

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'E', NEW DELHI**

**BEFORE SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBER**

ITA No.4709/Del/2003
Assessment Year: 2001-02

ACIT, Circle-33(1), New Delhi	Vs.	M/s. Alps International, 16/11, IInd Floor, R.D. Chamber, Karol Bagh, New Delhi
PAN :AAAF5155A		
(Appellant)		(Respondent)

Appellant by	Ms. Rinku Singh, Sr.DR
Respondent by	Shri Rohit Jain, Adv. ; Ms. Deepashree Rao, CA; and Sh. Vibhu Gupta, CA

Date of hearing	27.12.2018
Date of pronouncement	09.01.2019

ORDER

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

This appeal has arisen on account of the decision dated 23.12.2010 of the Hon'ble High Court of the Delhi in the case of the assessee, setting aside the order of the Tribunal and remitting the matter back for deciding the appeal on merit. The appeal filed by the Revenue against the order dated 31/07/2003 passed by the Ld. Commissioner of Income-tax (Appeals)-XXVI, New Delhi [in short 'the Ld. CIT(A)'] for assessment year 2001-02, was dismissed by the Tribunal for non-filing of Annexure-A to the assessment order. Now before us, the Revenue has filed a copy of

said Annexure-A to the assessment order and thus parties were heard on the merit of the addition. The Assessing Officer filed revised grounds of appeal along with verification dated 21/04/2017. The revised grounds raised in the appeal are reproduced as under:

1. *On the facts and circumstances of the case, the Ld. CIT(A) erred in deleting the addition of Rs.77,44,468/-, which was made by the AO on account of undisclosed investment u/s 69B of the Income-tax Act, 1961.*
2. *On the facts and circumstances of the case, the Ld. CIT(A) erred in deleting the addition of Rs.15,48,894/-, which was made by the AO u/s 40A(3) of the Income Tax Act, 1961 (being 20% of the assumed purchase of Rs.77,44,468/-)*
3. *On the facts and circumstances of the case, the Ld. CIT(A) erred in deleting the addition of Rs.7,74,447/-, which was made by AO as 10% GP on unexplained purchases sold in market.*

2. Briefly stated facts of the case are that, the assessee, a partnership firm was engaged in the business of export of goods like uniforms accessories, leather and brass items etc. In the return of income filed for the assessment year under consideration on 29/10/2001, the assessee declared total income of Rs.49,84,920/- after claiming deduction amounting to Rs.83,27,793/- under section 80HHC of the Income-tax Act, 1961 (in short 'the Act'). The case was selected for the scrutiny. During the scrutiny proceedings, the Assessing Officer noted that there were many instances when the assessee made sales, but no corresponding purchases were shown. The Assessing Officer prepared a month wise trading account, wherein he noticed negative stock balance from the month of July, 2000 to

November, 2000 and peak of which amounting to Rs.77,44,468/- was observed in the month of August, 2000. This trading account was made as Annexure-A to the assessment order. The assessee explained that the goods were purchased in the months corresponding to the export from July, 2000 to November, 2000 but bills for these purchases were obtained in the month from December, 2000 to March, 2001. This explanation of the assessee was not accepted by the Assessing Officer in absence of any evidence to support that corresponding goods were received in the month of July 2000 to November, 2000. The assessee identified 31 bills from 9 parties, which were claimed to be received in the month of December, 2000 to March, 2001 and the purchases corresponding to which were claimed to be made in the month of July 2000 to November, 2000. The Assessing Officer also called for few parties from the list of 31 bills and recorded their statement. According to the Assessing Officer, the parties could not substantiate with documentary evidence that goods were supplied 6 months prior to issue of the bills. No other evidence of dispatch of goods to the assessee was provided. A copy of the statements of the parties was duly confronted to the assessee but the assessee failed to substantiate the claim of goods received approximately 4-6 months prior to issue of the bills. In view of the above facts, the Assessing Officer concluded that goods corresponding to the exports in the month of July 2000 to Nov. 2000, were purchased out of unexplained sources and thus he made addition of Rs.77,44,468/-. The Assessing Officer made this addition on protective basis subject to working out of similar peak negative stock balance in assessment year 1999-2000. According to the Assessing Officer, these purchases

were presumed to be made in cash and thus he also disallowed 20% of the said expenditure amounting to Rs.15,48,894/- in terms of section 40A(3) of the Act. According to the Assessing Officer, the goods purchased corresponding to the export in the month of July, 2000 to Nov., 2000/- were held to be from unexplained sources and thus the goods shown to be purchased corresponding to bills raised in the month of December, 2000 to March, 2001 must have been sold out of books of accounts. The Assessing Officer estimated a gross profit at the rate of 10% on such purchase bills amounting to Rs.77,44,468/- and made addition of Rs.7,74,447/- as undisclosed profit.

2.1 Before the Ld. CIT(A), the assessee claimed that the goods exported were unique and specific to the country and not saleable in India. The assessee claimed that none of the suppliers were new and goods were received for last 2 to 3 years from the same suppliers and payments to those suppliers were made through crossed cheques. The assessee claimed that payments were made as soon as the goods were supplied. According to the assessee there was no reason to make cash purchases and make sales out of books specifically when those goods cannot be sold in India.

2.2 According to the Ld. CIT(A), the whole basis of working out the negative stock figures by the Assessing Officer was erroneous. He observed that the Assessing Officer worked out the stock figures by taking opening stock plus purchases plus expenses on one side while on another side; he took sales and calculated the gross profit applying average gross profit rate of 24.9% and the difference of two sides was worked as closing stock (positive or negative). According to the Ld. CIT(A) there cannot be fixed gross

profit rate for different items of export like “Buttons”, “caps”, “hooks”, “shirts”, “jackets”, “trousers”, “leather footwear” etc. The Ld. CIT(A) was also of the view that there cannot be a fixed gross profit rate for all 12 months and the Assessing Officer has fallen into error in computing the negative stock applying this fixed gross profit ratio of 24.96%.

2.3 The Ld. CIT(A) also observed that the supplier parties confirmed of having made sales to the assessee and received payment by account payee cheques. None of the parties stated to have received payment in cash. According to him, there statement did not show anything incriminating and the inference drawn by the Assessing Officer that those goods were purchased in cash, is without any basis. In view of the Ld. CIT(A), the whole addition is made on presumption without any actual proof. The Ld. CIT(A) deleted the addition of observing as under:

“9. Of negative stock figure once the monthly trading account by which he has arrived at the figure of 77.44 lakhs is based on wrong understanding of the principle of accountancy and taking fixed GP rate for each month for different items which is not sustainable. Therefore the theory of negative stock cannot be accepted. Neither has he proved that there were purchases made out of books. As the appellant has paid all the purchases by account payee cheques and all the suppliers have confirmed this fact that the appellant was having a running account with them for many years and they used to supply the goods and payments were received by cheques. The presumption that cash purchases have been made from undisclosed sources cannot be sustained and as it is earlier stated the goods purchases by the appellant was such that they can only be sold to buyers in Western. African countries and they were uniforms of army. They cannot be sold in the open market. They have necessarily exported out of the country and once the export income is exempt deduction u/s 80HHC than why should any assessee make sales and purchases out of books. Hence, the addition of Rs.77,44,468/- by the AO is hereby deleted as it was based on pure conjectures and surmises.”

2.4 The Ld. CIT(A) also deleted the addition of Rs.15,48,894/- made under section 40A(3) of the Act holding that original addition itself is deleted by him. He also deleted the addition of

Rs.7,74,447/-made for undisclosed profit estimating gross profit rate at the 10%.

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

3. Before us, the Ld. DR supporting the order of the Assessing Officer submitted that in absence of any stock register maintained by the assessee for inward and outward of goods, there was no option with the Assessing Officer except preparing of monthly trading account wherein negative stock balance was noticed. She submitted that the fact of negative stock balance has been confirmed by the assessee itself when it submitted list of 31 bills and claimed that goods corresponding to those bills were supplied in the month of July, 2000 to November, 2000. She submitted that the assessee as well as the supplier parties failed to substantiate with documentary evidences that those goods were supplied during the period from July, 2000 to November, 2000. She also drawn our attention to the statements of the Sh. Mohd. Suleh Prop. M/s PAN Indian Enterprises, wherein he stated that bills were raised within 15 to 20 days. She also referred to statement of Sri Devi Dyal Singhal Partner Jariwal Devidayal & Sons, wherein he stated that bills were raised at the time of delivery of the goods. She drawn our attention towards the analyses of the statements of the supplier parties made by the Assessing Officer. She submitted that there was no requirement of making more than one bill by those suppliers in the month of December, 2000 to March, 2001, when the goods were claimed to be supplied in the month of July or August 2000 and making of a composite bill would have served the purpose. She submitted

that pattern of the payments made shows that the payments have been made corresponding to each sale bill and not made at the time of supply of the goods as stated by the assessee. According to her, it was confirmed that the goods corresponding to these bills were not received by the assessee in the month of July, 2000 to November, 2000 and the goods were purchased by the assessee from undisclosed sources and must have been paid in cash and thus the Assessing Officer is justified in making the addition for unexplained investment of Rs.77,44,468/-. On the issue of the addition made on the protective basis, she submitted that only amount was subject to change, pending the working out of the peak undisclosed investment in assessment 1999-2000. She also supported the finding of the Assessing Officer in respect of the addition of Rs.15,48,894/-and Rs.7,74,446/-respectively.'

4. On the contrary, the Ld. counsel of the assessee referred to paper book filed by the assessee on 11/06/2007 containing pages 1 to 163 and made detailed arguments supporting the order of the Ld. CIT(A). The Ld. counsel filed also written submissions, which are reproduced as under:

“Arguments:

It is the respectful submission of the assessee that there is no error in the order of the CIT(A) deleting the additions, inter alia, on the following grounds:

- a) The assessment order is based on fundamentally erroneous premise/ assumptions and self-contradictory findings;*
- (b) The finding of the assessing officer regarding deficit stock in certain months, is erroneous;*
- (c) Reliance placed by the assessing officer on ex-parte statements, without any opportunity of cross-examination to the assessee is erroneous;*
- (d) Protective assessment, without any prior substantive addition/ assessment, is erroneous and have no legs to stand;*
- (e) No addition, without prejudice, warranted on facts.*

The aforesaid grounds/ arguments are briefly elaborated hereunder:

Re (a): Assessment Order - erroneous/ assumptive and self-contradictory:

- It is, at the outset, submitted that the entire assessment is based on fallacious assumptions and self-contradictory findings, which are briefly summarized hereunder:
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- (a) First and foremost, the entire assessment is based on fallacious fundamental preparation of monthly trading account with static GP rate @ 24.962% throughout the year.
It has not at all been appreciated that: (a) preparation of monthly trading account is against the very fundamental concept of accounting since trading account is always prepared at the end of the relevant financial period and not monthly and/or in the middle of the year; and (b) no business can have static monthly GP rate.
- (b) The order is self-contradictory, inasmuch as in paras 6.2 and 7.2, AO accepts that the assessee must have purchased goods for making exports (assumed to be purchased in cash) and also accepts that the assessee actually purchased goods from the suppliers since none of the suppliers denied having sold goods to the assessee.
The order is thus, contradictory, since the assessing officer, on the one hand accepts that the assessee must have made purchases to export goods but alleges that the said purchases were not from the parties claimed by the assessee and in the same breadth also accepts that the very same parties supplied goods to the assessee.
- (c) The assessing officer presumes that the assessee must have purchased material outside books in cash, totally de-hors any material/ evidence to support cash purchases outside regular books of account;
- (d) The assessing officer assumes sale-of stock outside books of account, again totally de-hors any material/ evidence to support cash purchases;
- (e) The assessing officer further assumes that sale of goods outside books must have been made in local market at net profit @10%, without any cogent material/ evidence. It has also not been appreciated that the assessee procured specified goods for export market, which cannot be sold in the local market;
- (f) The assessing officer accepts that the assessee is 100% exporter eligible for deduction under section 80-HHC of the Act, but still alleges sale/ purchases outside books of account.

Re(b) and (c): Addition on account of deficit stock, cash purchases/ sales - erroneous

- Firstly, the allegation in the assessment regarding deficit stock in certain months is based on fallacious preparation of monthly

trading account with static GP rate @ 24.962% throughout the year.

- It is settled law that GP rate varies and does not remain static from year to year, leave aside it being static on a month to month basis. The Delhi Bench of the Tribunal in **Miracle Menthol Distillery v ITO (1993) 46 TTJ 13 (Del)** deleted the additions made by applying higher G.P. rate holding that the additions are based on surmises and conjectures. **The Tribunal observed that G.P. rate cannot remain static and is likely to vary from year to year depending on the facts and circumstances prevailing.**
- In the following decisions, preparation of monthly trading account and additions based on inferences drawn therefrom have been disapproved/ deleted:
 - CIT V. Hindustan Mills and Electrical Stores: 232 ITR 421 (MP)
 - ACIT V. Mercury Rubber Mills: 142 TTJ 1 (Del)
- The following facts further supports the case of the assessee:
 - GP and NP rates for the current year were better than the corresponding rates for the immediately preceding year (refer page 1 of paperbook);
 - Assessee is undisputedly in business of export and the entire profit is exempt under section 80HHC of the Act. There is, therefore, no justifiable reason for the assessee to make purchases outside the regular books of account, that too in cash, as alleged by the assessing officer;
 - Ex-parte statements of various parties, in principle, supports the case of the assessee since none of the parties denied having supplied material to the assessee, none of the parties stated having received any cash from assessee and all payments were admittedly made through account payee cheques;
 - Peculiar/ specialized nature of products, which cannot be sold locally in open market;
 - Books of accounts, which are duly subjected to tax audit, have been accepted by the AO and not rejected [refer CIT V. Anil Kumar & Co.: 386 ITR 702 (Kar.)].
- As regards ex-parte statements, it pertinent to note that:
 - None of the parties denied having supplied material to the assessee;
 - None of the parties stated having received any cash from assessee;
 - All payments were admittedly made through account payee cheques;

- Sh. Ajay Shroff, from whom purchases to the extent of Rs.24,46,449, were made, fully supports the case of the assessee [refer pages 92 to 100 of paper book];
- Sh. Md. Sulaeh, in his statements categorically confirmed having sold goods to the assessee, but claimed books of account lost and certified accounts taken from the assessee - thus, no adverse inference could be drawn from his statement [refer pages 86 to 91 of paper book]
- Even otherwise, no adverse inference could be drawn on the basis of ex-parte statements of persons, who were not allowed to be cross-examined (refer objection filed at pages 58- 59 before the assessing officer), as held in the following decisions:
 - CIT V. Andaman Timber Industries V. CCE: 281 CTR 241 (SC)
 - CIT vs. M/s Dharam Pal Prem Chand Ltd: 295 ITR 105 (Del)
 - CIT vs. Ashwani Gupta: 191 Taxman 51 (Del)
 - CIT vs. SMC Share Brokers Limited: 288 ITR 345 (Del)
 - In view of the aforesaid, the addition on account of alleged deficit stock made by the assessing officer is erroneous and rightly deleted by the CIT(A).
 - Further, disallowance made by the AO under section 40A(3) of the Act on account of alleged cash purchases, without any supporting document, is illegal and bad in law, as has been held in the following decisions:
 - CIT. v. Ratanlal Vyaparilal Jain: 339 ITR 351 (Guj)
 - Free India Assurance Services Ltd. v. DCIT: 132 ITD 60 (Mum)
 - ITO v. Nardev Kumar Gupta: ITA No. 829/Jp/2012 (Jaip)
- Similarly, addition made by the AO on account of profit from alleged cash sales outside the books of accounts, without any supporting document, is illegal and bad in law, as has been held in the following decisions:
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 - CIT vs Sethia Plastic Industries: 206 CTR 484 (Del)
 - ITO vs. Himalaya Drug Company: 17 TTJ 9 (Del Tri.)

Re (d): Protective Vs. Substantive assessment;

- In the present case, the assessing officer made protective assessment, without any prior substantive addition/assessment, which is erroneous, as has been held in the following decisions:
 - Lalji Haridas vs. ITO: 43 ITR 387 (SC)
 - ITO vs. Fussy Financial Services Pvt. Ltd.: ITA No. 4227 of 2014 (Del) Suresh K. Jajoo vs. ACIT: 39 SOT 514 (Mum)

Re (e): No addition - without prejudice

- Without prejudice to the aforesaid, it is submitted that on facts no addition is called for in the year under consideration in view of the following:

- *Firstly, total alleged purchases billed later aggregates to Rs.46,57,455 and not Rs.77,44,468 assumed by the AO (refer pages 23-25 of the paper book);*
- *Out of the aforesaid purchases of Rs.46.57 lacs, purchases of Rs.24.46 lacs were made from the firms of Mr. Ajay Saraf, who categorically stated having supplied goods earlier and billed later;*
- *Further, in respect of balance three parties, from whom purchases aggregating to Rs.7,78,600 was made, no statement of the said parties were recorded and thus no adverse inference can be drawn in respect of such purchases.*
- *Thus, the balance amount comes to Rs. 14,32,406;]*
- *As against the aforesaid, ad-hoc addition of Rs.25 lakhs was made by the AO in assessment year 1999-2000 [refer pages 159-163 of paper book].*
- *Thus, as against alleged balance amount of Rs. 14.32 lakh, addition of Rs.25 lakh was already made in A.Y. 1999-2000.*
- *In view of the aforesaid, it is submitted that even on facts and without prejudice to the aforesaid contentions, no addition is called for in the assessment year under consideration.”*

5. We have heard submission of the rival parties and perused the relevant material including the order of the lower authorities and paper book filed by the assessee. In the instant case the assessee was not maintaining stock inventory in respect of the goods received physically and goods exported physically. Thus. for working out availability of goods with the assessee for export of the same, the only option with the Assessing Officer was to work out the stock as per books on the basis of monthly trading accounts calculated on the basis of average gross profit rate. The Ld. CIT(A) has held this approach of the Assessing Officer as erroneous. The Ld. counsel of the assessee has also supported this finding of the Ld. CIT(A) and argued that preparation of the monthly trading account is against the very fundamental concept of the accounting since trading account is always prepared at the end of the relevant financial period and not on monthly basis or

middle of the year. The Ld. counsel has also submitted that no business can have static monthly GP rate. However, we are not convinced with the above arguments of the Ld. counsel in view of the facts that the preparation of the monthly trading account triggered the assessee to come forward and state that goods corresponding to 31 bills issued in period December, 2000 to March 2001, were received during July, 2000 to Nov., 2000. In our opinion, when the assessee itself has accepted the fact that sales were made without corresponding purchase bills, then whether preparing of the monthly trading account applying average or static gross profit(GP) rate was against the accounting principles or not, is not relevant in the case and thus we are not discussing the decisions relied upon by the assessee to support this contention. The issue which arises in the facts and circumstances of the case are whether the goods corresponding to those 31 bills were received by the assessee in the month of July, 2000 to November, 2000. The assessee itself identified 31 bills received from following parties and claimed that those purchase bills were received after a few months from receipt of goods:

- *M/s. Damodar Dass Saraf & Co.;*
- *M/s. Deepak Trading Co.;*
- *M/s. Chaturbhai J. Jariwala;*
- *M/s. Gem Impex;*
- *M/s. N.D. Traders;*
- *M/s. N.K. Enterprises;*
- *M/s. Safar Sons;*
- *M/s. PAN Indian Enterprises; and*
- *M/s. Jariwala Devidayal & Sons.*

6. It is evident that no stock inventory was maintained by the assessee, which could substantiate receipt of goods in the month

of July, 2000 to November, 2000. The Assessing Officer asked the assessee to substantiate the claim that goods corresponding to 31 bills were received in the month of July, 2000 to November, 2000 but the assessee failed to submit any evidence in this regard including copy of challans issued by the parties or evidence of any freight payment etc or produce the parties before the Assessing Officer. The Assessing Officer issued summons to those parties and recorded the statements of following parties:

- a) *Smt. Sanju Lata, w/o- Sh. Naval Kishore Proprietor of M/s Deepak Trading Co., statement recorded on 28.02.2003,*
- (b) *Sh. Ajay Safar, Partner of Damodar Saraf & Co., statement record on 03.03.2003*
- (c) *Sh. Mohd. Sualeh, Prop. of Pan Indian Enterprises, statement recorded on 27.02.2003.*
- (d) *Sh. Devi Dayal Singhal, S/o- Sh. Kashmiri Lal Partner of Jariwala Devi Dayal & Sons, statement recorded on 03.03.2003*

7. One of the supplier, namely, Sh Mohd. Sulah Prop. Of M/s PAN Indian Enterprises submitted that he lost books of accounts but confirmed the transaction of raising bills of Rs.30,000/- on 01/01/2001, Rs. 30,000/- on 08/01/2001; Rs.30,000/- on 20/01/2001; Rs. 26,000/- on 25/01/2001, on the basis of ledger accounts provided by the assessee. He submitted that bills were raised by him within 15 to 20 days of supply of goods and in no case the delay in raising the bills was more than that. The Assessing Officer also observed from the detail of payments made to the party that the assessee was paying money to the supplier as soon as the bills were drawn and thus it cannot be accepted that goods were received 6 months prior to the raising of bills. Another supplier, namely, Smt Sanju Lata Prop. Of M/s Deepak trading company stated that sales of Rs.3,43,900/- and Rs.2,83,500/- were made to the assessee on 21/12/2002 and

22/12/2002 respectively. She submitted that bills were raised on the date of the delivery of the goods itself. This statement contradicts the claim of the assessee that goods corresponding to the bills were received in the month of July to Nov., 2000. The assessee has claimed to have received following bills from M/s Jariwala Devidyal and sons:

Bill date	Amount(Rs.)
01.01.2001	52,169/-
11.01.2001	1,42,669/-
16.01.2001	1,11,151/-
12.02.2001	1,07,789/-
16.02.2001	72,203/-
12.03.2001	1,14,453/-
15.03.2001	1,13,832/-

8. According to the assessee goods corresponding to these bills were received in the month of August, 2000, but in the statement recorded on 03/03/2003, Sh Devidayal Singhal Partner of M/s Jariwal Devidayal and sons stated that bills were raised at the time of the delivery of the goods though the payments might even received after 10 to 15 days. This statement of Sh. Devidayal Singhal contradicted the contention of the assessee that goods corresponding to these bills were received in the month of August 2000. On perusal of copy of bills issued by M/s PAN Indian enterprise which are available on page 39, 41, 43, 45 and 47 of the paper book, we find that bills have been issued in seriatim from number 445 to 449 from 01/01/2001 to 24/01/2001 respectively. All the bills are in respect of single item "Brass Knots". Similarly, copy of bills issued by M/s Deepak Trading Company are available on page 36 and 37 of the paper book. On perusal of the those bills, which are dated 21/12/2000 and

22/12/2000, we find that in both the cases, bills raised are in respect of the same items. If the claim of the assessee that those goods were already supplied to it, then we do not understand as why more than one bills were raised subsequently. We agree with the observation of the Assessing Officer that if the goods were received in the month of August, 2000, then there was no logic for preparing separate bills from January to March, 2001. In view of the above statements and other evidences of the case, it is evident that there were no purchase in books before export of the goods in the month of July 2000 to November 2000 to the extent of deficiency of Rs.77,44,468/- pointed out by the Assessing Officer and assessee has attempted to justify availability of goods by way of purchase bills raised in the month of December, 2000 to March, 2001. The contention of the assessee that goods corresponding to those bills were received in the month of July, 2000 to November 2000 but the bills were received in the month of December, 2000 to March, 2001. Thus, the burden of proof was on the assessee to substantiate that corresponding goods were received in the month of July, 2000 to November, 2000. But the assessee has miserably failed to discharge its burden of proof. The assessee neither produced any stock register nor produced any challans or proof of payment for freight of the goods stated to have been received. The statement made by the supplier parties also do not support the contention the assessee. The fact of the export of the goods is not in dispute and it is impossible to make export without having goods in possession of the assessee. In such circumstances, only probability could be that the assessee purchased goods from unexplained sources and fulfilled the exports as without availability of the goods export was not

possible at the end of the assessee. We also noted that similar negative stock has been observed in AY 1999-2000 and the assessee could not substantiate the unexplained investment in that year also. It was claimed by the assessee that books of accounts were stolen and thus the assessee agreed for making addition of Rs. 25 lakh against the discrepancy of negative stock.

9. In the case of Sumati Dayal Vs CIT 214 ITR 801 (SC), The assessee was engaged in the business as a dealer in art pieces, antiques and curios at Bangalore. The assessee shown income from winnings in Jackpots and Treble events in horses races. The said amount was shown by the assessee in the capital account in the books. The ITO made an assessment order and held that the sum is not winnings in races and he treated the said receipts as income from undisclosed sources. The matter went before the before the Settlement Commission. The majority member of the settlement commission decided against the assessee. In the facts of the case the Hon'ble Supreme Court observed as under:

" 8. During the year 1970-71, (pertaining to asst. yr. 1971-72) between 6th April, 1970 to 20th March, 1971, the appellant claims to have won in horse races a total amount of Rs. 3,11,831 on 13 occasions out of which 10 winnings were from Jackpots and 3 were from Treble events. Similarly, in the year 1971-72 the appellant won races on 2 occasions and both the times winnings were from Jackpot. In her sworn statement dt. 6th Jan., 1973, the appellant had stated that she started going for races from the end of 1969 and that she first won Jackpot on 12th Dec., 1969 on the first day she went to races. The appellant also stated that she worked out the combination on the basis of what her husband advised her but she used to add a few horses of her own although she admitted that she did not know anything about the performance of these horses before December, 1969. As regards her husband, the appellant stated that he won once in Calcutta and once in Madras and he had similar wins also. The appellant had also stated that she had not gone to races in 1972. The appellant admitted that she had been buying jackpot tickets of the value of Rs. 2,000, Rs. 1,400 and even tickets for Rs. 3,000 have been bought and that on the first day she won the jackpot she purchased a jackpot combination ticket for approximately Rs. 2,500 and that on 8th Nov., 1970 she had bought two combinations, each for about Rs. 2,000. The appellant also admitted that she had not claimed any loss in races and only winnings were shown and stated that she won similar amounts which were not accounted and the losses were met out of the said amounts. The

appellant further stated that she had no record of her expenditure at the race course as against her claim of winnings.

Having regard to the said statement of the appellant, the two members, constituting the majority on the Settlement Commission, came to the conclusion that the apparent is not the real and that the appellant's claim about her winning in races is contrived and not genuine for the following reasons :

(i) The appellant's knowledge of racing is very meagre.

(ii) A jackpot is a stake of five events in a single day and one can believe a regular and experienced punter clearing a Jackpot occasionally but the claim of the appellant to have won a number of jackpots in three or four seasons not merely at one place but at three different centres, namely, Madras, Bangalore and Hyderabad appears, prima facie, to be wild and contrary to the statistical theories and experience of the frequencies and probabilities.

(iii) The appellant's books do not show any drawings on race days or on the immediately preceding days for the purchase of jackpot combination tickets, which entitled sizable amounts varying generally between Rs. 2,000 and Rs. 3,000. The drawings recorded in the books cannot be co-related to the various racing events at which the appellant made the alleged winnings.

(iv) While the appellant's capital account was credited with the gross amounts of race winnings, there were no debits either for expenses and purchase of tickets or for losses.

(v) In view of the exceptional luck claimed to have been enjoyed by the appellant, her loss of interest in races from 1972 assumes significance. Winnings in racing became liable to income-tax from 1st April, 1972 but one would not give up an activity yielding or likely to yield a large income merely because the income would suffer tax. The position would be different, however, if the claim of winnings in races was false and what were passed off as such winnings really represented the appellant's taxable income from some undisclosed sources.

The majority opinion concludes that it would not be unreasonable to infer that the appellant had not really participated in any of the races except to the extent of purchasing the winning tickets after the events presumably with unaccounted funds.

The Chairman of the Settlement Commission, in his dissenting opinion, has laid emphasis on the fact that the appellant had produced evidence in support of the credits in the form of certificates from the racing clubs giving particulars of the crossed cheques for payment of the amounts for winning of Jackpots, etc. The Chairman has rejected the contention regarding lack of expertise in respect of the appellant and has observed that the expertise is the last thing that is necessary for a game of chance and anybody has to go and call for five numbers in a counter and obtain a Jackpot ticket and that books containing information are available which are quite cheap.

This, in our opinion, is a superficial approach to the problem. The matter has to be considered in the light of human probabilities : The Chairman of the Settlement Commission has emphasised that the appellant did possess the winning ticket which was surrendered to the race club and in return a crossed

*cheque was obtained. It is, in our view, a neutral circumstance, because if the appellant had purchased the winning ticket after the event she would be having the winning ticket with her which she could surrender to the race club. The observation by the Chairman of the Settlement Commission that "fraudulent sale of winning ticket is not a usual practice but is very much of an unusual practice" ignores the prevalent malpractice that was noticed by the Direct Taxes Enquiry Committee and the recommendations made by the said Committee which led to the amendment of the Act by the Finance Act of 1972 whereby the exemption from tax that was available in respect of winnings from lotteries, crossword puzzles, races, etc., was withdrawn. Similarly the observation by the Chairman that if it is alleged that these tickets were obtained through fraudulent means, it is upon the alleged to prove that it is so, ignores the reality. The transaction about purchase of winning ticket takes place in secret and direct evidence about such purchase would be rarely available. An inference about such a purchase has to be drawn on the basis of the circumstances available on the record. Having regard to the conduct of the appellant as disclosed in her sworn statement as well as other material on the record an inference could reasonably be drawn that the winning tickets were purchased by the appellant after the event. We are, therefore, unable to agree with the view of the Chairman in his dissenting opinion. **In our opinion, the majority opinion after considering surrounding circumstances and applying the test of human probabilities has rightly concluded that the appellant's claim about the amount being her winning from races is not genuine. It cannot be said that the explanation offered by the appellant in respect of the said amounts has been rejected unreasonably and that the finding that the said amounts are income of the appellant from other sources is not based on evidence.***

9. In the circumstances, no case is made out for interference with the order passed by the Settlement Commission. The appeals, therefore, fail and are accordingly dismissed with costs."

(Emphasis supplied externally by us)

10. In the instant case before us also, it is not possible for the Assessing Officer to show as how the goods have been acquired by the assessee for fulfilling the export made, but it is certain that goods claimed to have been purchase through 31 bills, were not available at the time of export and thus keeping surrounding circumstances and human probability, we can logically infer that the assessee acquired those goods from unexplained sources in cash. How and to whom that cash has been paid and when that cash has been paid is known to the assessee and it is for the assessee to explain the same. If the assessee fails in doing so,

then provision of section 69B are attracted in the case of the assessee, which reads as under:

“Amount of investments, etc., not fully disclosed in books of account.

69B. *Where in any financial year the assessee has made investments or is found to be the owner of any bullion, jewellery or other valuable article, and the Assessing Officer finds that the amount expended on making such investments or in acquiring such bullion, jewellery or other valuable article exceeds the amount recorded in this behalf in the books of account maintained by the assessee for any source of income, and the assessee offers no explanation about such excess amount or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the excess amount may be deemed to be the income of the assessee for such financial year.”*

11. In view of aforesaid discussion, we reject the contention of the Ld. counsel that addition has been made without any material or evidence to support that cash purchases were made outside books of accounts. In our opinion, the Assessing Officer is justified in making addition for unexplained investment in goods consumed for fulfilling the export, when no goods were available with the assessee as per books of accounts maintained by the assessee.

12. As far as the issue of addition on protective basis is concerned, we find that similar issue of negative stock was observed by the Assessing Officer in assessment year 1999-2000 and he reopened the assessment for that year. As the working of peak of negative stock for the assessment year 1999-2000 was pending on the date of passing the assessment order for the year under consideration, the Assessing Officer thought of making the amount of addition as provisional till the pending of the working

out of the peak undisclosed investment in assessment year 1999-2000. In view of the Assessing Officer, the amount of addition might require changes in view of the finding of peak undisclosed investment in assessment year 99-2000. Thus, in our opinion, in substance, the addition made by the Assessing Officer is not on protective basis. In view of the aforesaid, the decisions relied upon by the Ld. counsel that no addition can be made on protective basis without any prior substantive addition, are not relevant.

12. Before us, the Ld. counsel of the assessee submitted that benefit of the addition of Rs. 25 lakh made in assessment year 1999-2000 should be granted to the assessee. On perusal of the assessment order dated 29/03/2005 for assessment year 1999-2000 under section 143(3) read with section 148 of the Act, which is available on page 160 to 161 of the paper book, we find that shortage of stock worth Rs. 62.86 lakh as observed by the Assessing Officer in the month of April 1998, which was not accepted by the assessee. On being asked by the Assessing Officer to produce books of accounts and vouchers to support its claim, the assessee contended that books of accounts were stolen while being carried in a car and thus unable to reconcile the discrepancy. The assessee agreed for making addition of Rs. 25 lakhs. The Ld. counsel of the assessee has asked for reducing this addition of Rs.25.00 lakhs from the addition made on account of peak amount of negative stock in the year under consideration. We are not convinced with the argument of the Ld. counsel in this regard. There is no connection between the addition of Rs. 25 lakh made on agreed basis in the assessment year 1999-2000 and the addition made in the year under consideration. The

benefit of peak of negative stock can be given if the stock statement is prepared for the entire period beginning from assessment year 1999-2000 till the assessment year under consideration, but addition in assessment year 1999-2000 has not been made on the basis of such statement and thus, we are unable to understand on what basis the benefit of the agreed addition of Rs. 25 lakh can be allowed to the assessee. Accordingly, we reject the contention of the Ld. counsel of the assessee.

13. The Ld. counsel also contended that purchase of Rs.24.46 Lakhs were made from the firms of Mr. Ajay Saraf, who categorically stated having supplied goods earlier and bill later, and thus requested that the amount of Rs. 24.46 Lacs should be subtracted from the addition. A copy of statement of Sh Ajay Saraf is available on page 92 to 100 of the paper book. On perusal of the statement, we find that Sh. Ajay Saraf admitted that no specific purchase order was received. He admitted that goods were sent sometime on challan but the assessee failed to produce any challan to support its contention that goods were received prior to receipt of bills. On being asked by the Assessing Officer as how the items were delivered to the assessee and when the bills were raised, Sh Ajay Saraf stated that he did not remember. The relevant question to Sh Ajay Saraf and his answer are reproduced here for ready reference:

Q. No. 13- Please state how the items to M/s. Alps International Exports were delivered and when the bills were raised?

Ans. – I do not remember as this is a matter of last 2 years.

14. In question No. 15, Sh. Saraf was asked about mode of transportation of the goods, but he did not submit any response on the mode of transportation of goods.

15. In view of the above statement of Sh Saraf , it is evident that he has not provided any evidence regarding date of supply of goods to the assessee and the bills raised by his firms. Accordingly, we reject the contention of the Ld. counsel to subtract the purchase bills worth Rs. 24.46 Lakhs from the addition on account of negative stock.

16. The Ld. counsel also submitted that in respect of the balance parties from whom purchases aggregating to Rs.7,78,600/- were made, no statement of the said person were recorded and thus no adverse inference can be drawn in respect of such purchases. In our opinion, the onus was on the assessee to substantiate that goods corresponding to bills raised from those parties were received in the month of July, 2000 to Nov. 2000. But the assessee has neither produced those parties nor furnished any other evidence to support its claim of receipt of goods prior to the raising of bills by those parties thus, the Assessing Officer cannot be faulted. We, accordingly, reject the contention of the Ld. counsel of the assessee.

17. The Ld. counsel of the assessee further submitted that the total 31 purchases bills were aggregating to Rs.46,57,455/-and not Rs.77,44,468. We find that the Assessing Officer computed negative peak stock of Rs.77,44,468/- in the month of August, 2000 and it is assessee who came forward with the list of 31 bills raised in the month of December, 2000 to March, 2001 and claimed that goods corresponding to those bills were received in the month of July, 2000 to Nov., 2000. It is not clear from the

orders of the lower authorities as how the assessee identified that goods in respect of only 31 bills were received prior to raising of bills by the suppliers. As no doubts have been raised on the quantum of goods received prior to issue of bills, which were identified and computed by the assessee either in the assessment proceeding or in the first appellate stage, we accept the contention of the assessee for restricting the addition to the aggregate amount of purchases reflected in 31 bills which amounted to Rs.46,57,455/- subject to verification by the Assessing Officer. Accordingly, the ground No. 1 of the appeal is partly allowed for statistical purposes.

18. On the issue of disallowance of Rs.15,48,894/- which was made by the Assessing Officer under section 40A(3) of the Act, is concerned, we are of the opinion that this addition is not justified as the entire unexplained purchase has already been added. The disallowance under section 40A(3) could be made in respect of the expenditure made in cash and found to be recorded in books of accounts. Making such a disallowance in respect of unexplained expenditure would amount to double disallowance, which cannot be permitted in law. Accordingly, the action of the Ld. CIT(A) in deleting the addition is upheld. The ground No. 2 of the appeal of the Revenue is, accordingly, dismissed.

19. On the issue of addition of Rs.7,74,447/- made by the Assessing Officer considering 10% gross profit on the purchases sold in the market without recording sales in books of accounts, is concerned we are of the opinion that when the goods corresponding to the exports in the month of July to Nov., 2000 have been held to be obtained from unexplained sources, then the goods corresponding to the bills raised from 31 parties should

have been reflected in the closing stock. The onus is on the assessee to explain as why those goods were not considered as part of the closing stock. Since these goods are not appearing in the closing stock, the logical inference is that the goods have been sold in open market without recording the sales in the books of accounts. In our opinion, the action of the Ld. Assessing Officer in making the addition is justified however the amount of disallowance is restricted to the 10% of Rs.46,57,455/-, i.e., the amount of unexplained stock , which works out to Rs.4,65,745/-. Accordingly, the ground No. 3 of the appeal is partly allowed.

20. In the result, the appeal of the Revenue is partly allowed for statistical purposes.

Order is pronounced in the open court on 9th January, 2019.

Sd/-
[SUDHANSHU SRIVASTAVA]
JUDICIAL MEMBER

Sd/-
[O.P. KANT]
ACCOUNTANT MEMBER

Dated: 9th January, 2019.

RK/-[d.t.d.s]

Copy forwarded to:

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

Asst. Registrar, ITAT, New Delhi