IN THE INCOME TAX APPELLATE TRIBUNAL
AMRITSAR BENCH, AMRITSAR.

BEFORE SH. SANJAY ARORA, ACCOUNTANT MEMBER
AND SH. N. K. CHOUDHRY, JUDICIAL MEMBER

I.T.A. No. 349/(Asr)/2017
Assessment Year: 2010-11

Income Tax Officer Ward-2(2), Jammu	Vs.	Neeraj Aggarwal, Khasra No. 69/3, Village-Singhola, 656, Gali No. 11, Sardar Bazar, Delhi-6 [Present at 545, Patoli Magotrian, Jammu] [PAN: ACZPA 1726C]
(Appellant)		**(Respondent)**

Appellant by : Sh. Alok Kumar, CIT-DR
Respondent by: Sh. S. Krishnan (Adv.)

Date of Hearing: 21.05.2018
Date of Pronouncement: 09.08.2018

ORDER

Per Sanjay Arora, AM:

This is an Appeal by the Revenue directed against the Order by the Commissioner of Income Tax (Appeals), J & K, Jammu ('CIT(A)' for short) dated 31.01.2017, partly allowing the assessee's appeal contesting his assessment u/s. 144 of the Income Tax Act, 1961 ('the Act' hereinafter) dated 08.03.2013 for the Assessment Year (AY) 2010-11.

2. The appeal raises the following grounds:

'Whether the ld. CIT(A) was right in law and fact in allowing the appeal of the assessee by relying on the additional evidence, submitted before him during appellate proceedings which were not remanded back from the (to) the Assessing Officer.

The appellant craves leave to amend or add any one or more rounds of appeal.'

3. The thrust of the arguments before us by either side was *qua* additional evidences, i.e., that additional evidences had/had not in fact been furnished by the assessee before the ld. CIT(A), and that therefore there was no breach of rule 46A of the Income Tax Rules, 1962, ('the Rules' hereinafter), which is mandatory in its application. The ld. Authorized Representative (AR), the assessee's counsel, Sh. S. Krishnan, Advocate, would toward this take us through the different pages of the assessee's paper-book (PB), claiming them to have been furnished during the course of the assessment proceedings. He would though admit of the drawing of the transformer, submitted in first appellate proceedings (vide pages 76-79 of the assessee's paper-book before the ld. CIT(A)), as being an additional evidence furnished before the first appellate authority, and for which reference was made by him to the index of the paper-book before the ld. CIT(A) (at PB pg. 388), also conceding during hearing that the explanation *qua* process details (for electric lamination) was also furnished in appellate proceedings (refer pgs. 38-39, 45-47, 114-115 of the impugned order). The ld. CIT-DR, Sh. Alok Kumar, was, on the other hand, at pains to emphasize that the various explanations furnished by the assessee during the appellate proceedings were not before the Assessing Officer (AO), who thus had valid, if not also strong, basis to hold that the assessee's accounts were manipulated and did not reveal the actual or true state of affairs. Most of his queries remained unanswered, and which position continues to obtain even at the first appellate stage.

4. We have heard the parties, and perused the material on record.

4.1 Our first observation in the matter is that the ld. CIT(A) has per the impugned order issued three findings, as under:

(a) that there is a valid assumption of jurisdiction to frame an assessment u/s. 143(3) by issue and service of notice/s u/s. 143(2);

(b) that the rejection of accounts by the AO u/s. 145(3) of the Act and, consequently, the invocation of section 144 by him, is invalid; and

(c) that the disallowance u/s. 80-IB as well as of the indirect expenditure (as debited to the profit and loss account), made at 50% thereof, by the AO, is liable to be deleted.

Qua the first, the same is of little consequence in the instant proceedings as the assessee is not in appeal challenging the said finding. As regards the second finding, we find no basis for the same in-as-much as the books of account were never produced before the AO. *How could then, the same be rejected*? The non-production of the books of account, despite being called for to be produced by the AO, is patent from the assessment order. Further, the disallowance of the P&L expenses (at Rs.13,85,090/-), at paras 6 & 23 of the assessment order, clearly refers to the non-production of the books of account as being the reason for the said disallowance. In fact, we observe no basis for contradicting the said finding by the AO, who makes this abundantly clear per the show cause notice dated 12/2/2013. There is, thus, no reason or basis with the ld. CIT(A) to hold that the assessee had in fact produced the books of account before the AO, as he does at page 129 of his order. Without doubt, there can be, as observed earlier, no rejection of accounts without examining the same, including the vouchers on which they are based, also called for per the show cause afore-referred. Concomitantly, and correspondingly, there can be no acceptance thereof (accounts) either. This is particularly so, as in the present case, when the same have been called for, i.e., generally, along with the relevant bills and vouchers, throughout the assessment proceedings, and specifically vide show cause notice dated 12.02.2013, reading as under, which was accompanied by a notice u/s. 142(1):

"In view of the above, it is established beyond doubt that you are intentionally, deliberately and willfully avoiding the assessment proceedings for A.Y. 2010-11 by not furnishing the remaining details of questionnaire dated 11.12.2012 and by not producing the Books of account along with supporting Bills & vouchers for verification for the reasons best known to you." (pg. 26 of the assessment order)

That is, the AO is categorical in the same having not been produced at any stage and, further, *that in the absence of non-production, and consequent non-verification, the assessment would be completed on the basis of the material on record* (reproduced at pgs. 26-28 of the assessment order). The stock register for the relevant year (as well as that for the preceding and succeeding year), was also called for verification vide summons u/s. 131 dated 01.11.2012 and, again, vide show cause dated 12.02.2013, which was also accompanied by summons of even date.

The AO's finding as to the applicability of s. 145(3), which reads as under, and, thus, of s. 144, however, is not based only on the non-production of the books of account, indeed essential for him to complete the verification, before him:

'Method of accounting.

145. (1) – (2)……

(3) Where the Assessing Officer is not satisfied about the correctness or completeness of the accounts of the assessee, or where the method of accounting provided in sub-section (1) or accounting standards as notified under sub-section (2), have not been regularly followed by the assessee, the Assessing Officer may make an assessment in the manner provided u/s. 144.'

Why, in a particular case the AO may be satisfied with the assesse's accounts even without the production of account books, so that nothing turns thereon *per se*, but on the reason/s why he finds the assessee's accounts as not correct or complete, i.e., the basis for his so stating, on which we observe no finding by the ld. CIT(A). The details of purchase and sales, i.e., their prices, item-wise and party-wise, were also called for per Questionnaire dated 04.10.2012, also seeking the cost break-up

of the output/s (with reference to the inputs), i.e., to justify the valuation of inventory, along with the supporting bills. This, even otherwise vital, assumes added significance as admittedly the same, i.e., the quantitative details and the valuation adopted, had been taken as stated by the proprietor (refer Note 3 to Schedule 2 of the Notes, adverted to by the assessee in his reply dated 02.11.2012), prompting a requisition of the document/s provided by the proprietor (to the Auditors) for verification, which became essential in-as-much as the auditors had thus in effect issued a disclaimer to that extent. The assessee having claimed deduction u/s. 80-IB at Rs.852.06 lacs, i.e., on almost the entirety of his gross income, returning a net income of Rs.16,982, the AO was from the beginning earnest in examining the veracity of the said claim, also enquiring about the genuineness and competitiveness of the market rate/s of the assessee's final product/s, i.e., with reference to that prevailing in the market, and also if the buyers and sellers were connected in any way, besides of how the assessee's gross profit (GP) rate compared with that of other concerns/companies in the same business, as well as, of course, internally, i.e., with reference to the preceding and succeeding year (refer points 8, 14, 26-31 of the Questionnaire dated 04.10.2012/refer pgs. 3-5 of the assessment order). *Needless to add, none of this was furnished at any stage of the assessment proceedings*. Of equal concern and, therefore, requisitioned, and on more than one occasion, are the process details, i.e., for each of the three items stated to have been manufactured during the relevant year, i.e., electrical lamination /transformer core, stated to being manufactured since f.y. 2005-06; HT/LT coils (of aluminum and copper), and transformer tank (manufacture of both of which is stated to have commenced from the relevant previous year), i.e., with reference to the available machinery, stating its' capacity along with, as well as the power consumption, also seeking explanation *qua* the expenditure on power and fuel, i.e., vis-à-vis sales, across different years. The same, again, remained to be

furnished. It is pertinent here to add that machinery worth Rs.3.16 lacs, besides laboratory equipment for Rs.8,000/-, was acquired during the current year, with no sale of plant and machinery having been reported since inception. Notices u/s. 133(6) dated 14.12.2012 were sent to different trade parties, i.e., with whom the assessee had purchase/sale transactions, on the basis of the information, including addresses, provided by the assessee on 14.12.2012. The same were returned back by some (4 parties). No reply was received from several (20) of them, while some (4) stated of not having any transaction with the assessee. There was no improvement in this regard up to the last date of hearing in the assessment proceedings, i.e., 25.02.2013. *This, despite these facts being brought to the knowledge of the assessee vide show cause letter dated 12.02.2013*. All this led to AO to conclude as under: (at pgs. 30-31of the assessment order)

21.23 (3) During the course of assessment proceedings, the assessee was asked to furnish the details regarding Purchase and Sales parties giving their Name, latest address, PAN No. and amount of purchase or sale. This detail was filed by the assessee on 14.12.2012. Accordingly, information u/s 133(6) was sought from all these Purchase and Sales parties vide notice dated 14.12.2012 therein directing them to furnish these details by 31.12.2012. However, it was noticed that notices u/s 133(6) of I.Tax Act returned back in the case of M/s Numro Uno Corporation (Purchase party) and M/s B.R. Industries Ltd, M/s Dausa Transformers Udyog P Ltd, M/s Nucon Switchgears Pvt. Ltd. (Sales parties). Further, inspite of being made aware to the assessee vide show cause dated 12.02.2013, no reply has been received till date from the following Purchase and Sales parties:-

Purchase Parties:
M/s B.R. Industries,
M/s Ravi Iron Traders,
M/s Hind Steel Sales,
M/s Ess Ell Cable Co,
M/s Banwari Lai Vijay Kumar,
M/s H.V. Enterprises,
M/s Aggarwal Steel,
M/s Senapathy Symons Insulation Pvt. Ltd., M/s Wonder Tape Industries,
M/s Naveen Steel,
M/s Maha Shakti Conductors.
Sales Parties :
M/s S.K Transformers,
M/s ECE Industries Ltd.,

M/s Harit Transformers Pvt. Ltd.,
M/s Accurate Transformers Ltd.,
M/s Technical Association Ltd,
M/s B. Roy Electronics,
M/s Swastik Copper Pvt Ltd.,
M/s Valley Electricals Ltd.,
M/s PME Transformers (India) Ltd,

Besides above, on perusal of the replies furnished by the relevant Purchase and Sales parties, it is noticed that the following parties have denied of having made any Purchases or having making Sales to the assessee:-

Purchase Parties:
M/s Shalimar Industries, Awantipore Distt. Pulwama, J & K

Sales Parties :
M/s SA Auto Engineers, Street No. 3, Mukand Singh Nagar, Daba Road, Ludhiana
M/s Kumar and Kumar, 1544, Kucha Kacha Bagh, SP Mukerjee Marg, Delhi-06
M/s S.K. Industries Prop. Sunil Kumar, C-2./120, Keshav Puram, New Delhi.

Thus, it can be seen that inspite of being made aware, the replies from the relevant Purchase and Sales parties could not be obtained. Therefore, the genuineness of Sales and Purchases made to the parties whose confirmations alongwith other details have not been received along with other documents called for by this office, could not be verified. Since the above three parties have already denied of having made any Sale or Purchases to the assessee and in most of the cases the confirmation along with other details are still awaited, *therefore, the Sales and Purchases made by the assessee cannot be held to be the genuine Sales and Purchases*.' (emphasis, supplied)

We may here clarify that our stating that no explanations were furnished by the assessee in respect of the fore-going, is based on our examination of the assessee's replies submitted during the assessment proceedings (forming part of the assessee's paper-book), besides finding a reflection and discussion with reference thereto at para 21.23 (pgs. 28-37) of the assessment order. In fact, on the basis of the findings by the AO, based on the material on record; the assessee's replies; and the report dated 29.10.2012 pursuant to physical verification of the assessee's unit on 27.10.2012, *the AO concluded that the purchases and sales were bogus*, and the production figures manipulated, with the unit manufacturing only electrical

lamination. *It is this that led to his 'rejection' of the assessee's accounts as not reliable*. The AO's stating of the rejection of the assessee's accounts has to be therefore understood in this context, i.e., of the same having been found as not representing the actual state of affairs during and as at the end of the relevant year, including the operating results of its business, *much less as to what that business was*, for the year. The same can be disturbed or cancelled only by issuing contrary findings, further stating as to how the same are infirm.

4.2 Apart from the fore-going, the following observations/findings by the AO, being relevant, merit consideration:

(a) the assessee was, on the basis of the information gathered during physical verification (pv) dated 27.10.2012, found to be undertaking only production of electrical lamination, and no activity relating to HT/LT Coil or transformer tank/ boxes, was carried out at any time. The aspect whether therefore the production of the latter two items could be with the available machinery is to be ascertained, and which could only be with reference to the process details (with reference to the machinery), called for (though not supplied) during assessment proceedings.

(b) the production, on the basis of the rated capacity of the available machinery, even considering that all the three items could be produced, is at 400 kg. to 500 kg. per day, i.e., at Rs.1.20 to Rs.1.50 lac kg. per annum, as against the stated production of 12.88 lacs kg. Juxtapose this with the non-confirmation and, in fact, in some cases denial of having any transaction with the assessee, by some parties, and the matter assumes serious proportions. Also, the machinery, on physical verification (on 27.10.2012), *was found to be very old*, even as the assessee had admittedly purchased machinery worth Rs.18.94 lacs during the previous year relevant to AY 2008-09. In fact, of this, that for Rs.15.86 lacs was from one supplier alone (M/s. A.S. Enterprises, Kunjwani, Jammu), *which would therefore need to be verified*.

(c) bills of M/s. R.R. Industries, Jammu, were found at the assessee's factory premises (39A, Birpur Industrial State, Bari Brahmana, Jammu). On the basis thereof, as well as the second hand raw material (CRGO/CRNGO) (rough) sheets, found during pv, as well as the enquiries with the workers and Sh. Rakesh Goyal, proprietor, M/s. R.R. Industries, it was gathered that the assessee was in fact not

undertaking any manufacturing activity for itself, but only job work for M/s. R.R. Industries. *The matter, therefore, needed to be probed and examined.*

(d) the assessee's final accounts (balance-sheet as on 31.03.2010) disclose a credit of Rs.295.05 lacs in favour of M/s. R.R. Industries, which requires to be confirmed and explained. Further, the assessee had itself advanced Rs.571.37 lacs to different parties, which again required being confirmed. *No information regarding the same, called for vide Questionnaire dated 04.10.2012 (refer point 17), as well as other information sought under the said para, was provided.*

(e) information was sought during assessment proceedings in respect of the assessee's bank accounts, i.e., the details, including narration thereto, of the transactions – debit or credit, in the sum of Rs.50,000/- or more therein; the assessee maintaining 5 bank accounts. No narrations were provided, with the transactions raising doubts as to the genuineness of the said transaction as the representing genuine business transactions. Sample this: cash deposits with PNB were followed by withdrawals, which were not explained. Cash deposits in Bank of Rajasthan account were followed by cheques to M/s. R.R. Industries; B.R. Industries; and S.K. Industries, *which required explanation/justification, not furnished*. Cheques received from M/s. Yamuna Alloys Ltd. in account with J&K Bank Ltd. were followed by self withdrawal or cheques favouring R.R. Industries and J.K. Transport Corporation. *This goes on for all bank accounts, emphasizing the need for examination/verification, which becomes more pertinent in view of no narration/explanation having been, as called for, provided.*

(f) the assessee himself confirms the need for laboratory equipments for testing/ checking of quality, while no laboratory equipments were found on physical verification on 27.10.2012, even as the W.D.V. of the laboratory equipments (as on 31.03.2010) is stated at Rs.1,68,663/-, including fresh purchase for Rs.2.15 lacs during AY 2008-09. *This needs to be explained, which was not.*

(g) the assessee's turnover, at Rs.2733.91 lacs for the current year, up from a range of Rs.8-10 cr. for the preceding 3 years, falls to Rs.1.36 cr. for the following year, which in fact is found to be the sale of the closing stock as at the year-end. Juxtapose this with the fact that the current year is the 5th year of the operations (of the unit), i.e., the last year for which it enjoys 100% exemption (u/s. 80-IB) on its profit, which would, w.e.f. the 6th year (AY 2011-12 onwards), stands to reduce to 25% (of the profit). That is, the substantial reduction in the tax concession *coincides* with the sudden vanishing of the assessee's business, burgeoning hereinbefore. *The matter is factual, though begs for further examination and*

probe, particularly in light of and coupled with the other information or facts found/surfaced.

(h) the assessee is found to have invested Rs.427.92 lacs in shares in Adhunik Niryat Ispat Ltd., a little known company, during March, 2012, at a premium of Rs.295 per share, i.e., at 29.5 times the face value of Rs.10. The investment decision, which thus represents the destination of the profits earned by the assessee over the past years, needs to be verified for its genuineness, as are the other share transactions entered into by the assessee (listed at pg. 36 of the assessment order). Needless to add, no reply was received from the assessee *qua* the same.

Not only the fore-going transactions/facets of the assessee's business – brought out in sufficient detail in the assessment order, which seriously jeopardize the reliability of the stated state of affairs, remain unexplained and unexamined in the least during the assessment proceedings, they continue to be so for most part, we are afraid to say, even during the first appellate proceedings. True, explanations were furnished *qua* certain aspects of assessment in appellate proceedings. The same, however, for satisfactory conclusion, would, require further verification.

4.3 There is, in view of the fore-going, substantial basis for the AO to regard the assessee's accounts as unreliable, for which he relies on the decisions in *CIT v. S.N. Namasivayam Chettiar* [1960] 38 ITR 579 (SC); *Bhai Sundar Dass, Sardar Singh (P.) Ltd*. [1972] 86 ITR 106 (Del); *Awadhesh Pratap Singh Abdul Rehman & Bros. v. CIT* [1994] 210 ITR 406 (All). The ld. CIT(A) has, without meeting these objections by the AO, summarily stated that in-as-much as account books were produced - which we have found as not, held the rejection of accounts as not valid, and that therefore the AO could not have proceeded u/s. 144. The furnishing of explanations before the ld. CIT(A) itself validates the existence of grounds for the AO to regard the assessee's books as not reliable. The relevant part of the impugned order reads as under:

'I have considered the above submissions and found that this is not a fit case where books of account was ought to be rejected u/s. 145(3) of the Act on the ground that the AO was not satisfied about the correctness of the accounts of the assessee. The assessee has submitted Audited books of account along with bank accounts, ledger accounts and other details as and when required from the AO. It is evident from the assessment records that the assessee also tried to satisfy the AO by furnishing all documents/evidence in support of its claim of deduction u/s. 80IB of the Act. It is not material whether the AO was convinced with those details and has taken a different view.'

In fact, his order does not indicate if he considers the stock record, maintenance of which itself is doubtful, given its non-furnishing and, besides, the inventory and its cost being admittedly only as per the proprietor, to be a part of the books of account. The said finding by the ld. CIT(A) is, in any case, as would also be apparent from the foregoing, patently incorrect; the non-production of accounts also forming the basis for the disallowance of indirect expenditure at Rs. 13.85 lacs and there being no contention as to production of stock record, which is an integral part of the books of account, even as we have clarified that it is the finding of the same as not reflecting the true or actual state of affairs – for which we observe sufficient basis with the AO, which would require cogent material for rebuttal, besides being not determined by the ld. CIT(A), that is relevant and not their production *per se*. The reliance on the cited case law by the AO is apposite.

4.4 That apart, the invocation of section 144 by the AO in the present case is not only for the reason of the applicability of section 145(3), but also, which in fact constitutes the primary reason for the best judgment assessment, due to the non-compliance of notice u/s. 142(1); the assessee in fact failing to comply with the several opportunities extended to him for complying the requisitions or the answers sought. Rather, the assessee failing to respond even to the summons u/s. 131, issued twice during assessment proceedings, the AO takes pains to clarify as to why the presence of the assessee (i.e., in person) was necessary (refer para 21.23(1), pgs. 28-29 of the assessment order). Why, it is even otherwise evident

that the answers to the various facts, some of which border on being termed anomalies, observed (viz. the production process and capacity with reference to the machines; the machinery being very old; the absence of the testing equipment, admittedly necessary for the testing the inputs as well as the production, on physical verification; the absence of books of account for the relevant year at the assessees' premises – with no answer as to where they were, and, on the contrary, the presence of the books of another (R.R. Industries); the disclaimer (or not responding) by the several parties with whom the assessee claims to be having trade (purchase/sale) transactions; the complete extinguishment of business, running prosperously and, in fact, growing for the last 5 years, in the 6th year, in which the tax holiday gets substantially reduced; the investment in shares of little known companies and, at a huge premium; the bank entries, etc., could only be, assuming so, satisfactorily answered or information furnished by the assessee himself. Where, for example, as stated, was the testing equipment placed? Who conducted the tests – the workers being admittedly unskilled and uneducated; the test reports evidencing the same. Besides, verification of its sale, stated to have been since sold (in the appellate proceedings), would be required. *The assessee's conduct itself raises serious questions*. Even granting that he was facing trying circumstances on account of the serious illness of his mother, it is clear that he was evading attendance – the opportunities granted extending over a few months, going to the extent of even not complying with the summons – and in fact twice. All these in fact find mention in the show cause notice dated 12.02.2013, issued along with the notice u/s. 142(1) for 18.02.2013, making is abundantly clear that in the event of failure to comply therewith, it shall be presumed that the assessee has nothing to say in the matter, and the assessment finalized on the basis of the material on record, treating the aspect on which no details/documents are filed, as unexplained. Needless to add, there was no compliance on 18.02.2013, or even

thereafter; the AO, despite clearly stating it to be the final opportunity and that no further opportunity would be allowed, graciously allowing further time on the assessee seeking the same, which finds reference at para 21.21 of his order, reproduced as under:

'21.21. Though the assessee had already been allowed ample opportunities of being heard and it was noticed that after 07.01.2013, the assessee is neither attending nor responding to this office's letters/show cause/summons and seeking adjournments on one ground or other, however, in order to allow one more final opportunity, the assessee was telephonically informed that his next date of hearing is 25.02.2013, which is final hearing and in case of his non attendance on this date, assessment shall be finalized ex-party. Again neither anybody appeared on 25.02.2013 or thereafter, till the date of passing of this assessment order nor the remaining details/documents as quantified in show cause dated 12.02.2013 were furnished.

Not only is therefore section 145(3) attracted in the facts of the case, the assessee's conduct and the facts and circumstances of the case impelled the AO to resort to a section 144 assessment. Though he, having issued notice u/s. 142(1), was in law not obliged to issue a show-cause notice, he does so, seeking to bring on the table the relevant aspects of the assessment which needed to be explained and, accordingly, determined, i.e., on the basis of his examination of the assessee's return (and the accompanying documents) as well as the developments that took place during the course of the assessment proceedings, information on which in fact had been already sought during the assessment proceedings, to though no avail. Therefore, to say or suggest or construe, as does the ld. CIT(A) – the relevant part of his order having been reproduced supra, that sec. 145(3) is the sole basis for the best judgment assessment in the present case, is wholly incorrect; s. 144(1)(b), reading as under, being clearly attracted in the facts and circumstances of the case:

Best judgment assessment

144. (1) If any person—

(a) …….

(b) fails to comply with all the terms of a notice issued under sub-section (1) of section 142 or fails to comply with a direction issued under sub-section (2A) of that section, or

(c) …..

the Assessing Officer, after taking into account all relevant material which the Assessing Officer has gathered, shall, after giving the assessee an opportunity of being heard, make the assessment of the total income or loss to the best of his judgment and determine the sum payable by the assessee on the basis of such assessment:

The finding by the ld. CIT(A) holding the invocation of s. 144 by the AO as invalid, cannot, therefore, be countenanced.

4.5 The next question before us is if therefore the instant assessment could be said to be a section 143(3) assessment, as held by the ld. CIT(A), or is a section 144 assessment. We have, as shall be apparent from the fore-going, clarified that no grounds, in the facts and circumstances of the case, for not upholding the invocation of section 144, exist. While finding sufficient basis for the applicability of section 145(3), so that it constitutes a valid basis for making an assessment u/s. 144, we have further found the condition specified u/s. 144(1)(b) to be satisfied in the facts and circumstances of the case, to, therefore, the same effect, i.e., the validity in law of the resort to section 144 by the AO and making an assessment to the best of his judgment. Though, it would under regular circumstances warrant a set aside back to his file to decide on an aspect, deemed relevant, which has though been omitted to, this may not be necessary in the present case as the invocation of section 144 gets even otherwise upheld, i.e., on the basis of our finding of the applicability of section 145(3), so that no prejudice is caused to the assessee. Continuing further, deciding on the status of impugned assessment, i.e., whether it is the section 143(3) or u/s. 144, assumes relevance and is significant in that the admission of additional evidence and, consequently, the applicability of rule 46A (of the Income Tax Rules, 1962, - 'the Rules' hereinafter), the bone of contention between the assessee and the Revenue, would come into play only in the case of s. 143(3) assessment. As explained in *CIT v. Rayala Corporation Pvt. Ltd.* [1995]

215 ITR 883 (Mad.), the best judgment assessment is of the AO and not of any other, implying an appellate authority. Admitting further materials and explanations would, under the circumstances, operate to convert a section 144 assessment into a section 143(3) assessment, which is not permissible in law. The purview of an appellate authority in such a case would therefore be to examine the reasonableness of the conclusion/s drawn by the assessing authority, i.e., on the basis of the materials before him. The same stands succinctly stated by it in the following words:

'In a best judgment assessment so long as the estimate made by the assessing authority is not arbitrary and has a nexus with the facts discovered, the same cannot be questioned. In the very nature of things, the estimate made may be an over-estimate or an under-estimate. But, that is no ground for interfering with his best judgment. The assessee cannot be permitted to take advantage of his own illegal acts and it is his duty to place all facts truthfully before the assessing authority. If he fails to do his duty, he cannot be allowed to call upon the assessing authority to prove conclusively what turnover he had suppressed. That fact must be within his personal knowledge. Hence, the burden of proving that fact is on him. If the estimate made by the assessing authority is a bona fide estimate and is made on a rational basis, the fact that there is no good proof in support of that estimate is immaterial. Prima facie, the assessing authority is the best judge of the situation. It is his best judgment and not of any one else. The question whether the Income-tax Officer has committed any error in his judgment under section 144 of the Act can be decided only on the basis of the materials gathered by him and not on the basis of any materials that are later produced by the assessee. There cannot be a procedure wherein the best judgment of the Income-tax Officer is subjected to the discretion of the assessee to produce evidence/material at the appellate stage and thus convert the proceeding of the best judgment assessment into a proceeding for regular assessment in which the assessee is served with a notice under section 139(2) of the Act. The Tribunal cannot enter into a reappraisal of evidence after taking into consideration the additional evidence produced by the assessee before it in a proceeding arising out of a best judgment assessment.'

In other words, there is no scope for admission of additional evidence in the facts and circumstances of the case, making it unnecessary for us to delve into whether there is, in the facts and circumstances of the case, a breach of r. 46A of the Rules. It is this consideration that impelled us to examine this aspect of the matter, i.e., besides placing the Revenues Gd. before us in context.

4.6 As afore-explained, the only purview of an appellate authority in a best judgment assessment is to examine the reasonableness of the conclusions drawn or arrived at by the assessing authority, i.e., on the basis of the material on record, whether so brought by the assessee or the Revenue. It may therefore be, next, necessary for us to examine the facts of the case in perspective, as the validity of the impugned order, inasmuch as it deletes the disallowance of deduction u/s. 80-IB as well as of the indirect expenditure, i.e., the two adjustments to the returned income made by the AO in assessment. We may begin with reviewing the powers of the first appellate authority and, consequently, the obligation cast by law upon him. It is trite law that the powers of the first appellate authority are co-terminus with that of the assessing authority (*Jute Corporation of India vs. CIT* [1991] 187 ITR 688 (SC)). Sub-sec (6) of sec. 250 obliges the Commissioner Appeals to, while disposing an appeal, state the points for determination, decision thereon, and the reason for the decision. Clause (a) of sec. 251, which states the powers of the Commissioner Appeals, provides that in disposing an appeal against an order of assessment, he may confirm, reduce, enhance or annul the assessment. In the instant case, we observe a complete absence of determination of the several issues raised by the assessing authority, vital to the assessment, by the ld. CIT(A) while deciding the assessee's appeal. How, for example, the assessment under appeal be said to be a s. 143(3) assessment, i.e., given the clear position of law in the matter and, further, without disturbing the finding impugning the basis of the best judgment assessment, i.e., the applicability of the provision of s.144(1)(b), i.e., on a failure the comply with all the terms of the notice issued u/s 142(1). This is as, clearly, as held by the Hon'ble Court in *Rayala Corporation Pvt. Ltd*. (supra), the appellate authority cannot change the status of assessment - without of course impugning the very basis thereof, and proceed to decide the appeal on merits by reappraising the evidence in the light of the explanations furnished before him. He,

no doubt, can reverse or modify the finding/s by the assessing authority, guided only by the material on record, so brought by either side, and the explanations furnished before the assessing authority, and of course after allowing reasonable opportunity of hearing to both the sides before him. We may hasten to add that adjudication on merits (of the quantum adjustments) is not, and we may not be construed as suggesting it as, precluded in case of a best judgment assessment, which in the present case is with regard to the denial of deduction u/s. 80-IB as well as the part disallowance of the indirect expenditure. The same, however, cannot be without addressing the issues on which the assessment is premised. The impugned order does not bear any comment, much less definite findings in the matter, which are essentially matters of fact, being, in sum, as to the genuineness of the assessee's activities. Could, for example, the purchase and sale be held as genuine on the existing set of materials, which exhibit a denial/non-confirmation by the trade parties, with the corresponding transactions in the bank being unexplained, so that there is no definiteness of the source and destination of funds. A deduction u/s. 80-IB posits a genuine business activity, resulting in business profits derived from an industrial undertaking, while in the present case the purchase and sale itself has been held as bogus, and which finding remains un-disturbed. There is no justification for the cost or the gross margin, on record. We could in fact go on. Maintenance of accounts and their audit is a prerequisite for deduction u/s. 80-IB. Could the assessee, without the disturbing the finding of the purchases and sales, as recorded in its books, being not genuine, be said to have complied with the said requirement, so as to entitle the profits stated to be generated there-from as eligible for deduction u/s. 80-IB? Likewise, for the production details; the inventory details, all of which remain un-explained. In fact, the nature of the relationship with some specified parties, as well as the specified bank transactions, are unexplained. *In short, without arriving at a positive finding*

of the books of account as representing the true state of affairs, which is the very basis of the requirement of the maintaining accounts and their audit. Rather, the AO himself has erred, and which the ld. CIT(A) ought to have amended, in assessing the income returned as business income, i.e., given his finding with regard to the complete unreliability of the assessee's accounts in representing the actual state of affairs. Rather, even if, for the sake of argument, if it were to be a sec. 143(3) assessment, as apparent, the materials or explanations furnished would itself require verification, if not also gathering material by the assessing authority in verification and/or rebuttal of the assessee's claim/s, as contemplated under rule 46A(3), which explains the Revenue's Ground. The question of deduction u/s. 80-IB, without first entering a finding as to the income earned being derived from the 'business' of the assessee's industrial undertaking, does not arise. The ld. CIT(A) has completely omitted to frame the points for determination, integral and necessary in deciding the issues on merits in-as-much as the same have neither been drawn nor, therefore, addressed. There is accordingly a clear failure to meet the requirement of sec. 250(6), disqualifying the order as one contemplated by law.

The impugned order is not maintainable, looking thereat from another stand-point, for another reason. Unless a finding/s by the AO is disturbed by him, being either canceled or reversed or confirmed, no decision - right or wrong, can follow. As afore-noted, the ld. CIT(A) has not rendered any finding on the assessee's purchases and sales, held by the AO as bogus, and which is a ground for the denial of deduction u/s. 80-IB. Could, therefore, its' reversal be given effect to without reversing the finding *qua* the same by the AO, which is, besides other surrounding facts, in turn, based on the denial/non-confirmation of transactions, which remains undisturbed, resulting in an anomalous situation. Surely, not. Similarly, for the production of details - both with regard to the nature and quantity of the goods produced and sold, the inventory details, etc. all of which though again lead to the

same conclusion of the impugned order being not a valid order u/s. 251(1)(a) r/w s. 250(6) of the Act. In fact, there could possibly be under the given facts and circumstances no such order without admitting materials addressing the various issues raised in assessment, even as no doubt the ld. CIT(A) has admitted explanations. It was incumbent on the ld. CITA), having held the impugned assessment to be a sec. 143(3) assessment, to admit the additional evidences, allowing the AO to complete the verification process as well as the assessee to answer him. It is this anomaly that the Revenue's Ground before us seeks to capture. Further still, the finding of deductibility of sec. 80IB, in-as-much as it fails to address the basic issues on which the deduction there-under is premised, i.e., profits and gains of business of an eligible undertaking, which stands impugned in assessment, cannot hold. Likewise, for the disallowance of indirect expenditure.

We are conscious that the assessee stands allowed deduction u/s. 80-IB for the preceding years, and which is the principal issue, i.e., on merits of the quantum adjustment, in the instant appeal. We consider it relevant to discuss this aspect of the matter even as each year is an independent and separate unit of assessment, for which reference, among others, may be made to *New Jehangir Vakil Mills Co. Ltd. v. CIT* [1963] 49 ITR 137 (SC), explaining that there is no *res judicata* in matters of taxation. This is as the same has weighed with the ld. CIT(A), and without doubt, would have to be therefore held in view as well as in proper prospective. Being essentially a matter of fact, the same would require being determined with reference to the obtaining facts for the relevant year. For example, there could be a manufacture in a particular year while not in the other year, the quantum of which itself, or the profits derived there-from, would vary from year to year. In fact, production of two (of the three) items stated to have been manufactured, are stated to have commenced during the current year itself, on which the AO has raised considerable doubts, seeking process details for all three, with reference to the

existing plant & machinery – the functionality of which would also, in view of the report on physical verification, be required to be looked into, as well as its capacity, and which has not been furnished. In sum, the genuineness of the activities is in serious doubt for the detailed reasons in the assessment order, delineated hereinbefore. Why, the nature of the business itself is in doubt. Further, the accounts for the current year have itself been found as not reflecting the true state of affairs and, accordingly, rejected, with that being also the basis for the disallowance of indirect expenditure. There is, again, no reference to any finding issued for the other years, which may have not been subject to examination, or, in any case, on the aspects under verification. The matter in issue is factual, and would therefore need to be determined on the basis the facts as found for the current year.

Conclusion

5.1 Looked at from any angle, therefore, the impugned order is not maintainable in law. That we also understand to be, in substance, the Revenue's grievance as well, who though, no doubt, has been reckless/not exquisite in drafting the grounds of appeal, even as the ld. CIT-DR, to be fair, while arguing the appeal, did touch upon issues impinging thereon. The same cannot, however, constrain us from culling out/formulating issues arising for determination in the facts and circumstances of the case, particularly given the law in the matter, which stands also delineated in the ensuing part of this order. In fact, while an omission to observe rule 46A, being mandatory, would also render the impugned order as not maintainable, and liable to be set aside with a view to render opportunity to the AO, we have found basic structural defects in the impugned order in-as-much as it is *sub silentio* on various aspects fundamental and basic to the assessment, seriously impugned, or, in any case, found as factually indeterminate by the AO,

who was in the absence of the relevant materials/explanations unable to carry out verification on several aspects of the assessment. Under the circumstances, we only consider it proper to restore the assessment back to the file of the ld. CIT(A) for adjudication afresh in accordance with law - both procedural and substantive, after hearing both the parties before him. Further, should the assessee plead for opportunity for furnishing materials/explanations with regard thereto, the ld. CIT(A) shall consider and first decide if it permissible in law to do so, i.e., given it to be a case of a best judgment assessment. Needless to add, his finding as to the validity of the assumption of jurisdiction by issue and service of a valid notice u/s. 143(2), not challenged, shall obtain. We decide accordingly.

5.2 Questions may arise on our competence to direct in the manner afore-said, as well as proceed to examine the facts and delineate the issue/s arising, i.e., given the Ground raised before the Tribunal by the Revenue, which, we are afraid to say, was also not requested for being suitably changed or modified, by it, so as to capture the issue/s arising in appeal. That is, in view of the non-challenge, at least *ex facie*, of the complete overlooking of the vital aspects of the assessment by the ld. CIT(A) in adjudicating the assessee's appeal. The question, however, is, if that would be decisive of the matter. In our clear view, surely not. To begin with, it is the correct legal position that is relevant, and not the view that the parties may take of their rights in the matter (*CIT v. C. Parakh & Co. (India) Ltd*. [1956] 29 ITR 661 (SC); *Kedarnath Jute Mfg. Co. Ltd. v. CIT* [1971] 82 ITR 363 (SC)), and which has a direct bearing on their understanding of and, thus, the delineation or ascertainment of the issue/s that needs to be determined, directly impacting of the raising of such issue/s, per their appeal. Further, it is trite law that appellate proceedings are a continuation of the assessment proceedings. That, therefore, the basic purpose of an appeal in an income-tax matter is to ascertain the correct tax

liability of the assessee in accordance with law, observing the procedure laid down thereby. Therefore, at both the stages, either before the Appellate Commissioner or before the Appellate Tribunal, the appellate authority can consider the proceedings before it and the material on record before it for the purpose of determining the correct tax liability of the assessee. The only limitation on the power of an appellate authority is that it cannot travel beyond the proceedings and examine a new source of income, for which there are separate remedies available to the Revenue under the Act. Speaking specifically in context of the powers of the appellate tribunal, it was held in *Ahmedabad Electricity Co. v. CIT* [1993] 199 ITR 351 (Bom)(FB) that the subject matter of an appeal is the entire tax proceedings of the assessee which is before the tribunal for consideration, which would cover the proceedings before the AO; before the first appellate authority; as well as that before the tribunal itself. In *CIT v. Indian Express (Madurai) Pvt. Ltd.* [1983] 140 ITR 705 (Mad), it stands explained that the authorities sitting in appeal in a tax case cannot be regarded as deciding a *lis*, being only engaged in an administrative act of adjusting the taxpayers' liability. The Revenue being a party, and at the same time an authority vested with the responsibilities of drawing up of the assessment and determining the correct tax liability, it would not be in accord with the scheme of the Act to impose restrictions on the ambit and power of the tribunal by notions such as finality; subject matter of appeal, etc. The Apex Court in *Kapurchand Shrimal v. CIT* [1981] 131 ITR 451 (SC) held that an appellate authority has the jurisdiction as well as the duty to correct all errors in the proceedings under appeal and to issue, if necessary, appropriate directions (to the authority against whose decision the appeal is preferred) to dispose of the whole or any part of the matter afresh unless forbidden for doing so by the statute. Further still, rule 11 of the Income Tax (Appellate Tribunal) Rules, 1963 reads as under:

'Grounds which may be taken in appeal.

11. The appellant shall not, except by leave of the Tribunal, urge or be heard in support of any ground not set forth in the memorandum of appeal, but the Tribunal, in deciding the appeal, shall not be confined to the grounds set forth in the memorandum of appeal or taken by leave of the Tribunal under this rule:

Provided that the Tribunal shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of being heard on that ground.'

The Apex Court in *Hukumchand Mills Ltd. v. CIT* [1967] 63 ITR 232 (SC), referred to both in *Indian Express (Madurai) Pvt. Ltd*. (supra) and *Ahemdabad Electricity Co.* (supra), held that rules 11 and 27 of the Appellate Tribunal Rules are not exhaustive of the powers of the appellate tribunal. They are merely procedural in character, and do not, in any way, circumscribe or control the power of the tribunal. In our clear view, therefore, there is no excess of jurisdiction in our – the final fact finding body, deciding and directing in the manner we have in the instant case.

6. In the result, the Revenue's appeal is allowed for statistical purposes.

Order pronounced in the open court on August 09, 2018

Sd/-	Sd/-
(N. K. Choudhry)	(Sanjay Arora)
Judicial Member	Accountant Member

Date: 09.08.2018
/GP/Sr. Ps.
Copy of the order forwarded to:

(1) The Appellant: Income Tax Officer, Ward-2(2), Jammu
(2) The Respondent: Neeraj Aggarwal Khasra No. 69/3,Village-Singhola, 656, Gali No. 11, Sardar Bazar, Delhi-6 Present at 545, Patoli Magotrian, Jammu
(3) The CIT(Appeals), J & K, Jammu
(4) The CIT concerned
(5) The Sr. DR, I.T.A.T

True Copy

By Order