment year 2006-07 this issue was decided in favour of the assessee and the revenue has not challenged the said order. Accordingly, in view of the above facts and circumstances of the case we do not find any error or illegality in the impugned order of the CIT(A) qua this issue.

In view of the finding for the assessment year 2007-08 these grounds of the revenue's appeal are dismissed.

19. For the assessment year 2009-10 the assessee has raised the following grounds.

1. The order of the CIT(A) is opposed to law and facts of the case.
2. The assumption of jurisdiction u/s. 147 and the issue of notice u/s. 148 are not in accordance with law and therefore the assessment is liable to be annulled.
3. Assuming without admitting that assumption of jurisdiction u/s.147 was proper on the basis of the recording u/s. 148(2) still the order of assessment is invalid because of the terms of the first proviso to section 147 r/w. explanation 3, inasmuch as no income has been brought to tax in respect of contracts on reassessment and the reopening had been done in the light of 148(2) on the premise that contract income had escaped assessment and further income from sources other than contracts as have been assessed in the impugned order is not traceable to any issue coming to the notice subsequent to the issue of notice u/s. 148.
4. Having regard to the prevailing rate of gross profit in this line of business as seen from the Appellate Order itself, the adoption of 9% is too high.
5. The addition on account of cancellation of National Savings Certificate in a sum of Rs.25,420/- is not in accordance with law and against the facts, for they represent realization of earlier investments made by the assessee in such certificates not being income.

6. A sum of Rs.79,607/- called miscellaneous receipts is not liable to tax and the explanation offered in this regard ought to have been accepted.
7. The invoking of the provisions of Section 40A(3) bringing to tax a sum of Rs.1,50,03,495/- is unjustified because it has not been shown that any part of the payments as reflected in the diary represent expenditure claimed as a deduction in computing income under either the head "business" or "other sources". Every payment per se is not liable to action u/s.40A(3) unless it falls within the realm of claimed expenditure with respect to the above two heads.
8. Without prejudice, and in the alternative, anyway in respect of the purchases and sales of contract material accepted by the Commissioner as the result of dealing outside the books where gross profit has been estimated as held by courts 40A(3) is inapplicable in relation to the expenditure connected there with.
9. The initial burden on the assessee with respect to the gifts of Rs. 12,41,000/- in the aggregate from his two brothers -in-law was discharged when relevant names with address, confirmatory letters and details of their agricultural holdings were provided to the Assessing Officer and it was for him to make enquiries to dislodge, if possible, the version of the assessee. This, having not been done, no part of the sum of Rs. 12,41,000/- could be brought to tax.

10. The Commissioner ought to have applied his mind to the interest levied u/s. 234(B) especially when there was an earlier communication u/s. 143(1) as regards quantification and interest should have been directed to be quantified from the date of the communication u/s. 143(1) and not as has been done in the impugned order.
11. The appellant craves for leave to add, to delete from, or amend the grounds of appeal.

RELIEFS CLAIMED

12. For these and other reasons that may be adduced at the time of hearing it is prayed that the order of assessment be annulled or in the alternative without prejudice the following reliefs may be granted:
- a) The adoption of gross profit @ 9% by CIT(A) be suitably reduced.
 - b) The addition of Rs.25,420/- may be deleted
 - c) The addition of Rs. 79,607/- may be deleted
 - d) The addition of Rs.1,50,03,495/- u/s. 40A(3) may be deleted
 - e) The addition of Rs.12,41,000/- may be deleted
 - f) The interest u/s. 234(B) may be directed to be levied as per law and re-quantified accordingly.

20. Ground no. 1 is general in nature and does not require any specific adjudication.

21. Ground nos. 2 and 3 are regarding the validity of reassessment. These grounds are common as for the assessment year 2008-09. In view of our finding on this issue raised in ground nos. 2 and 3 for the assessment year 2008-09 in the foregoing paras these grounds of the assessee's appeal are dismissed.

22. Ground no. 4 is regarding addition made on account of sale of material. An identical issue has been considered by us for the assessment year 2008-09 in ground no. 4 regarding addition confirmed by CIT(A) at GP rate of 9%. In view of the finding on this issue for the assessment year 2008-09 this issue is decided in favour of the assessee and against the revenue.

23. Ground no. 5 is regarding addition for cancellation of NSC of Rs. 25,420/-. We have heard the ld. AR as well as ld. DR and considered the relevant material on record. An identical issue has been considered for the assessment year 2008-09. In view of our finding for the assessment year 2008-09 on this issue we set aside this issue to the record of the AO for fresh examination and adjudication on same terms.

24. Ground no. 6 is regarding addition on account of miscellaneous receipts.

We have heard the ld. AR as well as ld. DR and considered the relevant material on record. The AO has made an addition of Rs. 79,607/- on account of miscellaneous receipts as found in the diary entries. The break-up of these receipts are given by the CIT(A) at page 20 of the impugned order as under.

3	29-Apr-08	23,321	cash by corp bank DDCA expn
19	25-Aug-08	10,000	Cash by syndicate bank BGM
29	13-Nov-08	3,800	KIADB Tend Corp...
30	13-Nov-08	6,000	Line of Credit
31	13-Nov-08	6,900	Appln Charges
32	13-Nov-08	200	DD cancellation amt
34	21-Nov-08	871	by cash vinayakkamat
40	20-Jan-09	2,265	Interest for
43	29-Jan-09	26,250	Cash by int.....
		79,607	Total

25. The items of the receipt regarding DDCA, KIADB tender corporation, DD cancellation are common to the assessment year 2008-09. Therefore in view of the finding on these receipts for the assessment year 2008-09, we delete the addition made by the AO in respect of these items. Though the assessee has contended that no part of these amount can be considered as

income in the hand of the assessee however in the absence of any explanation and further the narration entry in the diary suggest that some of the items are clearly in the nature of income such as the interest and line of credit. The said contention of the assessee can't be accepted. There is nothing in the diary entry to suggest or indicate that these are the receipts not in the nature of income. Therefore we sustain the addition in respect of the interest of Rs. 2,265/-, cash by interest of Rs. 26,250/-. The remaining items which are Rs. 10,000/- cash by Syndicate Bank, BGM, Rs. 6,000/- line of credit, Rs. 871 by cash vinayakkamat are set aside to the record of the AO for further verification and examination to find out the actual nature of these transactions whether the same can be treated as income of the assessee.

Accordingly, this ground of the assessee's appeal is partly allowed.

26. Ground nos. 7 and 8 are regarding disallowance made u/s. 40A(3). We have heard the ld. AR as well as ld. DR and considered the relevant material on record. These grounds are common as involved in the assessment year 2007-08 and 2008-09. In view of the finding on this issue for the assessment year 2008-09 in the forgoing para this issue is set aside to the record of the AO for fresh consideration on the same terms.

27. Ground no. 9 is regarding the gift received from relatives. The AO has made an addition of Rs. 12,41,000/- on account of gift received from brothers-in-law, brother of wife. We have heard the Id. AR as well as Id. DR and considered the relevant material on record. An identical issue was considered by us for the assessment year 2007-08 vide order dated 28.04.2017 in ITA Nos. 219 & 291/Bang/2014 while deciding the ground no. 13 of the assessee's appeal as under:

"29. Ground no. 13 is regarding the addition on account of gift received of Rs. 10,00,000/-. During the previous year relevant to the assessment year under consideration the assessee received the gift from Shri N.G. Patil of Rs. 5,00,000/- and Shri B.G. Patil of Rs. 5,00,000/-. The assessee explained that Shri N.G. Patil and Shri B.G. Patil are brothers-in-law of the assessee and therefore when the donors have confirmed the transaction of gift then no addition can be made in this respect. The AO did not accept the explanation of the assessee and made the addition of Rs. 10,00,000/-. The assessee challenged the action of the AO before the CIT(A) but could not succeed.

30. Before us the Id. AR of the assessee has submitted that the assessee filed the confirmation before the authorities below wherein the donors have confirmed the gifts in question. He has further submitted that the donors are relative of the assessee and the genuineness of the transaction cannot be doubted. These gifts in cash were made to the assessee who is sister's husband of the donors. The assessee has explained the source, credit worthiness of the donors as agriculture land holdings of the donors. The AO has straightway rejected the explanation of the assessee without examination of the credit worthiness of the donors.

31. On the other hand, the Id. DR has submitted that the assessee has not submitted any evidence to prove the genuineness of the gifts and the credit worthiness of the donors. Since the gifts are shown as received in cash

therefore the genuineness of the transaction is not proved. He has relied upon the orders of the authorities below.

32. We have considered the rival submissions as well as relevant material on record. The assessee has explained the transaction of gift by filing the confirmation from the donors placed at page 86 and 87 of the paper book. Both the donors are close relative of the assessee being the brothers of the wife of the assessee. We find that once the assessee has produced the confirmation letter from the donors then the further examination and investigation was required to be conducted by the AO. In this case the AO has not examined the donors regarding the genuineness of the gift and the credit worthiness of the donors. Accordingly, in the facts and circumstances of the case and in the case of justice we set aside this issue to the record of the AO for proper verification and investigation by examination of the donors on this issue. Needless to say the assessee be given appropriate opportunity of hearing."

In view of the finding for the assessment year 2007-08 we set aside this issue to the record of the AO with same directions.

ITA No. 293/Bang/2014 Revenue's appeal for the assessment year

2009-10:-

28.The revenue has raised the following grounds.

- 1) The order of CIT(A) is opposed to law and facts of the case.
- 2) Whether in the circumstances and facts of the case and in law, the CIT(A) is right in holding that unexplained receipts of Rs. 54,05,675/-- represents sale of materials?
- 3) Whether in the circumstances and facts of the case and in law, the CIT(A) is right in holding that only GP @ 9% is liable to tax when the said unexplained receipts of Rs.54,05,675/- are allowed to set off against unexplained expenditure? .
- 4) Whether in the circumstances and fact of the case and in law, the CIT(A) is right in allowing set off of unexplained repayment of hand loan of Rs. 30,08,000/- against the unexplained receipts of hand loans of Rs. 7,32,000/-.
- 5) Whether in the circumstances and facts of the case and in law, the CIT(A) is right in allowing relief on account of set off of repayment of loans against unexplained receipts of hand loans when the said unexplained hand loan receipts are already considered for set off against unexplained expenditure?
- 6) Any other ground that may be taken during the appeal.
- 7) The appellant craves leave to add, alter, amend and delete any of the grounds.

The grounds raised by the revenue are identical and common as for the assessment year 2008-09. In view of our finding for the assessment year 2008-09 these grounds of the revenue's appeals stands dismissed.

29. For the assessment year 2010-11 the assessee has raised the following grounds.

1. The order of the CIT(A) is opposed to law and facts of the case.
2. The assumption of jurisdiction u/s. 147 and the issue of notice u/s. 148 are not in accordance with law and therefore the assessment is liable to be annulled.
3. Assuming without admitting that assumption of jurisdiction u/s.147 was proper on the basis of the recording u/s. 148(2) still the order of assessment is invalid because of the terms of the first proviso to section 147 r/w. explanation 3, inasmuch as no income has been brought to tax in respect of contracts on reassessment and the reopening had been done in the light of 148(2) on the premise that contract income had escaped assessment and further income from sources other than contracts as have been assessed in the impugned order is not traceable to any issue coming to the notice subsequent to the issue of notice u/s. 148.
4. Having regard to the prevailing rate of gross profit in this line of business as seen from the Appellate Order itself, the adoption of 9% is too high.
5. The addition on account of cancellation of National Savings Certificate in a sum of Rs.26,015/- is not in accordance with law and against the facts, for they represent realization of earlier investments made by the assessee in such certificates not being income.

6. A sum of Rs.1,47,695/- called miscellaneous receipts is not liable to tax and the explanation offered in this regard ought to have been accepted.
7. There was no justification to bring to tax 9% on the missing entries and no part of the missing entries constitute income.
8. The explanation offered in respect of unexplained expenditure of Rs.87,54,285/- should have been accepted and no part of such addition could be made. Even otherwise, the sums ultimately brought to tax appropriately on the basis of entries in the Diary would be available to the extent of expenditure incurred from day to day and due set off should have been given.
9. The invoking of the provisions of Section 40A(3) bringing to tax a sum of Rs.1,52,07,747/- is unjustified because it has not been shown that any part of the payments as reflected in the diary represent expenditure claimed as a deduction in computing income under either the head "business" or "other sources". Every payment per se is not liable to action u/s.40A(3) unless it falls within the realm of claimed expenditure with respect to the above two heads.
10. Without prejudice, and in the alternative, anyway in respect of the purchases and sales of contract material accepted by the Commissioner as the result of dealing outside the books where gross profit has been estimated as held by courts 40A(3) is inapplicable in relation to the expenditure connected there with.

11. The Commissioner ought to have applied his mind to the interest levied u/s. 234(B) especially when there was an earlier communication u/s. 143(1) as regards quantification and interest

should have been directed to be quantified from the date of the communication u/s. 143(1) and not as has been done in the impugned order.

12. The appellant craves for leave to add, to delete from, or amend the grounds of appeal.

RELIEFS CLAIMED

13. For these and other reasons that may be adduced at the time of hearing it is prayed that the order of assessment be annulled or in the alternative without prejudice the following reliefs may be granted:
- a) The adoption of gross profit @ 9% by CIT(A) be suitably reduced.
 - b) The addition of Rs.26,015/- may be deleted.
 - c) The addition of Rs. 1,47,695/- may be deleted.
 - d) The addition of Rs.71,280/- upheld by the CIT (A) be deleted.
 - e] The addition of Rs.87,54,285/- may be deleted.
 - e) The addition of Rs.1,52,07,747/- u/s. 40A(3) may be deleted.
 - f) The interest u/s. 234(B) may be directed to be levied as per law and re-quantified accordingly.

30. Ground no. 1 is general in nature and does not require any specific adjudication.

31. Ground nos. 2 and 3 are regarding validity of reassessment. These grounds are common for the assessment year 2008-09 and 2009-10. In view of our finding for assessment years 2008-09 and 2009-10 these grounds of the assessee's appeal are dismissed.

32. Ground nos. 4 and 8 are regarding addition on account of sale of material and expenditure by adopting GP rate at 9%. This issue is common to the assessment years 2008-09 and 2009-10. In view of our finding for the earlier assessment years this issue is decided in favour of the assessee and against the revenue.

33. Ground no. 5 is regarding receipts on cancellation of NSC. An identical issue has been considered by us for the assessment year 2008-09 and 2009-10. In view of our finding this issue is remanded to the record of the AO for fresh consideration.

34. Ground no. 6 is addition on account of miscellaneous receipts. The AO has made an addition of Rs. 1,47,695/- on account of miscellaneous receipts found in the diary entry. The CIT(A) has confirmed the addition made by the AO. We have heard the ld. AR as well as ld. DR and considered the relevant material on record. The bifurcation of this amount

of miscellaneous receipts has been given by the CIT(A) at page 20 as under:

Entry No	Date	Amount	Particulars
1	20-Apr-09	1,000	Yadavapur Taxi Hire
11	23-Jun-09	60,000	Basumarabad for Hitachi
18	07-Jul-09	315	Railway ticket cancellation
20	10-Jul-09	31,000	KLE Polytechnic- Donation & Fees Of Son
32	05-Sep-09	2,560	Tiles Return
45	20-Nov-09	1,200	Hero puck
52	29-Dec-09	24,820	Ch. Jayashree M S for aTATA a/c Bellad motors
53	31-Dec-09	10,300	cash to DDCA a/c
61	26-Feb-10	1,500	Roller
66	19-Mar-10	15,000	P I Angadi for Hitachi hire
		1,47,695	Total

From the above details the amount of Rs. 10,300/- towards cash received on behalf of DDCA is common as in the earlier assessment years. In view of our finding on this issue we delete the addition made by the AO on this account. For remaining items of receipt the ld. AR of the assessee has submitted that the sum of Rs. 77,500/- comprising of Rs. 1,000/-, Rs. 60,000/-, Rs. 1,500/- and Rs. 15,000/- relates to hire and excavation charges and the same are accounted in the regular books. Thus the ld. AR has submitted that when this amount of

Rs. 77,500/- has already been accounted as income in the regular books of account then no further addition can be made on this amount. He has referred to the details of the income as per the regular books of account and submitted that the hire charges income of the assessee shown in the regular books includes this amount of Rs. 77,500/-. The ld. AR has further submitted that the sum of Rs. 31,000/- relates to refund of son's college fee. Therefore the same cannot be treated as income of the assessee. The balance amount of Rs. 28,895/- has been explained as sundry receipts such as ticket cancellation, return of tiles etc which has no character of income. Thus the ld. AR has submitted that the addition made by the AO is not justified when none of the items of the miscellaneous receipt have any element of income. On the other hand, the ld. DR has submitted that the assessee has failed to explain how these amounts are reflected in the regular books of accounts and also failed to explain how the amounts which are not reflected in the books of accounts are not chargeable to tax. He has relied upon the orders of the authorities below.

35. We have considered the rival submissions as well as relevant material on record. The assessee has claimed that out of this total amount of Rs. 1,47,695/- recorded in the diary Rs. 77,500/- relates to the hire /

excavation charges and which have already been accounted in the regular books. The hire charges are shown under different heads in the table above such as Yadavapur Taxi Hire, Basumarabad for hitachi, roller and P I Angadi for Hitachi hire. We further note that the assessee has shown the hire charges income in the Profit & Loss Account of Rs. 1,15,640/-. Therefore the assessee's explanation cannot be brushed aside once the assessee has shown an income of Rs. 1,15,640/- in the Profit and Loss account on account of hire charges. Neither the AO nor the CIT(A) has verified this fact while deciding this issue but the explanation of the assessee has been turned down at the threshold. Therefore we direct the AO to verify this fact of Rs. 77,500/- as shown in the diary as hire charges is part of the income already accounted in the books of accounts and particularly in the Profit and Loss Account. As regards the remaining entries the assessee has explained that the amount of Rs. 31,000/- relates to the refund of son's college fee which is also clear from the noting in the diary and therefore the entry in the diary itself is self-explanatory. Hence this amount of Rs. 31,000/- cannot be treated as income of assessee which was received as refund of the college fee of the son. Further, an amount of Rs. 2,560/- is also shown in the diary entry as tiles return. Therefore the said amount cannot be treated as income of the assessee. Next item is a sum of Rs. 315/- which is also explained in the diary as railway ticket

cancellation which cannot be held as income of the assessee. Accordingly, we delete the addition in respect of these items. Since the assessee has not furnished the satisfactory explanation regarding the other amounts of Rs. 1,200/-, Rs. 24,820/- therefore, the addition in respect of these two items is sustained.

36. Ground no. 7 is regarding the addition on account of unexplained receipts of missing entries. The AO has made an addition of Rs. 7,92,000/- on account of sale of material. The CIT(A) has directed the AO to adopt the GP rate of 9% on the sale of material. We have heard the ld. AR as well as ld. DR and considered the relevant material on record. This issue is identical to the issue involved in ground nos. 4 and 8. In view of our finding regarding ground nos. 4 and 8 in para 32 of this order this issue is decided in favour of the assessee and against the revenue.

37. Ground nos. 9 and 10 are regarding disallowance made u/s. 40A(3). We have heard the ld. AR as well as ld. DR and considered the relevant material on record. This ground is common as for the assessment year 2008-09 and 2009-10. In view of our finding of this issue for the assessment years 2008-09 and 2009-10 this issue is set aside to the record of the AO for fresh adjudication and in the same terms.

ITA No. 294/Bang/2014 Revenue's appeal for the assessment year 2010-11:-

38.The revenue has raised the following grounds.

- 1) The order of CIT(A) is opposed to law and facts of the case.
- 2) Whether in the circumstances and facts of the case and in law, the CIT(A) is right in holding that unexplained receipts of Rs. 33,11,035/-- represents sale of materials?
- 3) Whether in the circumstances and facts of the case and in law, the CIT(A) is right in holding that only GP @ 9% is liable to tax when the said unexplained receipts of Rs.33,11,035/- are allowed to set off against unexplained expenditure? .
- 4) Whether in the circumstances and fact of the case and in law, the CIT(A) is right in allowing set off of unexplained receipt of hand loan of Rs.15,000/- against the unexplained repayment of hand loans of Rs.6,000/-.
- 5) Whether in the circumstances and facts of the case and in law, the CIT(A) is right in allowing relief on account of set off of repayment of loans against unexplained receipts of hand loans when the said unexplained hand loan receipts are already considered for set off against unexplained expenditure?
- 6) Any other ground that may be taken during the appeal.
- 7) The appellant craves leave to add, alter, amend and delete any of the grounds.

39.Ground no. 1 is general in nature and does not require any specific adjudication.

40. Ground nos. 2 and 3 are regarding the addition deleted by the CIT(A) on sale of material. This ground is common to the ground nos. 4, 5 and 8 of the assessee's appeal. In view of our finding on this issue while deciding the assessee's appeal these two grounds of the revenue's appeal stands dismissed.

41. Ground nos. 4 and 5 are regarding unexplained hand loan. These grounds of the revenue's appeal are identical to the earlier assessment years (2008-09 and 2009-10). In view of our finding on these grounds for the earlier assessment years these grounds of the revenue's appeal stands dismissed.

42. In the result the appeals of the assessee for Assessment years 2008-09 to 2010-11 are partly allowed and those of revenue's are dismissed.

Pronounced in the open court on this 05th day of May, 2017

Sd/-
(S. JAYARAMAN)
Accountant Member

Sd/-
(VIJAY PAL RAO)
Judicial Member

Bangalore,
Dated, the 05th May, 2017.

/MS/

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore.