

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DIVISION BENCH 'B', CHANDIGARH**

BEFORE SHRI SANJAY GARG, JUDICIAL MEMBER  
AND MS. ANNAPURNA GUPTA, ACCOUNTANT MEMBER

**ITA No.729/Chd/2017**  
(Assessment Year : 2012-13)

M/s Austees Hydro Power & Construction Company (P) Ltd.,  
VPO Bahot Kasol, Tehsil Sadar,  
Distt Bilaspur (HP),  
Through its Authorised Signatory  
PAN: AAFCA8697M

Vs.

The Income Tax Officer,  
Bilaspur Distt. Bilaspur  
(HP).

&

**ITA No.837/Chd/2017**  
(Assessment Year : 2012-13)

The Income Tax Officer,  
Bilaspur Distt. Bilaspur  
(HP).

Vs.

M/s Austees Hydro Power &  
Construction Company (P) Ltd.,  
VPO Bahot Kasol, Tehsil Sadar,  
Distt Bilaspur (HP),  
Through its Authorised Signatory  
PAN: AAFCA8697M  
(Respondent)

(Appellant)

Assessee by : None  
Department by : Dr.Gulshan Raj, CIT(DR)  
Date of hearing : 24.05.2018  
Date of Pronouncement : 21.08.2018

**ORDER**

**PER ANNAPURNA GUPTA, A.M. :**

The impugned Cross appeals, by the assessee and the Revenue, have been filed against the order of Learned Commissioner of Income Tax (Appeals), Palampur dated 09.02.2017, relating to assessment year 2012-13.

At the outset it is stated that the case was fixed for hearing on several occasions, and adjournment was sought time and again by the Ld. counsel for assessee ,on most

occasions on the identical ground that he is busy in the High Court, despite the fact that the assessee had also filed appeal. On 23.5.2018, when the case was fixed for hearing and adjournment sought again by the Ld. counsel for assessee citing the same reason, the Bench took note of the repeated adjournments sought by the Ld. counsel for assessee and noted that it appeared that the assessee is not interested in prosecuting its appeal. However, in the interest of justice another opportunity was given to the assessee to present its case, fixing the hearing of the same for the next day i.e. 24.05.2018, which was conveyed to the proxy counsel who appeared on behalf of the assessee Shri Jaspal Sharma, Advocate in the open court. The order sheet entry on the said date reads as under:

23.05.2018	<i>Present for assessee</i>	<i>Sh.Jaspal Sharma, Adv. (Proxy Counsel)</i>
	<i>Present for Deppt.</i>	<i>Dr.Gulshan Raj, CIT(DR)</i>

*Adjournment Application has been moved by the assessee's counsel stating that he has to appear in the High Court of Himachal Pradesh at Shimla. Earlier also on 22.6.2017 none appeared on behalf of the assessee and notice was issued to the assessee. On 5.9.2017 Bench did not function and the matter was adjourned to 7.11.2017. On 7.11.2017 Bench did not function and the matter is adjourned to 16.11.2017. On 16.11.2017, assessee's counsel appeared before the Bench and sought adjournment. The matter was adjourned for 8.1.2018. The adjournment was sought by assessee's counsel on the similar grounds on 8.1.2018. The matter was adjourned to 14.3.2018 and none appeared on 14.3.2018. Then notice through Department was issued for 9.4.2018. On 9.4.2018, the hearing was adjourned on the request of the assessee's counsel on similar grounds for 23.5.2018. Though it is the appeal of the assessee and the assessee is supposed to pursue it, however, time and again notice is issued to the assessee to come present. However, repeated adjournment applications have been received from counsel citing identical ground that he is busy in High Court. In view of above facts, it appears that the assessee is not interested in prosecuting his appeal.*

*However, on the request of Proxy counsel that the case be adjourned to tomorrow and in the interest of justice a last and final opportunity given to the assessee and the hearing adjourned to 24.5.2018.*

Sd/-  
(AG)  
(AM)

Sd/-  
(SG)  
(JM)

2. On the next date also i.e. 24.5.2018, none appeared on behalf of the assessee, nor any application was moved for adjournment. The case was, therefore, proceeded to be heard with.

We shall first be taking up the appeal of the assessee in **ITA No.729/Chd/2017 for A.Y 2012-13.**

3. Grounds of appeal raised by the assessee are as under:

- "A The Ld. Assessing Officer has erred in law and facts of the case by not deciding the matter in view of the different judgments of the court that even if the charitable society is making profit even then it qualifies for various exemptions under the provisions of the IT Act. The orders of the Ld. Assessing Officer is contrary to the law, equity and justice and facts and material on record, devoid of jurisdiction arbitrary based on conjunctions and surmises.*
- B That the impugned order (Annexure A- 2) passed by the Respondent No.5 is arbitrary, unreasonable, illegal, bad in law and facts of the case and hence is liable to be set aside.*
- C That the impugned order is against the provisions of the Act and no proper procedure as is prescribed under the Act has been followed while issuing the impugned orders. Hence, on this ground alone, the impugned order deserve to be quashed and set aside.*
- D That orders of the Ld A.O. dated 27.02.2015 is illegal, wrong, null and void being passed without application of legal mind, hence deserve to set be aside. That Respondent is not justified in orders by making additions on account of diesel transactions with Mr Ajay Kumar Rs.1,70,20,367/- and Rs.55,00,000/- with Surender Kumar. Ld A.O. orders para wise contradicts in principle of justice, false, concocted story and bad in law. Ld A.O. did not verify the transaction justification to end user/transporters who used the diesel. Ld A.O. treated it as expenses where as it was not an expenses of company but just a facilitation to the Transporters to increase the*

*working efficiency and increase the targets of AH.PC. It was the need of the business. Hence finding of the Respondent are based on surmises and conjecture & as such not sustainable in the eyes of law.*

*E That the Ld A.O. has not followed the provisions of law in the proceedings of the case no opportunity of cross examination of witnesses. Hence, the examination not justified in orders by making additions on account of unexplained expenditure taken by Rs.1,15,,65,717/-. Appellant did not claimed any such amount as expenditure of Rs. 1,15,66717/-. But was based on a statement of Mr Anil Kumar i.e Nikhil filling station. Ld A.O. in para 4.7 of its order stated that "which in any financial year an Appellant has incurred any expenditure and he offers no explanation about of such expenditure or part there of or the explanation, if any offered by him is not, in the opinion of the (Assessing Officer) satisfactory, the amount covered such expenditure or part thereof, as the case may be, deemed to be income of the Appellant for such financial year." Appellant had made transaction for transporters with Nikhil filling station of Rs. 11,01,150/- which was accepted by the Ld A.O. Addition made by the Ld A.O. was not claimed by the Appellant, it was taken Rs.1,15,65,717/- (i.e Rs. 1,26,66,867- Rs. 11,01,150) from Mr Anil Kumar statement. Nothing to do with it by the Appellant. Keeping in view the orders should be set aside. Order of Ld. Respondent No.5 is self contradictor) and is resulted confusion, hence same is liable to be set aside.*

*F That the Ld. A.O. is not justified in orders by making additions on account of diesel expenses Rs.1,39,452/- since affidavit of Mr.Sada Ram was not further verified by the Lei. A.O. Since the Learned A O did not gone through for further verification of affidavit". Hence failed to appreciate the record and its evidence. It is also supported by case laws —*

*howkchand Balabux vs. CIT, (1961) 41 ITR 465 (Assam)AND Mehta Parekh & Co. vs. CIT, (1956) 30 ITR 181 (SC).*

*G That the Ld A.O. is not justified by disallowing expenses of Rs. 87,650/-treating it as donation. It was considered Rs. 87,650/- instead actual amount was Rs. 85,550/-. Since the payment was of the nature of*

*Advertisement/Souvenir. Payments made to Nalwari Fair ( Bilaspur &, S,nagar) to Deputy Commissioner Bilaspur & Mandi office and local melas. Al all the places wrestling's, bull/ buffalo exhibition, agriculture sponsorship programmes, etc done by state gouv agencies. Hence disallowance of expenses is not justified.*

*H The Ld. Assessing Officer has erred in law and fact of the case by charging / imposing interest under section 244-A and 234-B. 234-1) of the IT Act, without appreciating the circumstances and fact of the case and not giving any reason on what grounds the interest has been charged / imposed. On this ground also the appeal deserves to be allowed.*

*I That the orders of the Ld. Commissioner of Income Tax (Appeals), Shimla as well as LD IT AT" are contrary to the law, equity ar.cl justice and facts and material on record, devoid of jurisdiction, arbitrary based on conjectures and surmises. The inference and conclusions as drawn by the Ld. Court below are neither supported by the facts and record neither of the case nor by any provisions of law as such does the order deserves to be set aside."*

4. The issue raised in Ground 'A', we find relates to charitable society and it was pointed out to us by the Ld. DR that the assessee was carrying on business and was neither a charitable society nor had ever claimed to be so. It was pointed out that the issue raised in the impugned ground therefore did not arise from the order of the CIT(A) and needed to be dismissed for this reason alone. Nothing to the contrary was brought to our notice. In view of the same we dismiss this ground raised before us

5. Ground 'B' & 'C' are general in nature and need no adjudication.

6. In Ground 'D' & 'E' the issue relates to addition made to the income of the assessee on account of purchase of

diesel. The Assessing Officer made addition of Rs.2,25,18,367/- treating the payment made by the assessee for purchase of diesel to be bogus and further of Rs.1,15,65,717/-, by holding that diesel was purchased outside the books of the assessee thereby making addition u/s 69C of the Act ,of the same. The CIT(Appeals) in turn, dealt with both the additions together and deleted the said addition to the extent of Rs.1,26,66,867/- out of the addition made of Rs.2,25,18,367/- upholding the balance of Rs.98,51,500/-. The addition made u/s 69C of Rs.1,15,65,717/- was also deleted by the CIT(Appeals). Against the disallowance upheld by the CIT(Appeals), the assessee has come up in appeal before us .

7. The facts relating to the issue are that the Assessing Officer observed that during the year the assessee company did sub-contract work for M/s Italian Thai Development Public Company Ltd. (in short ITD Ltd.), having been awarded contract for supply of clay and labour to the Kol Dam Project. The Assessing Officer noted that the assessee had debited expenses on account of hiring of vehicles amounting to Rs.6,49,93,168 /- in its Profit and Loss account which was explained by the assessee as comprising the following:

Sl. No.	Name of item	Amount (Rs.)
1.	Diesel	2,36,21,517/-
2.	TDS	6,63,841/-
3.	Retention	31,87,298/-
4.	Water Tank	2,38,284/-
5.	To sub-contractors/ Transporters	3,72,82,228/-
Total		6,49,93,168/-

8. The Director of the company Sh. Joginder Singh Thakur was asked to furnish documentary evidence i.e. bills & vouchers for purchase of diesel. In response, it was stated that the diesel was purchased and got filled in the vehicles of the sub-contractors/ transporters, transporting clay for the assessee company. It was contended that as only one or two petrol pumps existed near the project site, diesel was not easily available. Hence, to achieve the monthly targets of the contract work and to avoid penalty, the transporters/drivers of vehicles had requested the assessee company to arrange diesel for the vehicles and deduct the cost of diesel from their bills. The assessee company accordingly purchased diesel and made payments for diesel directly to the suppliers and deducted it from the bills of the transporters alongwith other costs and TDS. It was stated that this was done to facilitate the transporters and the amount was deducted from their bills. The assessee contended that the amount so paid for purchase of diesel was neither an expense of the company nor had been claimed as such in the P&L account. Diesel was stated to be purchased from the following persons:

Sl. No.	Name & address of the person who diesel supplied for the F.Y. 201 1-12 to the	Amount of diesel supplied
1.	Nikhil Filling Station, NH-21, Slapper, Sundernagar, Mandi	11,01,150/-
2.	Sh. Ajay Kumar S/o Sh. Lachman Dass, Vill, Chamyoun, P.O. Harnora, Sadar,	1,70,20,367/-
3.	Sh. Surender Kumar Thakur S/o Sh. L.R. Thakur, Vill. Chamyoun, P.O. Harnora,	55,00,000/-
Total diesel supplied		2,36,21,517

9. The A.O. issued summons u/s 131 to the above three persons from whom the diesel was stated to have been

purchased and after examination held the purchases to be not genuine on the following grounds :

i) Sh. Surinder Kumar Thakur

10. In his statement recorded u/s 131, Sh. Surender Kumar stated that he was engaged in the business of LIC during F.Y. 2011-12 besides having interest income from FDRs. It was stated by him that he had received payments through cheque for supply of diesel to the Austeas Hydro Construction Co. Pvt. Ltd. during F.Y. 2011-12 and had received payment of Rs.55,00,000/-approximately. He produced Sale Bills for supply of diesel to Austeas Hydro Power Construction Pvt. Ltd. as under :

For Rs. 31,68,120/- on 08.06.2011,

For Rs. 22,74,644/- on 25.05.2011 and

For Rs. 57,240/-on 01.07.2011.

11. However, when asked by the A.O. as to from where diesel was purchased by him for being sold to the appellant, and to produce copies of the bills of purchase of diesel and copy of the license for sale of the petroleum product, Sh. Surender Kumar stated that he had no purchase bills of diesel or any other documentary evidence with him to show the purchase of diesel by him. The AO noted that Sh. Surender Kumar was the real brother of Sh. Joginder Singh Thakur, Director of the assessee company.

ii) Sh. Ajay Kumar

12. In response to summon u/s 131, Sh. Ajay Kumar attended on 18.02.2015 and again appeared on 25.02.2015

and stated that he was having income from two heavy commercial vehicles (Trucks), salary income & was also engaged in purchase and sale of diesel during F.Y. 2011-12. During the year, he received Rs. 17.33 lacs approximately through cheque on account of "Hiring of Vehicles" to Astees Hydro Construction Co. Pvt. Ltd. Apart from this, he received a payment of Rs.170.18 lacs approximately on account of "Sale of Diesel" from Astees Hydro Construction Co. Pvt. Ltd. The said payments for work done and for sale of diesel received from Astees Hydro Construction Pvt. Ltd. were deposited by him in his four bank accounts. However, upon perusal of the sale bills issued by him to the assessee company, it was noticed by Ld. A.O. that there was no VAT No. on the bills. When confronted, Sh. Ajay Kumar admitted that he had not obtained any sales tax number and was not filing any VAT returns. When asked by the A.O. to produce copies of the bills of purchase of diesel and copy of the license for sale of petroleum product for about Rs. 170.18 lacs, he stated that he had no bills for purchase of diesel. However, he confirmed that he had issued bills for sale of diesel to the assessee company. It was also stated that he had purchased diesel from Nikhil Filling Station and Murari Filling Station. Copy of ITR of Sh. Ajay Kumar for A.Y. 2012-13 was generated from AST which showed income of Rs. 1,20,000/- from two commercial vehicles and Rs.60,000/- from salary only.

iii) Sh. Anil Kumar

13. Statement of Sh. Anil Kumar, Manager of Nikhil Filling Station was recorded u/s 131 on 11.02.2015, 13.02.2015 of the Act. He furnished copy of ledger account of Austeese Hydro Power Construction Co. Pvt. Ltd., details of payments received from it, and bank account statement of Nikhil Filling Station. As per these, diesel of Rs.1,26,66,867/- was stated to have been sold to the assessee out of which payment of Rs.1,24,85,111/- was stated to have been received by cheque and cash during F.Y. 2011-12. On 23.02.2015, Sh. Anil Kumar filed a written reply stating that direct sale of diesel to the assessee was of Rs. 11,01,150/- and that Ajay Kumar and Surender Kumar also filled diesel for the vehicles attached with Austeese Hydro Power Construction Co.(AHPC) in the year 2011-12. At the petrol pump a consolidated account for vehicles attached with AHPC was kept. The value of sale of diesel is for all three during the year. No books of account for Nikhil Filling Station were produced. Payments of Rs.11,54,901/- marked in the ledger to have been made by RTGS/cheque by the assessee to Nikhil Filling Station were not found credited in the bank account statement of Nikhil Filling Station.

14. After considering the explanation of the assessee and the statements of the above persons, Ld. A.O. held that the bills submitted by the assessee to substantiate purchase of diesel by him from Surender Kumar & Ajay Kumar were bogus bills. Both the above persons had no VAT number and

no license for sale of a petroleum product. Both of them failed to produce any purchase bills or any other evidence to show the purchase of diesel by them out of which sale could have been made to the assessee. Neither of the two persons could produce any books of accounts or the bill books from where the bills were issued by them to the assessee. No income from the purchase/sale of diesel was shown by them in their ITRs. Placing reliance upon a series of judgments as mentioned in para-3.11 of the assessment order, Ld. A.O. therefore, held that even if payments were made by cheque and TDS was deducted therefrom, still the transactions could be treated as unexplained in view of the facts of the case. The Assessing Officer held that the assessee had filed the purchase bills of diesel purchased from the above two persons only to cover up expenses booked under the head "Operating & other expenses" in the P&L account. The expenditure booked on account of "diesel purchased" from the said two persons was, therefore, disallowed and additions of Rs.1,70,18,367/- and Rs.55,00,000/- were made to the income of the assessee company.

15. Further the Assessing Officer noted that the Manager of Nikhil Filling Station Sh. Anil Kumar, had stated to have sold diesel of Rs.1,26,66,867/- to the assessee and received a total amount of Rs.1,24,85,111/- on account of the same during the impugned year, however, diesel of Rs.11,01,150/- only was shown by the assessee as purchased from Nikhil Filling Station. Thus, difference of Rs.1,15,65,717/- was

held by Ld. Assessing Officer, to be expenditure incurred out of the books of accounts of the company and added to the income of the assessee u/s 69C as unexplained expenses.

16. The matter was carried in appeal before the CIT(Appeals) where the assessee contended that no disallowance could be made of the payment made on purchase of diesel since this was not the expense of the assessee but was only a mode of payment of hiring charges of vehicles hired by getting diesel filled in the same on behalf of the contractors. The Ld.CIT(Appeals) dismissed the said contention, holding that the disallowance had been rightly made since out of the expenses claimed on account of hiring of vehicles, the assessee was found to have not actually paid to the transporters/sub contractors but had retained the same. The Ld.CIT(A) further accepted the purchases stated to have been made by the assessee from the three parties to the extent of Rs. 1,26,66,867/-, believing the statement of the manager of Nikhil Filling Station, Shri Anil Kumar who had stated to have sold diesel of Rs. 1,26,66,867/- to the assessee attributing direct sale out of the same to the extent of Rs.11,01,150/- while the rest through Shri Surender Kumar and Sh.Ajay Kumar. As for the assessee's claim for balance payment made to Shri Surender Kumar and Shri Ajay Kumar, amounting in all to Rs.98,51,500/- the same was rejected stating that the said party could not demonstrate that they had made purchase of diesel to the assessee to this extent since they had failed to

produce purchase bills, nor had any licence of sale of petroleum product, nor had any VAT registration number. The Ld.CIT(Appeals) also noted that no income from the same was returned by them in their return of income filed. He, therefore, treated purchases made from the said two persons to the extent of Rs.98,51,500- as bogus purchases. The relevant findings of the Ld.CIT(Appeals) at para 5.3 of its order are as under:

*“5.3 I have considered the facts of the case and written submissions of the appellant. The appellant is engaged in doing sub-contract work of supply of clay & labour for M/s Italian Thai Development Public Company Ltd. (in short ITD Ltd.) which is referred to in the Letter of Intent as the Contractor. The appellant is mentioned in the Letter of Intent as sub-contractor. During the year, the appellant has done work of Rs.7,57,51,534/- out of which Rs.6,77,11,058/- is from Clay work and Rs.80,40,476/- from receipt of wages to workers. Besides, income of Rs.1,38,272/- is received on account of interest etc. Return of income has been filed declared income of Rs.8,45,396/-. The appellant has thus shown net profit of about 1.13% only which is apparently very low.*

*The argument of the appellant that Rs. 2,36,21,577/- is not an expenditure claimed by it in its P&L account and hence no addition could be made of the same is not tenable. The appellant has claimed an expenditure of Rs. 6,49,93,168/- under the head "Hiring of Vehicles". However, during the course of examination of books of accounts during assessment proceedings, it was found by Ld. A.O. that out of the above expenditure of Rs. 6,49,93,168/-, Rs. 2,36,21,517/- had not been actually paid to the transporters /sub-contractors. The amount was retained by the appellant with itself. The explanation of the appellant before the A.O. was that this amount was retained on account of diesel expenses as the diesel in the vehicles of the transporters engaged in carrying clay were got filled by the appellant on behalf of the transporters. The appellant further stated that the diesel was got filled from three persons, i.e. Nikhil Filling Station, Sh. Ajay Kumar & Sh. Surender Kumar. As mentioned in detail in para-5.1 above, both Surender Kumar who is also brother of the*

*appellant and Ajay Kumar, in their statements recorded u/s 131 of the Act, admitted sale of diesel to the appellant and even produced sale bills issued by them. However, when required to produce purchase bills showing the diesel purchased by them, they could not produce any purchase bills. Neither of them had a license for the sale of petroleum product and neither of them had any VAT registration number. No profit from sale of vehicles was found to have been shown by them in their ITRs. In view of the above, Ld. A.O. has rightly held that the appellant has booked bogus expenditure on account of diesel purchased from Sh. Surender Kumar & Sh. Ajay Kumar for vehicles of the transporters.*

*It was stated by Sh. Surender Kumar & Ajay Kumar that the diesel was got filled by them in the vehicles attached with Austees Hydro Power Const. Pvt. Ltd. (AHPC) from Nikhil Filling Station & Mata Murari Filling Station. In such a station, the payments could have been made by the appellant directly to Nikhil Filling Station or Mata Murari Filling Station. The payments were made instead to Sh. Ajay Kumar who had also provided vehicles to AHPC and to Surender Kumar, brother of a Director of the Company. It was slated that payments were made by cheque. However, the appellant failed to produce any evidence in this regard that the payments were made by cheque. Also no documentary evidence was filed showing payments made by Surender Kumar & Ajay Kumar for purchase of diesel to the various filling stations.*

*The appellant has further relied upon the assessments made u/s 143(3) / 147 in the hands of Surender Kumar and Ajay Kumar. No income from business of sale of diesel was shown by Sh. Surender Kumar & Ajay Kumar in their original returns of income. Subsequently, after the completion of assessment in the case of the appellant, information was passed to the A.O. exercising jurisdiction over Sh. Surender Kumar and Ajay Kumar regarding the sale of diesel admitted by them in their statements u/s 131 of the Act. In response to notice u/s 148, they still stated that the returns originally filed by them may be treated as returns filed in response to notice u/s 148. During their assessment proceedings, both of them stated that vehicles were fuelled by them on behalf of the AHPC from the petrol pumps on commission basis. However, the assessments were completed in both cases in an adhoc and cursory manner by applying net profit rate @ 2.17% to the amounts found deposited in their bank accounts. There is no material on record to establish that the*

*amounts deposited by them in their bank accounts were received by them from the appellant for sale of diesel. Similarly there is no evidence on record that they made payments to Nikhil Filling Station or any other filling station for filling up diesel for the vehicles of the transporters doing contract work for the appellant (AHPC).*

*During assessment proceedings, statement was also recorded u/s 131 of the Act of Sh. Anil Kumar, Manager of Nikhil Filling Station on 11.02.2015 and then on 13.02.2015. He furnished copy of the Ledger account of Austees Hydro Construction Company Pvt. Ltd. (Appellant) for F.Y. 2011-12 and the bank account statement of Nikhil Filling Station. No books of accounts of Nikhil Filling Station were produced. However, it was stated by him in his statement and in his written reply filed before Ld. A.O. that diesel of Rs.1,26,66,867/- was sold by Nikhil Filling Station to the appellant during F.Y. 2011-12 out of which payment of Rs. 1,24,85,111/- was also received either by cheque or through cash. Rs. 11,54,901/- was stated to be received by cheque / RTGS. However, the same could not be got verified by him. It was clarified by him through his written reply dated 23.02.2015 that*

*"..... I wish to explain that at our petrol pump, AHPC, Ajay Kumar & Surender Kumar filled the diesel for vehicles attached with AHPC in the year 2011-12. Bills issued to all these parties separately and payments received separately on the basis of diesel filled of vehicles for AHPC. So at petrol pump we kept one account (consolidated) for vehicles attached to AHPC. The value of sale of diesel is for all three during the year. Actual transaction of AHPC directly for F.Y. 2011-12 was Rs.11,01,150/- .....".*

*The statements of Sh. Surender Kumar, Ajay Kumar & Anil Kumar recorded by Ld. A.O. are not conclusive. Books of accounts have not been produced and examined in only of the three cases. Ld. A.O. has also not verified the payments made/received by cheque in the bank accounts of the appellant and the above three persons though some of these clearly bear a narration mentioning their names. Even the assessment orders u/s 147/143(3) of Sh. Surender Kumar & Sh. Ajay Kumar do not record any finding of fact that the amounts received in their bank accounts were received, (most of which are received in cash), from the appellant out of the amounts retained by him / deducted by him from the bills of the transporters*

*as claimed by it. Similarly, there is no documentary evidence on record that Sh. Surender Kumar & Ajay Kumar made cash payments or any payments by cheque to the various petrol pumps. The only statement / reply that has come on record in this regard is of Sh. Anil Kumar, Manger of the Nikhil Filling Station, who attended in response to summons u/s 131 of the Act. In the absence of any other evidence on record, his statement that a consolidated account was kept at the petrol pump for filling diesel in the vehicles attached with AHPC and that the sale of diesel of Rs. 1,26,66,867/- as per the ledger account was made to all the three persons (parties) can be accepted as a reasonable and plausible explanation.*

*In the present case, Ld. A.O. has not rejected the books of accounts u/s 145(3) of the Act. However, the N.P. rate of 1.13% shown by the appellant is apparently very low. Keeping in view the totality of above facts, it would be reasonable if the purchase of diesel for the vehicles of the transporters by the appellant is accepted to the extent of Rs.1,26,66,867/-. After confirming the above addition of Rs.98,51,500/-, the net profit works out to 14.14%. The appellant gets a relief of Rs.1,26,66,867/-. The addition of Rs.98,51,500./- (Rs.2,25,18,367 (-) Rs.1,26,66,867) is upheld. The ground of appeal is partly allowed.”*

17. As for the addition made on account of unexplained expenditure amounting to Rs.1,15,65,717/- the Ld.CIT(Appeals) held that since he had accepted the payment made to Nikhil Filling Station as genuine, there was no reason to uphold the said addition. The relevant findings of the CIT(Appeals) at para 6.3 of his order are as under:

*“6.3 I have considered the facts of the case and written submissions of the appellant. As discussed in detail in para-5.2 & 5.3 above, the payment of Rs.11,01,150/- was shown to have been made by the appellant directly to Nikhil Filling Station. Ld. A.O. has accepted this payment as genuine. However, he has made an addition of Rs.1,15,65,717/- with reference to the total cost of diesel purchased from Nikhil Filling Station, i.e., Rs.1,26,66,867/- as per the statement of Sh.Anil Kumar. As the addition of Rs.98,51,500/- has already been upheld out*

*of the amount of Rs.2,25,18,367/- the addition for Rs.1,15,65,717/- which amounts to double addition cannot be sustained and is accordingly deleted.”*

18. Before us, vis-à-vis the disallowance of diesel expenses upheld of Rs.98,51,500/- the Ld. DR relied heavily on the order of the CIT(Appeals) stating that in the absence of any evidence of purchase of diesel by the persons who had supplied diesel to the assessee, the said expenses had been rightly disallowed. As for the diesel expenses deleted by the Ld.CIT(Appeals) amounting to Rs.1,26,66,867/-, being the diesel purchased from Nikhil Filling Station as per the statement of the manager of the Filling Station, it was contended that since the CIT(Appeals) had himself found the purchase made from the said parties to be bogus in the absence of license to sell diesel, VAT registration number and bills of purchases of the same and no evidence of either payment received by them from the assessee for the same or they having paid to the suppliers of diesel, and also having found to have not returned any income from the said transaction to tax, there was no reason to accept the genuineness of the impugned purchase merely on the basis of the statement and copy of account of Nikhil Filling Station. The Ld. DR relied upon the findings of the Assessing Officer vis-à-vis the ingenuineness of purchase made from Shri Ajay Kumar and Shri Surender Kumar, which he pointed out had been upheld by the CIT(Appeals) also at para 5.3 of his order as reproduced above. The Ld. DR, therefore, stated that there was no reason to delete the

disallowance made of purchases shown to have been made from Shri Ajay Kumar and Shri Surender Kumar.

19. The submissions of the assessee, as can be gathered from the statement of facts filed before us, is that the disallowance made of payment made on account of purchase of diesel was not the expenses of the assessee and was made on behalf of the transporters from whom vehicles were hired by the assessee for clay work. It was stated that the amount so paid was by way of settlement of the ultimate payment to be made to the transporters of Rs.6,49,93,168/-. The contention of the assessee was that the payment was in fact in the nature of hire charges paid and there being no question relating to the genuineness of the same, no disallowance could be made. The assessee also contended that even otherwise the payment made on account of purchase of diesel on behalf of the transporters had been wrongly held to be bogus since the suppliers had confirmed the said fact in their statements recorded, had also filed copies of bills issued to the assessee in this regard and had stated that payments had been received through cheque and or deposited in their bank accounts. Thus it was contended that all necessary documents proving the genuineness of the said transaction had been filed by the assessee. It was also submitted that in the case of purchase of diesel made from one Shri Ajay Kumar, the copy of bill book had also been produced before the ITO who had impounded the same but the Assessing Officer had omitted to mention this fact. The

assessee has further contended that there was no requirement of any licence for making the said purchases of diesel by the suppliers of the same since the said parties were only suppliers who had arranged for the diesel from authorised petrol pump owners to fill the diesel in the transporters' vehicles. It has further been contended in the statements of facts that the CIT(Appeals) while upholding the disallowance of diesel purchased amounting to Rs.98,51,500/- had accepted the statement of the manager of Nikhil Filling Station even when no books of account were produced by him. The contention of the assessee also is that assessment of the two suppliers had been completed and income from this transaction had been assessed in their hands. The assessee has also contended that in any case, the provisions of section 69C of the Act apply only to unexplained expenses and since the said amount did not pertain to any expenses incurred, there was no question of making any addition u/s 69C of the Act at all.

20. We have considered the contentions of both the parties and gone through the orders of the authorities below. The issue before us relates to the addition made on account of purchases made of diesel by the assessee holding the same to be bogus amounting in all to Rs.2,25,18,367/- and addition made on account of purchase of diesel made out of books of the assessee u/s 69C of the Act amounting to Rs.1,15,65,717/- by the Assessing Officer. Out of the addition made on account of bogus purchases, the

CIT(Appeals) deleted the same to the extent of Rs.1,26,66,867/- and upheld the balance of Rs.98,51,500/-. As for the addition made on account of expenditure incurred out of the books of the assessee, the same was entirely deleted by the CIT(Appeals).

21. Coming to the facts of the case, it is not in dispute that the diesel expenses of Rs. 2,36,21,257/- were in fact part of hiring charges paid by the assessee amounting in all to Rs.6,49,93,168/-and debited to the Profit & Loss Account of the assessee. The break-up of the Hiring Charges is as under:

Diesel	=	Rs.2,36,21,257/-
TDS	=	Rs.6,63,841/-
Retention	=	Rs.31,87,298/-
Water Tank	=	Rs.2,38,284/-
To Sub Contractors/ Transporters	=	<u>Rs.3,72,82,228/-</u>
Total	=	Rs.6,49,93,168/-

22. The contention and the explanation of the assessee vis-à-vis the same is that it was in the business of contract work and supply/transportation of clay to Koldam project and had hired vehicles of transporters for clay work. That the total cost of hiring was Rs.6,49,93,168/- which was accordingly debited under the head 'vehicle hiring charges' which was paid to the transporters directly amounting to Rs.3.72 crores as above and indirectly by getting diesel filled in their vehicles, on incurring water tank expenses, deducting TDS on the payment made and retaining certain amount for any mistake or failing of contract by the

transporters. The above contention of the assessee has not been controverted by the Revenue at any stage even before us. Therefore, it is clear and we agree with the Ld. counsel for assessee that the payment made by the assessee for purchase of diesel was not the expenses of the assessee at all. The expense of the assessee in fact was hiring charges. Therefore, the question of disallowance, if any, which arises can be only of hiring charges paid. We find that vis-à-vis the hiring charges no enquiry or investigation has been done by the Revenue at all. No effort has been made by the Revenue to find out whether the claim of the assessee that it had incurred expenditure of Rs.6.49 crores on account of hiring of vehicles was correct or not. There is no whisper in the entire order of the Assessing Officer of any enquiry or investigation conducted in this regard except from one contractor Sh Narinder Singh, to whom the assessee had claimed to have paid Rs.6,70,423/- while the said person stated that he had received only Rs.1,16,569/-. This ,by any standards cannot be said to be a sufficient inquiry so as to arrive at a conclusion that the expenses claimed on account of hiring charges were not entirely genuine, considering the quantum of hiring charges book of Rs.6.49 crores and the inquiry done of Rs.6.70 lacs only. Without, therefore, questioning the genuineness of the claim of the assessee of hiring charges paid, we fail to understand how the Revenue could have held a portion of the payment claimed to have been made by the assessee by way of purchase of diesel on behalf of the transporters to be bogus or not genuine. By

making addition/holding the diesel charges paid by the assessee on behalf of the transporters of Rs.2.36 crores as being bogus, the Revenue's claim, in effect, is that the hiring charges claimed by the assessee to this extent were bogus. In our view, the line of enquiry and investigation of the Revenue, therefore, should have been first and foremost regarding genuineness of the claim of hiring charges of the assessee, which should have been supplanted by the subsequent enquiry regarding the diesel expenses incurred by the assessee. Without first establishing that the claim of hiring charges was not genuine and without making any direct enquiry and investigation in this regard, the Revenue was wrong in disallowing hiring charges to this extent by way of indirect enquiries conducted vis-à-vis payment of any diesel charges made by the assessee or not. Therefore, in our view, the enquiry and investigation conducted by the Revenue is totally flawed and the entire exercise has not been approached correctly by the Revenue.

23. Further even vis-à-vis enquiry conducted regarding payment made on account of diesel charges, we find that the authorities below have not properly appreciated the evidences collected. Undisputedly the diesel was supplied by the following three parties to the assessee:

1)	Nikhil Filling Station	= Rs.11,01,150/-
2)	Shri Ajay Kumar	= Rs.1,70,20,367/-
3)	Shri Surender Kumar Thakur	= <u>Rs.55,00,000/-</u>
	Total	= Rs.2,36,21,517/-

24. The assessee had claimed the payments to the aforesaid parties to have been made by cheques and or depositing the entire receipts in bank and even bills relating to purchase of diesel were submitted. All the three parties statements were recorded and they had admitted selling of diesel to the assessee and receiving payment by cheque. The parties had claimed to have purchased the diesel from Nikhil Filling station and Murari Filling station. What turned the table against the assessee was the fact that Shri Ajay Kumar and Shri Surender Kumar Thakur from whom majority of the purchases were made to the extent of Rs.2.25 crores out of total purchase of Rs.2.36 crores, failed to explain or substantiate the source from where they had purchased the diesel for supplying to the assessee by producing any documentary evidence in this regard in the form of purchase bills. It was also noted by the Assessing Officer that they had no licence to sell diesel, nor were registered under VAT for the same. At the same time, we find that the third party Nikhil Filling Station had admitted making sales of Rs.1.26 cores to the assessee, while the assessee has claimed to have purchased diesel of only Rs.11 lacs from him. The Assessing Officer on the basis of this fact has presumed that the assessee has made purchases of diesel outside the books while the CIT(Appeals) has read it otherwise and has held that the actual purchase of diesel by the assessee can be taken only to the extent purchased from Nikhil Filling Station to the extent of Rs.1.26 crores and, therefore, deleted the addition made to this extent. The picture which

emerges is that the Assessing Officer had held the purchases made from Shri Ajay Kumar and Shri Surender Kumar to be bogus while in the same breath he has held that from Nikhil Filling Station the assessee has made purchases of diesel outside the books. The said conclusion of the Assessing Officer, in our view, does not appear to be logical conclusion. The Assessing Officer appears to be blowing hot and cold at the same time. It is difficult to comprehend as to why the assessee on claiming to have purchased diesel on behalf of its transporters would at the same time make a bogus claim and also purchase diesel outside his books of account. Therefore, it appears that the enquiry and investigation conducted by the Revenue is inconclusive. Further we find that the CIT(Appeals) has believed the version of Nikhil Filling Station of having sold diesel to the assessee of Rs.1.26 crores merely on the basis of statement of the manager despite the fact that no books of account were produced by the manager to corroborate his statement. The CIT(A) has, we find, at the same time held that the purchases from Surinder Kumar and Ajay Kumar to be bogus, but has also accepted that purchases to the extent of Rs.1.24 crores were made by them from Nikhil Filling station for supplying to the assessee, believing the version /statement of the manager of the filling station. The conclusion derived by the Ld.CIT(A) is clearly not sustainable. Therefore, in our view, the entire exercise of the Revenue and the entire enquiry and investigation conducted is inconclusive and incomplete and the matter

needs to be considered afresh. We find that even the Ld.CIT(Appeals) has made identical observations about the inconclusive nature of the inquiry in his order while stating so at pages 13 and 14 of his order as under:

*“The statements of Sh. Surender Kumar, Ajay Kumar & Anil Kumar recorded by Ld. A.O. are not conclusive. Books of accounts have not been produced and examined in only of the three cases. Ld. A.O. has also not verified the payments made/received by cheque in the bank accounts of the appellant and the above three persons though some of these clearly bear a narration mentioning their names. Even the assessment orders u/s 147/143(3) of Sh. Surender Kumar & Sh. Ajay Kumar do not record any finding of fact that the amounts received in their bank accounts were received, (most of which are received in cash), from the appellant out of the amounts retained by him / deducted by him from the bills of the transporters as claimed by it. Similarly, there is no documentary evidence on record that Sh. Surender Kumar & Ajay Kumar made cash payments or any payments by cheque to the various petrol pumps. The only statement / reply that has come on record in this regard is of Sh. Anil Kumar, Manger of the Nikhil Filling Station, who attended in response to summons u/s 131 of the Act. In the absence of any other evidence on record, his statement that a consolidated account was kept at the petrol pump for filling diesel in the vehicles attached with AHPC and that the sale of diesel of Rs. 1,26,66,867/- as per the ledger account was made to all the three persons (parties) can be accepted as a reasonable and plausible explanation.*

*In the present case, Ld. A.O. has not rejected the books of accounts u/s 145(3) of the Act. However, the N.P. rate of 1.13% shown by the appellant is apparently very low. Keeping in view the totality of above facts, it would be reasonable if the purchase of diesel for the vehicles of the transporters by the appellant is accepted to the extent of Rs.1,26,66,867/-. After confirming the above addition of Rs.98,51,500/-, the net profit works out to 14.14%. The appellant gets a relief of Rs.1,26,66,867/-. The addition of Rs.98,51,500./- (Rs.2,25,18,367 (-) Rs.1,26,66,867) is upheld. The ground of appeal is partly allowed.”*

25. Therefore, we consider it fit to restore the issue back to the Assessing Officer to conduct proper enquiries in the present case beginning with first examining the claim of the assessee vis-à-vis the genuineness of expenses claimed of hire charges and further making complete enquiries regarding the purchases of diesel from the aforesaid three parties so as to arrive at proper conclusion thereafter in accordance with law. Grounds 'D' & 'E' raised by the assessee therefore, with regard to the diesel expenses incurred and addition made u/s 69C on account of the same stand allowed for statistical purposes

26. Ground 'F' raised by the assessee relates to disallowance of diesel expenses claimed by the assessee amounting to Rs.1,39,452/-.

27. The A.O. made the above addition of Rs.1,39,452/- on account of diesel expenses claimed by the assessee in P&L account which was explained to be incurred to run a generator set at the work site. Ld. A.O. noted that there was no generator set appearing in the schedule of fixed assets. The explanation of the assessee that the generator set was arranged by the Director of company from one of his friend Shri Sada Ram and the affidavit of Shri Sada Ram submitted in this regard were rejected by Ld. A.O. on ground that no purchase bill or any other documentary evidence regarding the purchase of generator by Shri Sada Ram could be produced. Hence, the diesel expenses of Rs.1,39,452/- was disallowed u/s 69C of the Act.

28. During appellate proceedings the assessee contended that the Assessing Officer had rejected the affidavit of Shri Sada Ram without any verification or without summoning Shri Sada Ram and in the absence of any adverse material brought on record in this regard, the Assessing Officer could not have rejected the affidavit in a summary manner. The Ld.CIT(Appeals) rejected the assessee's contention stating that the assessee had only produced an affidavit from his friend and had failed to establish the veracity of the recital in the affidavit by producing any affidavit regarding purchase of generator by Shri Sada Ram or by producing him for cross examination.

29. On perusing the statement of facts filed before us we find that the contention of the assessee is the same as that before the lower authorities, being that the expenses were incurred to run generator at project site and that the assessee did not have any generator, the same was arranged by the Director of the assessee company from his friend Shri Sada Ram free of cost whose affidavit to this effect had also been filed before the lower authorities. The contention of the assessee was that if no effort is made to controvert the contents of the affidavit, the same has to be accepted as true. The assessee has cited the decision of the Hon'ble High Court of Gauhati in the case of **Chowkchand Balabux Vs. CIT (1961) 41 ITR 465** and the decision of the Hon'ble Apex Court in the case of Mehta Parekh & Co. Vs. CIT (1956) 30 ITR 181 in this regard.

30. The Ld. DR, on the other hand, has relied upon the order of the CIT(Appeals).

31. We have considered the rival contentions and find merit in the contention of the Ld. counsel for assessee. The assessee's explanation of having purchased diesel for running its generator set which was owned by the friend of the Director of the company from whom it was borrowed, has been duly evidenced by the affidavit of the said person Shri Sada Ram. Without controverting the contents of the affidavit or without making any effort to verify the same, the Revenue could not have doubted the veracity of the same. Further having filed the affidavit it was for the Revenue to make further enquiries vis-à-vis the veracity of the same, the onus in this regard had been wrongfully shifted on the assessee. Also since we have restored the issue of diesel expenses to the Assessing Officer in the absence of adequate enquiry conducted and noting that on the present issue also complete and adequate enquiry has not been conducted by the Revenue, we restore this issue also back to the Assessing Officer for conducting proper enquiry and thereafter adjudicate the same in accordance with law. Ground.F raised by the assessee is, therefore, also allowed for statistical purposes.

32. Ground 'G' raised by the assessee relates to disallowance of expenses of Rs.87,650/- as donation expenses.

33. A perusal of the order of the CIT(Appeals) reveals that the said expenses claimed by the assessee had been allowed by him. Therefore, we find no merit in the present ground raised by the assessee, the assessee not being aggrieved by the order of the CIT(Appeals) on this issue. Ground G raised by the assessee is, therefore, dismissed.

34. Ground No. 'H' raised by the assessee relating to charging/imposing interest u/ss 244-A, 234B & 234D of the Act are consequential and, therefore, needs no adjudication. Ground No. 'H' raised by the assessee is dismissed.

35. Ground No. 'I' raised by the assessee is general and no adjudication is required.

In the result the appeal of the assessee is partly allowed for statistical purposes.

36. We shall now be taking up the appeal of the Revenue in **ITA No.837/Chd/2017 for A.Y 2012-13.**

37. The Revenue has raised following grounds:

- “1. *On the facts and in the circumstances, the Ld. CIT(A) has erred in deleting the addition of Rs. 1,26,66,867/- made by the A.O. on account of expenditure allegedly booked in operating and other expenses in the name of Sh. Ajay Kumar and Sh. Surender Kumar as the assessee company could not produce documentary evidences and could not satisfactorily prove purchases of diesel from both the persons.*
2. *On the facts and in the circumstances, the Ld. CIT(A) has erred in deleting the addition of Rs.1,15,65,717/- as the assessee company could not justify the difference of Rs.1,15,65,717/- occurred in diesel ledger account of Austee Hydro Power & Construction Company Pvt Ltd (assessee) and Nikhil Filling Station (Saler).*

3. *On the facts and in the circumstances, the Ld. CIT(A) has erred in deleting the addition of Rs.87,650/- made on account of donation paid as the assessee company paid donation to such persons who do not come under the preview of Section 80G.*

38. Ground Nos.1 and 2, it was pointed out and we have also noted, are on the issue of diesel expenses disallowed by the Assessing Officer which was partially deleted by the CIT(Appeals). Since this issue has already been dealt with by us in ground 'D' and 'E' of the assessee's appeal wherein we have restored the entire issue back to the Assessing Officer for conducting proper enquiry at paras 20 to 25 of our order above, The issue raised by the Revenue stands covered by the same and thus restored to the Assessing Officer. In view of the above, ground Nos.1 and 2 raised by the Revenue are allowed for statistical purposes.

39. Ground No.3 relates to the issue of donation expenses disallowed by the Assessing Officer on the ground that the assessee had failed to establish that the persons to whom donations were given were registered u/s 80G of the Act.

40. Before the Ld.CIT(Appeals), the assessee had contended that the amounts paid were not donations but were made in connection with festival, melas, tournaments, etc. sponsored by Deputy Commissioner, Mandi/Panchayat and were advertisement expenses incidental to the business of the assessee. The CIT(Appeals) found the explanation of the assessee to be plausible and, therefore, allowed the claim of the assessee.

41. Before us, the Ld. DR relied upon the order of the Assessing Officer.

42. We have gone through the order of the Assessing Officer. We find that the impugned expenses of Rs.87,650/- were incurred on the following:

Detisl of Staff Welfare Exp. [fair & festivals office expenses] for the F.Y. 2011-12			
Date	Particulars	Total	Return cheque
04/04/2011	Guga Mela committee Barmana		2100/-
13/06/2011	Guga Mela committee Barmana	5200/-	
23/08/2011	Guga Mela committee Barmana	5100/-	
25/08/2011	Guga Mela committee Barmana Jay Shri Ram	5100/-	
14/09/2011	Slapper HP Basket Ball Association	5000/-	
29/11/2011	Paddal Ground Mandi	11000/-	
02/12/2011	Jay Shri Ram Yuvak Mandal Slapper	10000/-	
09/01/2012	Lohari Utsav Committee Bahot Kasol Kasol	11000/-	
06/03/2012	State Level Nalwari Fair Bilaspur	250/-	
15/03/2012	State Level Nalwari Fairsunder nagar	35000/-	
	Total	87650	2100

43. There is no evidence on record to show the nature of the expenses, whether donations, as claimed by the Revenue or advertisements, as claimed by the assessee. The Assessing Officer has given no basis for holding the said expenses to be donations ,while the CIT(Appeals) has accepted the assessee's claim of the same being advertisements stating it to be a plausible explanation. None has cared to verify the facts relating to the said expenses.

We, therefore, restore this issue also back to the Assessing Officer to verify the exact nature of the expenses and thereafter adjudicate the issue in accordance with law. Ground No.3 raised by the Revenue is allowed for statistical purposes.

The appeal of the Revenue is allowed for statistical purposes.

44. In the result, the appeal of the assessee is partly allowed for statistical purposes and the appeal of the Revenue is allowed for statistical purposes.

Order pronounced in the Open Court.

Sd/-  
**(SANJAY GARG)**  
**JUDICIAL MEMBER**

Sd/-  
**(ANNAPURNA GUPTA)**  
**ACCOUNTANT MEMBER**

Dated : 21<sup>st</sup> August, 2018

\*Rati\*

Copy to:

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

Assistant Registrar,  
ITAT, Chandigarh