

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

श्री रमेश सी शर्मा, लेखा सदस्य एवं श्री विजय पाल राव, न्यायिक सदस्य के समक्ष
BEFORE: SHRI RAMESH C SHARMA, AM & SHRI VIJAY PAL RAO, JM

आयकर अपील सं./ITA No. 696/JP/2018

निर्धारण वर्ष / Assessment Year :2009-10

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| A.C.I.T., Circle-2, Jaipur. | बनाम Vs. | M/s Ganpati Exclusive Designer Sarees Pvt. Ltd., 154, Haldiyan Ka Rasta, Johari Bazar, Jaipur. |
| स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AADCG 0084 E | | |
| अपीलार्थी / Appellant | | प्रत्यर्थी / Respondent |

आयकर अपील सं./ITA No. 1081/JP/2018

निर्धारण वर्ष / Assessment Year :2014-15

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| M/s Ganpati Exclusive Designer Sarees Pvt. Ltd., 154, Near Kamla Nehru School, Haldiyan Ka Rasta, Johari Bazar, Jaipur. | बनाम Vs. | D.C.I.T., Circle-2, Jaipur. |
| स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AADCG 0084 E | | |
| अपीलार्थी / Appellant | | प्रत्यर्थी / Respondent |

राजस्व की ओर से / Revenue by : Shri Ashok Khanna (JCIT)

निर्धारिती की ओर से / Assessee by : Shri Vijay Goyal (CA) &
Shri Gulshan Agarwal (CA)

सुनवाई की तारीख / Date of Hearing : 28/03/2019

उदघोषणा की तारीख / Date of Pronouncement : 29/03/2019

आदेश / ORDER

PER: R.C. SHARMA, A.M.

Firstly we take ITA No. 696/JP/2018

This is an appeal filed by revenue against the order of Id.CIT(A)-I,
Jaipur dated 23/03/2018 for the A.Y.2009-10 in the matter of order

passed U/s 143(3) read with Section 147 of the Income Tax Act, 1961 (in short the Act).

2. In this appeal, the revenue is aggrieved for deleting the addition of Rs. 2,01,00,000/- made by the Assessing Officer U/s 56(1) of the Act.

3. Rival contentions have been heard and record perused. Facts in brief are that the assessee is a company engaged in the business of manufacturing and trading of sarees, and dress material on wholesale basis. The case was re-opened by issuing notice u/s 148 of I.T. Act, 1961 on 31-03-2016. The assessment of the assessee was completed under section 143(3)/147 of the Act on 18-07-2016 on a total income of Rs. 2,03,67,210/- as against the returned income of Rs. 2,67,210/- by making the addition on account of receipt of share premium/share capital received from various persons to the tune of Rs. 2,01,00,000/- (Rs. 1,92,96,000/- + Rs. 8,04,000/-) u/s 56(1) of the Act treating the same as unjustified.

4. By the impugned order, the Id CIT(A) deleted the addition after observing as under:

“3.2.2 Determination:

- (i) *I have duly considered the submissions of the appellant, assessment order, and the material placed on record. It is noted that during the year under consideration, the appellant has issued 80,400 equity*

shares of face value of Rs. 10/- each at a premium of Rs. 240/- each i.e. 80,400 equity shares were issued for total consideration of Rs. 2.01 Crore including share capital of Rs. 8,04,000/- and share premium of Rs. 1,92,96,000/-. In the assessment order, it has been observed by the AO that the appellant company was incorporated on 26.09.2007 and it did not have any business commensurate to such high premium. The AO has invoked the provisions of section 56(1) of the Act and has made an addition of Rs. 2.01 Crore by observing that the receipt of share capital and share premium was part of a device of colourful transaction by way of which a sum of the Rs. 2.01 Crore was introduced in to the books of accounts of the appellant company in the form of share premium attached to the share capital. It was also held by the AO that the appellant company has failed to prove the identity, creditworthiness of the share applicants and the genuineness of the transaction.

- (ii) *It would be appropriate to examine the applicability of the provisions of section 56 of the Act to the facts of the instant case under consideration, which reads as under:-*

"56. Income from other sources.

(1) "Income of every kind which is not to be excluded from the total income under the Act shall be chargeable to income tax under the head." Income from other sources", if it is not chargeable to income tax under any of the heads specified in section 14, items A to E."

- (iii) *The provisions of Section 56(1) the Act can be invoked to tax income of every kind which is not chargeable to tax under any head specified in Section 14 under the head 'Income from other sources'. Therefore, provisions of sec 56(1) are not applicable. Further the amended provisions of sec 56 (2) of the I.T. Act, 1961 specify the various*

incomes to be assessed under this section. The premium on shares has been included u/s sec 56(2) (viiib) of the Act w.e.f. 01.04.2014, which is reproduced as under:

"56(2) In particular, and without prejudice to the generality of the provisions of sub-section (1), the following incomes, shall be chargeable to income tax under the head 'Income from other sources' namely:-

(i) dividends

(ia) to (viiia)...

(viiib) Where a company, not being a company in which the public are substantially interested, receives, in any previous year, from any person being a resident, any consideration for issue of shares that exceeds the face value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares:"

(iv) A corresponding amendment has also been made in the definition of 'income' u/s 2(24) of the Act w.e.f. 01-04-2013. The relevant portion reads as under:-

"(xvi) any consideration received for issue of shares as exceeds the fair market value of the share referred to in clause (viiib) of sub-section (2) of Section 56:]"

(v) It is to be noted that to tax the income under the Act, it must come under the definition of income as provided u/s 2(24) of the I.T. Act, 1961. There were amendments in section 2(24) of the Act and in section 56(2) of the Act w.e.f. 01.04.2013, which are not applicable to A.Y. under consideration. By these amended provisions, any consideration received for issue of shares that exceeds the fair market value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares shall be taxable

as income as per clause (viib) of section 56(2) of the Act. The CBDT vide Circular No. 3 of 2012 dated 12.06.2012 has also mentioned that provisions of section 56(2) (viib) will be applicable from A.Y. 2013-14 onwards. It would be appropriate to reproduce the relevant portion of above referred CBDT Circular as under:-

"Share premium in excess of fair market value to be treated as income In the Finance Bill, 2012, it had been proposed [section 56(2), as sub-clause [(viib)] that in case of a company, not being a company in which the public are substantially interested, which receives, in any previous year, from any person being a resident, any consideration for issue of shares and the consideration received for issue of such shares exceeds the face value of such shares, then the aggregate consideration received for such shares as exceeds the fair market value of the shares shall be chargeable to income tax. An exemption was provided in a case where the consideration for issue of shares is received by a venture capital undertaking from a venture capital company or a venture capital fund.

- (i) It has now been further provided that such excess share premium is included in the definition of "income" under sub clause (xvi) of clause (24) of section 2.*
- (ii) Considering that the proposed amendment may cause avoidable difficulty to investors who invest in start-ups where the fair market value may not be determined accurately, it is proposed to provide an exemption to any other class of investors as may be notified by the Central Government. These amendments will take effect from 1st April, 2013 and will, accordingly, apply in relation to the assessment year 2013-14 and subsequent assessment years."*
- (vi) The provisions of sec 56(2) (viib) of Income-tax Act, 1961 are applicable w.e.f. 1st April, 2013 and will accordingly apply in relation to AY 2013-14 and subsequent assessment years. The income as*

mentioned in section 56(2) (viib) of the Act is included in definition of section 2(24) of the Act w.e.f. 01-04-2013. Therefore, the provisions of these sections cannot be made applicable prior to A.Y. 2013-14.

- (vii) *Reliance is placed on the judgement dated 30.10.2017 of Hon'ble ITAT, Jaipur in the case of M/s. Motisons Buildtech Pvt. Ltd. Vs ACIT in ITA No. 481 /JP/2017 for AY 2009-10, wherein the appeal of the revenue on the same issue was dismissed. Further, the above judgement was followed by the Hon'ble ITAT, Jaipur in its judgement dated 06.11.2017 in the case of M/s. Rainbow Buildcon Pvt. Ltd Vs ACIT in ITA No. 491/JP/2017 for the A.Y. 2009-10.*
- (viii) *It is to be noted that in the case of Vodafone India Services Ltd. 368 ITR 01 (Bom), it was held that share premium cannot be subjected to income and the department has accepted the said judgement and did not file any appeal thereof. Further, vide instruction no. 2/2015 dated 29.03.2015, the CBDT has directed as under:*

"Subject Acceptance of the Order of the Hon'ble High Court of Bombay in the case of Vodafone India Services Pvt. Ltd.-reg.

In reference to the above cited subject I am directed to draw your attention to the decision of the High Court of Bombay in the case of Vodafone India Services Pvt. Ltd. for AY 2009-10(WP No.87112014), wherein the Court has held, inter-alia, that the premium on share issue was on account of capital account transaction and does not give rise to income and, hence, not liable to transfer pricing adjustment.

2. It is hereby informed that the Board has accepted the decision of the High Court of Bombay in the above mentioned Writ Petition. In view of the acceptance of the above judgment, it is directed that the ratio decidendi of the judgment must be adhered to by the field officers in all cases where this issue is involved. This may also be brought to the notice of the ITAT, DRPs, and CsIT(Appeals)."

(ix) *In the case of CIT V/s Gagandeep Infrastructure Limited in ITA No. 1613/2014, it was held by the Hon'ble High Court of Bombay that:*

"(e) We find that the proviso to Section 68 of the Act has been introduced by the Finance Act 2012 with effect from 1st April, 2013. Thus it would be effective only from the Assessment Year 2013-14 onwards and not for the subject Assessment Year. In fact, before the Tribunal, it was not even the case of the Revenue that Section 68 of the Act as in force during the subject years has to be read/understood as though the proviso added subsequently effective only from 1st April, 2013 was its normal meaning. The Parliament did not introduce to proviso to Section 68 of the Act with retrospective effect nor does the proviso so introduced states that it was introduced "for removal of doubts" or that it is "declaratory". Therefore it is not open to give it retrospective effect by proceeding on the basis that the addition of the proviso to Section 68 of the Act is immaterial and does not change the interpretation of Section 68 of the Act both before and after the adding of the proviso. In any view of the matter the three essential tests while confirming the pre-proviso Section 68 of the Act laid down by the Courts namely the genuineness of the transaction, identity and the capacity of the investor have all been examined by the impugned order of the Tribunal and on facts it was found satisfied. Further it was a submission on behalf of the Revenue that such large amount of share premium gives rise to suspicion on the genuineness (identity) of the shareholders i. e. they are bogus. The Apex Court in Lovely Exports (P) Ltd. (supra) in the context to the pre-amended Section 68 of the Act has held that where the Revenue urges that the amount of share application money has been received from bogus shareholders then it is for the Income Tax Officer to proceed by reopening the assessment of such shareholders and assessing them to tax in accordance with law. It does not entitle the Revenue to add the same to the assessee's income as unexplained cash credit.

(f) In the above circumstances and particularly in view of the concurrent finding of fact arrived at by the CIT(A) and the

Tribunal, the proposed question of law does not give rise to any substantial question of law. Thus not entertained."

- (x) *During the appellate proceedings, the appellant was required to explain why the provisions of section 68 of the Act should not be invoked instead of provisions of section 56 as invoked by the AO. In response, it was submitted by the appellant that this issue has been discussed in detail by the Hon'ble ITAT, Jaipur in the case of M/s. Motisons Buildtech Pvt. Ltd. Jaipur vs. ACIT. It was further submitted that in view of the above judgement of Hon'ble ITAT, Jaipur, the Ld. CIT(A) has no legal sanction to apply the provisions of section 68 to convert the addition made by the AO u/s 56(1) against the share capital. It was further submitted that the AO has applied the provisions of section 56 of the Act after proper examination of all the aspect of the case and all the details were furnished before the AO relevant to ingredients to section 68 of the Act. It is noted that in the case of Motisons Buildtech Pvt. Ltd. vs. ACIT and cross appeal in ITA No. 481, 554, 482 and 555/JP/2017, vide consolidated judgement dated 30.10.2017, it was held by the Hon'ble, ITAT, Jaipur (page No. 102-103), that:*

"8.4 We have heard the rival contentions and perused the materials available on record. In this ground, it is noted that the AO made the addition of Rs.3,68,27,500/- out of which the Id CIT(A) deleted the addition of Rs. 2,86,27,500/- and sustained the addition of Rs.82.00 lacs as mentioned at para 3.2.2. and 2.1.4.6 & 2.1.4.7 of the Id. CIT(A)'s order (supra). The question arises as to whether the Id CIT(A) can make the addition u/s 68 of the Act or not. For this purpose, the definition of Section 68 of the Act is as under:-

"Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the

explanation offered by him is not, in the opinion of the [Assessing] Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year.'

From the above definition, it is noted that Section 68 of the Act does not empower the Id. CIT(A) to make addition under this Act. Thus the addition u/s 68 can only be made by the Assessing Officer. The definition of the Assessing Officer has been provided in Section 2(7A) of the Act which reads as under:-

[(7A) "Assessing Officer" means the Assistant Commissioner [or Deputy Commissioner] [or Assistant Director] [or Deputy Director] or the Income-tax Officer who is vested with the relevant jurisdiction by virtue of directions or orders issued under sub-section (1) or sub-section (2) of section 120 or any other provision of this Act, and the [Additional Commissioner or] [Additional Director or] [Joint Commissioner or Joint Director] who is directed under clause (b) of sub-section (4) of that section to exercise or perform all or any of the powers and functions conferred on, or assigned to, an Assessing Officer under this Act;]

Thus the Id. CIT(A) is not the Assessing Officer as per Income-Tax Act. Therefore, the Id. CIT(A) does not have any legal sanction to make the addition u/s 68 of the Act. Id. CIT(A) in his order at para 2.1.4.6 had clearly held that the identity, creditworthiness and genuineness of transactions of these companies cannot be held doubtful and addition by applying the provision of sec 68 of the Act cannot be upheld. The Id. CIT(A) has sustained the addition of Rs. 82.00 lacs without specifying any provision of income tax Act. No such addition can be sustained without invoking the relevant provisions of the Act" (emphasis supplied)

- (xi) In view of the above discussion, submissions of the appellant and looking to the totality of facts and circumstances of the case, it is, therefore, held that the AO was not justified in making addition of Rs. 2.01 Crore u/s 56(1) of the Act, during the year under consideration and hence, the addition made by the AO is hereby deleted."*

5. The revenue is in further appeal before the ITAT against the order of the Id. CIT(A).

6. We have considered the rival contentions and carefully gone through the orders of the authorities below and found that during the year under consideration the assessee allotted 80,400 equity shares of Rs. 10 each to various parties at a premium of Rs. 240/- per share. The AO made the addition by applying the provisions of section 56(1) of the Act on the ground that the assets of the assessee company don't commensurate to premium charged and the assessee company do not possess sufficient worth of assets and profit. The Id CIT(A) deleted the addition made by AO by applying the provisions of section 56(1) of the Act, on the basis of his detailed findings at page 54-63 of his order. It is clear from the order of the Id. CIT(A) that the issue is covered by decision of Hon'ble ITAT Jaipur bench in the case of Motisons Buildtech Pvt. Ltd. vs ACIT in ITA No 481,554,482, and 555/JP/2017 order dated 30/10/2017. This order of Hon'ble ITAT has been upheld by Hon'ble Rajasthan High Court by in DB No 162 & 165/2018 by order dated 31/07/2018. The findings of Hon'ble ITAT Jaipur Bench in the case of Motisons Buildtech Pvt. Ltd are at pg 27-53 of the order. The relevant extracts of the findings are as under:-

"4.6 We have heard the rival contentions and perused the materials available on record. Brief facts of the case are that the Department carried out search over Motisons Group on 31-10-2012. The AO during the course of assessment proceeding observed that in the course of search and seizure action u/s 132 of the Act, cash, jewellery, valuables, stock-in trade, documents, books of account and / or loose papers were found and /or seized from the premises of the members of the Motisons Group of which one such member happens to be the assessee. The AO also noted that the Group is involved in introducing large share capital on high premium in accounts of various group companies through the Kolkata based companies. The AO has mentioned these details at page 3 and 4 of his assessment order. The AO further noted that the receipt of share capital is Rs. 3,03,000/- and the premium is to the tune of Rs. 2,99,97,000/- during the year under consideration which is not only abnormal but also appeared to be part of a well planned exercise of tax evasion. Accordingly, the AO issued the show cause notice dated 6-02-2015 to the assessee company requiring the assessee to show cause as to why the amount of Rs. 3,03,00,000/- should not be treated as income of the assessee u/s 56(1) of the Act. The assessee submitted the reply before the AO who rejected the assessee's contention and made the addition of Rs. 3,03,00,000/- u/s 56(1) of the Act in the hands of the assessee company. In first appeal, the ld. CIT(A) has deleted the addition of Rs. 3,03,00,000/- made by the AO. The relevant portion of ld. CIT(A)'s order from para 2.1.4.2 to 2.1.47 is reproduced hereunder:-

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Section 68 of the Act provides regarding any sum found credited in the books of an assessee maintained and explanation offered by the assessee is not satisfactory in the opinion of the AO then such sum credited be charged to income-tax as the income of the assessee of that previous year.

The Section 68 reads as under:-

Section 68 – Cash Credits: Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the (Assessing) Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year.'

Thus the sum so received by assessee towards share application and share premium could have been taxed as income u/s 68 of the Act. However, the AO has not invoked provisions of sec 68 of the Act. The AO invoked the provisions of sec 56(1) of the Act which reads as under:-

'56. Income from other sources.

(1) "Income of every kind which is not to be excluded from the total income under the Act shall be chargeable to income tax under the

head.” Income from other sources’’, if it is not chargeable to income tax under any of the heads specified in section 14, items A to E.’’

The provisions of Section 56(1) the Act can be invoked to tax income of every kind which is not chargeable to tax under any head specified in Section 14 from Item No. A to E is chargeable under the head ‘Income from other sources’ by the provisions of section 56 of the Act. .

Therefore, provisions of sec 56(1) are not applicable. Further the amended provisions of sec 56 (2) of the I.T. Act, 1961 specify the various income to be assessed under this section. The premium on shares has been included by provision of sec 56(2)(viii) of the Act w.e.f. 01-04-2014 which is reproduced as under:

‘‘56(2) In particular, and without prejudice to the generality of the provisions of sub-section (1), the following incomes, shall be chargeable to income tax under the head ‘Income from other sources’ namely:-

(i) dividends

(ia) to (viii)...

(viib) Where a company, not being a company in which the public are substantially interested, receives, in any previous year, from any person being a resident, any consideration for issue of shares that exceeds the face value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares:’’

This has also been included in the definition of income u/s 2(24) of the Act w.e.f. 01-04-2013. The relevant portion reads as under:-

‘‘(xvi) any consideration received for issue of shares as exceeds the fair market value of the share referred to in clause (viib) of sub-section (2) of Section 56;]’’

To tax the income under the Act, it must come under the definition of income as provided u/s 2(24) of the I.T. Act, 1961. There were amendments in sec 2(24) of the Act and in section 56(2) of the Act w.e.f. 01-04-2013 are not applicable to A.Y. under consideration. By these amended provisions, any consideration received for issue of shares that exceeds the face market value of such shares the aggregate consideration received for such shares as exceeds the fair market value of the shares shall be taxable as per clause (viib) of sub-section 2 of section 56 of the Act. The CBDT vide Circular No. 3 of 2012 dated 12-06-2012 has also mentioned that provision of section 56(2)(viib) will be applicable for A.Y. 2013-14. Thus the relevant portion of CBDT Circular is reproduced is as under:-

‘Share premium in excess of fair market value to be treated as income

In the Finance Bill, 2012, it had been proposed [section 56(2), as sub clause [(viib)] that in case of a company, not being a company in which the public are substantially interested, which receives, in any previous year, from any person being a resident, any consideration for issue of shares and the consideration received for issue of such

shares exceeds the face value of such shares, then the aggregate consideration received for such shares as exceeds the fair market value of the shares shall be chargeable to income tax. An exemption was provided in a case where the consideration for issue of shares is received by a venture capital undertaking from a venture capital company or a venture capital fund.

(i) It has now been further provided that such excess share premium is included in the definition of "income" under sub-clause (xvi) of clause (24) of section 2.

(ii) Considering that the proposed amendment may cause avoidable difficulty to investors who invest in start-ups where the fair market value may not be determined accurately, it is proposed to provide an exemption to any other class of investors as may be notified by the Central Government.

These amendments will take effect from 1st April, 2013 and will, accordingly, apply in relation to the assessment year 2013-14 and subsequent assessment years.’’

The provisions of sec 56(2)(viib) of Income-tax Act, 1961 are applicable w.e.f. 1st April, 2013 and will accordingly apply in relation to Assessment Year 2013-14 and subsequent Assessment Years. The income as mentioned in section 56(2)(viib) is included in definition of section 2(24) of the Act w.e.f. 01-04-2013. Therefore, the provisions of these sections cannot be made applicable prior to that A.Y. 2013-14. It is pertinent to note that the ld. CIT(A) had issued the show cause notice to the assessee to tax the share capital under section 68 of the I.T. Act, 1961 as against section 56(1) applied by the AO. However, he had not made any addition under section 68 of the Act. His observation on this issue is in para 2.1.4.6 which reads as under:-

‘‘2.1.4.6 Therefore, in view of the findings of Hon'ble Jurisdictional High Court, the identity, creditworthiness and genuineness of transaction of these companies cannot be held as doubtful and addition by applying the provisions of sec 68 of the Act cannot be upheld.’’

The Revenue has not preferred appeal against this findings the ld. CIT(A). It is also pertinent to note that AO has made whole addition by invoking section 56 of the Act, hence the amended provision w.e.f. 01-04-2013 are applicable only on shares premium received on fair market value. In view of these facts, circumstances of the case and the case laws relied on by the ld.AR of the assessee (supra), it is clear that share premium received cannot be considered as income for the year under consideration by invoking provisions of section 56(1) of the Act.

Therefore, in our considered view, the ld. CIT(A) has rightly deleted the addition of Rs. 3,03,00,000/- and we concur with his findings on the issue in question Thus the Revenue's appeal in ITA No. 481/JP/2017 is dismissed."

7. From the record we also found that to substantiate the identity, genuineness and creditworthiness of the share holders, the assessee has furnished various documents before the Assessing Officer. However, the Assessing Officer has made addition U/s 56(1) of the Act and the Id. CIT(A) has deleted the same by observing that the provisions of Section 56(1) are applicable w.e.f. 01/4/2013 by relying on the decision of the Coordinate Bench in the case of Motisons Buildtech Pvt. Ltd. Vs. ACIT (supra) which the order of the Tribunal was confirmed by the Hon'ble Jurisdictional High Court vide order dated 31/7/2018. Respectfully following the order of the Hon'ble High Court, we do not find any infirmity in the order of the Id. CIT(A) in deleting the addition made U/s 56(1) of the Act.

8. In the result, appeal of the revenue is dismissed.

9. **Now we take ITA No. 1081/JP/2018**

This is an appeal filed by the assessee against the order of Id.CIT(A)-I, Jaipur dated 31/07/2018 for the A.Y.2014-15 in the matter of order passed U/s 143(3) of the Act.

10. In this appeal, the assessee is aggrieved for addition of Rs. 3,67,846/- by estimating the G.P. @ 8.56% in place of 8.52% declared by the assessee.

11. Rival contentions have been heard and record perused. The assessee is a company engaged in the business of manufacturing and wholesale trading of Sarees and dress material. The assessee filed its return of income on 24-11-2014 declaring total income of Rs. 42,51,820/-. The case was selected for scrutiny under section 143(3) of I.T. Act, 1961 under CASS. The AO completed the assessment u/s 143(3) vide his order dated 19-12-2016 assessing the total income of assessee Rs. 50,54,674/- as against the returned income of Rs. 42,51,820/- by rejecting the books of accounts of the assessee by invoking the provisions of section 145(3) of Act. The following additions are made by the AO.

| S. No. | Particulars | Amount |
|---------------|--|--------------------|
| 1. | Trading addition of Rs. 7,68,940/- by applying the G.P. rate of 8.60% as against the declared G.P rate of 8.52% declared by assessee | 7,68,940.00 |
| 2. | On account of late deposit of employee contribution of Provident Fund and ESI under sec. 36(1)(va) | 33,914.00 |
| | Total Additions | 8,02,854.00 |

12. By the impugned order, the Id. CIT(A) estimated the G.P. @ 8.56% as against 8.60% applied by the Assessing Officer, against which the assessee is in further appeal before us.

13. We have considered the rival contentions and carefully gone through the orders of the authorities below and found from the record that the AO rejected the books of accounts of assessee by pointing out the following defects therein: -

i) Stock register is not maintained

(ii) The discount allowed to various persons/concerns not verifiable as the discount is allowed to these persons/concerns at its will.

(iii) The payment of salary made to the ladies covered u/s 40A(2) (b) of the Act is not commensurate with the experience of such ladies.

14. As per our considered view, to apply the provisions of section 145(3) of Income Tax Act, there must be finding of the Assessing Officer that books of account are not correct or incomplete or the assessee is not following the proper method of accounting regularly or not following the accounting standards notified by Central Government. In the case of the assessee, there is no such finding of the Assessing Officer. With regard to defect pointed out in his stock register, we found that the assessee is engaged in the business of manufacturing (by way of job work) and trading of sarees, which has number of quality and variety where each purchases & sales lot contains the different quality, variety,

design and sarees have to go through various job work before production of final product therefore it is practically not possible for assessee to maintain stock register. Since the purchases, sales and expenses of the assessee are supported by bills & vouchers and completely verifiable from books of accounts. No defects therein have been pointed out by Assessing Officer. When the costs as well as sales are 100% subject to verification than books of account cannot be rejected merely for want of stock register. Moreover, the assessee has explained the reason for non maintenance of the stock register. The assessee explained that it is practically not possible for assessee to maintain stock register; therefore, the assessee is not maintaining stock register. The explanation of the assessee should be considered from the view point of a businessman. However, even if stock record is not maintained, the Books of Accounts can't be rejected on this ground alone. For this purpose reliance may be placed on the decision of the Hon'ble Rajasthan High Court in the case of Malani Ramjivan Jagannath Vs. Assistant Commissioner Of Income Tax (2009) 316 ITR 120, Hon'ble High Court of New Delhi in the case of CIT-XII vs Smt Poonam Rani in ITA No. 406/2009 vide order dated 07/05/2010 and CIT Vs Jas Jack Elegance Exports 324 ITR 95 (Delhi).

15. From the record, we also found that the G.P. shown by the assessee in the preceding three years are as under:

| AY | Turnover | Gross Profit | G.P. rate |
|------------------------|---------------|--------------|-----------|
| 2012-13 | 69,65,32,229 | 5,36,96,413 | 7.71% |
| 2013-14 | 83,44,77,620 | 7,22,76,765 | 8.66% |
| 2014-15 | 96,11,74,921 | 8,19,08,727 | 8.52% |
| Weighted average GP | 249,21,84,770 | 20,78,81,905 | 8.34% |

The weighted average GP rate of AY 2012-13, A.Y 2013-14 & A.Y 2014-15 comes to 8.34% against which the AO estimated the GP @ 8.60% and Ld CIT (A) confirmed the GP rate of 8.56%. Therefore both the lower authorities have not followed the concept of past history in estimation of profit. Moreover, the GP of the assessee was better than the AY 2012-13 and slightly down from AY 2013-14 for the reasons explained hereinabove. The AO has not considered the past history of the assessee. Past history does not mean immediate preceding year. It means current year's GP should be compared with the result of last few years. Considering the past history of the assessee the weighted average GP comes 8.34% against which the GP of the assessee was 8.52% which is better. Hon'ble Rajasthan High Court in the case of CIT Vs Bhawan Va Path Nirman (Bohra) & Co (No. 1) 258 ITR 431 has held that the past history of the assessee is best guiding factor. Therefore no trading addition deserves to be made. Keeping in view the totality of the facts and circumstances of the case, we do not find any merit in the impugned order passed by the Id. CIT(A) in upholding the addition by estimating

the GP @ 8.56% when the weighted GP comes to 8.34% as against the G.P. declared by the assessee at a higher percentage of 8.52%. Accordingly, we direct the Assessing Officer to delete the addition made on account of G.P..

16. The next grievance of the assessee relate to confirming the addition of Rs. 33,914/- made by AO by applying the provisions of section 36(1)(va) of Income Tax Act, 1961 in respect to the employees contribution of P.F (Rs. 8929/-) and ESI (Rs. 24,985/-) which was deposited by the assessee after the due date but before the due date of filing income tax return.

17. We have considered the rival contentions and carefully gone through the orders of the authorities below and found that the AO at page 5 of Assessment order observed that the assessee had credited such sum to the employee 's account in PF and ESI and Deposited after due dates shown as under :-

| Month | Amount of ESI of Employee's Contribution deducted | Due date of deposit with grace (6 days) period | Date of Deposit |
|---------------|---|--|-----------------|
| April, 2013 | Rs. 8,852/- | 21/05/2013 | 30/05/2013 |
| July, 2013 | Rs. 7,745/- | 21/08/2013 | 23/08/2013 |
| January, 2014 | Rs. 8,388/- | 21/02/2014 | 27/02/2014 |
| Total | Rs. 24,985/- | | |

| Month | Amount of PF of Employee's Contribution deducted | Due date of deposit with grace (5 days) period | Date of Deposit |
|---------------|--|--|-----------------|
| April, 2013 | Rs. 4,482/- | 20/05/2013 | 30/05/2013 |
| January, 2014 | Rs. 4,447/- | 20/02/2014 | 25/02/2014 |
| Total | Rs. 8,929/- | | |

During the course of assessment proceedings the assessee submitted the detail of deposit of PF & ESI contribution of employees and as per such detail the entire contribution was paid before the due date of filing of Income Tax return i.e. 30.09.2014. Since the amount has been paid before filing of Return of Income and hence nothing should be disallowed.

18. The issue under consideration are also covered by the decision of the Coordinate Bench in the case of Shri Rajendra Kumar Sancheti v/s Income Tax Officer, Ward 1(1), Jaipur in ITA No. 1082/JP/2018 vide order dated 31/12/2018. The finding of Hon'ble ITAT is as under:-

"3. We have heard the Id. A/R as well as the Id. D/R and considered the relevant material on record. At the outset, we note that this issue is covered in favour of the assessee by various decisions of Hon'ble Jurisdictional High Court including decision in case of CIT vs. SBBJ, 363 ITR 70 (Raj.) as well as CIT vs. JVVNL, 99 DTR 131 (Raj.). Subsequently, the Hon'ble Jurisdictional High Court in case of CIT vs. Udaipur Dugdh Utpadak Sahakari Sangh Ltd., 366 ITR 163 (Raj.) also decided this issue in favour of the assessee in para 6 to 10 as under :-

"6. It was contended by learned counsel for the Revenue that the CIT(A) and ITAT fell in error in deleting the addition made under Section 36(1)(va) read with Section 2(24)(x) of the Act without considering the facts and legal aspect involved therein. It was submitted with reference to Section 43B of the Act that the deletion of second proviso therein, after the amendment by the Finance Act,

2003; the contribution of the employer is governed by provisions of Section 43B, whereas, employees' contribution continues to be governed by provision of Section 36 (1)(va) read with Section 2(24)(x) of the Act and, therefore, the ITAT fell in error in upholding the order passed by the CIT(A).

7. The effect of deletion of second proviso to Section 43B of the Act was considered by Hon'ble Supreme Court in *CIT v. Alom Extrusions Ltd.* [2009] 319 ITR 306/185 Taxman 416 and it was observed at page 314 of the report as under:-

".....section 43B (main section), which stood inserted by the Finance Act, 1983, with effect from April 1, 1984, expressly commences with a non obstante clause, the underlying object being to disallow deductions claimed merely by making a book entry based on the mercantile system of accounting. At the same time, section 43B (main section) made it mandatory for the Department to grant deduction in computing the income under section 28 in the year in which tax, duty, cess, etc., is actually paid. However, Parliament took cognizance of the fact that the accounting year of a company did not always tally with the due dates under the Provident Fund Act, Municipal Corporation Act (octroi) and other tax laws. Therefore, by way of the first proviso, an incentive/relaxation was sought to be given in respect of tax, duty, cess or fee by explicitly stating that if such tax, duty, cess or fee is paid before the date of filing of the return under the Income-tax Act (due date), the assessee(s) then would be entitled to deduction. However, this relaxation/incentive was restricted only to tax, duty, cess and fee. It did not apply to contributions to labour welfare funds. The reason appears to be that the employer(s) should not sit on the collected contributions and deprive the workmen of the rightful benefits under social welfare legislations by delaying payment of contributions to the welfare funds. However, as stated above, the second proviso resulted in implementation problems, which have been mentioned hereinabove, and which resulted in the enactment of the Finance Act, 2003, deleting the second proviso and bringing about uniformity in the first proviso by equating tax, duty, cess, and fee with contributions to welfare funds."

8. Further the Hon'ble Supreme Court in *CIT v. Vinay Cement Ltd.* [2009] 313 ITR (St.) 1 while dismissing the Special Leave Petition preferred by the Revenue against the judgment of the Guwahati High Court observed as under:-

"In the present case we are concerned with the law as it stood prior to the amendment of section 43B. In the circumstances the assessee was entitled to claim the benefit in section 43B for that period particularly in view of the fact that he has contributed to provident fund before filing of the return."

9. Following the observations of Hon'ble Supreme Court in *Vinay Cement (supra)*, the Delhi High Court in *CIT v. Aimil Ltd. [2010] 321 ITR 508/188 Taxman 265* held at page 518 as under:-

*"We may only add that if the employees' contribution is not deposited by the due date prescribed under the relevant Acts and is deposited late, the employer not only pays interest on delayed payment but can incur penalties also, for which specific provisions are made in the Provident Fund Act as well as the ESI Act. Therefore, the Act permits the employer to make the deposit with some delays, subject to the aforesaid consequences. In so far as the Income-tax Act is concerned, the assessee can get the benefit if the actual payment is made before the return is filed, as per the principle laid down by the Supreme Court in *Vinay Cement (2009) 313 ITR (St.) 1.*"*

10. *In view of the settled legal position, the appeal preferred by the Revenue has no substance and the same is, therefore, dismissed. No costs."*

*We further note that the Id. CIT (A) though accepted the binding precedents of Hon'ble Jurisdictional High Court, however, due to some typographical mistake the decision of Hon'ble Jurisdictional High Court in case of *Principal CIT vs. Rajasthan Renewal Energy Corporation in DBIT Appeal Nos. 10 to 12/2018* has misunderstood the said decision and consequently sustained the addition made by the AO. Hence in view of the binding precedents of Hon'ble Jurisdictional High Court as well as the fact that the assessee already deposited the amount of PF and ESI before the due date of filing of return under section 139(1) of the IT Act, the addition made by the AO is deleted.*

4. In the result, appeal of the assessee is allowed."

19. In view of the above facts and circumstances and respectfully following the decision of the Hon'ble Supreme Court in the case of *CIT Vs. Vinay Cement* as well as the decision of the Coordinate Bench quoted

above (supra), we do not find any merit in the disallowance made by the Assessing Officer U/s 36(1)(va) of the Act.

20. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 29th March, 2019.

Sd/-
(विजय पाल राव)
(VIJAY PAL RAO)
न्यायिक सदस्य / Judicial Member

Sd/-
(रमेश सी शर्मा)
(RAMESH C SHARMA)
लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 29th March, 2019

*Ranjan

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

1. अपीलार्थी / The Appellant- The A.C.I.T./DCIT, Circle-2, Jaipur.
2. प्रत्यर्थी / The Respondent- M/s Ganpati Exclusive Designer Sarees Pvt. Ltd., Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 696 & 1081/JP/2018)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar