

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "A": NEW DELHI
BEFORE SHRI H.S.SIDHU, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 5999/Del/2014
(Assessment Year: 2010-11)

ACIT, Cricle-19(1), New Delhi	Vs.	Bimal Kumar Jain, 17, Meera Tower, 1 st Floor, Wazirpur Indl. Area, New Delhi PAN: AAEPJ6566J
(Appellant)		(Respondent)

CO No. 170/Del/2015
(In ITA No. 5999/Del/2014)
(Assessment Year: 2010-11)

Bimal Kumar Jain, 17, Meera Tower, 1 st Floor, Wazirpur Indl. Area, New Delhi PAN: AAEPJ6566J	Vs.	ACIT, Cricle-19(1), New Delhi
(Appellant)		(Respondent)

Revenue by :	Shri Rajeev Kumar, Sr. DR
Assessee by:	Shri RS Singhvi, CA Shri Satendra Goel, CA
Date of Hearing	21/11/2017
Date of pronouncement	27/11/2017

ORDER

PER PRASHANT MAHARISHI, A. M.

1. This appeal is preferred by the Assistant Commissioner of Income Tax, Circle – 19 (1), New Delhi (in short the Ld. Assessing Officer) against the order dated 4/4/2014 of the Ld. Commissioner of Income Tax (Appeals) – XXII, New Delhi (in short the Ld. CIT (A) for Assessment Year 2010-11, wherein the addition of Rs. 4.85 crores was deleted and disallowance u/s 14A of the act of Rs. 1545259/- is confirmed.

2. The solitary issue involved in this appeal of revenue is that whether the loss of Rs. 4.85 crores partially reimbursed to buyer claimed by assessee because of short supply of goods is allowable or not. The Ld. assessing officer has disallowed this claim whereas, the Ld. CIT (A), has allowed the claim of the assessee.
3. In the cross objection filed by the assessee disallowance was confirmed by the Ld. CIT (A) under section 14A of Rs. 1 545259/- is contested.
4. Brief facts as narrated in the orders are that assessee is an individual engaged in the business of trading in iron and steel, wheat and pulses, diamonds, garments, machinery equipments etc. He filed his return of income for assessment year 2010 – 11 for Rs. 2682029/-. The assessment under section 143 (3) of the Income Tax Act, 1961 was passed by the Ld. AO on 28th of March 2013, where in following addition were made to the total income of the assessee and it was assessed at Rs. 5, 26, 27, 260/-.
 - I. Disallowance of Rs. 4.85 crores on account of the loss claimed by the assessee on account of partial loss reimbursed to the buyer on account of short supply of material in terms of settlement deed
 - II. The Ld. assessing officer also made addition because of disallowance under section 14 A of the act of Rs. 1545259/-.
5. The only ground in appeal of the revenue is against disallowance of Rs. 4.85 crores because of the loss claimed by the assessee, which was deleted by the Ld. CIT (A). The brief facts relating to above disallowances are that during the year the assessee has imported CR Mill equipments from 3 parties for Rs. 1788669647/- and sold it on high seas basis for Rs. 1806556340/- to M/s Rabirun Vinimay Limited. The buyer took delivery of the material at Paradeep port and It reported to the assessee that some of the items had not been received as per bill and the value of such items are determined by the buyer at Rs. 9.5 crores which was calculated on the basis of the expenditure incurred by the buyer for buying the same parts in

order to make the project functional. Hence, the parties after discussion entered in to a settlement agreement and assessee agreed to compensate the buyer for Rs 4.85 cr out of the total additional cost incurred by buyer. Accordingly, the buyer raised a debit note on 12/03/2010 for short supply of Rs. 4.85 crores towards the settlement based on the settlement deed dated 01/03/2010 between the parties. The settlement deed provided that the assessee was doing business the buyer of the goods for a fairly long time and to maintain the business relation in future also both the parties decided to settle the dispute amicably with regard to the short supply of equipments. As per the claim of the buyer, vital parts from CR mill equipment are missing and therefore the buyer to complete the project purchased these. The claim of the assessee was that as it has already made payment of import of goods and now he cannot claim money back from the original exporters to the assessee and further as per legal advice too the claim of the would be difficult to succeed. Therefore, ultimately, it was settled between the parties that buyer would raise a debit note of Rs. 4.85 crores, which was mutually agreed on the assessee, and the assessee would pay it to the buyer.

6. Before the Ld. assessing officer the assessee submitted the documents relating to the purchases of the goods as imported such as commercial invoice,, Bill of exchange, invoice of shipping company, Ledger account and bank statements. With respect to the high seas sale of the goods assessee submitted retail invoice, high seas sale contract, bill of entry for home consumption, list of missing quantity, confirmation of account, Ledger account of the buyer, the settlement deed, the debit notes issued by the buyer. However, the assessing officer for the reason that evidences produced by the assessee are attached based neutral evidences and the assessee has failed to produce the further evidences did not accept this claim of the assessee. The Ld. AO further held that purchase of CR mill equipments in the hands of the buyer is not a revenue expenditure, but capital expenditure. Therefore, even if the buyer has received the sum it cannot be allowed to the assessee as deduction because the payment made by the assessee has gone into the hands of the buyer towards the expenditure on acquisition

of the fixed assets. Further, the assessee is benefited to this extent, by reducing its taxable income. The assessee has not engaged any intermediary while dealing with the overseas parties. The Assessee has also not engaged any technical experts to not only to evaluate the value of CR mill equipments but also to ensure the functional viability of the goods imported. According to the Ld. Assessing Officer, no prudent businessperson would enter into such a highly risky deal for the return of 1%. The assessee has further failed to prove that it has entered into any correspondence with the overseas sellers because of short supply. The Ld. Assessing Officer also rejected the advice of the legal expert obtained by the assessee taken on 21/3/2013. The Ld. Assessing Officer further held that assessee as well as the buyer both were not in position to identify the party out of the 3 overseas sellers who have actually responsible for the so-called short supply. Ld. assessing officer was further of the opinion that assessee has reduced the above amount from the total sales made by the assessee to the above party. However, according to him, the assessee as short supply should have recorded such amount. Therefore, according to the Ld. assessing officer the above claim of the assessee was not a bonafide and he further held that even the case of purchase by the buyer on on high seas sales is also not bonafide. He further held that settlement deed and related correspondence between the parties regarding short supply of goods does not have any evidentiary value. Therefore, he made disallowance of Rs. 4.85 crores to the total profit of the assessee.

7. On appeal before the Ld. CIT (A), the above addition deleted the above deletion as under:-

“8.1 I have considered the Observations of the Assessing Officer and Submissions of the Appellant. It is seen from the Assessment Order that the Assessee is engaged in the business of Trading in Iron & Steel, Wheat & Pulses, Diamond, Garments, Machinery Equipment etc. The Assessing Officer has added an amount of Rs.4,85,00,000/- to the income on account of claimed Sales Return. There was a transaction during the year which is stated to be a High Seas Sales, as per which the Assessee made purchases of CR Mill Equipment from 3 parties for Rs. 178,86,69,647/-, the same being sold to M/s Rabirun Vinimay Pvt. Ltd., Kolkata for Rs. 180,65,56,340/- resulting in a profit of Rs. 1,78,86,693/- to the Assessee. These transactions were carried out by M/s Jain Enterprises, the proprietary concern of the Assessee. The Assessee claimed that M/s Rabirun Vinimay Pvt. Ltd. issued a debit

note of Rs.4.85.00,000/- to the Assessee (to M/s Jain Enterprises). Such debit was stated by the Assessee to be a Sales Return. It was observed by the Assessing Officer that the Sales Return should either form part of the Closing Stock as on 31.03.2010 or the purchases to that extent should have been reduced. It was stated by the Assessee that the amount of Rs.4,85,00,000/- was towards Short Supplies made by the sellers and that these could neither be taken as Sales Return by the buyer nor it was a case of Bad Debts, but it was in the nature of Short Supplies. The Assessing Officer disbelieved the Assessee and added an amount of Rs.4,85,00,000/- to the income.

8.2 It has been claimed by the Appellant that the Assessing Officer was not justified in making the addition of Rs.4,85,00,000/- in respect of genuine claim of business loss relating to High Seas Sales, the loss being duly supported by documentary evidences and that the Assessing Officer had made the addition on mechanical basis without properly appreciating the facts of the case.

8.3 It is seen that the Assessee has claimed that there was purchase of CR Mill Equipment for Rs. 1,78,86,69,647/- from 3 foreign parties by way of High Seas Sales and that this entire purchase was sold by way of High Seas Sale Contract dated 03.09.09 to M/s Rabirun Vinimay Pvt. Ltd., Kolkata and that the buyer i.e. M/s Rabirun Vinimay Pvt. Ltd. took the delivery of these goods at Paradip Port, and that after taking delivery of the containers in which the imported CR Mill Equipment was sent, M/s Rabirun Vinimay Pvt. Ltd. noticed that some of the items had not been received. The value of the items which had not been received i.e. the Short Supplied items was estimated at Rs.9.50 Crores, which was calculated on the basis of the expenditure incurred by M/s Rabirun Vinimay Pvt. Ltd. for buying the same parts in order to make the project functional. The Assessee stated that it was agreed between the Assessee and M/s Rabirun Vinimay Pvt. Ltd. that the buyer would raise debit notes of Rs.4,85,00,000/- on the Assessee, and thus the Assessee and M/s Rabirun Vinimay Pvt. Ltd. would share the loss due to Short Supplies which amounted to Rs.9.50 Crores. On the raising of such Debit Note dated 12.03.10, an amount of Rs.4,85,00,000/- was debited towards settlement of Short Supplies. Such Debit Note was raised by M/s Rabirun Vinimay Pvt. Ltd. on the basis of the Settlement Deed dated 01.03. between M/s Jain Enterprises and M/s Rabirun Vinimay Pvt. Ltd. in which it was inter alia stated as under :-

"Whereas the first party and second party are doing business since a long time and to maintain the same in future have mutually agreed to settle the dispute with regard to short supply of shipment.

Whereas the real dispute between the parties is with regard to short supply of material.

As per the second party, they are liable to be compensated to the tune of Rs.9,50,00,000/- (Rs. Nine Crore and Fifty Lacs only) as cost of replacement of vital missing parts from the entire mill train. Whereas the contention of the first party is that they have already made the payment of the goods to the party from whom they have imported the same, and the party is not responding to

the calls of the first party. And now if he has to make the payment to the second party as demanded then they will suffer a huge loss.

Now both the parties have mutually agreed to bear the loss sustained by both the parties in the aforementioned business transaction as per debit note to be placed after execution of this deed."

8.4 The major objection of the Assessing Officer is regarding the initial terminology used by the Assessee i.e. 'Sales Return'. In a case of Sales Return, some goods sold by a Seller (First Party) are returned by the Purchaser (Second Party), and in such cases while the sale amount in the books of First Party is reduced by the amount of the goods returned i.e. the Sales Return, simultaneously, the value of Closing Stock in the books of First Party goes up due to the goods returned being received back by the First Party. However, in the instant case, whatever may have been the terminology used for the transaction, it is a fact that the Assessee has not claimed that any goods were received back by him. In fact, the nature of the transaction i.e. High Seas Sales, is such that the goods being purchased from foreign parties were sold to the Purchaser i.e. M/s Rabirun Vinimay Ltd., who directly took possession of such goods at Paradip Port and that the nature of transaction was such that the goods never came in the actual possession of the Assessee. In such a case, it was not possible for the Assessee, when there was short supply on the High Seas Sales, to receive any goods, either in the original purchase by the Assessee or on the subsequent sale by the Assessee. The Assessing Officer has laid too much emphasis on the fact that the transaction was stated to be a Sales Return particularly when the facts of the claim of the Assessee were clear that it was a case of Short Supply of goods. The Assessing Officer could have a suspicion regarding the genuineness of the transaction and the loss claimed and this could have been a reason for further inquiry, but no addition can be made to the income merely on the basis of suspicion.

8.5 It has been vehemently argued by Sh. R.S. Singhvi, CA, the Learned Counsel of the Appellant that the Assessing Officer did not disbelieve or have any doubt about the genuineness of the transaction i.e. the purchase of the CR Mill Equipment by High Seas Sales from foreign parties at Rs. 178,86,69,647/- and its sale to M/s Rabirun Vinimay Ltd., Kolkata, which were recorded in the Books of Account and that only part of the transaction i.e. loss of Rs.4,85,00,000/- on account of Short Supply was suspected and disallowed on adverse observations of technical nature. It was claimed that once the purchase of Rs. 1,78,86,69,647/- was debited and the sale of Rs. 1,80,65,56,340/- was credited in the accounts, and these were not doubted, the subsequent debit of Rs.4,85,00,000/- in the same transaction was disallowed merely on the basis of suspicion. It was stated by the Ld. Counsel that the Assessing Officer was motivated for disallowance on the basis of the original nomenclature of the loss as Sales Return and subsequent nomenclature of the loss as Business Loss ; and that once it was clear that it was a case of Short Supply of goods and the actual nature was Business Loss, the same should have been accepted in the absence of any contrary evidence. It was also stated by the Ld. Counsel that the Assessing Officer had not disputed the identity and existence of the buyers and sellers and the banking transactions and that general observations could not override the weight of evidences

placed on record. It was also claimed by the Ld. Counsel that there was a contradiction in the approach of the Assessing Officer particularly when he himself has considered the profit to the extent of Rs. 1,78,86,693/- in respect of the very same transaction and as such the genuineness of the transaction could not be disputed or disregarded. It was also stated by the Ld. Counsel that even if it was presumed that the Assessee has not acted as a prudent businessman, but the lack of prudence could not be a ground for disallowance of a claim which is otherwise supported from the relevant documents and actual payment through banking channels. It was also pointed out by the Ld. Counsel that the Assessing Officer has not rejected the Books of Account u/s 145 and also that the nature of the business activities of the Appellant have not been disputed.

8.6 It is seen that a very large number of documents relating to the above transactions were placed before the Assessing Officer which have been mentioned in the Written Submissions of the Appellant dated 20.09.13, reproduced above in Para 7.1 and a relevant excerpt from the same is mentioned hereunder

"It is relevant to submit that fact of loss has not been disputed by the Assessing Officer and adverse observation are merely of technical nature. In the support of transactions of purchases and sales, we have furnished all the relevant documents as under:

A. Documents relating to Purchases

- a. King Empire Group Ltd.
 - i. Copy of Commercial Invoice with packing list
 - ii. Copy of Bill of Lading
 - iii. Copy of bill of exchange
 - iv. Copy of Invoice of Shipping Company
 - v. Copy of ledger account
 - vi. Copy of Bank Statement
 - b. Global Trade Commodities DMCC
 - i. Copy of Commercial Invoice with packing list
 - ii. Copy of Bill of Lading
 - iii. Copy of bill of exchange
 - iv. Copy of application offorward contract for currency exchange
 - v. Copy of ledger account
 - vi. Copy of Bank statement
 - c. Euro Eagle General Trading FZC
 - i. Copy of Commercial Invoice with packing list
 - ii. Copy of Bill of Lading
 - iii. Copy of bill of exchange
 - iv. Copy of ledger account
 - v. Copy of Bank statement
- B. Documents relating to Sales (M/s. Rabirun Vinimay P. Ltd.)

- a. Copy of Retail Invoice
 - b. Copy of High Sea Sale contract
 - c. Copy of Bill of Entry for Home Consumption
 - d. Copy of Calculation Sheet of Margin
 - e. Copy of list of Missing Quantity
 - f. Copy of Confirmation of Account
 - g. Copy of Assessee's Ledger Account
 - h. Copy of ITR Acknowledgement
 - C. Settlement deed.
- D. Debit Note

The Assessing Officer has not disputed the genuineness and correctness of these documents and merely raised doubts because of claim of loss. There is no dispute that payment for purchases was through banking channels with the approval by Reserve Bank of India. Similarly, receipt from buyers was also through banking channels. In fact, the Assessing Officer himself has considered the profit emanating from the very same transaction to the extent of Rs. 1,78,86,693/- as per particulars extracted in the assessment order itself. Once the transactions and resultant profit was accepted, the Assessing Officer cannot disregard the consequential aspect of the said transactions."

8.7 Perusal of the Assessment Order shows that the Ld. Assessing Officer has not given even a single adverse comment against the genuineness, contents or the verifiability of any of the above documents mentioned in Para 8.6. In fact, the Assessing Officer has also observed in Para (vi) on page 5 of the Assessment Order that the Assessee has clearly stated that this was not a case of Sales Return by the buyer, nor it was a case of Bad Debts, but it was in the nature of Short Supplies. The Assessing Officer has also further observed that the Assessee stated that there was a settlement between the Assessee and M/s Rabirun Vinimay Pvt. Ltd., as per which that party raised Debit Note of Rs.4,85,00,000/- out of the loss on Short Supplies estimated at Rs.9.50 Crores, on the basis of the amount incurred by M/s Rabirun Vinimay Pvt Ltd for making the project functional. The Assessing Officer has further admitted that documents relating to such claims were given by the Assessee, which included Debit Note dated 12.03.2010 raised by M/s Rabirun Vinimay Pvt. Ltd., Settlement Deed dated 01.03.2010, copies of 3 High Seas Sales Contracts, List giving details of Short Supplied items, copy of account of the Assessee in the books of M/s Rabirun Vinimay Pvt. Ltd., bills of lading, bills of entry for home consumption issue by Customs Authorities, etc. The Assessing Officer has not given even a single adverse comment regarding any of these documents. In case the Assessing Officer suspected that the claim of Short Supply was bogus, then further verification could have been done once the List giving details of the Short Supplied items was there along with other documents. If the Assessing Officer disbelieved the copy of account of the Assessee in the books of M/s Rabirun Vinimay Pvt. Ltd., then inquiry could have been done from that party. However, rather than pointing out any specific document which was non genuine, bogus, false or that even any document which the Assessing Officer thought to be suspicious, the Assessing Officer has made the addition merely on the basis of general suspicion without even pointing out any

suspicious document and totally ignoring all the documents submitted in support of the transactions.

8.8 It is seen that the Ld. Assessing Officer has come up with a theory of several types of evidence, which is seen from a perusal of Para 2.4 on Page 5 of the Assessment Order. The Ld. Assessing Officer has mentioned several types of evidence which include 'Available Evidence', 'Crucial Evidence', 'Neutral Evidence', 'More Evidence' and 'Missing Evidence'. The Assessing Officer has very appropriately mentioned in Para 2.4 on page 5 of the Assessment Order that "Every transaction or issue has to be examined in the light of totality of the evidence and also the surrounding circumstances. In a case where the genuineness of transactions apparent on the basis of evidence available and surrounding circumstances, then even if some of the evidence is missing or not available, there is no difficulty in accepting the transaction as genuine.". However, thereafter, the Assessing Officer has propounded his theory about various types of evidences such as 'Available Evidence', 'Crucial Evidence', 'Neutral Evidence', 'More Evidence' and 'Missing Evidence'. Other than the 'Available Evidence', which is obviously the evidence available before the Assessing Officer, it has not been specified as to what is the concept of 'Crucial Evidence', 'Neutral Evidence', 'More Evidence' and 'Missing Evidence' what exactly is that in the form of documents, evidence or other material which the Assessing Officer implies should be included in such types of evidence. It is seen that the Assessing Officer has used these words without specifying as to what do they mean and what are the evidences which they include.

8.9 The Assessing Officer has stated that "in a case where crucial evidence is missing and just on the basis of available evidence it is not possible to take a decision on the genuineness of the transaction then due notice of the missing evidence and surrounding circumstances has to be taken". The Assessing Officer has not mentioned as to what is implied by 'Crucial Evidence' and how the 'Available Evidence' is inadequate. The Assessing Officer has mentioned about it not being possible to take a decision on the genuineness of the transaction on the basis of the 'Available Evidence'. If such is the situation, then it is clear that there is nothing in the 'Available Evidence' against the Assessee, as it is not as if the genuineness of the transaction is disproved by the 'Available Evidence' or that there is any adverse finding against the 'Available Evidence', but it is only that the Assessing Officer is unable to take a decision on the genuineness of the transaction. This only implies that the Assessing Officer has a general suspicion about the transaction, without having any evidence or anything specific against the transaction. In such a situation, the Onus would lie on the Assessing Officer to prove that either the 'Available Evidence' is false or that there is some other relevant evidence which has been ignored or concealed by the Assessee. In the absence of any of the 'Available Evidence' being proved to be false or any other relevant evidence being found which goes against the Assessee, it is clear that if the Assessing Officer is not finding is possible to take a decision on the genuineness of the transaction, then it is only due to indecisiveness of the Assessing Officer or general suspicion about the transaction without any evidence.

8.10 The Ld. Assessing Officer has further stated that "If it is a case of collusive transaction, the evidence submitted by the assessee can be termed as neutral evidence, which the assessee might have fabricated to make an apparent case.". It is seen that the Assessing Officer has not even given the clear finding that it is a collusive transaction and has just mentioned the possibility that it may be a collusive transaction stating that "If it is a case of collusive transaction...". Further, It has not been specified as to what is implied by 'Neutral Evidence', though the Assessment Order appears to suggest that the evidence submitted in the case of collusive transaction would be a 'Neutral Evidence', but even that is not clear and the order further mentions that the "neutral evidence, which the assessee might have fabricated", suggesting that 'Neutral Evidence' was one which was fabricated. However, even though apparently suggested by the Assessment Order, this conclusion cannot be drawn, as the Assessing Officer has not given any clear finding that 'Neutral Evidence' was one which was fabricated, in view of the use of the word "might", which shows the uncertainty. Thus the 'Neutral Evidence' according to the Assessing Officer, may be genuine or might have been fabricated. It is obvious that the Ld. Assessing Officer has not given any clear finding or definition whether 'Neutral Evidence' was one which was fabricated or not.

8.11 The Ld. Assessing Officer has further stated in Para 2.4 that "In this case also the evidence furnished by the assessee is at best neutral evidence, which is required to apparently show that the transaction took place. However, for showing that the transaction really took place, some more evidence is required, which the assessee has utterly failed to produce. This evidence is very crucial to the very issue under the consideration.". The Assessing Officer has claimed that the evidence given by the Assessee is 'Neutral Evidence' without fully clarifying the concept of 'Neutral Evidence' and how it was claimed that the evidence submitted by the Assessee was 'Neutral Evidence'. It is also seen that the Ld. Assessing Officer has not denied that the transaction "apparently took place", and states that the 'Neutral Evidence' was required to show so. However, the Ld. Assessing Officer has stated that for showing that the transaction "really took place", some "More Evidence" was required. However, what exactly was this "More Evidence" and how was it "very crucial", has not been mentioned by the Ld. Assessing Officer. It is seen that the Ld. Assessing Officer does not deny that the transaction "apparently took place", but claims that to show that the transaction "really took place", some "More Evidence" was required without specifying as to what were the documents or evidences required. In such a situation, no adverse inference can be taken against the Assessee for the absence of such "More Evidence".

8.12 In the last sentence of Para 2.4 on page 5 of the Assessment Order, it is stated that "if this is collusive transaction the assessee stands benefitted to this extent by reducing his taxable income and on the other hand M/s Rabirun Vinimay (P) Ltd is also benefitted in the sense that part of the payment of CR Mill Equipment to the extent of Rs.4,85,00,000/- can be made by it out of undisclosed cash.". It is seen that the Ld. Assessing Officer has again only put a suspicion on the transaction being collusive, stating that "if this is collusive transaction". If the Assessing Officer was

convinced that the transaction was a collusive transaction, then he should have given a clear finding that he was holding that the transaction was a collusive transaction, his reasons for such a decision alongwith the evidences and material for the same. However, it is seen that the Ld. Assessing Officer has merely voiced his suspicion about the possibility of the transaction being collusive. The reasons given by the Ld. Assessing Officer for his suspicion was that the other party i.e. M/s Rabirun Vinimay Pvt. Ltd. could have made part of the payment for the purchase of CR Mill Equipment to the extent of Rs.4,85,00,000/- out of undisclosed Cash which could have been received by the Assessee, the Assessee gaining by concealing the receipt of this Cash and M/s Rabirun Vinimay Pvt. Ltd. gaining by utilizing its undisclosed Cash. However, this again is a theory made up by the Ld. Assessing Officer without any evidence or material in support and is at best in the nature of a suspicion only. Any addition to the income cannot be made merely on the basis of suspicion. If the Ld. Assessing Officer had any information, evidence or material or even any genuine suspicion that M/s Rabirun Vinimay Pvt. Ltd. had unaccounted Cash amounting to Rs. 4,85,00,000/- or that any such unaccounted Cash was received by the Assessee, then any such information, evidence, material etc. should have been clearly mentioned and further inquiry could have been done by him if there was any suspicion regarding such Cash transactions. However, mere allegations that Cash payments "can be made", without any evidence or material in support cannot be relied upon to take any adverse decision against the Assessee.

8.13 It is seen that the Ld. Assessing Officer, quite imaginatively, has come up with the concept of various types of evidence which include 'Available Evidence', 'Crucial Evidence', 'Neutral Evidence', 'More Evidence', 'Missing Evidence', without specifying as to what exactly he implies by such terminology, and what was the evidence to be included in each of these various categories. Other than 'Available Evidence', which apparently refers to the evidence available with the Assessing Officer, it is not possible to say with certainty as to what evidence the Ld. Assessing Officer intends to include in which category. The Ld. Assessing Officer can be appreciated for original and innovative thinking and coming up with the concept of these various types of evidence, but merely this is not sufficient for taxation, as firstly a clear concept about these evidences and the reasoning as to how adverse decision can be taken on the basis of such categories of evidence has not been explained, and secondly, a citizen can be taxed only as per law, and not on the basis of such innovative concepts, howsoever attractive they may be.

8.14 While discussing various types of evidence, the Ld. Assessing Officer has missed out the most relevant and significant type of evidence, that is the 'Relevant Evidence'. Perusal of the various judicial decisions show that it is the 'Relevant Evidence' which is the deciding factor for any legal issue.

8.15 It has been stated by the Hon'ble Gujarat High Court in the case of Commissioner of Gift-tax vs. Maneklal Hargovandas Patel, 264 ITR 0592, as under

"The gift of a part of a partner's share to another has to be established by relevant evidence and the onus of doing so is on the Revenue."

8.16 It has been stated by the Hon'ble Supreme Court of India in the case of Krishak Bharati Co-operative Ltd. vs. JCIT, 310 ITR 400, as under (as per Catchwords) :-

"Industrial undertaking—service charges-whether qualify for deduction—assessee manufacturing urea and ammonia-supplying ammonia gas to heavy water plant located in its premises and receiving service charges- ammonia gas returned to assessee after extracting deuterium-whether there was interdependence-appellate tribunal rejecting claim for allowance owing to paucity of facts-supreme court-matter remanded to appellate tribunal for reconsideration after permitting parties to produce relevant evidence- income-tax act, 1961, s. 80-i."

8.17 It has been held by the Hon'ble Allahabad High Court in the case of Ajeet Singh vs. Appropriate Authority, 226 ITR 330, as under :-

"This is a case where the authorities have deliberately or ignorantly refused to consider the cogent and relevant evidence and relied on irrelevant and extraneous considerations. The authorities are guilty of non-application of mind and have failed to apply the established principles and method of valuation of property and as such the said order suffers from severe infirmity bordering on perversity."

8.18 Thus, it is seen that the Hon'ble Courts have repeatedly upheld that it is the Relevant Evidence which is most significant and having the legal basis which is to be considered, and evidence other than Relevant Evidence can be in the realm of 'irrelevant and extraneous considerations'. In the instant case, the Ld. Assessing Officer has discussed about various types of evidence such as 'Crucial Evidence', 'Neutral Evidence', 'More Evidence' and 'Missing Evidence', (and that too without specifying and clarifying as to what exactly he intends by such sort of classification and what was the evidence covered under each category), but has missed out the most relevant and significant type of evidence, that is the 'Relevant Evidence'. The Assessing Officer has not pointed out that any of the 'Available Evidence' was not 'Relevant Evidence' or that any of the evidence submitted by the Assessee was false. In such a situation, the theory about evidence and the various contentions of the Ld. Assessing Officer cannot be accepted and are hereby rejected. No addition can be made on the basis of such illogical arguments as made by the Ld. Assessing Officer.

9. The Ld. Assessing Officer has further stated in Para 2.5 on page 6 of the Assessment Order that "did not feel either the need to engage an intermediary while dealing with overseas parties or to engage a technical expert". However, it is not for the Assessing Officer to dictate as to how the Assessee is to run his business and to whom he has to take the advice from. If the Assessee feels it prudent not to involve or to spend money upon some intermediary or expert, it is not for the department to draw an adverse inference on the basis of such decision of the Assessee. In case, the Assessee engages an intermediary or expert, it can again be argued by the Assessing Officer that he does not "feel" that the Assessee should have wasted money on the

intermediary or expert when the transactions could have been done directly without the effort and expenditure towards such intermediary or expert. In any case, it is not for the Revenue to put itself in the armchair of the businessman and to assume the role to decide as to how the business should be run, in view of the decision of the Hon'ble Delhi High Court in the case of CIT vs. Dalmia Cement (P) Ltd., 254 ITR 377.

9.1 The Ld. Assessing Officer has also stated in Para 2.5 of page 6 of the Assessment Order that "No prudent businessman would enter into such a highly risky deal for a mere return of 1%. Again, it is not for the Revenue to dictate as to how the business should be run and what risks the Assessee should take and at what return. If the Ld Assessing Officer was of the view that the transactions for purchase and sale which gave a return of only 1% were false, then some evidence or material should have been collected, but adverse inference can be drawn merely on the basis of suspicion. The Assessing Officer has himself stated in Para 2 on page 1 of the Order dated 28.03.13 that "the assessee is engaged in bulk trading of the above items on low profit margin". Once it is accepted by the Assessing Officer that the nature of business of the Assessee is bulk trading of items on "low profit margin", there is no reason to take adverse view against one particular transaction which is again in the nature of bulk trading on low profit margin. Further, though much higher profit rates are possible and have been confirmed by Courts and Tribunals (for instance, the Hon'ble Allahabad High Court, in the case of Ganeshi Lai and Sons, Jewellers vs. CIT, 6 ITR 390, upheld the decision of the lower authorities where the profits were assessed at a flat rate of 30 per cent, of the sale proceeds, and with regard to the sale of a particular piece of jewellery the profits were assessed at 60 per cent), much lower rates of profit have been accepted by the Hon'ble Courts and Tribunals. It has been stated by the Hon'ble ITAT, Rajkot in the case of ITO vs. Girish M. Mehta, 296 ITR (A.T.) 125, that the Books of Account or Rate of Profit could not be rejected merely because of low rate of profits, which were as low as 0.18% and 0.23%, in the case before the Hon'ble Tribunal. The Hon'ble ITAT, Rajkot held as under:-

"that the onus was on the Revenue to prove that either the books of account maintained by the assessee were not correct and complete or the method of accounting adopted was such that the true profit could not be deduced therefrom. As the onus to make out a case for rejection of books of account was on the Revenue, the assessee could not be burdened with the responsibility of proving a negative aspect of the matter meaning thereby the assessee could not be held responsible for not having earned profits at a particular rate."

9.2 It was further stated by the Hon'ble ITAT, Rajkot in the case of Girish M. Mehta (supra), in the final paragraph in the body of the order as under

"In the instant case, no mistake has been pointed out by the Assessing Officer either in the books of account or in the statement of purchases, sales and Qtnnk which was maintained quantitatively on day-to-day basis. The finding recorded by the Commissioner of Income Tax (Appeals) at page Nos. 3 and 4

have not been controverted by the Department by bringing any positive material on record. We are, therefore, inclined to agree with the learned Authorised Representative, Mr. Rindani, that the assessee has maintained proper books of account and full details regarding the purchases, sales and stock registers were furnished to the Assessing Officer in which no defect whatsoever was pointed out, thus there was no reason before the Assessing Officer for rejecting the book results and thereby estimating the profit merely by comparing the assessee's gross profit rate with M/s. Gayatri Bullion, which was standing entirely on different footing than the assessee."

9.3 In the present case also, the Assessing Officer has not pointed out any mistake in the purchase, sales etc. nor in the details of Short Supplied items. In fact, the situation in the instant case is even worse than the case of Girish M. Mehta (supra), as in that case, the Assessing Officer had drawn adverse inference against the profit rate by at least comparing it with some other concern. There was no such comparison by the Assessing Officer in the present case for drawing adverse inference against the rate of return being only 1%. It is again seen that the observations of the Ld. Assessing Officer are in the nature of suspicion only.

9.4 The Ld. Assessing Officer has further stated in Para 2.5 on page 6 of the Assessment Order that "assessee has no correspondence worth the name with the overseas sellers in the aftermath of the so called disclosure of short supplies. From the allegation itself, it is clear that he Assessee did have some correspondence, but in the opinion of the Ld. Assessing Officer it was not "worth the name". It is again seen that the Ld. Assessing Officer has made generalized allegations, without any substance, as it is definite that the Assessee did have some correspondence, but the Assessing Officer wanted that some more correspondence should have been made. The Assessing Officer has also stated that "not a single evidence" was filed about the lack of response by the sellers regarding Short Supplies. However, the Ld. Assessing Officer has failed to take into account the fact that there can be evidence for a response, but there would not normally be such evidence for a lack of response. If the Assessing Officer had suspicion about the transaction or had the suspicion that the correspondence disclosed to him was false, then some further inquiry could have been done, but no cognizance can be taken of such generalized and vague opinions of the Ld. Assessing Officer.

9.5 Ld. Assessing Officer states that the advice of the legal expert s contemporary and was taken only on 21.03.13. However, perusal of the document shows that the certificate of the Advocate though dated 21.03.13 clearly mentions that the advice was given in the month of February 2010. If the Assessing Officer had any suspicion that the certificate from the Advocate was false, then necessary inquiries could have been done from the Advocate, but in the absence of any evidence to the contrary, the certificate of the Advocate cannot be just brushed aside. It is seen that the Advocate has stated that he had given the advice to M/s Jain Enterprises (whose proprietor is Sh. Bimal Kumar Jain, the Assessee) as under:-

"1. That the parties are beyond the territorial jurisdiction of Indian Court.

2. That if the party initiate the legal proceeding and ex party decree is passed in the favour of the M/s Jain enterprises, the execution of the same is not possible as the Indian Courts does not have territorial jurisdiction for execution of the decree beyond its territorial jurisdiction, so the cost incurred in filing the recovery would be unnecessary.
3. Besides this the party accepting the goods did not verify the goods at the time of taking delivery of the same so the short fall claim would fall in the court of law."

9.6 Thus it is clear from the opinion of the Advocate that the fault was both of M/s Jain Enterprises and M/s Rabirun Vinimay Pvt. Ltd. as M/s Jain Enterprises could not ensure the supply of the fully functional plant containing 100% of the internal parts, and on the other hand M/s Rabirun Vinimay Pvt. Ltd. was also at fault as it did not verify the goods at the time of taking delivery from the overseas parties. In such a situation, the options before the two parties involved were, firstly, that the parties share the loss incurred, or secondly, go through protracted litigation whose outcome could not be predicted.

9.7 It is seen that the Ld. Assessing Officer has made further suspicions as to how the party responsible for Short Supplies out of the 3 overseas sellers could not be identified. However, it is seen that the goods were never in the actual possession of the Assessee who acquired the goods by way of High Seas Sales and sold the goods to M/s Rabirun Vinimay Pvt. Ltd., who took the possession of the goods at Paradip Port. It has been stated by the Assessee that "we had purchased the complete plant as part of high seas sales and there is no details of component of the same in the purchase invoice. The total value of plant was Rs. 178,86,69,647 and value of missing or defective items was to the extent of Rs. 9,50,00,000/-, which is only a fraction of the total value. In fact these items are merely internal parts of the plant and as such it is not practicable to connect the same with the party. In fact, it is a case of high seas transactions from consortium of parties and sale was on "as is where is " basis and as such all the parts were integral part of the plant as a whole. ". It is seen that the Assessee had purchased the complete plant as a High Seas Sales from a consortium of parties, the sale being on 'as is where is' basis and the missing parts were an integral part of the plant as a whole. The transaction had to be considered in its totality. The Assessing Officer does not have the option of accepting part of the transaction and rejecting part of the transaction without any basis or evidence. Once the missing parts themselves were identified, and the details submitted to the Assessing Officer, adverse inference could not be drawn without any evidence or material to the contrary. It is seen from Para 2.3 on page 5 of the Assessment Order that the Assessing Officer had before him the details of the Short Supplied items. In such a case, if there was any suspicion, further inquiries could have been made, but any adverse conclusion could not be found against the Assessee merely on the basis of suspicion.

9.8 The Ld. Assessing Officer has further stated in Para 2.5 on page 6 of the Assessment Order that "Assuming but not accepting that it is not a case of sales return as shown by the assessee on 12.03.2010 in the account of M/s Rabirun Vinimay (P) Ltd. but is a case of short supplies, then the assessee should have claimed it as loss on account of short supplies. However, in no case the assessee can reduce it from its sales, when the amount of sales has been recorded in its books of accounts. Sales can be reduced only in a case of sales return.". Thus it is seen that the Ld. Assessing Officer is dissatisfied with the method of accounting of the Assessee and the nomenclature given to the transaction. However, once the nature of transaction is clear, being a case of Short Supplies, then no adverse inference can be drawn merely because the Assessee initially labeled such Short Supplies as Sales Return. The relevant issue is whether there was any such Short Supply or not and in the absence of any evidence or material against the Short Supply, adverse inference cannot be taken merely on the basis of the nomenclature, once the nature of the transaction and the claim is clear. If the Ld. Assessing Officer was dissatisfied with the method of accounting, then that matter should have been pursued further and in case any adverse evidence or material was found, the Books of Account could have been rejected u/s 145(3) of the I.T. Act, 1961. It is seen that neither the Books of Account were rejected, nor any adverse evidence or material was found against them.

9.9 The Ld. Assessing Officer has in the concluding part of Para 2.5 on page 6 of the Assessment Order has stated that "The evidence in the form of settlement reached between the assessee and M/s Rabirun Vinimay (P) Ltd. is self-serving in nature. The settlement deed and related correspondence between these two parties does not have any evidentiary value, so long as it is complemented by evidence generated at the end of the overseas seller, actually responsible for the so-called short supplies of goods. Therefore, I am making an addition of Rs.4,85,00,000/- to the total profits of the assessee.". It is seen that the Ld. Assessing Officer has rejected the settlement between the Assessee and M/s Rabirun Vinimay Pvt. Ltd. claiming that the settlement is self serving in nature and that the Settlement Deed and the related correspondence between these parties does not have any evidentiary value. Such opinion of the Ld. Assessing Officer is again only on the basis of suspicion as the evidence in the form of the Settlement Deed etc. between the Assessee and M/s Rabirun Vinimay Pvt. Ltd. cannot be brushed aside, in the absence of any adverse evidence or material. If the Ld. Assessing Officer was dissatisfied with the evidence before him, then either some contrary evidence or material should have been collected by him or the evidence produced by the Assessee or that available on record should have been proved to be false. In the absence of any such contrary evidence or finding that the evidence before the Assessing Officer was false, the rejection of the evidence, which was very much relevant evidence cannot be upheld, and has to be rejected.

9.10 It is seen that the Ld. Assessing Officer had suspicions regarding the transactions in view of the large quantum of loss on the basis of Short Supply, being claimed at Rs.4,85,00,000/-, but rather than proving that the evidence on record was false or collecting any evidence or material which was contrary to the evidence produced by the Assessee or which could show that the transactions claimed by the

assessee as self serving or false, the Id Assessing Officer has framed the entire assessment merely on the basis of suspicion. There is nothing to show that the loss incurred by the Assessee on account of Short Supply of goods was not bona fide or that it was not in the course of business transactions or that it was not of revenue nature,, In view of the above discussion, the addition made by the Ld. Assessing Officer amounting to Rs.4,85,00,000/- is hereby deleted.”

8. On appeal before us, the Ld. departmental representative vehemently supported the order of the Ld. assessing officer submitting that the claim of the assessee with respect to the short supply of goods is not proved conclusively. He further relied upon the same reasons, which were given by the Ld. assessing officer in his order. He submitted that the Ld. CIT (A) has deleted the addition/disallowances based on the submission made by the assessee. Therefore, he submitted that the order of the Ld. assessing officer might be upheld.
9. The Ld. authorized representative reiterated the same submissions, which were made before the Ld. AO as well as the Ld. CIT- A. He submitted that the Ld. CIT (A) has considered all the arguments of the Ld. assessing officer and stated that the loss claimed by the assessee is genuine. He further submitted that such losses arise during the course of the business and is incurred during the year and therefore this claim is allowable. It was further stated that assessee has produced the complete details of such claim before the assessing officer in the form of details of purchases of the goods imported and as well as all details with respect to the high seas sale of the goods. The assessee has further produced the income tax return copies of the buyer as well as the settlement deed between the parties. He further stated that the Ld. assessing officer accepted the transaction of the purchases and sales of the goods and merely because there was a short supply from such a huge transaction, the loss incurred by the original buyer and partly compensated by the assessee, is not accepted. The Ld. assessing officer has also not stated that what more evidences were required to be produced by the assessee when the buyer has confirmed the above claim reimbursed to that assessee. He therefore submitted that there was no doubt about the import of the goods, sale of the goods, the profit shown on the transactions in the income tax return of the assessee, the short

supply of the goods, the loss incurred by the buyer, but only doubt that is being raised is with respect to the partial compensation of the total loss incurred by the buyer on account of such short supply. The assessee has also given a detailed reasons that assessee is in the business transaction with that particular buyer for a long time and therefore to maintain the good relationship and for the future business the assessee has agreed vide settlement deed to compensate the buyer. He further stated that the loss claimed by the buyer was not also stated to be inflated or not genuine as the buyer has incurred such cost for the purpose of completing the project as vital parts were missing in the import of the goods. With respect to the three parties, it was stated that it was CR mill equipment from different parties and therefore different material was missing from all the three consignments. He further stated that assessee has contacted to the buyers on various occasions and requested them for the supply of or compensation of the missing parts however, it were not responded to by the overseas parties. Therefore, the assessee further has taken opinion of the legal expert regarding the claim to be made against the overseas parties, which was opined in negative. Therefore, it cannot be said that the assessee has not made adequate efforts for reducing its losses. In view of this, it was submitted that the claim of the assessee is genuine, supported with adequate evidences, and is incurred during the course of the business and hence allowable as deduction.

10. We have carefully considered the rival contentions and perused the orders of the lower authorities. The facts are culled out from the orders of the lower authorities that assessee imported CR mill equipment from three different parties and these goods were sold on high seas basis, to M/s Rabirun Vinimay Limited. The amount of the purchases and the sale consideration received by the assessee are not disputed. The assessee demonstrated the fact of purchase of goods as well as sale of goods to the third party by submitting requisite evidences. There is no dispute on these facts. However, as the buyer took delivery of the imported goods at Paradip port reported that there is a short supply of goods. As the goods

were in short supply to complete the project of CR mill equipments, the buyer incurred the cost of buying those goods from the outside market. Therefore, the buyer incurred an additional cost of Rs. 9.5 crores. To compensate this loss the buyer and the assessee entered into a settlement deed where the material facts as well as the reasons for entering into the settlement deed were noted. According to the settlement deed, the buyer raised a debit note of Rs. 4.85 crores on the assessee and the assessee as a business loss made such claim. However while recording the purchases and sales in the books of accounts of the assessee reduced a sum of Rs. 4.85 crores from the total sales recorded therein of CR mill equipment. The claim of the assessing officer is that that assessee has reduced this sum from the sales, but should have been recorded as short supply. We do not find any merit in the argument of the Ld. assessing officer with respect to the accounting entries made by the assessee. In fact, the assessee has recorded the actual sales after reducing the short receipt or sales price reduced on account of the about transaction is. It is not the case before us that assessee has received any material as sales return. Therefore, according to us the assessee has not made any mistake in recording due sales amount arising on account of this compensation of short supply paid to the buyer. Further, the Ld. assessing officer has stated that assessee has not entered the purchase and sale transaction through any intermediary. We find that it is for the assessee to decide how he wants to carry on his business. Therefore, if the assessee wants to enter the business directly through the various overseas sellers it cannot be found fault with assessee. The Ld. assessing officer should have appreciated that the assessee has entered into the total transaction of import of such goods of 178 crores and has earned profit thereon of Rs. 1.78 crores. The assessee has further entered into the business of fabrics and diamonds for Rs. 6.97 crores and has shown profit of Rs. 50.35 Lacs. Therefore, assessee cannot be dictated the manner in which he should carry on his business. He assumes risk and earns his reward based on his business modality. The revenue is to tax on the rewards earned by the assessee. The assessee paid the above compensation to the buyer on account of short supply

of goods received by it on account of high seas sales made by the assessee. Therefore, the assessee assumed such risk at the time of sales. Further, the adequate evidences furnished by the assessee before the lower authorities also supported the above loss. However, the Ld. assessing officer stated that the assessee should have produced more evidences. However, it was not stated by him that what other evidences were required. Merely because the assessee has produced the evidences. According to the wishes and design of the Ld. assessing officer the claim of the assessee cannot be denied. Further, more in the present case even the Ld. assessing officer did not state that what more evidences assessee should have submitted. On appreciation of the evidences submitted by the assessee, such as the settlement deed, the high seas sale details, the income tax return of the buyer and debit notes, it is apparent that the adequate evidences to justify the loss incurred by the buyer, which was partly compensated by the assessee and claimed as a business loss cannot be disallowed. Furthermore, the Ld. assessing officer also verified that the buyer has accounted for this loss may be towards the reduction in the cost of the purchase of the fixed assets by the buyer, but that does not make any difference regarding the claim of the assessee. As the above loss has been incurred by the assessee during the course of the business and incurred during the year, hence, the assessee is entitled to get the deduction of the same. Regarding the genuineness of the claim, it is supported by the settlement deed and confirmation of the buyer who received the above sum by issuing the debit note. The Id CIT (A) has considered all the reasons given by the Id Assessing Officer for disallowance and after that has allowed the claim of the assessee. The Id Departmental Representative also could not point out any error in the order of the Id CIT (A). In view of this we confirm the finding of the Id CIT(A) in deleting the disallowance of Rs. 4.85 crores on account of reimbursement of the cost of short supply replenished to the buyer as deduction under the head ‘Profits and Gains’ of the business. In the result, the solitary ground of appeal of the revenue is dismissed.

11. In the result, ITA No. 5999 /Del/2014 of the Revenue is dismissed.

12. The assessee has also filed cross objection wherein, it has raised a solitary ground that Id CIT (A) has sustained the disallowance of Rs. 1545259/- u/s 14A of the Act. During the year, the assessee has earned the dividend income of Rs. 55204/- which is exempt. The Id Assessing Officer applied the provisions of Rule 8D of the act and worked out disallowance of Rs. 1445259/- on account of interest expenditure and further a sum of Rs. 2332485/- on account of expenditure. However, he disallowed the interest expenditure of Rs. 1445259/- on account of interest and a further sum of Rs. 1 lac resulting into total disallowance u/s 14A of the act of Rs. 1545259/-. The Id CIT (A) confirmed the above disallowance. Therefore, assessee has raised cross objection.
13. The Id AR submitted that as the exempt income earned by the assessee as stated at page No. 7 of the assessment order is only Rs. 55204/- therefore, the total disallowance cannot exceed the same.
14. The Id DR submitted that once rule 8D is applied then whatever may be the working of the same that disallowance is required to be made.
15. We have carefully considered the rival contentions and perused the orders of the lower authorities. Admittedly, the assessee has earned exempt income of Rs. 55204/- as per page No. 7 of the assessment order. The above issue is squarely covered in favour of the assessee by the decision of the Hon'ble Delhi High Court in case of Joint Investments Pvt. Ltd vs. CIT 372 ITR 694 wherein, in para No. 9 Hon'ble High Court has held that disallowance cannot swallow the entire exempt income. Therefore, the disallowance u/s 14A confirmed by the Id CIT (A) of Rs. 1545259/- is restricted up to Rs. 55204/-.
16. In the result, cross objection filed by the assessee is allowed.

-Sd/-
(H.S.SIDHU)
JUDICIAL MEMBER

-Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated:27/11/2017

A K Keot

Copy forwarded to

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

ASSISTANT REGISTRAR
ITAT, New Delhi