

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: F , NEW DELHI

BEFORE SH. BHAVNESH SAINI, JUDICIAL MEMBER
AND
SH. O.P. KANT, ACCOUNTANT MEMBER

ITA No.4905/Del/2014
Assessment Year: 2011-12

Sh. Pankaj Rustagi, 1159, Kucha Mahajani, Chandni Chowk, Delhi	Vs.	ACIT, Circle-19(1), New Delhi
PAN :ADAPR8531N		
(Appellant)		(Respondent)

Appellant by	Sh. R.K. Malhotra, CA
Respondent by	Sh. Sanjeet Singh, CIT(DR)

Date of hearing	27.06.2018
Date of pronouncement	03.07.2018

ORDER

PER O.P. KANT, A.M.:

This appeal by the assessee is directed against order dated 02/06/2014 passed by the Ld. Commissioner of Income Tax (Appeals)-XXV, New Delhi [in short 'the Ld. CIT(A)'] for assessment year 2011-12. The assessee filed revised grounds vide letter dated 25/04/2018, which are reproduced as under:

- 1. Unjustified and uncalled addition of Rs.53,90,00,000/- in the income of the assessee, being cash found with him, is arbitrary.*
- 2. Unjustified and uncalled addition of undated cheque of Rs.2,50,000.00 drawn on State Bank of India duly signed & stamped by Kidar Nath, Proprietor of M/s. Kishan Kanayya*

Jewellers, which did not contain the name of the drawee, in the income of the assessee.

2. Briefly stated facts of the case are that the assessee an individual, is partner of M/s Lakshit Jewellers, a partnership firm engaged in carrying on the business of manufacturing and trading of jewellery, bullion and stones. A search was conducted by the Railway Police Authorities on a car at VIP gate of Railway Station, Jammu on 05/04/2010 and a black bag was recovered from the occupant of the car, i.e., the assessee. The bag was found to contain cash worth Rs.53,90,000/- and an undated cheque of State bank of India amounting to Rs.2,50,000/- which was signed by Kidarnath proprietor of M/s Kristian Kanyya Jewellers, however, the name of the drawee was not mentioned on the cheque. Consequent upon the receipt of above information by the Deputy Director of Income-tax (Investigation), Jammu, a warrant under section 132A of the Income-tax Act, 1961 (in short 'the Act') was obtained on 06/04/2010 and served on the Senior Superintendent of Police, Railway Zone, Jammu and the cash and cheque were seized by way of warrant of authorization for the search.

2.1 For the year under consideration, the assessee filed return of income on 28/03/2012, declaring total income of Rs.2,66,180/-. The case of the assessee was selected for scrutiny and notice under section 143(2) of the Act was issued and complied with.

2.2 In the scrutiny proceedings, the Assessing Officer observed:

- (1) that enquiries were made by the Railway police regarding the cash from the assessee. The Railway police informed

vide their letter that enquiries made from Sh. Pankaj Rustagi, he could not produce any valid proof related to the cash.

- (2) that in the statement of the assessee recorded on oath before the DDIT (Inv.), Jammu, under section 131 of the Act on 10/04/2010 and 16/04/2010, he disclosed that he had come from Delhi to Jammu for purchase of a property from Sri. Vijay Nishal. No detail of the property proposed to be purchased was provided by the assessee to the Assessing Officer. The statement of Sh. Vijay Nishal was also recorded and it was found that M/s. Lakshit Jewellers was operated from a rented shop owned by Sh. Vijay Nishal. According to the Assessing Officer, no outsider can purchase property in the state of Jammu and Kashmir and, thus, the explanation of the assessee was against the normal human conduct and probability.
- (3) that in the said statement, source of cash was explained by him as Rs.46,50,000.00 out of the cash-in-hand of the Delhi head office of the firm M/s Lakshit Jewellers and Rs.7,40,000 out of cash-in-hand of the Jammu branch office of the firm M/s Lakshit Jewellers. But the documents supporting the above contention including copy of balance sheet and cash book of the head office and branch office of the firm were provided to the DDIT (Inv.) on 13/05/2010, i.e., after a period of almost one month from his statement. According to the Assessing Officer, the period of one month provided the assessee ample time to manipulate the books of accounts.

- (4) that in the books of accounts of the firm M/s Lakshit Jewellers Produced before the DDIT, the cash Sales have been raised on 2nd and 3rd April, 2010, i.e., just before the date of seized cash and also shown purchase of gold and silver ornaments from M/s Mittal Brothers on credit just before the sales on 02/04/2010, though the sufficient cash was available in Delhi branch.
- (5) that the travelling expenses of Shri. Pankaj Rustogi, i.e., the assessee, were booked in the books of the firm on 10/04/2010, whereas he travelled on 03/04/2010, thus, the entry made subsequently was an afterthought
- (6) that there is an abnormal increase in turnover of the firm (Rs.1,58,94,498/-) in financial year 2010-11 i.e. the year in which cash was seized as compared to turnover of Rs.60,42,599/- in financial year 2009-10 and turnover of Rs.54,16,762/-in financial year 2008-09 .
- (7) that it is highly improbable that the partner of the firm would carry entire amount of cash-in-hand of the firm instead of utilizing banking channels
- (8) that the assessee failed to produce a copy of the statement recorded by the SSP, Jammu on 06/04/2010.

2.3 In view of the above observations, the Ld. Assessing Officer held the entire cash of Rs.53.90 Lacs and cheque amounting to Rs. 2.5 lakhs seized from the assessee as unexplained income.

2.4 On further appeal before the Ld. CIT(A), the assessee made various submissions to substantiate availability of cash in the hands of the firm including submissions challenging the warrant authorization issued. The Ld. CIT(A) after considering the

submission of the assessee, upheld the finding of the Ld. Assessing Officer observing as under:

“As against the above, the contentions of the Ld.AO holding the cash of Rs.53,90,000/- as unexplained were as under:-

- (i) The appellant produced self serving documents in the shape of balance sheet of the head office, Delhi for the year ending 31/03/2010 showing cash in hand of Rs.34,33,173/-, cash book of the Delhi head office for the period 01.04.2010 to 05.04.2010 amounting to Rs.46.50 lacs, balance sheet of Jammu Branch for the year ending 31/03/2010 showing cash of Rs.7,57,817/- and cash book entries for the period 01.04.2010 to 05.04.2010 at Rs.7.40 lacs.*

The reason for regarding the above documents produced before the DDIT, Jammu as self serving by the Id.AO was the fact of non-production of the same before the ADIT(Inv.), Jammu on 20/4/2010 in response to summons dated 15/4/2010. The above documents were submitted after a month i.e. on 13/5/2010 to the DIT (Inv.), Ludhiana. The late submission made the Id.AO cast doubt on the genuineness and the reliability of the above documents.

- (ii) The appellant's failure to produce the copy of the statements recorded from him by the SSP, Jammu on 6/4/2010 was with a design and upon a system to prevent the incriminating facts from coming to surface.*
- (iii) The books of account of M/s Lakshit Jewellers, in which the appellant was a partner, reflected abnormal hike in sales on 2nd and 3rd April, 2010 just before the date of seizure of cash of Rs 53,90,000/-.*

- (iv) Just before the day of the seizure of cash the appellant was noticed to have purchased gold, and silver ornaments from M/s Mittal Brothers on credit in spite of having*
- (v) The recording of the travelling expenditure of the appellant on 10/4/2010 in the books of account of his firm was an afterthought only to demonstrate that the appellant was even otherwise scheduled to visit Jammu.*
- (vi) The books of account of the firm, M/s Lakshit Jewellers, in which the appellant was a partner, revealed sale of Rs 1.46 crores only for the entire impugned AY while the appellant was trying to explain away the cash of Rs 53,90,000/- i.e. nearly 35% as the accumulated balance of a few days only.*
- (vii) It was highly improbable, according to the ld.AO that any prudent and extra ordinary businessman would carry such a huge cash in a vehicle and expose himself to various kinds of risks.*
- (viii) The purpose of carrying cash seized as explained to the ADIT (Inv.) Jammu by the appellant was that he wanted to purchase a property in Jammu & Kashmir which is not permissible as per the J&K Law.*
- (ix) The motive of carrying cheque of Rs 2.50 lacs on behalf of Kidar Nath was not satisfactorily explained by the appellant.*
- (x) The fact that sum of Rs 52,90,000/- was a loan taken by the appellant from its firm for its personal purposes was not mentioned at the time of the seizure proceedings,*
- (xi) The production of the so called corroborative details pertaining to the seized cash was not instantaneous.*

In view of all the above facts, the Id.AO felt inclined to treat the money of Rs.53,90,000/- as unexplained.”

2.5 Aggrieved with the above finding of the Ld. CIT(A), the assessee is in appeal before the Tribunal, raising the grounds as reproduced above.

3. Before us, the Ld. counsel of the assessee produced copy of capital account of the assessee in the firm for the year under consideration and submitted that amount of the cash already stand explained in the hands of the firm by way of cash sales and same have already been assessed in the hands of the said firm, and, thus, the lower authorities are not justified in assessing the same as unexplained in the hands of the assessee. The Ld. counsel referred to the order of the Assessing Officer in the case of firm M/s Lakshit Jewellers. He submitted that assessee being partner of the said firm was entitled to carry the said cash and he was not required to take any permission from any of the authorities of the Income Tax Department.

3.1 The Ld. counsel submitted that following documents are submitted before the Assessing Officer, however, same were not accepted:

- a. *Copy of duly Audited Cash Book of Both Head Office & Branch office for the period 01-04-2010 to 05-04-2010 showing Opening Balance of Rs.3433173.00 in HO and Rs. 757817.00, were produced.*
- b. *Copy of Cash Sale Bill No. 401/02.04.2010 Rs. 276551.00, 402/02.04.2010/Rs.331343.00,403/03.04.2010/Rs.31231 4.00 and 404/03.04.2010/Rs.350389.00,submitted showing the deposit of Vat § 1% of Rs.12580.00 in these bills.*

- c. *Copy of Vat Return for the period 01.04.2010 to 30.06.2010 showing the sale of these bills.*
- d. *Copy of tax Audit Report for the Financial Years 2008-09, 2009-10 and 2010-11 duly signed by Chartered Accountants Firm V.Jain & Co. and certifying the above said transactions.*
- e. *Copy of Purchase Bills of M/S Mittal Bros, certifying the Purchase of above bullion.*

3.2 The Ld. counsel further submitted that the assessee is being penalized by double taxation, firstly pay tax on those transaction in the firm, as this cash was generated in firm books through turnover after paying the due tax and when the assessee was utilizing his accumulated capital/income through imprest, he is again being compelled to pay income tax as unexplained income, whereas as per the provisions of the section 10(2A) of the Act, even share of the profit from the firm is tax-free income.

3.3 Regarding the cheque amount of Rs.2,50,000/-, the Ld. counsel submitted that name of drawee was not mentioned and this cheque has not been encashed by the assessee and in absence of transfer of fund to the assessee, addition to the same in the hand of the assessee was not justified.

4. On the contrary, the Ld. DR relied on the order of the lower authorities and submitted that the unexplained cash and the cheque were found in the possession of the assessee and, thus, in terms of section 132(4A) of the Act, it is presumed that same belongs to such person and onus is on the assessee to rebut this presumption, if the said cash & cheque belongs to someone else. He submitted that the assessee has miserably failed in

discharging this onus, which is evident from the frequent change in explanation or stand in respect of the cash found from his possession. He submitted that in the books of accounts of the firm the cash has been shown as generated, against the normal business conduct, just only to explain the cash in the hands of the assessee. According to him, the unexpected increase of cash sales particularly in the period before the cash is found, the purchase shown in credit before the cash is found etc. are against the normal business conduct. He also submitted that the assessee was only partner of two thirds share of the profit of the firm and in normal business affairs, he cannot be allowed to take away the entire cash in hand of the firm. In view of the above, he submitted that normal human conduct as well as business conduct do not justify and explain the source of cash in the hands of the assessee and accordingly the Assessing Officer has rightly assessed the same as unexplained in the hands of the assessee.

5. We have heard the rival submissions and perused the relevant material on record. The fact that in the search carried out by the Railway police authorities at Jammu, Railway Station on 05/04/2010, cash of Rs.53,90,000 and cheque of Rs.2,50,000 (without any name of drawee) were found from a bag in the possession of the assessee. The assessee failed to explain convincingly the source of the cash in his hand and accordingly, the Railway Authorities seized the cash and cheque and informed the Income Tax Department. On summoned by the DDIT (Inv), Jammu on 06/04/2010, the assessee explained that cash was to be utilized for purchase of a property. The Assessing Officer has

observed that in the state of Jammu and Kashmir, no one from outside can buy a property and, therefore, this explanation was not justified. The assessee explained the source of cash as withdrawn from the partnership firm M/s Lakshit Jewellers, but the copy of capital account and balance sheet of the head office and branch office of the said firm were produced after almost one month from the date of the seizure of the cash. According to the Assessing Officer, the assessee took period of one month in producing the documents so that he could manipulate the books of accounts of the said firm. In the books of accounts of the said firm produced, abnormal amount of cash sales have been shown on 2/04/2010 and 3/04/2010 service to generate the cash for explanation of the cash found in the possession of the assessee. The Assessing Officer in the case of the firm has reproduced the comparative figure of purchase and sales for the month of March and April. The Assessing Officer in the case of the said firm has also pointed out, the unusual manner of business affairs. The order of the firm was produced by the Ld. counsel before us. The relevant extract from the said order is reproduced as under:

“Apart from above while examining the details, books and ITR’s filed by M/s Lakshit Jewellers the following facts have emerged:-

A. *That the turnover of the assessee for the last few years is as under:-*

A.Y.	Turnover
2007-08	29,87,367
2008-09	54,16,762
2009-10	60,42,599

2010-11	1,58,94,498
2011-12	2,25,48,663

It is apparent that there is a drastic increase in the turnover of the firm in the F.Y.2010-11 in which the cash was generated by assessee. The circumstantial evidence does not inspire confidence to rely upon the books of accounts of M/s Lakshit Jewellers as the assessee has attempted to explain the cash on account of sale of gold ornaments.

B. *Month wise sale & purchase of the assessee for A.Y. 2010-11 & 2011-12 is discussed as under:-*

Details of Monthly Sale for A.Y. 2010-11

Month	Delhi(A)	Jammu(B)	Total(A+B)
Apr-09	676,410		676,410
May-09	266,978		266,978
Jun-09	38,742		38,742
Jul-09	1,543,558		1,543,558
Aug-09	211,792		211,792
Sep-09	2,680,623		2,680,623
Oct-09	712,567	401,200	1,113,767
Nov-09	746,937		746,937
Dec-09	18,867		18,867
Jan-10	1,620,837	445,117	2,065,954
Feb-10	1,627,264	414,763	2,042,027
Mar-10	4,488,842		4,488,842
	14633417	1261080	15894497

Details of Monthly Purchase for for A.Y. 2010-11

Month	Delhi(A)	Jammu(B)	Total(A+B)
Apr-09	277,044		277,044
May-09	124,642		124,642
Jun-09	583,^85		583,685
Jul-09	469,525		469,525
Aug-09	311,525		311,525
Spp:09	2,623,035		2,623,035
Oct-09	1,219,679	992,504	3,615,539
Nov-09	981,250		981,250
Dec-09	872,578		872,578
Jan-10	782,501	144,739	927,240

Feb-10	537,078		537,078
Mar-10	2,976,971		2,976,971
	11,759,514	1,137,243	12,896,757

Details of Monthly Sale for A.Y. 2011-12

Month	Total
Apr-10	1,856,505
May-10	1,343,861
Jun-10	3,957,107
Jul-10	1,390,648
Aug-10	550,718
Sep-10	3,273,600
Oct-10	1,946,386
Nov-10	2,811,938
Dec-10	414,219
Jan-11	195,179
Feb-11	3,689,695
Mar-11	1,118,807
	22,548,663

Details of Monthly Purchase for A.Y. 2011-12

Month	Total
Apr-10	5,898,545
May-10	3,076,024
Jun-10	1,115,465
Jul-10	1,153,958
Aug-10	1,202,959
Sep-10	2,070,000
Oct-10	621,047
Nov-10	3,647,191
Dec-10	2,039,604
Jan-11	1,181,511
Feb-11	1,817,514
Mar-11	699,902
	24,383,720

If we compare the sale & purchase for April 2009 with April, 2010 and March, 2010 with March, 2011 discussed below, it is apparent that there is no uniformity in sale & Purchase:

April, 2009

April, 2010

SALE	6,76,410/-	18,56,505/-
PURCHASE	2,77,044/-	58,98,545/-
	March, 2010	March, 2011
SALE	44,88,842/-	11,18,807/-
PURCHASE	29,76,971/-	6,99,902/-

Actually by inflating the sale & purchase for the month of March 2010 and April 2010, assessee tried to explain the cash of Rs 53,90,000/- seized from him on 05-04-2010. It is also interesting to note that the total sale for the entire F.Y. 2009-10 is only Rs. 1.46 Crores, out of which the assessee has been trying to explain the source of cash of Rs. 53 Lacs in April, 2010. It is highly improbable that the entire amount of cash on account of sale of gold ornaments would be kept as cash in hand.

Moreover for jewellery business, months of March and April are known to be lean period. Generally, Jewellery business flourishes during the months in which marriages take place whereas, in the month of March and April, by and large no marriages take place due to inauspicious period preceded Holi Festival as well as due to final exams of almost all academic sessions falling in these two months.

C. *During the A.Y. 2010-11 (F.Y. 2009-10), assessee has shown purchases from Shri Jain Jewellers on 17.03.2010 amounting to Rs. 16,50,000/- and on 15.03.2010 amounting to Rs. 7,20,351/- . It is worth noting that a purchase of round figure amounting to Rs. 16,50,000/- has been booked on 17.03.2010. Assessee has also booked another purchase of round figure amounting to Rs. 3,80,000/- from Royal Jewellers which is quite unusual. The sale bills for the month of March, 2010 has also been examined and the same are explained below:-*

Bill No.	Description of Goods	Weight	Amount
379 dt.26.03.2010	Gold Ornaments	240.140 grms.	Rs.3,68,663/-

378 20.03.2010	dt.	Silver Ornaments	18.180 kgs.	Rs.2,24,014/-
377 15.06.2010	dt.	Silver Ornaments	15.240 Kgs.	Rs.1,87,787/-
376 12.03.2010	dt.	Silver Ornaments	10.135 Kgs.	Rs.1,25,907/-
375 10.03.2010	dt.	Silver Ornaments	10.200 Kgs.	Rs.1,25,684/-
374 06.03.2010	dt.	Silver Ornaments	13.215 Kgs	Rs. 1,63,370/-
373 05.03.2010	dt.	Silver Ornaments	18.495 Kgs	Rs. 2,33,504/-
372 03.03.2010	dt.	Gold Ornaments	98.72 grms	Rs. 1,51,954/-
371 03.03.2010	dt.	Silver Ornaments	20,520 Kgs	Rs. 2,52,847/-

Assessee has also booked sales in cash on 2nd April and 3rd April, 2010 as per description below:-

Bill No		Description of Goods	Weight	Amount
401 02.04.2010	dt.	Gold Ornaments	180.140 grms	Rs. 2,76,551/-
402 02.04.2010	dt.	Gold Ornaments	215.830 grms	Rs. 3,31,343/-
403 03.04.2010	dt.	Silver Ornaments	25.140 Kgs	Rs. 3,12,314/-
404 03.04.2010	dt.	Silver Ornaments	28.320 Kgs	Rs. 3,50,389/-

Only Silver Ornaments/Gold Ornaments and cash have been mentioned on the bills. No further description of ornament pieces such as chain, Kangan, Ring etc. has been mentioned on the bills. This practice is also quite unusual.

D) During the A.Y. 2010-11, assessee has shown purchases from two parties namely Shri Jain Jewellers amounting to Rs. 16,50,000/- on 17.03.2010 & Rs. 7,20,351/- on 15.03.2010 and from M/s Royal Jewellers on 26.03.2010 amounting to Rs. 3,80,000/-. For verification of purchases from these two parties, verification letters were issued u/s 133(6) of the IT Act on the addresses mentioned on the purchase bills. No

information has been received from M/s Royal Jewellers in response to the verification letter No. 541 dt. 11.03.2014 and verification letter No. 542 dt. 11.03.2014 issued to Shri Jain Jewellers at the address mentioned on the purchase bills has been received back unserved with the remarks that "Locked on 21.03.2014 and no. such firm in this number- returned- 22.03.2014".

Similarly, assessee has shown purchases in A.Y. 2011-12 from three parties namely Shri Parshav Silver Ware amounting to Rs. 1,01,003/- on 17.04.2010 vide bill no. 005 and Rs. 2,02,006/- on 09.04.2010 vide bill no. 004. It is also very strange that M/s Shri Parshav Silver Ware has not issued any other sale bill between 09.04.2010 to 17.04.2010 i.e. within 7 complete days no bill has been issued by M/s Shri Parshav Silver Ware to any other party as both the bills issued to the assessee in serial no. 004 & 005. It is also worth mentioning to note that M/s Shri Parshav Silver Ware have sold the goods to the assessee in the month of April, 2010 and has not been paid till the end of the year, i.e., a total amount of Rs. 3.30,656/- is outstanding till the end of the year.

Similarly purchases have been shown from Mittal Associates amounting to Rs. 7,02,192/- and from Mittal Brothers vide bill no. 902 on 02.04.2010 amounting to Rs. 3,13,327/-, vide bill no. 904 on 07.04.2010 amounting to Rs. 2,82,917/- and vide bill no. 906 on 12.04.2010 amounting to Rs. 3,04,279/-. It is also apparent to mention here that Mittal Brothers has issued only one bill in between 02.04.2010 to 07.04.2010 and again only one bill between 07-04-010 to 12-04-2010 i.e. within 10 complete days only two other bills have been issued apart from bills issued to the assessee. For verification, letters u/s 133(6) were issued to the above mentioned three parties and reply has been received only from Mittal Associates. M/s Shri Parshav Silver Ware and M/s Mittal Brothers have not responded to the enquiries letters u/s 133(6) issued vide letter no. 544 dt. 11.03.201 and no. 546 dt. 11.03.2014 respectively.

The discrepancies pointed out above are clear indication that there is no uniformity in the sale/purchase booked by the

assessee and assessee has tried to temper with the purchase and sale in order to create the cash and otherwise also.

E) Comparison of GROSS & NET PROFIT Ratio for last two years and for A.Y. 2010-11 &'2011-12 is as under:-

<i>Fin. Year</i>	<i>Turnover</i>	<i>Gross Profit</i>	<i>Net Profit</i>	<i>GP Ratio</i>	<i>NP Ratio</i>
<i>2007-08</i>	<i>5416762</i>	<i>465014</i>	<i>10986</i>	<i>8.58%</i>	<i>0.20%</i>
<i>2008-09</i>	<i>6042599</i>	<i>481408</i>	<i>(-)24676</i>	<i>7.96%</i>	<i>-</i>
<i>2009-10</i>	<i>15894498</i>	<i>1471917</i>	<i>216332</i>	<i>9.26%</i>	<i>1.36%</i>
<i>2010-11</i>	<i>22548663</i>	<i>943397</i>	<i>(-)496546</i>	<i>4.18%</i>	<i>(-)2.20</i>

From above, it is apparent that since assessee firm has booked cash sales during the month of March 2010 to justify the cash seized from its partner Sh. Pankaj Rustagi, the firm was compelled to show G.P and N.P. at higher rate in F.Y. 2009-10 as compared to other years. Whereas, inflated cash sales have been shown in the month of April, 2010 only as the requirement to show the cash in hand was only up-to 05, April 2010 when the partner was nabbed with the cash. Thereafter also, the assessee manipulated the affairs in such a manner to show low G.P & negative N.P in subsequent F.Y. 201011. 'Actually the money seized from partner Shri Pankaj Rustagi belonged to him only in his individual capacity whereas the whole camouflaging has been done only to justify the generation of cash out of the books of the firm. The said amount seized had rightly been assessed in his individual hands as discussed above that the said cash seized has nothing to do with the firm accounts.'

5.1 In view of the observations by the lower authorities above, we find that:

- (i) The assessee at the time of such by the Railway Police Authorities could not explain the exact source of the cash found from him.

- (ii) Before the DDIT (Inv.), the assessee failed to substantiate the source of cash as stated to be out of the cash in hand of the firm.
- (iii) There is exceptional increase in sales turnover of the firm during the month of the March/April, 2010 as compared to month of March/April 2009.
- (iv) The bills of purchase of jewellery shown in the month of March 2010 from two parties M/s Jain Jewellers and M/s Royal Jewellers are of round figures amounts, and without description of ornaments, which is very unusual in the trade. On enquiry, these parties could not be traced.
- (v) Other discrepancies in the books of accounts of M/s Lakshit Jewellers shows that books of accounts raises concern whether the same were maintained in regular course of business.
- (vi) In the capital account of the assessee in the firm, produce before us capital of the assessee was shown at Rs.8,76,671.13 as on 31/03/2011. In such circumstances, the explanation of the assessee that cash of Rs.53,90,000/- has been taken from the firm, cannot be justified, particularly when the firm has shown net loss of Rs.4,96,545/- in the relevant year.

5.2 In the case of CIT Vs Durga Prasad More (1971) 82 ITR 540 (SC), the Hon'ble Supreme Court held that the apparent must be considered as real until it is shown that there are reasons to believe that the apparent is not the real and the tax authorities

are entitled to look at the surrounding circumstances to find out the realities and the matter as to be considered by applying the test of human probabilities.

5.3 In the case of Sumati Dayal Vs CIT (1995) 214 ITR 801 (SC), the assessee shown winning from the horse races. The assessee stated that she started going to the races in 1969 and she won her jackpot on 12/12/1969, i.e., the 1st day on which she went to the races. She also stated that she worked out the combination of the winning horses on the basis of what her husband advised her but she used to add some horses of her own, however she knew nothing about the performance of those horses. She suddenly lost interest in the horseracing in 1972 (i.e. coincidentally after race winning become taxable). The Hon'ble Supreme Court in the circumstances held that winning of the races was against human probabilities and it would not be unreasonable to infer that the taxpayer had not really participated in any of the races except to extent of purchasing the winning ticket after the event presumably with unaccounted funds.

5.4 In view of the facts and circumstances in the observation of the lower authorities as well as observation made by us, it is evident that availability of the cash shown in the hand of the firm to explain the cash found from the assessee, is against all human probabilities and conduct of the normal business affairs.

5.5 The contention of the Ld. counsel that tax has been paid in the hands of the firm on sales declared and hence it should not be assessed again in the hands of assessee. We don't agree with this contention of the Ld. counsel. The Hon'ble Supreme Court in the case of Income Tax Officer Vs. Ch. Atchiaiah (1996) 218 ITR

239 (SC) has held that under the present Act, the Income Tax Officer must tax the right person alone, who is liable to be taxed according to law with respect to a particular income & merely because a wrong person is taxed with respect to a particular income, the AO is not precluded from taxing the right person with respect to that income. In the instant case, the firm has declared sales at its own and though same have not been found convincing but has been accepted by the Department as same has been offered by the firm. The assessee can be allowed to take benefit of the same as the assessee is the right person, who is required to explain the source of the cash satisfactorily.

5.6 We note that in terms of section 132(4A) of the Act, it may be presumed that any books of accounts, documents, money, bullion, jewellery etc. found in the possession or control of any person in the course of search belongs to such person. This presumption is rebuttable presumption and onus is on the person from which possession said items of books of accounts or cash etc has been found. In the instant case, the onus was on the assessee and he has failed to discharge his onus in view of our observations above.

5.7 The section 110 of the Evidence Act has also specified that when the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner. In the instant case, the assessee was in possession of the cash and thus the burden of proving that he is not the owner of the said cash is on the assessee. Since before the lower authorities as well as before us the assessee has failed to

discharge this onus, the assessee is held to be owner of the said cash and in absence of any explained source of said cash in the hand of the assessee, it is held to be unexplained. The ground No. 1 of the appeal is dismissed.

6. As far as ground No. 2 of the appeal, regarding addition of Rs. 2,50,000/- is concerned, in our view, no name of the drawee was mentioned in the said cheque and the same has not been in encashed by the assessee, the cheque has remained merely a piece of paper without any monetary value . In view of the no monetary value of the said cheque, no addition can be made in the hands of the assessee. Accordingly, we direct the Assessing Officer to delete the said addition of Rs.2,50,000/-. The ground of the appeal of the assessee is accordingly allowed.

7. In the result, the appeal of the assessee is partly allowed. Decision is pronounced in the open court on 3rd July, 2018.

Sd/-
(BHAVNESH SAINI)
JUDICIAL MEMBER

Sd/-
(O.P. KANT)
ACCOUNTANT MEMBER

Dated: 3rd July, 2018.

RK/-(D.T.D.)

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi