आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES "A", JAIPUR

श्री विजय पाल राव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 977/JP/2018
निर्धारण वर्ष/Assessment Year :2012-13

Zuberi Engineering Company, C/o- Kapil Goel Adv., F-26/124 Sector 7 Rohini, Delhi-110085	बनाम Vs.	D.C.I.T., Circle-2, Jaipur.
PAN No.: AAAFZ 2103 K		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकर अपील सं./ITA No. 1122/JP/2018
निर्धारण वर्ष/Assessment Year :2012-13

A.C.I.T., Circle-2, Jaipur.	बनाम Vs.	M/s Zuberi Engineering Company, 2835, Tiba Jogian, Phuta Khurra, Jaipur.
PAN No.: AAAFZ 2103 K		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकर अपील सं./ITA No. 978/JP/2018
निर्धारण वर्ष/Assessment Year :2013-14

Zuberi Engineering Company, C/o- Kapil Goel Adv., F-26/124 Sector 7 Rohini, Delhi-110085	बनाम Vs.	D.C.I.T., Circle-2, Jaipur.
PAN No.: AAAFZ 2103 K		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकर अपील सं./ITA No. 979/JP/2018
निर्धारण वर्ष/Assessment Year :2014-15

Zuberi Engineering Company, C/o- Kapil Goel Adv., F-26/124 Sector 7 Rohini, Delhi-110085	बनाम Vs.	D.C.I.T., Circle-2, Jaipur.
PAN No.: AAAFZ 2103 K		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से / Assessee by : Shri Kapil Goel (Adv)
राजस्व की ओर से / Revenue by : Shri Varinder Mehta (CIT-DR)

सुनवाई की तारीख / Date of Hearing : 25/10/2018
उदघोषणा की तारीख / Date of Pronouncement : 21/12/2018

आदेश / ORDER

PER: BENCH

These are three appeals by the assessee for the A.Y. 2012-13 to 2014-15 and a cross appeal by the revenue for the A.Y. 2012-13 are directed against the composite order of the ld. CIT(A)-I, Jaipur dated 31/07/2018.

2. Since common issues are raised in these appeals, therefore, for the sake of convenience, these appeals are heard together and are being disposed of by this composite order. For the purpose of recording the facts, the appeal for the A.Y. 2012-13 is taken as lead case.

3. The assessee is a partnership firm and a contractor engaged in erection and fabrication work. The assessee filed its return of income for the A.Y. 2012-13 on 25/09/2012 declaring total income of Rs. 16,42,27,060/-. The assessment was completed U/s 143(3) of the Income Tax Act, 1961 (in short the Act) by the Assessing Officer on 30/3/2015 at a total income of Rs. 19,15,23,899/-. The Assessing Officer made various disallowances while passing the assessment order. Identical disallowances

were also made by the Assessing Officer for the A.Y. 2013-14 and 2014-15.

4. The assessee challenged the orders of the Assessing Officer making disallowances before the ld. CIT(A). The ld. CIT(A) while passing the impugned order has enhanced the assessment for all the three assessment years by rejecting the books of account and estimated the income of the assessee by applying the N.P. rate of 8.5%, 9.5% and 10% for the A.Y. 2012-13 to 2014-15 respectively. For the A.Y. 2012-13, part relief was granted by the ld. CIT(A) on the issue of disallowance made U/s 40(a)(ia) of the Act against which the revenue has filed the cross appeal. For the A.Y. 2012-13 the assessee has raised following grounds of appeal:

> *"1. That on the facts and in the circumstances of the case and in law, Id CIT-A grossly erred in enhancing the income of appellant assessee by sum of Rs 7,38,35,804 acting ultra vires to statutory limitation of enhancement powers u/s 251 which is ab initio void and fundamentally flawed action.*
>
> *2. That on the facts and in the circumstances of the case and in law, Id CIT-A grossly erred in enhancing the income of appellant assessee by sum of Rs 7,38,35,804 in perfunctory manner on preposterous basis of earlier history of books rejection and some orders of higher authorities without applying basic understanding that it is nowhere stated in the income tax law that once assessee's books are rejected and profit is estimated then for all years in perpetuity according to Ld CIT-A books would be rejected ipso facto and profit would be estimated which is absolutely against the basic scheme of income tax law specially when Id CIT-A has not established even remotely that facts of earlier years are homogenous to extant period;*

3. *That on the facts and in the circumstances of the case and in law, Id CIT-A grossly erred in enhancing the income of appellant assessee by sum of Rs 7,38,35,804 by wrongly invoking section 145(3) without appreciating that assessee's defect free audited book result cannot be assaulted light heartedly and in casual manner as done in extant case;*

4. *That on the facts and in the circumstances of the case and in law, Id CIT-A grossly erred in enhancing the income of appellant assessee by sum of Rs 7,38,35,804 by applying arbitrary and imaginary profit rate of 8.5% which is egregious and shocking and grossly lacks any rational/sound legal basis and is based on mere ipse-dixit of Ld CIT-A as it is settled law that mere books rejection by itself does not give a carte-blanche to the officer to estimate any additional income over and above returned income without bringing any incriminating material on records.*

5. *That on the facts and in the circumstances of the case and in law, Id CIT-A grossly erred in enhancing the income of appellant assessee by not issuing valid show cause notice as mandated and prescribed in CBDT instructions and under the law, and mere cryptic order sheet entry is treated as equivalent to valid and lawful show cause notice which omission vitiates the entire action.*

6. *That on the facts and in the circumstances of the case and in law, Id CIT-A grossly erred in enhancing the income of appellant assessee without appreciating that entire enhancement is based on purely hypothetical and artificial income which is never earned by assessee and is never corroborated even symbolically by any iota of trading outside the books .*

Other grounds relating to additions made by Ld AO which are not deleted by Ld CIT-A

7. *That on the facts and in the circumstances of the case and in law, Id CIT-A erred in not deleting the sustained disallowance of Rs 34,64,780 (Rs 594,412 and Rs 28,70,368) u/s 40(a)(ia) which does not cover direct costs allowable u/s 28 and for those amounts assessee's explanation has not been objectively appreciated and even for those amounts in worst case scenario only 30% of the expense can be considered for disallowance in view of retrospective amendment in*

section 40(a(ia). We request for total deletion of said disallowance first and alternatively we pray for 30% disallowance without prejudice to our main contention.

8. That on the facts and in the circumstances of the case and in law, Id CIT-A erred in not deleting the sustained disallowance of Rs 108,73,483/- pertaining to genuine and actual deductions made by the clients which is plainly against real income theory by merely and solely harping on form 26AS which is based on tentative process of TDS and cannot create automatic and conclusive charge of income in hands of recipient unless concrete material is brought on records by Ld AO/revenue to say that assessee concerned has obtained said sum in its coffers which can't be left in lurch as done in extant case .

8.1 Solemn duty of making of independent and meaningful enquiry u/s 133/6)/131 in assessment of recipient by its AO to verify veracity of 26AS data does not depend on assessee's filing of confirmation as held by CIT-A which reasoning is not as per scheme of income tax law.

8.2 Just because clients have shown certain amount in a particular wav in unilateral manner cannot overrule assessee's factual version that assessee has not reed, specified amount claimed as deductions in its coffers .which explanation is not objectively considered.

9. That on the facts and in the circumstances of the case and in law, Id CIT-A erred in not deleting the disallowance of Rs 190,325 u/s 36(1)(va)/ section 2(24)(x) of the Act without appreciating that said issue is covered in assessee's favor by jurisdictional high court decisions.

<u>Invalid issuance of notice u/s 143(2) on basis of CASS</u>

10. That Ld AO while issuing notice u/s 143(2) on mere basis of CASS has not applied its own mind which is mandated u/s 143(2) as evident from words used like considered necessary etc and as explained/dilated in various apex court rulings, accordingly the orders passed by Ld AO and Ld CIT-A are bad in law and deserves to be quashed on this short count itself.

That the appellant craves leave to add add/alter any/all grounds of appeal before or at the time of hearing of the appeal."

5. Grounds No. 1 to 6 of the assessee's appeal are interlinked and are regarding the enhancement of the assessment. The ld AR of the assessee has submitted that as per the provisions of Section 251 of the Act, the ld. CIT(A) is not given plenary and unbridled power of enhancement in every case and that too for making an enhancement based on hypothetical income, which was never earned by the assessee. Once the Assessing Officer did not raise any question about the correctness of the books of account then the ld. CIT(A) cannot invoke the extraordinary power of enhancement to reject the books of account U/s 145(3) of the Act in most perfunctory and preposterous manner and further applying certain self suiting presumptive and assumptive profit rate without any incriminating material. Thus, the action of the ld. CIT(A) enhancing the assessee has resulted invalid and unlawful demand of tax as well as penalty proceedings U/s 271 of the Act. The ld AR has contended that the addition made by the ld. CIT(A) are ex-facie unsustainable in law. The ld AR has then contended that Section 251 of the Act limits power of enhancement of ld. CIT(A) to the aspects considered by the Assessing Officer and not to pickup any new source of income or issue which was not even picked up by the Assessing Officer in the scrutiny assessment. The sole basis of enhancement by the ld. CIT(A)

is the past history of books rejection and profit estimation without any factual finding of defects in the books of account, therefore, the rejection of books of account U/s 145(3) of the Act and consequential enhancement is without considering and satisfying the stipulated conditions of law provided U/s 145(3) of the Act. The ld AR has further submitted that even after rejection of books of account and higher profit is applied by the ld. CIT(A) purely based on imaginary ground and without any requisite material to show such additions to the income. He has further contended that no valid show cause notice was issued by the ld. CIT(A) before invoking the extraordinary jurisdiction of enhancement. The enhancement made by the ld. CIT(A) is hypothetical and artificial and the same is not corroborated by any record or material to prove that any trading outside the books. In support of his contention, he has relied upon the decision of Hon'ble Kerala High Court dated 24/10/2017 in the case of CIT Vs. B.P. Sherafudin, [2017] 87 taxmann.com 330 (Kerala) arising thereof or material arising out of the proceedings. The ld. CIT(A) cannot make the enhancement by introducing a new source of income. He has also relied upon the following decisions:

(i) State of Kerala Vs C. Velukutty 60 ITR 239 (SC).

(ii) Order dated 26/08/2015 of Mumbai Benches of the Tribunal in the case of Malabar Hill Club Vs ACIT in ITA Nos. 517 &

518/Mum/2010m 1560/Mum/2012, 803/Mum/2010, 808/Mum/2010 and 4274/Mum/2012.

(iii) Decision of Mumbai Benches of the Tribunal dated 27/04/2016 in the case of DCIT Vs M/s Free India Assurance Services Ltd. in ITA No. 5588/Mum/2014 and 5934/Mum/2014.

(iv) Decision of this Tribunal dated 25/05/2018 in the case of Sh. Jagdish Narayan Sharma Vs ITO in ITA No. 751 to 753/JP/2015.

6. On the other hand, the ld CIT-DR has submitted that the ld. CIT(A) has enhanced the income of the assessee from business activity and therefore, there is no new source of income was introduced by the ld. CIT(A) while exercising the power of enhancement U/s 251(1) of the Act. The ld. CIT-DR has submitted that acceptance and rejection of books of account was very much subject matter of assessment and therefore, the ld. CIT(A) has the power to reject the books of account U/s 145(3) of the Act and thereby enhanced the income by adopting the G.P. rate which is found to be proper and reasonable. Once the ld. CIT(A) has given cogent reasons for rejection of books of account then the said decision and exercise of power by the ld. CIT(A) is within the four corners of the provisions of Section 251(1) of the Act. He has relied upon the order of the ld. CIT(A).

7. We have considered the rival submissions as well as the relevant material on record. There is no quarrel on the point that the ld. CIT(A) can exercise its power to enhance the income U/s 251 of the Act on the issue

which is subject matter of the assessment. However, the said power of enhancement of ld. CIT(A) cannot be exercised in respect of the issue which is not the subject matter of the assessment and therefore, there is a restriction on exercise of power of enhancement not to take up an altogether new source of income. The question arises what is subject matter of assessment and in our considered opinion it depends on the scope of the enquiry by the Assessing Officer during the scrutiny assessment proceedings. Therefore, if the Assessing Officer has taken up an issue or matter for scrutiny during the assessment proceedings and after considering the explanation/reply of the assessee has accepted the claim then though the Assessing Officer has not made any addition on that particular item or source of income but the said would be very much subject matter of the assessment. Consequently the ld. CIT(A) can exercise its power on such point or subject matter by scrutinizing the same again and in case it is found that the Assessing Officer has allowed the claim which is not allowable then the ld. CIT(A) in its power U/s 251 of the Act can enhance the assessment by disallowing or making an addition on such issue or subject matter. It is settled proposition of law as held in the series of decisions, some of which has been relied upon by the ld AR of the assessee and cited (supra) that the ld. CIT(A) while exercising its power for enhancement U/s 251 of the Act cannot bring a new source of income

which was not subject matter of assessment. There is a distinction between the subject matter of assessment and scope of assessment. The subject matter of assessment is confined only on the issue and subject which are taken up for scrutiny by the Assessing Officer whereas the scope of assessment is very wide which includes even an enquiry of any issue and claim but might not have been taken up by the Assessing Officer during the scrutiny assessment. Thus, the subject matter of assessment is the matters which were taken up by the Assessing Officer during the scrutiny assessment are very much subject matter of appeal so far as the power of the ld. CIT(A) exercising enhancement of income. Whereas the issue and subject matter which were falling under the scope of the assessment but were not taken up for scrutiny would fall in the ambit of provisions of Section 263 and the Commissioner in its revisionary power can take up those matters for revision of assessment order. Therefore, there is segregation of jurisdiction U/s 263 and Section 251 of the Act. In case of complete lack of enquiry on the part of the Assessing Officer while passing the assessment order, the same is subject matter of revision U/s 263 of the Act whereas if the Assessing Officer has taken up a particular issue or matter for enquiry but accepted the claim then the said matter can be taken up either by the ld. CIT(A) under the provisions of enhancement of income or by the Commissioner U/s 263 of the Act if it

satisfies the conditions provided U/s 263 of the Act. Therefore, the overlapping of jurisdiction on such issue cannot be ruled out. But in case of complete lack of enquiry where the Assessing Officer has not at all taken up a matter for enquiry or scrutiny then the jurisdiction over such mater is exclusively under the provisions of Section 263 of the Act and not U/s 251 of the Act for enhancement of assessment. The ld. CIT(A), therefore, though, vested with very wide powers U/s 251(1) of the Act so far as the subject matter and aspects of the assessment about which the assessee makes a grievance as well as regarding any other matter considered by the Assessing Officer and determined in the assessment. Therefore, it is not open to the ld. CIT(A) to introduce in the assessment a new source of income and the assessment must be confined to those items of income which were subject matter of original assessment which means the items of income and the aspects on which the Assessing Officer has taken up for scrutiny. This Tribunal in the case of Sh. Jagdish Narayan Sharma Vs ITO (supra) while considering an identical issue has discussed this question of jurisdiction of the ld. CIT(A) to enhance the assessment in para 44 to 51 as under:

> *"44. We have heard the rival contentions and perused the material available on record. The issue which arise for consideration is whether the ld CIT(A) was justified in bringing to tax long term capital gains, on sale of land by the assessee to his two daughter-in-laws, by way of enhancement of*

income in terms of provisions of section 251(1)(a) of the Act which reads as under:

" 251(1) In disposing of an appeal, the Commissioner(Appeals) shall have the following powers:

(a) In an appeal against an order of assessment, he may confirm, reduce, enhance or annual the assessment."

45. *Regarding the powers of the ld CIT(A) by way of enhancement of income in hands of the assessee, the matter had come up for the consideration before the Hon'ble Supreme Court in case of CIT vs Shapoorji Pallonji Mistry reported in 44 ITR 891 wherein the question framed for consideration was "whether in an appeal filed by an assessee, the Appellate Assistant Commissioner can find a new source of income not considered by the Income-tax Officer and assess it under his powers granted by section 31 of the Income-tax Act ?*

46. *The legal proposition laid down by the Hon'ble Supreme Court reads as under:*

"There is no doubt that the Appellate Assistant Commissioner can "enhance the assessment". It is admitted also by the assessee that within the four corners of the sources processed by the Income-tax Officer, the Appellate Assistant Commissioner can enhance the assessment. This power must, at least, fall within the words "enhance the assessment", if they are not to be rendered wholly nugatory. The controversy in this case is about his discovering new sources, not mentioned in the return and not considered by the Income-tax Officer. The High Court held following its earlier view in Narrondas Manordass v. Commissioner of Income-tax [1957] 31 ITR 909, that the Appellate Assistant Commissioner has revisional powers, but that they are confined to what was before the Income-tax Officer and considered by the latter. The correctness of this

view is challenged in this appeal by the Commissioner of Income-tax, Bombay.

The earliest case, which considered the meaning of section 31(3), was Jagarnath Therani v. Commissioner of Income-tax AIR 1925 Pat. 408 decided by the Patna High Court. In that case, the assessee had three businesses at Purnea, Jalpaiguri and Calcutta. His income from Purnea only was assessed by the Income-tax Officer. On appeal by the assessee, the Appellate Assistant Commissioner assessed him with regard to the income from the other two businesses. The head of income was the same within section 6 of the Income tax Act, but the sources of income were different. The Patna High Court observed :

"Now this section relating to appeals is enacted for the benefit of the subject and also, to the limited extent therein stated, for the benefit of the Crown. But the subject-matter of the appeal is the assessment and the scope of the appeal must in my opinion be limited by the subject-matter. The appellate authority has no power to travel beyond the subject-matter of the assessment and, for all the reasons advanced by the appellant, is in my opinion not entitled to assess new sources of income."

The view of the Patna High Court receives support from a decision of the Madras High Court in Gajalakshmi Ginning Factory v. Commissioner of Income-tax [1952] 22 ITR 502 where, at page 510, the Divisional Bench observed as follows:

"Of course, it would not be open to the Appellate Assistant Commissioner to introduce into the assessment new sources, as his power of enhancement should be restricted only to the income which was the subject-matter of consideration for purposes of assessment by the Income-tax Officer."

In Bishwanath Prasad Bhagwat Prasad v. Commissioner of Income-tax [1956] 29 ITR 748, the Appellate Assistant Commissioner had actually remanded the case, but while considering the powers of the Appellate Assistant Commissioner, the Divisional Bench appears to have approved of the abovequoted passage from the Madras case. The observations in that case may be treated as obiter. In Narrondas Manordass v. Commissioner of Income-tax [1957] 31 ITR 909 is to be found the earlier case of the Bombay High Court, which was followed in the judgment under appeal. In that case, the assessee was carrying on business in Bombay and also in Rajkot. The profits from the Rajkot business were assessed by the Income-tax Officer at Rs. 1,17,643. The Income-tax Officer also found remittances to the extent of Rs. 4 lakhs from Rajkot to Bombay, but did not include that amount in the assessment in view of the concession allowed by the Part B States Taxation Concession Order. The assessee appealed with respect to the sum of Rs. 1,17,643, contending that the Rajkot business had no profits but only loss. The Appellate Assistant Commissioner accepted this contention, but set aside the assessment and remanded the case to the Income-tax Officer for reassessment with a view to assessing the sum of Rs. 4 lakhs. In dealing with the case, the High Court held that the powers of remand were extremely wide, but it quoted with approval the decision of the Patna High Court in Jagarnath Therani v. Commissioner of Income-tax AIR 1925 Pat. 408 and also the above observation of the Madras High Court. The learned Chief Justice on that occasion added that there was a distinction between the subject-matter of the appeal and the subject-matter of the assessment, and that the Appellate Assistant Commissioner's powers under section 31 were not confined to the subject-matter of the appeal but extended to the subject-matter of the assessment. Those powers included a power of remand to include in the assessment something which ought to have been so included by the Incometax Officer, and a remand in that case was, therefore, proper.

The matter also came before this court in Commissioner of Income-tax v. McMillan & Co. [1958] 33 ITR 182 (SC); but the question, with which we are concerned, was left open. There is, however, a passage in the judgment, approving of the observations of Chagla, C.J., in Narrondas Manordass v. Commissioner of Income-tax [1957] 31 ITR 909 to the following effect:

"It is clear that the Appellate Assistant Commissioner has been constituted a revising authority against the decisions of the Income-tax Officer; a revising authority not in the narrow sense of revising what is the subject-matter of the appeal, not in the sense of revising those matters about which the assessee makes a grievance, but a revising authority in the sense that once the appeal is before him he can revise not only the ultimate computation arrived at by the Income-tax Officer but he can revise every process which led to the ultimate computation or assessment. In other words, what he can revise is not merely the ultimate amount which is liable to tax, but he is entitled to revise the various decisions given by the Income-tax Officer in the course of the assessment and also the various incomes or deductions which came in for consideration of the Income-tax Officer."

The learned Chief Justice in the judgment under appeal considers that this court has thus given approval to his view and also the view of the Patna High Court in the earlier case.

In our opinion, this court must be held not to have expressed its final opinion on the point arising here, in view of what was stated at pages 709 and 710 of the report. This court, however, gave approval to the opinion of the learned Chief Justice of the Bombay High Court that section 31 of the Income-tax Act confers not only appellate powers upon the Appellate Assistant Commissioner in so far as he is moved by an assessee but also a revisional jurisdiction to revise the assessment with a power to enhance the assessment. So much, of course, follows from the language of the section itself. The only question is whether in enhancing the assessment for any year he can travel outside the record that is to say, the return made by the assessee and the assessment order passed by the Income-tax Officer with a view to finding out new sources of income not disclosed in either. It is contended by the Commissioner of Income-tax that the word "assessment" here means the ultimate amount which an assessee must pay, regard being had to the charging section and his total income. In this view, it is said that the words "enhance the assessment" are not confined to the assessment reached through a particular process but the amount which ought to have been computed if the true total income had been found. There is no doubt that this view is also possible. On the other hand, it must not be over looked that there are other provisions like sections 34 and 33B, which enable escaped income from new sources to be brought

to tax after following a special procedure. The assessee contends that the powers of the Appellate Assistant Commissioner extend to matters considered by the Income-tax Officer, and if a new source is to be considered, then the power of remand should be exercised. By the exercise of the power to assess fresh sources of income, the assessee is deprived of a finding by two tribunals and one right of appeal. The question is whether we should accept the interpretation suggested by the Commissioner in preference to the one, which has held the field for nearly 37 years. ***In view of the provisions of sections 34 and 33B by which escaped income can be brought to tax, there is reason to think that the view expressed uniformly about the limits of the powers of the Appellate Assistant Commissioner to enhance the assessment has been accepted by the legislature as the true exposition of the words of the section. If it were not, one would expect that the legislature would have amended section 31 and specified the other intention in express words. The Income-tax Act was amended several times in the last 37 years, but no amendment of section 31(3) was undertaken to nullify the rulings, to which we have referred. In view of this, we do not think that we should interpret section 31 differently from what has been accepted in India as its true import, particularly as that view is also reasonably possible."***

47. *The Hon'ble Rajasthan High Court in case of Commissioner of Income-tax vs. Associated Garments Makers reported in 64 Taxman 215, following the above decision of the Hon'ble Supreme has held as under:*

"7. Appeals are provided under section 246 of the Act before the AAC and the Commissioner (Appeals). These appeals are by the assessee aggrieved by the orders mentioned therein. Any order made under section 143(3) is appealable and the powers of the appellate court are provided in section 251 of the Act wherein appellate authority has power to confirm, reduce, enhance or annul the assessment or he may set aside the assessment and refer the case back to the ITO for making fresh assessment in accordance with directions given in appeal and after making such further enquiry as may be necessary. These powers are, inter alia, mentioned in the other powers. According to subsection (2) of section 251, the AAC has no power to enhance assessment or a penalty, or reduce the amount or refund unless the appellant has a reasonable opportunity for showing cause against such enhancement or reduction. An explanation has been

provided according to which the AAC may consider and decide any matter arising out of the proceedings in which the order appealed against was passed, notwithstanding the fact that such matter was not raised before him. ***A perusal of sections 246 to 251 of the Act makes it clear that any questions arising out of the assessment orders in an appeal by the assessee can be possible and wide powers are given to the appellate authority, but these powers are circumscribed by the assessment order in the matters arising thereof or a matter arising out of the proceedings. Even the appellate authority has suo motu power to consider the questions arising thereof but there is no provision to go beyond the matter arising out of the proceedings before the assessing authority, more particularly as separate provisions for that are made in the Act. The Tribunal has elaborately discussed the provisions of the Act and the case law on the subject and has rightly come to the conclusion that new sources not mentioned in the return or considered by the ITO are beyond the scope of powers of the AAC.*** *The case relied on by the learned counsel for the petitioner about the power of setting aside the assessment order remanding the case for re-consideration of the whole matter including the evasion by the assessee, is not applicable to the facts of the present case because the matter arising in that case was one which arose out of the proceedings before the ITO. The question was not about new and fresh material for the purposes of enhancement. On the contrary, the case is clearly covered by the decisions of the Supreme Court in CIT v. Shapoorji Pallonji Mistry's case (supra) wherein it has been held that, "In an appeal filed by the assessee the Appellate Assistant Commissioner has no power to enhance the assessment by discovering new sources of income not mentioned in the return of the assessee or considered by the Income-tax Officer in the order appealed against", and in the case of Rai Bahadur Hardutroy Motilal Chamaria (supra) wherein it has been held that, "It is not therefore open to the Appellate Assistant Commissioner to travel outside the record, i.e., the return made by the assessee or the assessment order of the Income-tax Officer, with a view to finding out new sources of income and the power of enhancement under section 31(3) is restricted to the sources of income which have been the subject-matter of consideration by the Income-tax Officer from the point of view of taxability". Their Lordships considered the meaning of the word 'consideration' and held that, " 'consideration' does not mean 'incidental' or 'collateral' examination of any matter by the Income-tax Officer in the process of assessment. There must be something in the assessment order*

to show that the Income-tax Officer applied his mind to the particular subject-matter or the particular source of income with a view to its taxability or to its nontaxability and not to any incidental connection". In the instant case, the AAC had himself, after issuing notice, considered the new material and had gone into new sources of income for the consideration of which he had no jurisdiction.

8. In fact, we fail to understand as to why when the order was brought to the notice of the Commissioner he proceeded into wrong direction when he had ample powers under other provisions of this Act. There are various other provisions under the Act which can be invoked in cases of escaped income or such situation where the new sources had been left to be considered, but that would not give powers to the AAC to transgress his jurisdiction."

48. *In case of **CIT v. Sardari Lal & Co**. [2001] 251 ITR 864 (Delhi) (FB), the matter again came up for consideration before the **Full Bench of the Hon'ble Delhi High Court** regarding the first appellate authority's power to take into account a new source of income and to consider the correctness of the view expressed earlier in case of CIT v. Union Tyres [1999] 240 ITR 556, and the Full Bench of the Hon'ble Delhi High Court has held that the view expressed in Shapoorji Pallonji Mistry's case (supra) still holds the feet and it was further held as under:*

"8. Looking from the aforesaid angles, the inevitable conclusion is that whenever the question of taxability of income from a new source of income is concerned, which had not been considered by the Assessing Officer, the jurisdiction to deal with the same in appropriate cases may be dealt with under section 147/148 and section 263, if requisite conditions are fulfilled. It is inconceivable that in the presence of such specific provisions, a similar power is available to the first appellate authority. That being the position, decision in Union Tyres' case (supra) of this Court expresses the correct view and does not need re-consideration. This reference is accordingly disposed of."

49. *We have also look at the recent decisions on the subject and find that the **Hon'ble High Court of Kerala** in case of **Commissioner of Income Tax,***

Thrissur v. B.P. Sherafudin *reported in [2017] 87 taxmann.com 330 (Kerala) had an occasion to examine a similar issue as to whether the Appellate Authority has the power under section 251 of the Act to add income not at all considered by the AO? Referring to the catena of decisions including the decisions of Hon'ble Supreme Court in case of CIT vs Shapoorji Pallonji Mistry (supra) and in case of CIT v. Rai Bahadur Hardutory Motilal Chamaria [1967] 66 ITR 443 (SC), the decision of the Full Bench of the Hon'ble Delhi High Court in case of CIT v. Sardari Lal & Co. [2001] 251 ITR 864 (Delhi) (FB), besides various other decisions, it held that the powers under section 251 are, indeed, very wide; but, wide as they are, they do not go to the extent of displacing powers under, say, sections 147, 148 and 263. We deem it appropriate to reproduce the discussions and the relevant findings of the Hon'ble High Court as under:*

"The Ambit of Appellate Power:

37. To begin with, let us examine section 251 of the Act. As the assessment year was 1995-96, we will examine the provision as stood then. Before the amendment by Act 18 of 2008, section 251 read as: 251. Powers of the [* *] Commissioner (Appeals).—*

(1) In disposing of an appeal, the [* *] Commissioner (Appeals) shall have the following powers—*

(a) in an appeal against an order of assessment he may confirm, reduce, enhance or annul the assessment; [* *]*

(b) in an appeal against an order imposing a penalty, he may confirm or cancel such order or vary it so as either to enhance or to reduce the penalty;

(c) in any other case, he may pass such orders in the appeal as he thinks fit.

(2) The [* *] Commissioner (Appeals) shall not enhance an assessment or a penalty or reduce the amount of refund unless the appellant has had*

a reasonable opportunity of showing cause against such enhancement or reduction.

Explanation.—In disposing of an appeal, the [* *] Commissioner (Appeals) may consider and decide any matter arising out of proceedings in which the order appealed against was passed, notwithstanding that such matter was not raised before the [* * *] Commissioner (Appeals) by the appellant.*

38. The provision clarifies that in an appeal against an order of assessment, the Appellate Authority may confirm, reduce, enhance, or annul the assessment. In an appeal against an order imposing a penalty, he may confirm or cancel such order or vary it so as either to enhance or to reduce the penalty. The explanation to the provision further emphasizes that the Appellate Authority may consider and decide any matter arising out of proceedings in which the order appealed against was passed, though such matter was not raised before him by the appellant.

Precedential Position:

39. A Full Bench of this Court in the CIT v. Best Wood Industries & Saw Mills [2011] 33 ITR 63/11 taxmann.com 278 has examined the powers of the AO, but not the Appellate Authority. It has held that once the assessment is reopened for any valid reason recorded under Section 148(2), then the entire assessment is open for the AO to bring to tax any item of escaped income which comes to his notice in such reassessment.

40. Under the old Income Tax Act, the corresponding provision is section 31. Interpreting that provision, the Supreme Court in CIT v. Kanpur Coal Syndicate [1964] 53 ITR 225 has held that under section 31(3)(a), in disposing of an appeal, the Appellate Authority may confirm, reduce, enhance or annul the assessment; under clause (b), he may set aside the assessment and direct the Income-tax Officer [now AO] to make a fresh assessment. The Appellate Authority has, therefore, plenary powers in disposing of an appeal. "The scope of his power is conterminous with that of the Income-tax Officer. He can do what the Income-tax Officer can do and also direct him to do what he has failed to do."

41. As we can see, CIT v. P. Mohanakala [2007] 291 ITR 278/161 Taxman 169 (SC) deals with the powers of High Court in interfering with the findings of fact— and concurrent findings, at that—by re-appreciating the evidence. The Supreme Court has held in the negative. The Supreme Court in Jute Corpn. of India Ltd. v. CIT [1991] 187 ITR 688/[1990] 53 Taxman 85 has stated that the declaration of law is clear that the power of the Appellate Authority is co-terminus with that of the Income Tax Officer, and if that is so, there appears to be no reason why the appellate authority cannot modify the assessment order on an additional ground even if not raised before the Income Tax Officer. No exception could be taken, held the Supreme Court in CIT v. Nirbheram Deluram [1997] 224 ITR 610/91 Taxman 181 to this view as the Act places no restriction or limitation on exercising appellate power. Even otherwise, an appellate authority while hearing the appeal against the order of a subordinate authority, has all the powers which the original authority may have in deciding the question before it subject to the restrictions or limitation, if any, prescribed by the statutory provisions. Absent any statutory provision, the appellate authority is vested with all the plenary powers which the subordinate authority may have.

42. In CIT v. Shapoorji Pallonji Mistry [1962] 44 ITR 891 (SC) the assessment year was 1947-1948, and the case was finally decided in 14.02.1962. So the Act considered was pre-Independence enactment. Examining section 31 of the old Act, the Supreme Court has held that there is no doubt that the appellate authority can "enhance the assessment". This power must, at least, fall within the words "enhance the assessment", if they are not to be rendered wholly nugatory.

43. Now, we may examine the authorities that also have dealt with the powers of the appellate authority but seem to have taken a divergent path.

44. In CIT v. Rai Bahadur Hardutroy Motilal Chamaria,[1967] 66 ITR 443 (SC) a three-Judge Bench of the Supreme Court has observed that it is only the assessee who has a right conferred under section 31 to prefer an appeal against the order of assessment made by the Income-tax Officer. If the assessee does not appeal the order of assessment becomes final subject to any power of revision that the Commissioner may have under section 33B of the Act. Therefore, it would be wholly erroneous to

compare the powers of the appellate authority with the powers possessed by a court of appeal, under the Civil Procedure Code. The Appellate Assistant Commissioner is not an ordinary court of appeal. It is impossible to talk of a court of appeal when only one party to the original decision is entitled to appeal and not the other party, and because of this peculiar position the statute has conferred very wide powers upon the appellate authority once an appeal is preferred to him by the assessee.

45. Chamaria goes on to hold that the appellate authority has no jurisdiction under section 31(3) of the Act to assess a source of income not processed by the Income-tax Officer "and which is not disclosed either in the returns filed by the assessee or in the assessment order," and therefore the appellate authority cannot travel beyond the subject-matter of the assessment. In other words, the power of enhancement under section 31(3) of the Act is restricted to the subject-matter of assessment or the sources of income considered expressly or by clear implication by the Income-tax Officer from the viewpoint of the taxability of the assessee.

46. A question regarding powers of the first Appellate Authority came up for consideration before the Supreme Court recently in Nirbheram Daluram (supra). Following the earlier decisions in Kanpur Coal Syndicate and Jute Corporation of India, the Supreme Court reiterated that the appellate powers conferred on the Appellate Commissioner under Section 251 could not be confined to the matter considered by the ITO, as the Appellate Commissioner is vested with all the plenary powers which the Income Tax Officer may have while making the assessment.

47. Indeed, examining Daluram's holding, a Division Bench of the Delhi High Court in CIT v. Union Tyres [1999] 240 ITR 556/107 Taxman 447, has observed that Daluram did not comment whether these wide powers also include the power to discover a new source of income. So, Union Tyres concludes that the principle of law laid down in Shapoorji and Chamaria still holds the field.

48. The principle emerging from various pronouncements of the Supreme Court, Union Tyres observes, is that the first Appellate Authority is invested with very wide powers under Section 251(1)(a) of the Act and once an assessment order is brought before the authority, his competence is not restricted to examining only those aspects of the assessment about

which the assessee makes a grievance and ranges over the whole assessment to correct the Assessing Officer not only regarding a matter raised by the assessee in appeal but also regarding any other matter considered by the Assessing Officer and determined in assessment.

49. There is a solitary but significant limitation, according to Union Tyres, to the power of revision: It is not open to the Appellate Commissioner to introduce in the Assessment a new source of income and the assessment must be confined to those items of income which were the subject-matter of the original assessment.

50. In course of time, Union Tyres was doubted. In. Sardari Lal & Co.,(supra) the same issue—whether the appellate authority has the power under section 251 to discover a new source of income—was referred to a Full Bench. After examining the authorities holding the fielding on that issue, the learned Full Bench has held that the inevitable conclusion is that whenever the question of taxability of income from a new source of income is concerned, which had not been considered by the assessing officer, the jurisdiction to deal with the same in appropriate cases may be dealt with under section 147, or section 148, or even section 263 of the Act if requisite conditions are fulfilled. It is inconceivable, according to Sardari Lal, that in the presence of such specific provisions, a similar power is available to the first appellate authority. Eventually, Sardari Lal upheld the decision in Union Tyres.

51. Undeniably, the precedential position on the powers of the first appellate authority under section 251 undulates. There are seeming contradictions. But, as held by Union Tyres, and as affirmed on reference by Sardari Lal, there is a consistent judicial assertion that the powers under section 251 are, indeed, very wide; but, wide as they are, they do not go to the extent of displacing powers under, say, sections 147, 148, and 263 of the Act.

52. Therefore, ***we are in respectful agreement with the view taken by the Full Bench of the High Court of Delhi in Sardari Lal.*** *As a corollary, we hold that the Tribunal's deleting the enhancement of Rs. 22,15,116/- and canceling the order of the CIT (A) on that issue call for no interference."*

50. The issue which is being disputed before us has to be considered and decided in light of facts on record and the legal proposition which

emerges from the above referred decisions. In the instant case, the enhancement of income by the ld CIT(A) relates to long term capital gains on sale transactions executed through the registered sale deeds of even date i.e, 11.01.2007 whereby the assessee has sold certain plots of land at Village Goner, Tehsil Sanganer, Jaipur to his two daughters-in-law namely Narangi Devi w/o Chhaju lal and Jamna Devi w/o Kaluram for a total consideration of Rs 1,62,72,000. Now, if we look at the return of income filed by the assessee, it is noted that pursuant to issuance of notice u/s 148, the assessee had filed his return of income disclosing agricultural income of Rs. 1,10,000/- and prior to that, no return of income was filed by the assessee. The notice issued under section 148 dated 15.03.2013 talks about an amount of Rs 16,50,000 deposited in assessee's bank account maintained with PNB, the source of which has not been explained and the same has thus escaped assessment. On perusal of the assessment order passed under section 143(3) read with section 147 of the Act, it is noted that the said deposits in assessee's bank has been examined however, there is no linkage with the impugned sale transactions which are the subject matter of enhancement by the ld CIT(A). Further, there is a sale transaction which is the subject matter of assessment which relates to sale of ancestral land situated at the same village Goner, Village Goner, Tehsil Sanganer, Jaipur vide sale deed dated 26.12.2006 to M/s Fine Tech Macro Developers Pvt. Ltd for a consideration of Rs 13,20,000 and which has been valued by the stamp duty authorities at Rs 14,88,000. The said transaction has been brought to tax by the Assessing officer after providing the index cost of acquisition. We thus find that the impugned sale transactions relating to sale of land by the assessee to his two daughters-in-law for a total consideration of Rs 1,62,72,000 was neither the subject matter of notice issued under section 148 and the subsequent return filed by the assessee nor the subject matter of assessment order passed by the Assessing officer. It is clearly a new source of income which

has been discovered by the ld CIT(A) while adjudicating the matter and not a matter arising out of the assessment proceedings. Our view is fortified by the fact that the impugned sale transactions relating to sale of land by the assessee to his two daughters-inlaw for a total consideration of Rs 1,62,72,000 was the subject matter of reopening of assessment for preceding A.Y. 2006-07 whereby these transactions were identified with specific particulars in the reasons recorded before issuance of notice under section 148 for the said assessment year. Subsequently, the AO while passing the assessment order for A.Y. 2006-07 has discussed the taxability of such transaction in the body of the assessment order and has brought the same to tax. It is therefore a case where the impunged transactions are subject matter of assessment and arising out of the assessment order for A.Y 2006-07 and not that of A.Y 2007-08. It is not a case that the additions in respect of the said transactions are made on substantive basis in A.Y 2006-07 and on protective basis in A.Y 2007-08. The ld CIT(A) while adjudicating the matter for A.Y. 2006-07 had determined that the said transaction pertains to A.Y 2007-08 and not to A.Y 2006-07 and has deleted the additions in A.Y. 2006-07 and brought the same to tax in the impugned A.Y 2007-08 by way of exercising her enhancement powers under section 251(1)(a) of the Act which is clearly beyond her powers. In light of the legal propositions so laid down by the Hon'ble Supreme Court and other High Courts referred supra, the powers of the ld CIT(A) are circumscribed by the assessment order in the matters arising thereof or a matter arising out of the proceedings. As held by the Courts, even though, the ld CIT(A) has suo motu power to consider the questions arising thereof but there is no provision to go beyond the matter arising out of the proceedings before the Assessing officer, more particularly as separate provisions for such eventuality are provided in the Act. In light of the same, the enhancement so done by the ld CIT(A) whereby the impugned sale transactions are brought to tax in the year

under consideration are beyond the scope of her powers envisaged under section 251(1)(a) and the same thus cannot be accepted. However, the AO shall be free to take action as per law.

51. In light of the above discussions, having decided against the exercise of powers of the ld CIT(A) in bringing to tax the subject transaction, we do not deem it appropriate to examine and the address the arguments and contentions so raised by both the parties on merits of the taxability of the subject transaction."

In the case in hand, the Assessing Officer made certain disallowances of expenses while completing the assessment U/s 143(3) of the Act whereas the ld. CIT(A) invoked the powers to enhance the assessment by rejecting the books of account and consequently the income of the assessee was enhanced by applying the G.P. rate to estimate the income of the assessee. Therefore, it is clear that the said issue and aspect of not accepting the book results of the assessee was never taken up by the Assessing Officer in the scrutiny assessments of the assessee. Even if the Assessing Officer ought to have considered the said point of correctness of the books of account and rejection of same U/s 145(3) of the Act if the said matter was not taken up for scrutiny and enquiry then it is a subject matter falling in the ambit of revisionary power U/s 263 of the Act due to the reason that there was a complete lack of enquiry on the part of the Assessing Officer to examine the correctness of books of account. Since this was not at all subject matter of the assessment, therefore, it cannot

be a subject matter of enhancement of income U/s 251 of the Act. Accordingly following the various decisions as relied upon by the assessee as well as the decision of this Tribunal in the case of Jagdish Narayan Sharma Vs ITO (supra) we set aside the order of the ld. CIT(A) qua this issue being beyond the jurisdiction of the ld. CIT(A).

8. On the merits of the rejection of books of account, the ld AR of the assessee has submitted that the ld. CIT(A) has rejected the books of account without bringing any material or fact on record to show that the books of account of the assessee are not reflecting true and correct state of affairs of the assessee as well as trading results. The only reason as assigned by the ld. CIT(A) for rejecting the books of account is that the assessee has not maintained day to day consumption and moment of each and every stock material. The ld AR has pointed out that the assessee produced books of account as well as stock register to show the entries of inwards or outwards moment of the stock used in its projects. However, having regarding to the nature of business of the assessee, it is not possible to maintain day to day consumption and moment of the stock. Once, there is no defect about any quantity of the stock as maintained in the stock register or valuation of the stock then merely because the day to day moment is practically not possible due to the voluminous and material used at various projects cannot be recorded at one place on daily basis,

the books of account cannot be rejected. In support of his contention, he has relied upon the decision of Hon'ble Jurisdictional High Court dated 30/07/2015 in the case of Pr.CIT Vs M/s Hues India Pvt. Ltd. in D.B. Income Tax appeal No. 56/2015 and submitted that in absence of any finding that the assessee has made any excess claim and all the details and entries are recorded in the books of account, not found to be incorrect then merely because day to day consumption details are not recorded in the stock register, cannot be a reason for rejection of books of account. He has also relied upon the decision of Special Bench of Mumbai Tribunal in the case of M/s GTC Industries Vs. ACIT 164 ITD 1.

9. On the other hand, the ld DR has relied upon the order of the ld. CIT(A) and submitted that the assessee has expressed the inability to maintain the stock register showing day to day consumption clearly established that the assessee has not maintaining proper books of account and therefore, the book results are not giving correct picture and liable to be rejected.

10. We have considered the rival submissions as well as relevant material on record. The ld CIT(A) has rejected the books of account on the ground that the assessee has not maintained any record to verify the moment of items of its stock for its projects. The assessee has explained

that day to day moment of the material is not possible to maintain in the stock register as the material is the consumed at various projects at different sites. However, the ld. CIT(A) has rejected the book results on the ground that in the preceding years, the books of account were rejected by the Assessing Officer U/s 145(3) of the Act which has been sustained by the ld. CIT(A) as well as by the Tribunal. Thus, the sole reason of rejection of books of account is not maintaining day to day consumption and moment of material in the stock register and further the book results of the assessee were rejected for the preceding years. It is pertinent to note that the assessee is in the activity of manufacturing and trading and therefore day to day moment of the material in the stock register is not possible due to the reason that the projects are being erected and executed at different sites on the basis of the work contract. Therefore, the purchase of material, consumption, opening stock and closing stock alongwith work in progress are to be maintained in the regular books of account only when the factual details are collected from the project sites about the consumption of the material on regular intervals. The work executed for other parties is always subject to supervision and certification and approval of the running bills is based on the completion of the work executed by the assessee, therefore, the revenue of the assessee is entirely depending on the satisfaction of the

party for whom the work is executed. The running bills are based on the status of the work completed and therefore once the payment is approved and released by the party then the work executed and cost incurred by the assessee is also subjected to the verification and certification of the other party for whom the work is executed. In this line of business, it is not possible to maintain day to day record of consumption of the material and stock but the primary requirement is to maintain opening, purchases, consumption and closing stock with work in progress for the purpose of maintaining books of account. Hence, when the books of account are prepared as per the accounting standards and duly audited then the audit tax report pointing out of not maintaining the day to day moment of stock cannot be a reason for rejection of books of account in absence of any other defect either in the quantity of opening stock, purchase, consumption, work in progress and closing stock is found by the authorities below. Further the assessee has produced the stock register before the authorities below which contains all details of opening stock, purchases, closing stock and work in progress then in absence of any defect whatsoever in the quantity and valuation of the stock, mere day to day moment of the material and stock which is not possible due to very nature of the business activity of the assessee, cannot be a ground for rejection of books of account. Further the doctrine of resjudicata is not

applicable in the tax matter and particularly when the books of account for each years are maintained independently having no overlapping except the closing and opening stock. Therefore, the rejection of books of account in the preceding year cannot be a reason for rejection of books of account for the year under consideration when no defect is found in the books of account either by the Assessing Officer or by the ld. CIT(A) except the day to day moment of the material and stock maintained in the stock register. The Hon'ble Jurisdictional High Court in the case of Pr.CIT Vs M/s Hues India Pvt. Ltd. (supra) while considering the issue of rejection of books of account and G.P. addition has held in para 7 to 9 as under:

"7. *We have considered the arguments advanced by the counsel for the revenue and have perused the impugned order as also the other orders. In our view the CIT(A) as well as the Tribunal, after appreciation of evidence on record and considering the facts have come to a definite finding of fact that the trading results were not required to be interfered with merely because G.P. rate had decreased to an extent. The assessee has pin-pointedly placed material on record that the turn over stood increased from about 2 crore in the assessment year 2002-03 to 3.74 crore in the assessment year 2003-2004, and apart from this fact the Assessing Officer has not controverted or observed contrary to the claim of the assessee that cost had increased, when specific material was placed, before the Assessing Officer. Though the Books of Account have been rejected, and proper estimation can certainly be made but it is no ground to make an addition in a case where the Assessing Officer was not able to come to further material or controvert the facts narrated by the assessee during*

the course of assessment proceedings. The Assessing Officer was unable to pinpoint as to any specific defect noticed during course of the proceedings except that the Books of Account were rejected on certain discrepancies. It was for the Assessing Officer to come out clearly as to the basis for rejection of the Book of Accounts. Though both the appellate authorities have concurred with the finding of the Assessing Officer that rejection of Books of Account under Section 145(3) of the Act is found justifiable but whether in each and every case where Books of Account are rejected, does it entitle the Assessing Officer to make an addition to the Trading results? This court has taken into consideration similar issue in the case of CIT v. Gotan Lime Khanij Udyog (supra) which has been considered by the Tribunal wherein it has been held ad infra :-

> *"The Assessing Officer had found that the trading accounts of the assessee for the assessment year 1986-87 were not backed up with the quantitative and qualitative stock details and that there was a considerable fall in the gross profit rate and invoked the provisions of Section 145 (1) of the Act. The Assessing Officer was not convinced by the reason given by the assessee that the assessee had employed a method of accounting regularly which was accepted by the Department and made an addition of Rs.3,34,960 by increasing the gross profit rate. The Commissioner (Appeals) while substantially accepting the explanation of the assessee for reduction in gross profit rate was of the view that the addition was on the higher side and sustained an addition of Rs.34,000 only to cover up the possible leakage in the books of account. The Tribunal upheld the invocation of the provisions of section 145(1) but did not sustain the additions retained by the Commissioner (Appeals). On a reference :*
>
> > *Held, that the Tribunal had reached the finding on the ground that, in the absence of any finding recorded by the Commissioner (Appeals) that the expenses incurred on any account appeared to be unreasonable or excessive, the additions sustained merely on suspicion of pilferage or leakage were not justified. This conclusion was a finding of fact keeping in view that the additions in the profits and gains returned by the assessee were not a necessary concomitant of an order made under sections 145(1) or 145(2). Therefore, there was no error in the order of the Tribunal deleting the entire additions to the trading results after holding that the proviso to section 145(1) was applicable."*

8. This court, in the case of Malani Ramjivan Jagannath v. Assistant Commissioner of Income Tax 2007 (207) CTR 19, has held as under:-

> *"Mere deviation in GP rate cannot be a ground for rejecting books of account and entering realm of estimate and guesswork. Lower GP rate shown in the books of account during current year and fall in GP rate was justified and also admitted by the AO as well as CIT(A) as well as the Tribunal. Therefore, fall in GP rate lost its significance. Having accepted the reason for fall in GP rate, namely, stiff competition in market and also that huge loss caused in particular transaction, neither the rejection of books of account was justified nor resort to substitution of estimated GP by rule of thumb merely for making certain additions. We are, therefore, of the opinion that the findings arrived at by the Tribunal suffers from basic defect of not applying its mind to the existing material which were relevant and went to the root of the matter. When all the data and entries made in the trading account were not found to be incorrect in any manner, there could not have been any other result except what has been shown by the assessee in the books of account. We are, therefore, unable to sustain the order of the Tribunal."*

9. In the instant case as well we notice that even the Assessing Officer applied the G.P. Rate of 25% as against 28.14% in the preceding year. Therefore, the Assessing Officer also resorted to estimation. Accordingly in view of what we have observed hereinabove is basically a finding of fact based on the appreciation of evidence and this being essentially a finding of fact no substantial question can be said to arise out of the order of Tribunal. Accordingly, the instant appeal is dismissed in limine."

Therefore, once there is no material defect is found in the books of account then the same cannot be rejected on the reason that the assessee has declared less G.P. for the year under consideration or day to day moment of material is not reflected in the stock register. The Special Bench of Mumbai Tribunal in the case of M/s GTC Industries Ltd. Vs ACIT (supra) has also considered this issue in para 50 and 51 as under:

"50. Now coming to the issue of rejection of books of account as well as the estimation of income by multiplying the volume of sales of lower price brand with the differential price of higher price brand on account of theory of 'twin branding mechanism' and thereby giving an adhoc reduction of 10% on the ground that some of the share in premium money belonged to the wholesale buyers. First of all, it is noticed that, the basis of rejection of books of account by the Assessing Officer u/s 145(2) is that, *firstly,* assessee has maintained bank accounts in fictitious names outside the books and has otherwise incurred expenses which are not reflected in books of account; and *secondly,* assessee has been maintaining cash in bank accounts outside the books. Learned CIT (A) has further added one more ground that, bank accounts appearing to be channel for circulating such premium or assessee is bound to have a large share in such secret money and its circulation. First of all the first allegation of the AO that it is proved beyond doubt that assessee has maintained bank accounts in fictitious names outside the books, the same is not tenable because as already held above, it has not been proved through any direct or indirect material or evidence that bank accounts belong to the assessee-company. Though the premium was collected by the wholesale buyers which were deposited in the fictitious bank accounts from where certain advertisement expenses and other expenses were incurred, but as discussed in detail in the foregoing paragraphs, there is no material as such or any statement implicating the assessee that these bank accounts have been either maintained by the assessee or was under the control of the assessee or was benami of the assessee. If that is so, then the entire premise for rejecting the books of account gets vitiated. Once we hold that there is no material to implicate the assessee then the presumption that assessee is maintaining cash in bank account outside the books also fails because this allegation too is not flowing from the first premise of the AO. The additional reason cited by the ld. CIT (A) falls within the realm of suspicion and surmises and based on such suspicion and surmise sans any direct material, the same cannot be upheld. As stated several times herein above, there is no finding or any cogent material to establish that extra amount collected in cash by shopkeepers/retailers have been passed on further from wholesale buyers/ super buyers to the manufacturer, i.e., assessee; and once that is so, the presumption of indirect flow back cannot be made the basis for such addition or estimation of income. Various case laws have been referred by the learned counsel before us on this point; however, we are not referring to these decisions because, we have arrived at our conclusion on the basis of material facts brought on record and as referred to before us.

> **51.** Even though we have held that AO & CIT(A) were not correct in law and on facts to reject the books of account, however for the sake of completeness, we deem fit to deal with issue of estimation as has been made by A.O. in brief. The estimation made by the AO for assessing the income is very faulty because, it is based on high degree of presumption and hypothesis that on each and every sale of lower brand cigarette all across the country made to millions of consumers through millions of retailers, there has been collection of extra money equivalent to the price of high brand value cigarettes and then such collection of money has cent per cent flown back to the assessee directly; and out of that premium money some minor share pertains to the wholesale buyers. Such a wild speculation or basis for estimation on the facts of the present case is very far-fetched and implausible. The best judgment does not entail wild guesswork or huge additions should be resorted to, *albeit* it lays down the determination of income based on fair and reasonable analysis based on some tangible material. The framing of the best judgment though entails some kind of fair and honest estimation but at the same time it should be based on material and information on record. The best judgment is not a provision to penalize the assessee and resort to wild estimate but it is a machinery provision which is to be based on assessing the correct income and that too based on material and evidence having live link nexus with the income which is to be assessed. Thus, on this count also, we are unable to uphold the kind of estimation or addition which has been made by the AO and sustained by the ld. CIT (A) and accordingly, we direct the AO to delete the entire addition. In the result assessee's appeal is allowed."

Accordingly, in view of the facts and circumstances of the case, we hold that the rejection of books of account by the ld. CIT(A) is not valid as not based on any material defect pointed out by the ld. CIT(A), hence, the same is set aside.

11. Since we have set aside the order of the ld. CIT(A) rejecting the books of account U/s 145(3) of the Act, therefore, the consequential addition made by the ld. CIT(A) also stood deleted and the grounds raised

by the assessee in respect of the trading addition in grounds No. 4 and 5 stand allowed.

12. Ground No. 7 of the assessee's appeal is regarding disallowance made U/s 40(a)(ia) of the Act. The Assessing Officer has noted that the assessee has made payments of transportation to various contractors without deduction of TDS whereas the payments were required to be made subject to TDS U/s 194C of the Act. Accordingly, the Assessing Officer made disallowance of Rs. 1,62,33,061/- U/s 40(a)(ia) of the Act.

13. The assessee challenged the action of the Assessing Officer before the ld. CIT(A) and contended that the provisions of Section 194C(6) of the Act does not require deduction of tax at source when the payment is made to a contractor who is engaged in the business of plying/hiring/leasing goods carrier on furnishing his PAN to the person making the payment. The ld. CIT(A) accepted the contention of the assessee and partly deleted the disallowance made by the Assessing Officer U/s 40(a)(ia) of the Act. As regards the other payments made to the individual transporters, the assessee submitted before the ld. CIT(A) that the payments in the single transaction do not exceed the limits provided under the provisions, however, the ld. CIT(A) did not accept this contention and sustained the disallowance made by the Assessing Officer.

14. Before us, the ld AR of the assessee has submitted that the ld. CIT(A) has deleted the addition made by the Assessing Officer to the extent of Rs. 1,27,68,281/- out of the total addition of Rs. 1,62,33,061/-. Once the assessee has produced the challans having PAN number of the recipients payee transporters then the deduction of tax U/s 194C is not required and consequently no disallowance is called for U/s 40(a)(ia) of the Act. Alternatively the ld AR has submitted that in view of the amendment in Section 40(a)(ia) of the Act whereby the disallowance sustained by the ld. CIT(A) may be restricted to 30%. In support of his contention, he has relied upon the decision of Delhi Benches of the Tribunal dated 01/8/2018 in the case of Chopra Industries Vs. Addl.CIT in ITA No. 3099/Del/2015.

15. On the other hand, the ld CIT-DR has submitted that mere production of invoice of vouchers having PAN of the transporter is not a compliance of Section 194C(6)&(7) of the Act when the assessee has not produced the details in the prescribed proforma before the competent authority. He has relied upon the order of the Assessing Officer.

16. We have considered the rival submissions as well as relevant material on record. This issue is common in both the appeals of the

assessee as well as the revenue. The revenue has raised ground for the A.Y. 2012-13 on this issue as under:

> *"1. Whether in the facts and in the circumstances of the case and in law, the Ld. CIT(A) was justified in deleting the addition of Rs. 1,27,68,281/- when the assessee failed to furnish the information to prescribed authority in prescribed form as envisaged in section 194C(7) of the Act?*
>
> *2. Whether in the facts and in the circumstances of the case and in law, the Ld. CIT(A) was justified in deleting the addition of Rs. 1,27,68,281/- when it cannot be ascertained as to when the assessee obtained these PAN nos. from the transporters?"*

The Assessing Officer made total disallowance of Rs. 1,62,33,061/- by invoking the provisions of Section 40(a)(ia) of the Act because the assessee has not deducted TDS in respect of these payments made to various transporters as well as contract transporters. The ld. CIT(A) after considering the fact that the assessee produced information as required U/s 194C(7) of the Act in the shape of challan/builties/GR/invoice printing PAN of the recipients, therefore, to the extent of the payment made to these contractors, the assessee was held not liable to deduct tax, once the assessee has produced requisite information which was subject to verification in some of the cases. The relevant finding of the ld. CIT(A) in the concluding part at pages 10 to 21 of the order is as under:

> *"(v) I have duly considered the submissions the appellant, assessment order and the material placed on record and I do not find any merit in the contention of the appellant. The contention that the payments were*

made by its employee at Kanota and each payment was below Rs. 30,000/- and aggregate payment to a particular party did not exceed Rs. 75,000/- is devoid of any merit as it is not supported by any documentary evidence. The contention of the appellant that the provisions of section 40(a) (ia) of the Act are applicable where the amount remained payable on the close of the financial year whereas in the instant case under consideration, the entire payment was paid and nothing remained payable, is also devoid of any merit. It may be mentioned that the issue is no more res integra as it was held by the Hon'ble Apex Court in the case of Palam Gas Services CIT [2017] 81 faxmann.com 43 (SC) that:

"Section 40(a) (ia) of the Income-tax Act, 1961 - Business disallowance –

Interest etc. paid to a resident without deduction of tax at source (Scope of) - Whether word 'payable' occurring in section 40(a) (ia) not only covers cases where amount is yet to be paid but also those cases where amount has actually been paid - Held, yes [Para 15] [In favour of revenue] (head note)"

(vi) The contention of the appellant that the payment of Rs. 45,000 was genuine and cannot be disallowed under section 40A(3) of the Act is also devoid of merit as the appellant has not brought on record, the circumstances in which the said payment was made in cash in violation of the express provisions of section 40A(3) of the Act. The appellant could not indicate under which clause of Rule 6D of the IT Rules, it could take shelter to avoid the rigours of provisions of section 40A(3) of the Act. In view of the above discussion, it is held that the AO was justified in making disallowance of Rs. 5,94,412/- u/s 40(a) (ia) of the Act including Rs. 45,000/- u/s 40(a)(ia)/40A(3))and thus, the same is hereby sustained.

<u>Disallowance of Rs. 1,56,38,649/-</u>

(vii) The AO has disallowed the sum of Rs. 1,56,38,649/- by observing that the appellant has not complied with the provisions of section 1940(7) of the

Act and 1940(6) and 1940(7) are interlinked. It was also observed by the AO that it cannot be ascertained as to when the PANs were obtained by the appellant, whether these were obtained prior to making payment to transporters or at the time of furnishing the reply to query raised by the AO. It was also stated by the AO that the leeway given in section 1940(6) of the Act was actually meant to be for the benefit of small and medium transporters, who had to provide declaration to the deductor (instead of PAN) prior to 01/10/2009, i.e. before amendment to the provision of section 194C of the Act. Hence, in view of the provisions of section 194C(7) of the Act, the onus was upon the appellant to furnish information, it was entrusted to collect on behalf of the income tax department from the transporters, to remain free from the clutches of provisions of section 40(a) (ia) of the Act.

(viii) During the appellate proceedings, it was submitted by the appellant that as provided u/s 194C(6) of the Act, it was not required to deduct any tax at source where the payment is made to a contractor who is engaged in the business of plying, hiring or leasing goods carriages on furnishing of his PAN to the person making the payment. It has made the payments to respective parties after obtaining their PAN and vide letter dated 23.03.2015 furnished the same before the AO. It was further submitted that the PAN of the respective parties were lying printed/written on the GR/Challan/Bilty/Bill issued by them, therefore, the AO has no justification in holding that it cannot be ascertained whether the appellant has obtained the PAN prior to making payments to transporters or at the time of furnishing the reply to his query. It was further submitted that the Income Tax Authority particulars, Form and time as provided u/s 1940(7) of the Act were not prescribed during the preceding F.Y. 2010-11, however the CBDT at the end of the same, vide Notification No. 16/2011 dated 29.03.2011 provided u/r 31 A(4) (vi) of IT Rules to include such

particulars in respective Quarterly statements of TDS. It was the contention of the appellant that since the relevant previous year was the first year, when the above said notification became applicable, therefore, it could not noticed the same and consequently, under a bonafide error could not made compliance of the same.

(ix) It was the contention of the appellant that the provisions of section 194C (6) of the Act override the general provisions of section 194C(1) and since, it has obtained PAN of the transporters, there is no requirement of deduction of tax at source as provided u/s 194C(6) of the Act as it provides exemption from the application of section 194C(1) subject to the condition of obtaining PAN from the transporters. It was further stated that the provisions of section 194C(6) of the Act are independent and subject to compliance of section 194C(7) of the Act, therefore, the liability to deduct tax at source ceases at the moment, when it obtained the PAN of the transporter and that liability cannot be considered to have been again restored due to non compliance of section 194C(7). In support of its submissions, the appellant has relied upon the order dated 13.02.2015 of Hon'ble Hyderabad Bench of ITAT in the case of ACIT v. Mohammad Suhail in ITA No.l536/Hyd./2014.

(x) I have duly considered the submissions of the appellant, assessment order and the material placed on record. It is noted from the material placed on record that the PAN of the respective parties were printed on the GR/Challan/Bilty/Bill issued by the parties to whom major payments were made and only in few cases, it was hand written. Therefore, at least in respect of those parties, where PAN was printed on various documents, I find merit in the contention of the appellant that the AO has no justification in holding that it cannot be ascertained whether the appellant has obtained PAN prior to making payments to transporters or at the time of furnishing the reply to his query.

(xi) Before proceeding further, it would be appropriate to reproduce the relevant provisions of section 194C of the Act as under:

"194C. (1) Any person responsible for paying any sum to any resident (hereafter in this section referred to as the contractor) for carrying out any work (including supply of labour for carrying out any work) in pursuance of a contract between the contractor and a specified person shall, at the time of credit of such sum to the account of the contractor or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to—

(i) one per cent where the payment is being made or credit is being given to an individual or a Hindu undivided family;

(ii) two per cent where the payment is being made or credit is being given to a person other than an individual or a Hindu undivided family, of such sum as income-tax on income comprised therein.

****

(6) No deduction shall be made from any sum credited or paid or likely to be credited or paid during the previous year to the account of a contractor during the course of business of plying, hiring or leasing goods carriages, on furnishing of his Permanent Account Number, to the person paying or crediting such sum.

(7) The person responsible for paying or crediting any sum to the person referred to in sub-section (6) shall furnish, to the prescribed income-tax authority or the person authorised by it, such particulars, in such form and within such time as may be prescribed."

(xii) Thus, it is evident that on receipt of the PAN of the payee, the payer is not required to deduct tax at source in view of the provisions of section 194C(6) of the Act, however, in order to keep a track of such payments to contractors without deducting of tax at source, the details were to be furnished to the income tax Department in the prescribed form and to the prescribed authority. The AO has observed that the provisions of section 1940(6) and 194C(7) of the Act are interrelated and since the appellant

did not comply with the provisions of section 194C(7) of the Act, the amount paid to the contactors is liable for disallowance u/s 40(a) (ia) of the Act.

(xiii) In the case of ACIT Vs M/s Mohammed Suhail in ITA No. 1536/Hyd/2014 for the AY 2010-11, it was held by the Hon'ble ITAT, Hyderabad Bench that:

> *"4. After considering the rival submissions and perusing the submissions and notifications issued in this regard, we are of the opinion that there is no need to deviate from the order of Ld. CIT(A). Even though new provisions were introduced and assessees were made liable to deduct tax on the payments made to transporters, provisions of section 194C(6) gives exemption to the persons not to deduct the amount, in case they obtain/furnish the PAN. Assessee has complied with these provisions. Therefore, there is no need to deduct any tax and disallowance under section 40(a) (ia) does not arise. Even though it was stated in sub section (7) that person responsible for paying or crediting any sum to the person referred to in sub-section (6) shall furnish, to the prescribed Income Tax Authority or the person authorised by it, such particulars in such form within such time as may be prescribed, this provision was not made applicable for the impugned assessment year as the relevant notification was not issued immediately. In fact, the Board has given notification on 15.10.2010, which was made effective for the forthcoming second quarter statement due on 15th October, 2010. Since CBDT itself has issued notification in a later year, assessee's contention that in the impugned assessment year, no such prescribed authority was stated has to be accepted. Even otherwise, as rightly pointed out by the Ld. CIT(A) provisions of section 1940(6) are independent of section 1940(7). Just because there is violation of provisions of section 1940(7), disallowance under section 40(a) (ia) does not arise, if assessee complies with the provisions of section 1940(6). In view of this, we do not find any merit in Revenue appeal."*

(xiv) It may be mentioned that in the case of Soma Rani Ghosh Vs DCIT [2016] 74 taxmann.com 90 (Kolkata - Trib.), it was held by the Hon'ble Tribunal that:

"31. A Coordinate Bench of this Tribunal in ITA No. 86/VIZ/2013 in the case of ITO v. Kolli Bros, dated 11.12.2013 followed the decision of the Hon'ble High Court of Gujarat in the case of Valibhai Khanbhai Mankad (supra). In the case of Mahalaxmi Cargo Movers v. ITO [IT Appeal No. 6191 (MUM) of 2013, dated 09.12.2015], another Coordinate Bench of this Tribunal reached the same conclusion while following the decision of the Coordinate Bench in the case of Valibhai Khanbhai Mankad (supra) and Sri Marikamba Transport Co. (supra).

32. It is worth noticing that in ACIT v. Mohammed Suhail, Kurnool [IT Appeal No. 1536 (Hyd.) of 2014, dated 13.02.2015], the Coordinate Bench of this Tribunal specifically held that the provisions of section 194C(6) are independent of section 194C(7), and just because there is violation of provisions of section 194C(7), disallowance under section 40(a) (ia) does not arise if the assessee complies with the provisions of section 194C(6).

33. In view of the above and respectfully following the judicial reasoning delineated in the above judgments, we find that if the assessee complies with the provisions of section 194C(6), disallowance under section 40(a) (ia) does not arise just because there is violation of provisions of section 194C(7) of the Act.

*34. From our above discussion it follows that**,—***

(i) *in the context of Section 194C(1), person undertaking to do the work is the Contractor and the person so engaging the contractor is the contractee;*

(ii) that by virtue of the Amendment introduced by Finance Act (No.2) 2009, the distinction between a contractor and a subcontractor has been done away with and Cl. (Hi) of Explanation under 194C(7) now clarifies that "contract" shall include subcontract;

(iii) subject to compliance with the provisions of Section 194C(6), immunity from TDS under sec. 194C(1) in relation to payments to transporters, applies transporter and non-transporter contractees alike;

(iv) under Sec. 194C(6), as it stood prior to the amendment in 2015, in order to get immunity from the obligation of TDS, filing of PAN of the

Payee-Transporter alone is sufficient and no confirmation letter as required by the learned CIT is required;

(v) Sections I94C(6) and Section I94C(7) are independent of each other, and cannot be read together to attract disallowance u/s 40(a) (ia) read with Section I94C of the Act; and

(vi) If the assessee complies with the provisions of Section 194C(6), no disallowance u/s 40(a) (ia) of the Act is permissible, even there is violation of the provisions of Section 194C(7) of the Act.

35. Consequent to our findings in the preceding paragraphs, we reach a conclusion that the authorities below are not justified in treating the expense incurred by the assessee for Carriage inward and carriage outward as disallowable under section 40(a) (ia) of the Act, and adding back Rs. 1,63,78,648/- claimed as expense towards Carriage Inward and Rs. 1,13,00,980/- claimed as expense towards Carriage Outward, and such additions shall stand deleted."

(xv) It may be mentioned that following the above referred order in the case of Soma Rani Ghosh Vs. DCIT, the Hon'ble ITAT, Kolkatta in the case of case of Kali Kinkar Roy Vs ITO in ITA No. 1676/Kol/2016, vide its order dated 31.01.2017 has held that:

"8. Heard rival submissions and perused the material available on record. It is an admitted fact that since all the payees submitted their Permanent Account Numbers in the assessment proceedings. The provision contemplated in Sec 194C(6) permits no deduction of TDS shall be made u/s. I94C(I) if the payee furnishes PAN to the payer. We find that the requirement of Section 194C(6) of the Act submission of Permanent Account Number which enable the payer from no deduction of TDS. The finding of the AO was that the Permanent Account Numbers furnished cannot be accepted as it was not filed with the appropriate authority as required u/s. J94C(7) of the Act and whether such failure attracts and invokes the jurisdiction under Section 40(a) (ia) of the Act. At this juncture, we may refer the order of Coordinate Bench of this Tribunal which held that provisions of section 194C(6) and section 194C(7) are independent to each other and can join together not be read

together to attract the disallowance U/Section40(a)(ia) of the Act. The relevant portion of which is reproduced hereunder:

v) Sections 194C(6) and Section 194C(7) are independent of each other, and cannot be read together to attract disallowance u/s. 40(a) (ia) read with Section I94C of the Act;

and

vi) if the assessee complies with the provisions of Section 194C(6), no disallowance u/s.40(a) (ia) of the Act is permissible, even there is violation of the provisions of Section 194C(7) of the Act.

***9.** In the present issue as discussed the fact remains admitted the payees furnished PANs to the Assessee, but, the Assessee could not furnish the same to the prescribed authority within time and whether such failure attracts the addition and disallowance under section 40(a) (ia)of the Act, in our opinion there is violation of section 194C(7) and disallowance under section 40(a) (ia) does not arise as held by the Coordinate Bench supra, accordingly, the impugned addition made thereon shall go and thus, ground no's 2 and 3 raised by the Assessee are allowed."*

(xvi) In view of the above discussion and the judicial pronouncements, it is held that the AO was not justified in making disallowance u/s 40(a) (ia) of the Act, in respect of persons whose PAN have been obtained as in view of the provision of section 194C(6) of the Act, it was not required to deduct tax at source. Further, non furnishing of information u/s 1940(7) of the Act, did not result in violation of provisions of section 40(a) (ia) of the Act as the provisions of section 1940(7) does not override the provisions of section 194C(6) of the Act. However, it is noted that in some of the cases, PAN were not printed but hand written on challans/builties/GR/lnvoice etc. and as the appellant has failed to demonstrate that these were obtained prior to making payments to these parties, the same are to disallowed u/s 1940(6) of the Act. The name of such parties are Prakash Transport, Sahu Goods, Jai Prakash Tak etc (total amounting to Rs.

28,70,368/- subject to verification). Therefore, out of the disallowance of Rs. 1,56,38,649/-, a sum of Rs. 28,70,368/- is hereby sustained. Thus, out of total disallowance of Rs. 1,62,33,061/-, a sum of Rs. 34,64,780/- (5,94,412 + 28,70,368) is hereby sustained and the remaining amount of Rs. 1,27,68,281/- is hereby deleted."

Thus, it is clear that the ld. CIT(A) has considered the fact of production of relevant information as printed on challan/builties issued by the recipients in respect of the payment on account of transportation of goods under contract and to that extent the ld. CIT(A) has deleted the disallowance made by the Assessing Officer. The revenue has challenged the order of the ld. CIT(A),however, it is not disputed by the revenue that the record produced by the assessee contains the requisite information as required U/s 194C(6) of the Act. Hence, in view of the various decisions as relied upon by the assessee and followed by the ld. CIT(A), we do not find any reason to interfere with the order of the ld. CIT(A) so far as the disallowance made U/s 40(a)(ia) of the Act is deleted.

16.1 As regards the disallowance sustained by the ld. CIT(A), we find merits in the alternative plea of the ld AR that the amendment brought into the provisions of Section 40(a)(ia) of the Act by the Finance Act, 2015 has been held as remedial in nature and retrospective in applicability. In the case of Chopra Industries Vs Addl.CIT(Supra), the Delhi Benches of the Tribunal after considering a series of decisions including the decision

of the Coordinate Benches of this Tribunal has considered this issue in para 5 to 8 as under:

"5. The ld. counsel for the assessee made two-fold submissions. He submitted that in view of the Amendment to the provisions of section 4o(a)(ia) which has been held to be retrospective by various decisions, only 30% of the ITA No.3099/Del/20i5 amount on which tax has not been deducted should be disallowed and not the entire amount. He further submitted that the Assessing Officer may be directed to allow such disallowance, which has been made in this year, subject to verification in the subsequent year. He also relied on the following decisions

(i) Shri Rajendra Yadav vs. ITO, ITAN0.895/JP/2012 dt. 29.01.2016.

(ii) Smt. Kanta Yadav vs. ITO, nA.N0.6312/Del/2016 dt. 12.05.2017.

(iii) ACITvs. Girdhari Lai Bargoti, ITAN0.757/JP/2012 dt. 10.04.2015.

(iv) Smt. Sonu Khandelwal vs. ITO, ITAN0.597/JP/2013 dt. 13.05.2016.

(v) Shri Aridaman Singh vs. ITO, ITAN0.391/JP/2014 dt. 09.10.2015.

6. The ld. DR on the other hand strongly relied on the order of the ld. CIT(A) and submitted that since the assessee has violated the provisions of section 4o(a)(ia), therefore, 100% disallowance should be made.

7. After hearing both the sides, we find the only issue to be decided in the grounds of appeal is regarding the restriction of the disallowance to 30% of the addition. We find an identical issue had come up before the Co-ordinate Bench of the Tribunal in the case of Smt. Kanta Yadav vs. ITO. We find the Tribunal in ITA No.6312/Del/2016 order dated 12.05.2017 for assessment year 2012-13 has decided the identical issue and has observed as under :-

"6. We have considered rival submissions and find that issue is covered in favour of the assessee by order of ITAT Jaipur Bench in the case of Shri Rajendra Yadav vs. ITO and Smt. Sonu Khandelwal vs. ITO. In

these orders it was held that the disallowance u/s 4o(a)(ia) to be restricted to 30% of the addition. In these orders the Tribunal has considered the amended provisions of section 4o(a)(ia) of I.T. Act. In these orders the assessment year's involve was 2007-08 and 2008-09. In the present appeal the assessment year is 2012-13. Therefore facts are identical. In this view of the matter and following the above decisions of Jaipur Bench, we set aside and modify the orders of the authorities below and direct the Assessing Officer to restrict the addition to 30% of the total addition made on account of deduction of TDS u/s 40(a)(ia) of the Act."

ITA No.3099/Del/20l5

8. Respectfully following the decision of the Co-ordinate Bench of the Tribunal, we hold that the disallowance u/s 40(a)(ia) should be restricted to 30% of the total addition on account of non-deduction of TDS. So far as the argument of the Id. counsel for the assessee that direction may be given to the Assessing Officer to allow such disallowance made in this year in the order of the subsequent years, we hold that the assessee may move appropriate application before the Assessing Officer who shall decide the issue as per fact and law. We hold and direct accordingly. The grounds raised by the assessee are accordingly partly allowed."

In absence of any contrary precedent, we follow the decisions of this Tribunal on this issue whereby the amendment brought into Section 40(a)(ia) of the Act has been considered at retrospective in nature. Accordingly, the disallowance sustained by the ld. CIT(A) is restricted to 30% of the amount. The Assessing Officer is directed to recomputed the disallowance of 30% of the sum paid without TDS which was sustained by the ld. CIT(A).

17. Ground No. 9 of the appeal is regarding the disallowance of employees contribution to PF and ESI U/s 43B of the Act.

18. We have heard the ld AR of the assessee as well as the ld. CIT-DR and considered the relevant material on record. This issue is covered by the decision of the Hon'ble Jurisdictional High Court in the case of CIT Vs. JVVNL 265 CTR 62 (Raj) as under:

> ***"6.*** *We have considered the arguments advanced by the learned counsel for the Revenue and have also gone through the impugned orders. In our view no substantial question of law arises out of the orders of the Tribunal as it is an admitted fact that the entire amount was deposited by the respondent-assessee at least on or before the due date of filing of the returns under s. 139 of the IT Act and being a concurrent finding of fact by the respective authorities and in the light of the judgments rendered by this Court in the case of CIT v. State Bank of Bikaner & Jaipur/ Jaipur Vidyut Vitran Nigam Ltd. [2014] 363 ITR 70/43 taxmann.com 411 of even date wherein it has been held that if the amount has been deposited on or before the due date of filing the return under s. 139 and admittedly it was deposited on or before the due date then the amount cannot be disallowed under s. 43B of the IT Act or under s. 36(1)(va) of the Act. In fact in the above matters one of the parties is same as in the present appeals, therefore, the issue is no more res Integra in the light of judgments of this Court referred to supra and, in our view, no substantial question of law arises out of the impugned orders of the Tribunal, which may require attention of this Court."*

Similarly in the case of CIT Vs. SBBJ 363 ITR 70 (Raj), the Hon'ble Jurisdictional High Court has held as under:

> **"21.** A conjoint reading of the proviso to Section 43-B which was inserted by the Finance Act, 1987 made effective from 01/04/1988, the words numbered as clause (a), (c), (d), (e) and (f), are omitted from the above proviso and, furthermore second proviso was removed by Finance Act, 2003 therefore, the deduction towards the employer's contribution, if paid, prior to due date of filing of return can be claimed by the assessee. In our view, the explanation appended to Section 36(1)(va) of the Act further

envisage that the amount actually paid by the assessee on or before the due date admissible at the time of submitting return of the income under Section 139 of the Act in respect of the previous year can be claimed by the assessee for deduction out of their gross total income. It is also clear that Sec.43B starts with a notwithstanding clause & would thus override Sec.36(1) (va) and if read in isolation Sec. 43B would become obsolete. Accordingly, contention of counsel for the revenue is not tenable for the reason aforesaid that deductions out of the gross income for payment of tax at the time of submission of return under Section 139 is permissible only if the statutory liability of payment of PF or other contribution referred to in Clause (b) are paid within the due date under the respective enactments by the assessees and not under the due date of filing of return.

22. We have already observed that till this provision was brought in as the due amounts on one pretext or the other were not being deposited by the assessees though substantial benefits had been obtained by them in the shape of the amount having been claimed as a deduction but the said amounts were not deposited. It is pertinent to note that the respective Act such as PF etc. also provides that the amounts can be paid later on subject to payment of interest and other consequences and to get benefit under the Income Tax Act, an assessee ought to have actually deposited the entire amount as also to adduce evidence regarding such deposit on or before the return of income under sub-section (1) of Section 139 of the IT Act.

23. Thus, we are of the view that where the PF and/or EPF, CPF, GPF etc., if paid after the due date under respective Act but before filing of the return of income under Section 139(1), cannot be disallowed under Section 43B or under Section 36(1)(va) of the IT Act."

Accordingly in view of the binding precedent of the Hon'ble Jurisdictional High Court, the disallowance made by the Assessing Officer and confirmed by the ld. CIT(A) is deleted.

19. Ground No. 10 of the appeal is regarding the validity of notice issued U/s 143(2) of the Act. At the time of hearing, neither any argument was advanced by the ld. AR of the assessee nor any specific defect is pointed out in the notice issued U/s 143(2) of the Act, therefore this ground of assessee's appeal is dismissed being not pressed.

20. In the appeal for the A.Y. 2013-14, the assessee has raised following grounds:

"1. That on the facts and in the circumstances of the case and in law, Id CIT-A grossly erred in enhancing the income of appellant assessee by sum of Rs. 2,91,29,333/- acting ultra vires to statutory limitation of enhancement powers u/s 251 which is ab initio void and fundamentally flawed action.

2. That on the facts and in the circumstances of the case and in law, Id CIT-A grossly erred in enhancing the income of appellant assessee by sum of Rs. 2,91,29,333/- in perfunctory manner on preposterous basis of earlier history of books rejection and some orders of higher authorities without applying basic understanding that it is nowhere stated in the income tax law that once assessee's books are rejected and profit is estimated then for all years in perpetuity according to Ld CIT-A books would be rejected ipso facto and profit would be estimated which is absolutely against the basic scheme of income tax law specially when Id CIT-A has not established even remotely that facts of earlier years are homogenous to extant period;

3. That on the facts and in the circumstances of the case and in law, Id CIT-A grossly erred in enhancing the income of appellant assessee by sum of Rs. 2,91,29,333/- by wrongly invoking section 145(3) without appreciating that assessee's defect free audited book result cannot be assaulted light heartedly and in casual manner as done in extant case;

4. That on the facts and in the circumstances of the case and in law, Id CIT-A grossly erred in enhancing the income of appellant assessee by sum of Rs. 2,91,29,333/- by applying arbitrary and imaginary profit rate of 9.5% which is egregious and shocking and grossly lacks any rational/sound legal basis and is based on mere ipse-dixit of Ld CIT-A as it is settled law that mere books rejection by itself does not give a carte-blanche to the officer to estimate any additional income over and above returned income without bringing any incriminating material on records.

5. That on the facts and in the circumstances of the case and in law, Id CIT-A grossly erred in enhancing the income of appellant assessee by

not issuing valid show cause notice as mandated and prescribed in CBDT instructions and under the law, and mere cryptic order sheet entry is treated as equivalent to valid and lawful show cause notice which omission vitiates the entire action.

6. *That on the facts and in the circumstances of the case and in law, Id CIT-A grossly erred in enhancing the income of appellant assessee without appreciating that entire enhancement is based on purely hypothetical and artificial income which is never earned by assessee and is never corroborated even symbolically by any iota of trading outside the books .*

Other grounds relating to additions made by Ld AO which are not deleted by Ld CIT-A

7. *That on the facts and in the circumstances of the case and in law, Id CIT-A erred in not deleting the sustained disallowance of Rs 34,79,396/- pertaining to service tax amount which is correctly claimed in this period and otherwise also when only conflict is for the year of allowability and otherwise the claim is allowable under the law, it is revenue neutral to disturb assessee's claim and accordingly disallowance sustained is plainly incorrect. Alternatively sice A.Y. 2012-13 was also very much before CIT-A he could have very well held it should be given in that year but it seems Ld. CIT-A was not willing to advance justice to assessee.*

8. *That on the facts and in the circumstances of the case and in law, Id CIT-A erred in not deleting the sustained disallowance of Rs. 41,48,656/- pertaining to service tax amount which is correctly claimed in this period and otherwise also when only conflict is for the year of allowability and otherwise the claim is allowable under the law, it is revenue neutral to disturb assessee's claim and accordingly disallowance sustained is plainly incorrect. Alternatively since A.Y. 2014-15 was also very much before CIT-A he could have very well held it should be given in that year but it seems ld. CIT-A was not willing to advance justice to assessee.*

9. *That on the facts and in the circumstances of the case and in law, Id CIT-A erred in not deleting the disallowance of Rs 13,63,011/- pertaining to genuine and actual deductions made by the clients which is plainly against real income theory.*

10. That on the facts and in the circumstances of the case and in law, the ld. CIT(A) erred in not deleting the disallowance of Rs. 3,39,791/- U/s 36(1)(va)/Section 2(24)(x) of the Act without appreciating that said issue is covered in assessee's favour by Jurisdictional high Court."

21. Grounds No. 1 to 6 of the appeal are regarding rejection of books of account and enhancement of income by applying G.P. rate by the ld. CIT(A). These grounds are common to the ground taken in the appeal for A.Y. 2012-13 and the ld. CIT(A) has also given a common finding. We have already considered and decided this issue for the A.Y. 2012-13, accordingly in view of the our finding on this issue, grounds No. 1 to 6 of the appeal stand allowed and enhancement made by the ld. CIT(A) is deleted.

22. Ground No. 7 of the appeal is regarding the disallowance of service tax. The assessee has claimed expenditure on account of service tax demand of Rs. 76,28,052/-. The Assessing Officer noted that out of this total demand of Rs. 76,28,052/-, a sum of Rs. 34,79,396/- is the service tax payable as on 31/1/2013 and the assessee paid the said amount during the F.Y. 2012-13. However, the assessee has not booked the said amount in the P&L account. The Assessing Officer further noted that the demand arising due to the order dated 05/10/2011 of Commissioner of Central Excise, Jaipur, which is relevant for the A.Y. 2012-13 and therefore, the claim of expenditure in respect of the service tax

demand of Rs. 34,79,396/- is not admissible. The Assessing Officer accordingly disallowed the said amount. Further balance amount of Rs. 41,48,658/- was also considered as a demand on account on omission of the assessee and the Assessing Officer disallowed the said amount U/s 37(1) of the Act being the penalty as per the explanation to Section 37(1) of the Act.

23. On appeal, the assessee submitted that the demand was raised by the Service Tax Department in pursuance to the audit conducted during the relevant previous year. The assessee referred audit report dated 23/4/2013 of the Service Tax Department and submitted that the demand of service tax has been crystallized in the year under consideration and therefore, the same is an allowable claim. The ld. CIT(A) has not accepted the contention of the assessee and sustained the disallowance made by the Assessing Officer on the ground that the said liability pertains to the assessment year 2012-13 and not for the A.Y. 2013-14.

24. Before us, the ld AR of the assessee has submitted that when both the appeals were before the ld. CIT(A) and decided by a composite order then if the said demand of service tax was found for the A.Y. 2012-13 and not for the A.Y. 2013-14 the claim of the assessee was required to be allowed. He has thus pleaded that the claim on account of service tax may

be allowed for the A.Y. 2013-14. Even otherwise as per the provisions of Section 43B of the Act, the said sum is allowed on actual payment and not on accrual basis. In support of his contention, he has relied upon the decision of Delhi Benches of the Tribunal dated 09/11/2017 in the case of Dharampal Satyapal Sons (P) Ltd. Vs DCIT in ITA No. 5919/Del/2014 and submitted that once the payment was made before the due date of filing of the return of income then the amount is allowable in the relevant assessment year.

25. On the other hand, the ld CIT-DR has relied upon the orders of the authorities below and submitted that the ld. CIT(A) has given the finding that this liability to pay the service tax pertains to the A.Y. 2012-13 and therefore, the same is not allowable for the year under consideration.

26. We have considered the rival submissions as well as the relevant material on record. This was a claim regarding service tax liability of Rs. 34,79,396/- which was denied by the authorities on the ground that this service tax liability pertains to the A.Y. 2012-13 and not for the A.Y. 2013-14. There is no dispute that the payment of tax is allowed only on actual payment as per Section 43B of the Act and not on the basis of accrual of the liability. The Delhi Benches of the Tribunal in the case of Dharampal

Satyapal Sons (P) Ltd. Vs DCIT (supra) has considered this issue in para 4 and 5 as under:

> *"4. Now coming to the second ground, it is the contention of the assessee that unlike the cases relied upon by the AO in this matter, the liability was definite and the provision was created during the relevant FY to the tune of Rs. 8,37,69,394/- out of which only a sum of Rs. 95,90,000/- was paid before the due date for filing the return. According to the assessee, in view of the fact that the provision was very much available during the FY, the liability was crystallized before the clue date for filing the income tax returns, the payment of Rs.95,90,000/- towards the excise duty is an allowable expenditure for the AY 2011-12. Factually, there is no dispute that there was a demand under challenge in respect of Rs. 16,91,79,394/- towards excise demand, creation of provision to a tune of Rs. 8,37,69,394/- during the FY 2010-11 and payment of excise duty to the tune of Rs. 95,90,000/ pursuant to the order dated 27.04.2011. Further, there is no dispute that the tax rates are similar for the AYs 2011-12 & 2012-13. Reliance is placed on the decision of the Hon'ble* High Court, Delhi in the case of *CIT vs. Triveni Engineering* & *Industries Ltd. in ITA No. 346 of 2009* vide para 11 for the principle that.
>
> > *11.* **"……..***However, in the projected scenario of this case after taking stock of the entire situation***,** *we are 'of the opinion that it is not necessary to conclusively answer the aforesaid questions formulated. It is because of the reason that we find that the entire exercise, is revenue neutral It may be pointed that, it is a matter of record that against the provision of Rs. 139 lacs, i.e., more than the provision made. It is undisputed that the expenditure incurred by the assessee on the project is admissible deduction. The only dispute that the Revenue seeks to raise is regarding the year of allowability of expenditure. Considering that the assessee is a company assessed, at uniform rate of tax, the entire exercise, of seeking to disturb*

the year of allowability of expenditure is in any case, revenue neutral."

5. In the case on hand also as against the provision, the assessee made payment of Rs. 95,90,000/- and the tax rates are uniform for the relevant and subsequent assessment years, as such in a tax neutral scenario, it is fair to allow the expenditure for this assessment year. We, therefore, allow this ground of appeal and direct the AO to delete the addition on this count."

Thus, the Tribunal has allowed the claim when it was found that the payment was made before due date of filing of return of income U/s 139 of the Act. It is matter of fact that the liability is not in dispute and the disallowance is made only on account of year of allowability of claim. It is pertinent to note that when both the years were before the ld. CIT(A) and decided by the composite order then if the claim of assessee regarding actual liability of service tax was allowable in the assessment year 2012-13 then instead of sustaining the disallowance for the A.Y. 2013-14, the ld. CIT(A) ought to have allowed the claim of the assessee in terms of the provisions of Section 43B or at the best for the A.Y. 2012-13. Hence, we direct the Assessing Officer to allow the claim of the assessee for the A.Y. 2012-13.

27. Ground No. 8 of the appeal is regarding the disallowance of service tax of Rs. 41,48,656/-. The Assessing Officer and the ld. CIT(A) has disallowed this claim on the ground that this demand was crystallized in

the F.Y. 2013-14, which is relevant to the assessment year 2014-15 and not for the A.Y. 2013-14. An identical issue has been considered by us while deciding ground No. 7 of this appeal. Accordingly, the Assessing Officer is directed to allow the claim for the A.Y. 2014-15 which is also decided by the ld. CIT(A) by composite order and is being decided by us in this order.

28. Ground No. 9 of the appeal is regarding the disallowance of Rs. 13,63,011/-. The assessee has claimed an amount of Rs. 41,70,655/- towards various deductions made by the awarders of the contract/clients which includes a sum of Rs. 35,76,107/- towards the loss and damages. The Assessing Officer held that the alleged deduction are not supported by documentary evidence, accordingly, the Assessing Officer has made disallowance of Rs. 35,76,107/-.

29. The assessee challenged the action of the Assessing Officer before the ld. CIT(A) and submitted that the details of deduction alongwith copy of relevant ledger account and certificate of M/s DB Power Limited showing the deduction of Rs. 22,12,096/- was submitted before the Assessing Officer. The ld. CIT(A) after considering the said record has allowed the claim to the extent of Rs. 22,12,096/- for which the

documentary evidence was produced by the assessee. Accordingly, the balance disallowance of Rs. 13,63,011/- was sustained.

30. Before us, the ld AR of the assessee has submitted that the assessee has shown the amount receivable from the parties after relevant deductions which has been already received or receivables from the respective parties. The deductions have been taken in account either on the basis of mutual/oral discussions or settlement arrived between the parties. The bills/vouchers of the expenses are lying in the possession of the awarders/clients and the same has not been supplied to the assessee. Such types of deductions are of routine and general in nature in case of contractors and therefore, part and parcel of the business. The assessee by producing the books of account and copy of the relevant ledgers has established the genuineness of the claim that the assessee received the payment after the deductions made by the awarders of the contracts/clients.

31. On the other hand, the ld DR has submitted that when the assessee has not produced any documentary evidence in support of such deduction then the disallowance sustained by the ld. CIT(A) is justified.

32. We have considered the relevant material on record. The ld. CIT(A) has considered this issue at page 51 and 52 of the impugned order as under:

> *"(iii) I have duly considered the submissions of the appellant, assessment order and the material placed on record. It is noted that the appellant could not file any documentary evidence in support of its claim of deductions made by its clients on account of loss and damages except in the case of M/s DB Power Ltd. The AO did not allow any deduction even in the case of DB Power Ltd by observing that the certificate issued by the said company was not produced in original and it was not issued by the authorised signatory. During the appellate proceedings, the AO was directed to make enquiries from M/s DB Power Ltd to verify the deductions claimed by the appellant. Vide its letter dated 16/10/2017, in its remand report it was submitted by the AO that:*
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> > *"In connection to the above, it is submitted that as directed by your goodself a letter was written to M/s DB Power Limited, Mumbai. In compliance thereto, the company stated that 'the amount paid represents capital expenses and the amount deducted is reduced from capital expenditure. Also no further payments out of amount deducted were made to the above contractor." Further certified copies of letters dated 16.02.2016 and 31.08.2016 were also submitted through letter dated 07.10.2017 of the company (copy enclosed). The relevant documents were examined and prima facie appears to be in order."*
>
> (iv) *Therefore, in view of the above discussion, remand report of the AO and the certificate of M/s DB Power Ltd., the AO is hereby directed to allow deduction of Rs. 22,12,096/- made by M/s DB Power Ltd. Further, the appellant could not establish the remaining deduction amounting to Rs. 13,63,011/- (35,75,107 - 22,12,096) with any documentary evidence even during the appellate proceedings, therefore, I do not find any reason to interfere with the findings of the AO as recorded in the assessment order;*

and thus, it is held that the AO was justified in not allowing the deduction amounting to Rs. 13,63,011 /- and hence, the same is hereby sustained."

Thus, there is no dispute that the assessee has produced documentary evidence in support of the claim of deduction made by the clients only to the extent of Rs. 22,12,096/-. As regards the remaining deductions, the assessee has not produced any documentary evidence, however, the assessee has claimed that these deductions were made by the awarders of the contract on account of damages and losses. Since the claim is not supported by any documentary evidence, however, the facts remains that the assessee has not received the amount to the extent of the deduction stated to have been made by the parties for whom the assessee has executed the work. Therefore, it is pure matter of fact and requires a verification and confirmation on behalf of the parties. Accordingly, in the facts and circumstances of the case and in the interest of justice, we set aside this issue to the record of the Assessing Officer to verify the correctness of the claim either by calling the information from the concerned parties or the assessee shall furnish the confirmation from these parties. Needless to say that the assessee be given appropriate opportunity of hearing.

33. Ground No. 10 of the appeal is regarding disallowance made account of employees' contribution to ESI and PF.

34. We have heard the ld AR as well as the ld. CIT-DR and considered the relevant material of record. This issue is identical to the issue raised in ground No. 9 of the appeal for the A.Y. 2012-13. In view of our finding on this issue for the A.Y. 2012-13, this ground of appeal is allowed and the disallowance confirmed by the ld. CIT(A) is deleted.

35. Now we take up the appeal of the assessee for the A.Y. 2014-15. In the appeal, the assessee has raised following grounds of appeal:

"1. That on the facts and in the circumstances of the case and in law, Id CIT-A grossly erred in enhancing the income of appellant assessee by sum of Rs. 1,08,71,471/- acting ultra vires to statutory limitation of enhancement powers u/s 251 which is ab initio void and fundamentally flawed action specially when case was under limited scrutiny only.

2. That on the facts and in the circumstances of the case and in law, Id CIT-A grossly erred in enhancing the income of appellant assessee by sum of Rs. 1,08,71,471/- in perfunctory manner on preposterous basis of earlier history of books rejection and some orders of higher authorities without applying basic understanding that it is nowhere stated in the income tax law that once assessee's books are rejected and profit is estimated then for all years in perpetuity according to Ld CIT-A books would be rejected ipso facto and profit would be estimated which is absolutely against the basic scheme of income tax law specially when Id CIT-A has not established even remotely that facts of earlier years are homogenous to extant period;

3. That on the facts and in the circumstances of the case and in law, Id CIT-A grossly erred in enhancing the income of appellant assessee by sum of Rs. 1,08,71,471/- by wrongly invoking section 145(3) without appreciating that assessee's defect free audited book result cannot be assaulted light heartedly and in casual manner as done in extant case;

4. *That on the facts and in the circumstances of the case and in law, Id CIT-A grossly erred in enhancing the income of appellant assessee by sum of Rs. 1,08,71,471/- by applying arbitrary and imaginary profit rate of 10% which is egregious and shocking and grossly lacks any rational/sound legal basis and is based on mere ipse-dixit of Ld CIT-A as it is settled law that mere books rejection by itself does not give a carte-blanche to the officer to estimate any additional income over and above returned income without bringing any incriminating material on records.*

5. *That on the facts and in the circumstances of the case and in law, Id CIT-A grossly erred in enhancing the income of appellant assessee by not issuing valid show cause notice as mandated and prescribed in CBDT instructions and under the law, and mere cryptic order sheet entry is treated as equivalent to valid and lawful show cause notice which omission vitiates the entire action.*

6. *That on the facts and in the circumstances of the case and in law, Id CIT-A grossly erred in enhancing the income of appellant assessee without appreciating that entire enhancement is based on purely hypothetical and artificial income which is never earned by assessee and is never corroborated even symbolically by any iota of trading outside the books .*

Other grounds relating to additions made by Ld AO which are not deleted by Ld CIT-A

7. *That on the facts and in the circumstances of the case and in law, Id CIT-A erred in not deleting the sustained disallowance of Rs 2,53,993/- pertaining to genuine and actual deductions made by the clients which is plainly against real income theory.*

8. *That on the facts and in the circumstances of the case and in law, Id CIT-A erred in not deleting the sustained disallowance of Rs. 58330/- U/s 36(1)(va)/Section 2(24)(x) of the Act without appreciating that said issue is covered in assessee's favour by the jurisdictional High court decisions.*

9. *That on the facts and in the circumstances of the case and in law, Id CIT-A erred in not completely deleting the disallowance of Rs. 26,19,088/- and wrongly upholding ld. A.O.'s version that the*

assessee has diverted interest bearing loans towards interest from advances which is factually and legally incorrect where both the lower authorities have never discharged their burden U/s 36(1)(iii) and moreover have never objectively overruled assessee's impregnable explanation.

Invalid issuance of notice u/s 143(2) on basis of CASS

10. That Ld AO while issuing notice u/s 143(2) on mere basis of CASS has not applied its own mind which is mandated u/s 143(2) as evident from words used like considered necessary etc and as explained/dilated in various apex court rulings, accordingly the orders passed by Ld AO and Ld CIT-A are bad in law and deserves to be quashed on this short count itself.

That the appellant craves leave to add add/alter any/all grounds of appeal before or at the time of hearing of the appeal."

36. Grounds No. 1 to 6 of the appeal are regarding rejection of books of account and enhancement of income by applying G.P. rate by the ld. CIT(A). These grounds are common to the ground taken in the case for A.Y. 2012-13 and the ld. CIT(A) has also given a common finding. We have already considered the decided this issue for the A.Y. 2012-13, accordingly in view of the our finding on this issue, grounds No. 1 to 6 of the appeal stand allowed and enhancement made by the ld. CIT(A) is deleted.

37. Ground No. 7 of the appeal is regarding the deductions made by the clients/contract awarders was disallowed.

38. This ground is also common as in the A.Y. 2013-14, therefore, to the extent of the claim of deduction made by the clients/contract awarders, the assessee did not produce the supporting evidence. The actual fact of said deduction made by these clients can be verified from the concerned parties. Accordingly, in view of our finding in the A.Y. 2013-14 this ground is set aside to the Assessing Officer on similar terms and directions.

39. Ground No. 8 of the appeal is regarding disallowance made on account of employees' contribution to ESI and PF.

40. We have heard the ld AR as well as the ld. CIT-DR and considered the relevant material of record. This issue is identical to the issue raised in ground No. 9 of the appeal for the A.Y. 2012-13. In view of our finding on this issue for the A.Y. 2012-13, this ground of appeal is allowed and the disallowance confirmed by the ld. CIT(A) is deleted.

41. Ground No. 9 of the appeal is regarding the disallowance of interest of Rs. 26,19,088/- on account of interest free advances given. During the year under consideration, the assessee has shown interest income of Rs. 1,15,02,306/- and interest payment of Rs. 2,50,40,608/-. The Assessing Officer has observed that the interest paid to various parties and banks is ranging from 9% to 12% whereas the assessee has made interest free loans and advances to its group concerns which are covered U/s 40A(2)(b)

of the Act. The assessee contended that the interest free loans were given by the assessee out of its interest free loans taken from the group concerns and therefore no disallowance of interest is called for on account of interest free advances given to the group concerned. The Assessing Officer did not accept the contention of the assessee and made a proportionate disallowance of interest of Rs. 26,19,088/-.

42. The ld. CIT(A) has confirmed the disallowance made by the Assessing Officer. Though the amount of interest based on the duration for which the loan was given to the group concern during the year under consideration was considered by the ld. CIT(A) and the Assessing Officer was accordingly directed to modify the amount.

43. Before us, the ld AR of the assessee has submitted that out of total amount of Rs. 16.00 crores given to the three group concerns, the amount of Rs. 13.94 crores were given only for a period of three days during the year under consideration and only an amount of Rs. 2,06,64,063/- was given for the entire year but this amount was also not a fresh loan given during the year but this was given in the earlier year and no disallowance was made by the Assessing Officer for the A.Y. 2013-14. Therefore, when this loan was not given during the year under consideration and it is only a carry forward balance from the earlier year then no disallowance can be

made on account of interest. In support of his contention, he has relied upon the decision of the Hon'ble Supreme Court in the case of Hero Cycles P Ltd. Vs CIT 379 ITR 347. Thus, the ld AR has submitted that when no new loan or advance was given during the year under consideration except for three days then the disallowance made by the Assessing Officer is not justified. He has further pointed out that the assessee has also explained that the assessee is having interest free loan of Rs. 16.5 crores taken from M/s KSK Mahanandi Power Co. Ltd., which is sufficient for giving the loan/advance in question to the group concern, therefore, without prejudice to the contentions as raised even the assessee was having interest free funds to given these advances.

44. On the other hand, the ld CIT-DR has relied upon the orders of the authorities below and submitted that the Assessing Officer has pointed out the fact that the assessee is having capital of Rs. 13.79 crores whereas the total interest free loan has been taken to the tune of Rs. 22.59 crores. Further the assessee has also taken loan of Rs. 46.87 crores, therefore, these facts clearly shows that the assessee was not having non-interest bearing sufficient funds.

45. We have considered the rival submissions as well the relevant material on record. The Assessing Officer has made the disallowance of

Rs. 26,19,088/- on account of interest in respect of interest free advances given by the assessee to three group concerns as under:

S. No.	Name of the persons to whom interest free loans and advance given	Amount (Rs.)	Rate of interest charged	Period	Disallowance of interest (Rs.)
1.	M/s Zuberi Infra Pvt. Ltd.	13,00,00,000/-	12.00%	3 days	1,30,000/-`
2.	M/s Zuberi Solar Power P Ltd.	94,00,000/-	12.00%	3 days	9,400/-
3.	Zuberi Engineering Co. Ltd.	2,06,64,063/-	12.00%	12 months	24,79,668/-
				Total	26,19,088/-

Thus, it is clear that the first two amounts of advances of Rs. 13.00 crores and Rs. 94.00 lacs respectively were given only for the three days during the year under consideration and the Assessing Officer has also made the disallowance of interest only for the three days. The balance amount of Rs. 2,06,64,063/- was undisputedly not given during the year under consideration but it was given in the earlier year and the Assessing Officer has not made any disallowance on account of interest. Therefore, once the said amount of Rs. 2,06,64,063/- was not given during the year under consideration and no disallowance was made by the Assessing Officer in the earlier year then having regard to the rule of consistency, no disallowance can be made in respect of the said advance given by the assessee in the earlier year. It is pertinent to note that when this amount was given in the earlier year then the availability of interest free funds has to be seen in the earlier year and not during the year under consideration.

Further it is also not disputed by the revenue that the assessee has shown an interest free loan of Rs. 16.5 crores from M/s KSK Mahanandi Power Co. Ltd.. Considering the said amount of interest free loan of Rs. 16.5 crores, the loan given by the assessee is otherwise covered by the said interest free loan. Hence, the assessee has explained the availabilities of interest free funds for the interest free advance to the group concern then no disallowance on account of interest is called for. The Assessing Officer has also not considered the aspect of commercial expediency for giving the advance to the group concerns. Accordingly, in view of the totality of the facts and circumstances of the case that the disallowance made by the Assessing Officer in respect of Rs. 2,06,64,063/- which was not given during the year under consideration and no disallowance was made in the earlier year further the assessee was having sufficient interest free funds to give the advances then the disallowance made by the Assessing Officer on this account is not justified and the same is called for and is deleted.

46. Ground No. 10 of the appeal is regarding the validity of notice issued U/s 143(2) of the Act. At the time of hearing, neither any argument was advanced by the ld. AR of the assessee nor any specific defect is pointed out in the notice issued U/s 143(2) of the Act, then this ground of assessee's appeal is dismissed being not pressed.

47. In the result, all the three appeals of the assessee are partly allowed and that of revenue's cross appeal is dismissed.

Order pronounced in the open court on 21/12/2018.

Sd/-	Sd/-
(विक्रम सिंह यादव)	(विजय पाल राव)
(VIKRAM SINGH YADAV)	(VIJAY PAL RAO)
लेखा सदस्य / Accountant Member	न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur
दिनांक / Dated:- 21st December, 2018

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

1. अपीलार्थी/The Appellant- (i)The Zuberi Engineering Company, New Delhi.
   (ii) M/s Zuberi Engineering Company, Jaipur.
2. प्रत्यर्थी/ The Respondent- The D.C.I.T./ ACIT, Circle-2, Jaipur.
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त(अपील)/The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर/DR, ITAT, Jaipur
6. गार्ड फाईल/ Guard File (ITA No. 977 to 979/JP/2018 & ITA 1122/JP/2018)

आदेशानुसार/ By order,

सहायक पंजीकार/Asst. Registrar