

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

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

आयकर अपील सं./ITA No. 1346, 1347 & 1348/JP/2019

Assessment Years :2008-09, 2010-11 & 2011-12

M/s Vaibhav Global Ltd., K-6-B, Fateh Tiba, Adarsh Nagar, Jaipur.	बनाम Vs.	A.C.I.T., Circle-5, Jaipur.
PAN No.: AAACV 4679 F		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by: Shri S.R. Sharma &
Shri Rajnikant Bhatra(CAs)
राजस्व की ओर से / Revenue by : Shri K.C. Gupta (JCIT)

सुनवाई की तारीख / Date of Hearing: 24/07/2020
उदघोषणा की तारीख / Date of Pronouncement : 24/08/2020

आदेश / ORDER

PER: VIJAY PAL RAO, J.M.

These three appeals by the assessee are directed against the three separate orders dated 22/08/2019, 13/09/2019 and 22/08/2019 of Id. CIT(A)-2, Jaipur for the A.Ys. 2008-09, 2010-11 and 2011-12 respectively. The assessee has raised common grounds in these appeals except the quantum of addition. The grounds raised for the A.Y. 2008-09 are as under:

- “1. That on the facts and in the circumstances of the case, the Id. CIT(A) is wrong, unjust and has erred in law in not accepting contention of the appellant that the proceedings initiated by the Assessing Officer U/s 148 of the I.T. Act, 1961 and consequent

assessment made by him U/s 143(3) r/w Sec. 147 of the I.T. Act, 1961 is wrong and bad in law.

2. *That without prejudice to the ground No. (1) above on the facts and in the circumstances of the case, the Id. CIT(A) is wrong, unjust and has erred in law in upholding the rejecting of books of accounts of the appellant company by the Assessing Officer U/s 145(3) of the I.T. Act, 1961 on account of alleged unverifiable purchases of Rs. 15024461 and in further upholding addition of Rs. 1500000 to the income of the appellant on this count as trading addition.*
3. *That the appellant craves the permission to add to or amend to any of the above grounds of appeal or to withdraw any of them."*

2. The hearing of the appeals was concluded through video conference in view of the prevailing situation of Covid-19 Pandemic.

3. Ground No. 1 of all these appeals is regarding validity of reopening of the assessment. The assessee company is engaged in the business of manufacturing and exports of coloured gems stones and gold studded jewellery and diamonds. The assessee has one Export Oriented Unit (EOU) at Jaipur, two Domestic Tariff Area (DTA) units. The assessee also has one Santacruz Electronics Export Processing Zone located in Mumbai. The assessee filed its return of income for the year under consideration declaring loss of Rs. 86,49,010/-. The scrutiny assessment was completed U/s 143(3) of the Income Tax Act, 1961 (in short, the Act) and the matter was carried up to this Tribunal as well as to the Hon'ble Rajasthan High Court. Thereafter, the A.O. issued notice U/s 148 of the Act on

30/03/2015 by recording the reasons that the assessee has received accommodation entries of bogus purchases and consequently the income assessable to tax has escaped assessment. Similarly, for the A.Y. 2010-11, assessment was completed U/s 143(3) of the Act and thereafter the A.O. issued notice U/s 148 of the Act on 10/11/2017 respectively. The return of income filed for the A.Y. 2011-12 was processed U/s 143(1) of the Act on 28/01/2012 and thereafter the A.O. issued notice U/s 149 of the Act on 23/3/2018. The reassessment proceeding was completed U/s 143(3) r.w.s. 147 of the Act whereby the A.O. made additions after rejecting books of account U/s 145(3) of the Act.

4. The assessee challenged the action of the A.O. before the Id. CIT(A) and also raised objection against the validity of reopening of the assessment. The Id. CIT(A) has dismissed the ground raised by the assessee against validity of reopening of the assessment. However, on merits, the Id. CIT(A) granted part relief by restricting the addition.

5. Before us, the Id AR appearing on behalf of the assessee has submitted that for the A.Y. 2008-09 and 2010-11, assessments were completed U/s 143(3) and notice U/s 148 were issued by the A.O. after expiry of four years from the end of the assessment year. The assessee has produced all necessary records and details during the course of

scrutiny assessment proceedings in response to the notice issued by the A.O. u/s 142(1) of the Act. Even otherwise, the purchases are part of books of account and during the scrutiny assessment, the A.O. has duly verified all the purchases. Further, when all the sales of the assessee are export sales then corresponding purchases cannot be doubted. The Id AR has referred to the notice issued by the A.O. U/s 142(1) of the Act and submitted that the A.O. has specifically asked the assessee to produce all the details which includes the bills and vouchers and party-wise details from whom the assessee made purchases. As per the questionnaire dated 26/08/2010, the A.O. asked the assessee, inter alia, furnished list of all the persons to whom the total sales/any receipt of above Rs. 5.00 lacs booked during the year. Similarly, list of all such persons against whom total purchases/any expenses above Rs. 5.00 lacs have been booked. These requisite information and details were duly filed by the assessee in the reply dated 15/09/2010. After verification of all the details and recording, the A.O. passed scrutiny assessment and made various additions but has not found anything wrong with the purchases and sales of the assessee. Thus, the A.O. examined all the details and the claim of purchases for these two years in the scrutiny assessment. In the reasons recorded, the A.O. has not pointed out any default on the part of the assessee to disclose fully and truly all the materials necessary for the

assessment. Thus, in absence of failure on the part of the assessee to produce fully and truly all necessary material and facts necessary for assessment, the reopening after four years in case of scrutiny, assessment was completed U/s 143(3) of the Act is not valid. He has referred to proviso to Section 147 of the Act and submitted that the A.O. is barred to invoke provisions of Section 147 of the Act after expiry of four years when the original assessment was completed U/s 143(3) as there is no failure on the part of assessee to furnish fully and truly all material facts necessary for assessment. In support of his contention, he has relied upon the decision of Hon'ble Bombay High Court in the case of OHM Stock Brokers Pvt. Ltd. Vs CIT (2013) 351 ITR 443 (Bom) as well as decision of this Tribunal dated 17/12/2019 in the case of M/s Zari Silk India Pvt. Ltd. Vs DCIT in ITA No. 1103/JP/2019. The Id. AR has also relied upon series of decisions of the Hon'ble High Court as well as Supreme Court on the point that the A.O. has no power to exercise U/s 147 of the Act to review its own decision when there was no suppression of any material facts by the assessee.

6. On the other hand, the Id DR has submitted that submitted that after completion of the assessment U/s 143(3) of the Act, the A.O. received information from the Investigation Wing as found during the course of search and seizure action to show that the certain parties were

indulged in providing bogus entries of purchases and the assessee has availed bogus entries from M/s Impex Gems and M/s Jewel Diam. Thus, it is a new material came to the knowledge of the A.O. after scrutiny assessment and therefore, proviso to Section 148 of the Act cannot be invoked. The Id DR has relied upon the judgment of the Hon'ble Supreme Court in the case of Raymond Wollen Mills Vs ITO 236 ITR 34 (SC) and submitted that at the time of reopening of the assessment what is required is to form the prima facie belief that the income assessable to tax has escaped assessment in the hands of the assessee. The sufficiency and correctness of material need not be looked at this stage to initiation of the proceedings. He has relied on the order of the Id. CIT(A).

7. We have considered the rival submissions as well as relevant material on record. There is no dispute that the assessment for the A.Y. 2008-09 and 2010-11 was completed U/s 143(3) of the Act and the matters were even carried out up to the Hon'ble Jurisdictional High Court. The A.O. issued notice U/s 148 of the Act after expiry of more than four years from the end of the relevant assessment year. Thus, the proviso to Section 147 of the Act is relevant and applicable on the facts of the present case at least for the A.Y. 2008-09 and 2010-11. We further note that during the scrutiny assessment, the A.O. issued notice U/s 142(1) of the Act which is attached with a questionnaire containing 21 queries to be

replied by the assessee. Question No. 7 is relevant for the purpose of considering whether the assessee has disclosed fully and truly all material facts necessary for the assessment. For ready reference, we reproduce question No. 7 raised by the A.O. alongwith notice U/s 142(1) of the Act dated 26/08/2010.

"7. Furnish a list of all the person to whom total sales/any other receipt of above 5 lacs has ben booked during the A.Y. 2008-09. Similarly, furnish a list of all such persons against whom total purchase/any other expense above 5 lacs has been booked."

Thus, it is clear that the A.O. asked the assessee to furnish list of all the persons from whom the purchases were made above Rs. 5.00 lacs. The assessee vide reply dated 15/09/2016 has furnished details in the format as given by the A.O.. The reply to question No. 7 of the assessee is also reproduced as under:

"7. Details of purchases and sales exceeding Rs. 5 lacs made during the year under assessment in the given format are enclosed."

Thus, the A.O. has taken up the issue of verifying the purchases and sales both of the assessee at the time of scrutiny assessment and after satisfying himself has completed the assessment U/s 143(3) of the Act. The A.O. has reopened the assessment while recording the reasons as under:

“In this case, on the basis of information brought on record, it is noted that the assessee has taken accommodation entry of Rs. 57,60,222/- in the nature of bogus purchases from Impex Gems and Rs. 92,04,996/- from the JEWEL DIAM. The concern indulges in providing accommodation entries in lieu of cash obtained from the beneficiaries and not doing any genuine business activity as divulged during the course of search and seizure proceedings in the case of Bhanwarlal Jain, Mumbai. The assessee is a beneficiary who has taken the accommodation entries in the nature of bogus purchases which is not genuine as the seller was not carrying on any genuine business activity and was providing accommodation entries in lieu of cash obtained from the beneficiaries.

Similarly it is noted that the assessee has taken accommodation entry of Rs. 59,243/- from the AADI IMPEX. The concern indulge in providing accommodation entries in lieu of cash obtained from the beneficiaries and not doing any genuine business activity as divulged during the course of search and seizure proceedings in the case of Rajendra Jain Group, Sanjay Chaudhary Group and Dharnichand Jain Group, Mumbai. The assessee is a beneficiary who has taken the accommodation entries in the nature of bogus purchases which is not genuine as the seller was not carrying on any genuine business activity and was providing accommodation entries in lieu of cash obtained from the beneficiaries.

Once the assessee produced all the requisite details and record before the A.O. regarding the purchases during the scrutiny assessment, which was duly examined by the A.O. to satisfy him at the time of passing the assessment order U/s 143(3) of the Act and thereafter the A.O. has not even made any allegation that the assessee has failed to disclose fully and truly all material facts necessary for assessment while recording the reasons for reopening of the assessment, the reopening is hit by proviso to Section 147 of the Act. For ready reference, we reproduce 1st proviso to Section 147 of the Act as under:

“147. Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of

the relevant assessment year⁸, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure⁸ on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts⁸ necessary for his assessment, for that assessment year:”

Even the explanation 1 to Section 147 of the Act would not support the case of the A.O. when the A.O. has specifically called all the details and documents including purchases and verified/examined the same at the time of scrutiny assessment. All the purchases were undisputedly recorded in the books of account and also supported by the bills/vouchers as well as payment made by the assessee. Further the corresponding export of the assessee was not disputed by the A.O., therefore, when all these relevant documents were produced before the A.O. as called for by the A.O. vide notice issued U/s 142(1) of the Act then the subsequent information received by the A.O. from the Investigation Wing, Mumbai regarding some of the suppliers indulged in providing accommodation entries of bogus purchases would not change the fact that the assessee produced all the necessary details at the time of scrutiny assessment completed U/s 143(3) of the Act. Therefore, when there is no failure on the part of the assessee to disclose fully and truly all relevant material necessary for assessment and even there is no allegation by the A.O. in the reasons recorded for reopening of the assessment then the A.O. has no power to invoke provisions of Section 147 of the Act after expiry of four years from the end of the assessment year. The Coordinate Bench of

this Tribunal in the case of M/s Zari Sild India Pvt. Ltd. Vs DCIT in ITA No. 1103/JP/2019 dated 17/12/2019 has considered an identical issue in para 7 as under:

"7. We have considered the rival submissions as well as the relevant material on record. There is no dispute that the original assessment under section 143(3) of the Act was completed on 14.12.2010. It is also matter of record that as recorded by the AO in the assessment passed under section 143(3) that a notice under section 142(1) of the Act along with a questionnaire was issued on 17.08.2010 seeking specific details. For ready reference, the questionnaire issued by the AO along with notice under section 142(1) dated 17.08.2010 is reproduced as under :-

Ministry of Finance
OFFICE OF THE
INCOME-TAX OFFICER
WARD-2(2), JAIPUR

[dated: - 17.08.2010]

PAN-AAACZ 2642 3
M/s Zari Silk (India) P. Ltd.,
10-11, Narain Singh Circle, Jaipur.

Sir,

Sub: - Assessment proceeding for the A.Y. 2008-09-reg.

As you are aware that your case is under scrutiny assessment u/s 143(3). In this connection, you are requested to furnish following details/information:-

- 1. Please furnish comparative chart of turnover, G.P. rate for the last three years. Justify with reasons, for decline, if any, in G.P. rate.*
- 2. Furnish copies of accounts in respect of addition made in fixed assets during the year under consideration.*
- 3. Depreciation has been claimed on building constructed-4bn rented land. Please justify.*

4. *Name & add. with PAN of all the shareholders from whom paid up share capital, share application money and share premium amount received during the year. The same details may also be filed in respect of all unsecured loans accepted during the year, including squared up accounts.*
5. *Copies of accounts of all the directors.*
6. *Please produce all books of account, bills/vouchers and relevant records maintained for the year under consideration.*

The above details should reach this office by 27.08.2010 at 11.30 A.M., the date on which your case is fixed for hearing. Notice u/s 142(1) is enclosed.

Encl.: As above.

*Yours faithfully,
Income-tax Officer
Ward-2(2), Jaipur.*

The AO asked the assessee to furnish comparative chart of turnover, GP for last 3 years to justify the reason for decline in the GP rate, if any. In question no. 4, the AO has specifically asked the details of the shareholders from whom the paid-up share capital, share application money and premium money received during the year. The details called by the AO include name, address, PAN of all the shareholders. The AO also asked the assessee to produce all the books of account, bills/vouchers and relevant record maintained for the year under consideration. The AO has stated in the order that in response to the notice issued under section 142(1) the Id. A/R of the assessee attended from to time and furnished the requisite information/details and case was discussed with him. The AO has again stated in the assessment order regarding the necessary details produced by the assessee along with the books of account as under:-

" The assessee was asked to furnish necessary details and to produce complete books of accounts and other records for verification of trading results declared.

In compliance thereto the details required were furnished. Books of accounts consisting of cash book, ledger, bank books, purchase & sales vouchers, bills and vouchers for expenses were produced. The details furnished and records produced were put to test check. After examination of the records produced, the trading results declared by the assessee company are accepted."

All these facts manifest that the assessee produced all requisite details as called for by the AO which include the name and address, PAN of the shareholders, books of account, purchase and sale vouchers, bills/vouchers for expenses. The details produced by the assessee were also checked by the AO and after examination of record, the AO was satisfied with the return of income as well as books of account. We further note that the assessee has also shown the share capital issued during the year in the Balance Sheet as on 31st March, 2008 which clearly indicates that the assessee has given the necessary details of increase in the share capital during the year under consideration along with the premium received by the assessee. Once all these relevant documents were produced before the AO and were subjected to the verification and examination of the AO at the time of framing the assessment under section 143(3), then the subsequent information received by the assessee from the Investigation Wing Mumbai regarding the involvement of Shri Praveen Kumar Jain in providing the bogus accommodation entries will not render the case from production of all necessary details at the time of original assessment framed under section 143(3) to a case of failure on the part of the assessee to disclose fully and truly all relevant facts necessary for assessment. The AO has reopened the assessment by recording the reasons as reproduced in the assessment order itself as under :-

"In the case of assessee company the information was received from investigation Wing, Mumbai in the case of Praveen Kumar Jain group, it observed that the assessee is one of the beneficiaries and has obtained accommodation money received

amounting to Rs. 1.10 crore from the following group concerns details on which is as under:-

S. No.	Name of the Bill provider	PAN No. of Entry Provider	Type of accommodation entry	A.Y.	Amount
1.	Ansh Merchandise P Ltd. (New planet Trading Co P Ltd.	AABCN8176E	Share application money	2008-09	Rs. 8,00,000/-
2.	Alka Diamond Ind Ltd.	AAACA5236D	Share application money	2008-09	Rs.500,000/-
3.	Alka Diamond Ind. Ltd	AAACA5236D	Share application money	2008-09	Rs.8,00,000/-
4.	Javda India Ent. Ltd.	AAACA7065L	Share application money	2008-09	Rs.5,00,000/-
5	Kush Hindustan Ent. Ltd.	AACCK3597M	Share application money	2008-09	Rs.1,000,000/-
6	Nakshatra Business P Ltd (Hema Trading Co. P Ltd)	AABCH4279G	Share application money	2008-09	Rs.1,000,000/-
7	Nakshatra Business P Ltd (Hema Trading Co. P Ltd)	AABCH4279G	Share application money	2008-09	Rs.500,000/-
8	Olive Overseas P. Ltd. (Realgold Trading Co. P. Ltd)	AACCR4512K	Share application money	2008-09	Rs.1,000,000/-
9	Olive Overseas P. Ltd. (Realgold Trading Co. P. Ltd)	AACCR4512K	Share application money	2008-09	Rs.1,000,000/-
10	Olive Overseas P. Ltd. (Realgold Trading Co. P. Ltd)	AACCR4512K	Share application money	2008-09	Rs.500,000
11	Triangular Infocom Ltd.(Lexus Infotech Ltd.	AAACL4646G	Share application money	2008-09	Rs.1,000,000/-
12	Vanguard Jewels Ltd	AAACV3480A	Share application money	2008-09	Rs.5,00,000/-
13	Vanguard Jewels Ltd	AAACV3480A	Share application money	2008-09	Rs.9,00,000/-
14	Yash-V Jewels Ltd.	AAACY1119P	Share application money	2008-09	Rs.5,00,000/-
15	Yash-V Jewels Ltd.	AAACY1119P	Share application money	2008-09	Rs.5,00,000/-
16	Ansh Merchandise P.Ltd. (Newplanet Trading Co P Ltd)	AABCN8176E	Bogus purchases	2008-09	Rs.21,57,500/-
					Total Rs. 1,31,57,500/-

On the basis of this information, survey action u/s 133A(1) of the Income Tax Act, 1961 was carried on in the case of Zari Silk (India) Pvt. Ltd. on 26.11.2014.

Bogus Share Application Money:

The issue regarding introduction of share capital totaling Rs.1.10 crores through 08 shell companies of Mumbai was explored during survey operation. It was found that 1,10,000 shares of face value Rs.10/- had been allotted to these shell companies at premium of Rs. 90/- each. The Director, Sh. Arun Kumar Palawat and his in-house Chartered Accountant Sh. Virendra Dadhich were repeatedly questioned and cross questioned on this issue. They were asked to produce the share Application Forms supposedly submitted by these companies for allocation of shares of the assessee Company (as also recorded in the Minutes of Board meeting dated 1.10.2007, original minutes impounded at exhibit A-9). However, both these persons failed to produce any documents or information in respect of shares so allotted to 08 companies at huge premium. No justification for computation of high premium was given despite specific questioning. Thus, prima facie, the share application money of Rs. 1.10 crores introduced in F.Y. 2007-08 relevant to A.Y. 2008-09 is nothing but accommodation entries.

Bogus Purchases:

It was alleged that the assessee has indulged in inflation of purchases through introduction of bogus purchase bills worth Rs. 21,57,500/- from one New Planet Trading Co. Pvt. Ltd., a shell company owned and operated by Praveen Kumar Jain of Bhayander, Mumbai. In this context, the said original purchase bill was retrieved along with the inward registers for relevant period. It was noticed that goods purported to have been purchased through this company were not found entered in the inward registers. The said registers have also been impounded. Thus, the assertion of bogus entries provided by Praveen Kumar Jain, (as admitted by him during search action on 01.10.2013 at Mumbai) stands corroborated in this survey action. The in-house Chartered Accountant Sh. Virendra Dadhich was specifically questioned on this issue but he failed to provide details and documents where the stock of goods seemingly received from the Mumbai company of Mumbai were recorded. Thus, the 'purchase' of Rs. 21,57,500/- is, prima facie, proved to be bogus and accordingly liable to be added to the assessee's income for the A.Y. 2008-09.

Thus, in view of the information gathered during survey, as corroborated by material impounded during survey, and information received from Investigation Wing Mumbai, I have reasons to believe that income of Rs. 1,31,57,500/- has escaped assessment within the meaning of section 147 of the IT Act, 1961. Hence it is a fit case for issue of notice u/s 148 of the Act." Au

The first part of the reasons recorded by the AO is nothing but the details of share capital received by the assessee from various entities which were already recorded in the books of account and also shown in the Balance Sheet as on 31st March, 2008. The second part of the reasons recorded by the AO is regarding the information received from the Investigation Wing Mumbai and thereafter a survey conducted by the AO at the premises of the assessee. We find that except the non-discovery of the share application forms, nothing was detected by the AO during the survey which can lead to belief that the transaction of share capital received by the assessee is bogus. Thus whatever the AO has

alleged in the reasons recorded and proceedings of survey all these facts and details were part of the books of account already produced before the AO during the scrutiny assessment and were subjected to verification and examination. The third part of the reasons recorded is regarding the purchases worth Rs. 21,57,500/- from the company M/s. New Planet Trading Co. Pvt. Ltd. The AO has considered the said company as shell company owned and operated by Shri Praveen Kumar Jain. This belief was formed by the AO on the basis of the information received from the Investigation Wing Mumbai. Except the Inward Register, no other incriminating material found during the survey to say that the purchases made by the assessee are bogus. It is pertinent to mention that the purchases were made by the assessee when the assessee was having its only show room at M.I. Road, Jaipur whereas the survey was conducted at the show room at Narain Singh Circle, Jaipur. Subsequently the assessee has filed this record of inventory register showing the entries of the alleged purchases. Moreover, during the assessment proceedings under section 143(3), the AO has specifically called for purchase and sales vouchers, bills along with cash book, ledger, bank book and those details were furnished by the assessee for the verification and examination of the AO. The last part of the reasons recorded by the AO is referring the information gathered during the survey as well as material impounded and information received from the Investigation Wing Mumbai. However, except the non availability of the application form at the time of survey and the purchases were not found in the Inward Register at the place of survey, nothing else was detected during the survey proceedings. Most importantly, the AO in the reasons recorded has not made any allegation of failure on the part of the assessee to disclose fully and truly all relevant facts necessary for assessment. In the absence of any allegation that the income has escaped assessment due to the failure on the part of the assessee to

disclose fully and truly all the relevant facts necessary for assessment, the reopening after 4 years from the end of the relevant assessment year is hit by the proviso to section 147 of the IT Act. Once the transaction of share capital received by the assessee as well as purchases made from the said entity are duly recorded in the books of account and were subjected to the verification and examination of the AO, then the reopening of the assessment even on the basis of information received from the Investigation Wing Mumbai after 4 years from the end of the assessment year is not permitted as it will amount to review its own order by the AO and rejecting the documentary evidence produced by the assessee which was already accepted by the AO. This Tribunal in case of ITO vs. M/s. Silver Sand Builders Pvt. Ltd. (supra) has considered an identical issue in para 6 as under :-

"6. We have considered the rival submissions as well as the relevant material on record. The original return of income filed under section 139(1) for all the three years were subjected to scrutiny assessment under section 143(3). Subsequently the AO has proposed to assess the income being notional rent in respect of the closing stock in the commercial complex, namely, Silver Square. The said space which was to be assessed as Income from House Property is at 4th Floor of the said commercial complex. The AO has recorded identical reasons for all the three years. The recorded reasons for the assessment year 2007-08 are as under :-

" Return of income for the A.Y. 2008-09 was filed on 20.07.2009 at an income of Rs. 1,83,170/-. During the course of assessment proceedings for A.Y. 2012-13 it is found that the assessee is a builder and developer and has developed a commercial complex Silver Square at C-18, Bhagwan Das Road, Jaipur.

The project was started on 15.08.2003 and was completed on 10.08.2005. The assessee was requested to file the details of total area constructed and year-wise area sold. In response, the assessee filed details of opening stock as on 1.4.2011 and closing stock as on 31.03.2012. One more request was made vide letter dated 17.03.2015 to file year-wise details of area sold from the date of completion of project but no compliance was made.

Assessment for A.Y. 2012-13 has been completed u/s 143(3) of the I.T. Act, treating the income from unsold portion of project under the head Income from house property keeping in view the finding of Hon'ble Delhi High Court in the case of Commissioner of Income Tax vs. M/s. Ansal Housing Finance & Leasing Co. Ltd. in ITA 18/1999 dated 31.10.2012 wherein it is held that the income from unsold portion of stock in trade is also assessable under the head Income from house property.

On examination of details filed, it is found that the assessee was having 12722.82 Sq. ft. unsold area as on 1.4.2011, meaning thereby that at least this portion of stock 12722.82 sq. ft. was unsold during the F.Y. 2007-08 also.

Further, as per the rent agreement dated 27.06.2006 entered by the assessee with M/s. Dominos Pizza India Ltd. as regards 447.32 sq. ft. of the ground floor of the project, rent of Rs. 70 per sq. ft. per month is shown to be receivable on the let out portion.

Since no details of unsold portion for the F.Y. 2007-08 have been filed by the assessee, and unsold portion of 12722.82 sq. ft. was available with the assessee as on 01.04.2011, it is clear that at least area of 12722.82 sq. ft. was unsold during the F.Y. 2007-08 also. Keeping in view the above facts, I have reason to believe that income to the tune of Rs. 1,06,87,168 (12722.82 sq. ft. x 70 per sq. ft. per month x 12 months) has escaped assessment to tax under the head Income from house property for the A.Y. 2008-09 within the meaning of provisions of

sec. 147 of the I.T. Act. Therefore, permission is being sought for issue of notice u/s 148 of the I.T. Act.”

Accordingly, the AO issued notices under section 148 of the IT Act for the assessment year 2008-09 on 30th March, 2015, for the assessment year 2009-10 on 22nd March, 2016 and for the assessment year 2010-11 on 29th March, 2017. Thus the notices issued under section 148 for all the three years are after the expiry of four years from the end of the respective assessment year. The revenue has not disputed this fact that the reopening in respect of all the three years is after the expiry of four years from the end of the assessment year. It is apparent from the reasons recorded by the AO that the AO proposed to assess the notional rent after determining the ALV of the unsold space at 4th Floor of the commercial complex in question in view of the decision of Hon'ble Delhi High Court in case of CIT vs. M/s. Ansal Housing Finance & Leasing Co. Ltd. (supra). The reasons do not indicate that the AO has received any fresh factual information but all the relevant facts, information and record were available with the AO at the time of framing the scrutiny assessment for all these three assessment years. Though the assessment under section 143(3) for the assessment year 2012-13 was completed prior to the reopening of these assessments and therefore, the said assessment order for the assessment year 2012-13 may constitute tangible material apart from the decision of the Hon'ble Delhi High Court in case of CIT vs. M/s. Ansal Housing Finance & Leasing Co. Ltd. (supra) for forming the belief that income assessable to tax on account of notional

rent in respect of unsold stock of the assessee escaped assessment. However, even if the decision of Hon'ble Delhi High Court and the assessment order passed under section 143(3) for the assessment year 2012-13 may constitute tangible material for forming the belief, the same shall be subject to the fulfillment of the conditions as prescribed in the first proviso to section 147 of the IT Act. There is no allegation by the Assessing Officer in the reasons recorded that the income proposed to be assessed in the reassessment proceedings has escaped assessment due to the failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. Even otherwise, we find that all the relevant material in respect of the issue of assessment of rental income of the unsold stock was already available with the Assessing Officer at the time of scrutiny assessment. Hence, when the original assessment was framed under section 143(3) and the reopening is after the expiry of four years from the end of the relevant assessment year then the Assessing Officer is not permitted to reopen the assessment until and unless the conditions prescribed in the proviso to section 147 are satisfied. The Assessing Officer himself has not alleged that the income proposed to assess has escaped assessment for want of disclosure of all material facts necessary for assessment. The Id. Commissioner of Income Tax (Appeals) has considered this issue in para 3.1.2 as under :-

3.1.2 Determination:

(i) I have duly considered the submission of the appellant, assessment order and the material placed on record. The brief facts of the case are that the appellant company has developed a commercial complex known as 'Silver Square'. It has filed its return of income for the year under consideration u/s 139(1) declaring total income at Rs. 1,83,170/-. The case was selected for scrutiny and the assessment was completed u/s 143(3) determining total income at Rs. 12,79,610/-, which was reduced to Rs. 7,76,476/- after order of the first appellate authority. Subsequently, the AO has initiated proceedings u/s 147 of the Act and has issued notice u/s 148 dated 30.03.2015 and determined the total income of the appellant at Rs. 1,28,16,050/- by making addition of Rs. 1,20,39,569/- under the head 'income from house property'. It would be appropriate to reproduce the reasons recorded by the AO for initiating proceedings u/s 147 of the Act as under:

"Return of income for the A.Y. 2008-09 was filed on 20.07.2009 at an income of Rs. 1,83,170/-. During the course of assessment proceedings for A.Y. 2012-13 it is found that the assessee is a builder and developer and has developed a commercial complex Silver Square at C-18, Bhagwan Das Road, Jaipur. The project was started on 15.08.2003 and was completed on 10.08.2005. The assessee was requested to file the details of total area constructed and year-wise area sold. In response, the assessee filed details of opening stock as on 1.4.2011 and closing stock as on 31.03.2012. One more request was made vide letter dated 17.03.2015 to file year-wise details of area sold from the date of completion of project but no compliance was made.

Assessment for A.Y. 2012-13 has been completed u/s 143 (3) of the I. T. Act, treating the income from unsold portion of project under the head income from house property keeping in view the finding of Hon'ble Delhi High Court in the case of Commissioner of Income Tax vs. M/s Ansal Housing Finance & Leasing Co. Ltd. in ITA 18/1999 dated 31.10.2012 wherein it is held that the income from unsold portion of stock in trade is also assessable under the head Income from house property.

On examination of details filed, it is found that the assessee was having 12722.82 Sq. ft. unsold area as on 1.4.2011, measuring thereby that at least this portion of stock 12722.82 Sq. ft. was unsold during the F.Y. 2007-08 also.

Further, as per the rent agreement dated 27.06.2006 entered by the assessee with M/s Dominos Pizza India Ltd. as regards 447.32 Sq.ft. of the ground floor of the project, rent of Rs. 70 per Sq.ft. per month is shown to be receivable on the let out portion.

Since no details of unsold portion for the F.Y. 2007-08 have been filed by the assessee, and unsold portion of 12722.82 Sq. ft. was available with the assessee as on 01.04.2011, it is clear that at least area of 12722.82 Sq. ft. was unsold during the F.Y. 2007-08 also. Keeping in view the above facts, I have reason to believe that income to the tune of Rs. 1,06,87,168/- (12722.82 Sq. ft. × 70 per Sq. ft. per month × 12 months) has escaped assessment to tax under the head Income from house property for the A.Y. 2008-09 within the meaning of provisions of sec. 147 of the I. T. Act."

(ii) It is to be noted that the assessment in this was reopened after 4 years from the end of the relevant assessment year and thus, the proviso to section 147 comes in to operation, according to which, proceeding u/s 147 can be initiated if two conditions are satisfied,

namely (1) the AO must have reason to believe that income chargeable to tax has escaped assessment **and**; (2) he must have reason to believe that such income has escaped assessment **by reason of omission or failure on the part of the assessee to disclose fully and truly material facts necessary for his assessment**, for that assessment year. Both the condition should be **cumulatively satisfied** to confer jurisdiction to AO to initiate the reassessment proceeding.

(iii) It is evident from the reasons recorded by the AO for initiating proceedings u/s 147 of the Act that it has been stated therein that:

"Since no details of unsold portion for the F.Y. 2007-08 have been filed by the assessee, and unsold portion of 12722.82 Sq.ft. was available with the assessee as on 01.04.2011, it is clear that at least area of 1272282 sq. feet was unsold during the F.Y. 2007-08 also. Keeping in view the above facts, I have reason to believe that income to the tune of Rs. 1,06,87,168/- (12722.82 Sq.ft. × 70 per Sq.ft. per month × 12 months) has escaped assessment to tax under the head Income from house property for the A.Y. 2008-09 within the meaning of provisions of sec. 147 of the I. T. Act."

(iv) It is noted that these details were already filed alongwith the return accompanied with audited final accounts with Notes to Accounts and Audit Report under Companies Act, 1956, for the year under consideration. These details were completely given in note No. 8 of 'Notes to Accounts' and also in Tax Audit Report column No. 28. It would be appropriate to summarize the details in column no. 28 of the tax audit report as under:

(Qty. in square feet)

	Quantitative details of principal items of goods traded in the case of a trading concern	Quantitative details of finished products	Total
Opening stock	3927.4	15080.61	19008.01
Purchases	Nil	Nil	Nil
Quantity manufactured	NA	Nil	Nil
Sales	Nil	1350.23	1350.23
Closing stock	3927.4	13730.38	17657.78
Shortage/excess	Nil	Nil	Nil

(v) It is to be noted that the details under the head 'Total' in the above table are tallying with the details stated in column no. 8 to "Notes forming part of accounts for the year ended on 31st March, 2008". Thus, it is evident that the reasons recorded by the AO for initiating proceedings u/s 147 of the Act were prima facie wrong and based on incorrect facts. Thus, the proceedings initiated u/s 147 on a wrong premise, cannot be legally sustained. It may be mentioned that in the case of CIT vs. Corporation Bank Ltd. [2002] 122 Taxman 826/254 ITR 791 (SC) in a case wherein the balance sheet filed along with the income-tax return, the assessee furnished particulars of interest suspense account showing a sum which was not recoverable for the relevant account year, it was held that the proceedings under Section 147 of the Act was not justified since there was no failure on the part of the assessee to disclose fully and truly the material facts necessary for the assessment.

(vi) In the reasons recorded, the AO has made reference to the addition made in the A.Y. 2012-13 on the similar issue on the basis of

judgement of Hon'ble Delhi High Court in the case of CIT vs. M/s Ansal Housing Finance & Leasing Co. Ltd. (Supra). It is to be noted that this is not a relevant reason for initiating proceedings u/s 147 of the Act as the judgment rendered by even the Hon'ble Supreme Court is an expression of opinion on the interpretation of statute. The power u/s 147 of the Act will have to be invoked by the AO in accordance with the said provision. In other words, merely because a judgment has been rendered, the same cannot be a ground for reopening the assessment under s. 147 of the Act. Reliance is placed on CIT Vs Baer Shoes (India) (P) Ltd. [2010] 235 CTR 194 (Mad.), wherein it was held that where material facts were fully disclosed and assessment was completed allowing deduction u/s 80HHC on export incentive, such an assessment cannot be reopened based upon a subsequent decision of Supreme Court. Further, in the case of DCIT Vs Simplex Concrete Piles (India) Ltd. [2012] 25 taxmann.com 283 (SC), it has been held by the Hon'ble Apex Court that an assessment stood closed on basis of law as it stood at relevant time cannot be reopened in view of subsequent reversal of legal position by judgment of Supreme Court.

(vii) In the case of Madras Suspensions Ltd. Vs DCIT [2017] 88 taxmann.com 256 (Madras), it was held by the Hon'ble High Court Of Madras that:

*After an assessment has been made, in the normal circumstances, there would be no reason for anyone to doubt that the assessment has been made on the basis of all relevant facts. **If the Assessing Officer chooses to entertain the belief that***

***the assessment has been made in the background of the assessee's failure to disclose truly and fully all material facts, it is necessary for him to record that fact, and in the absence of a record to that effect, it cannot be held that a notice issued without recording such a fact is capable of being regarded as a valid notice. As to whether the material facts disclosed by the assessee are full and true is always a question of fact and unless the facts disclosed had been examined in relation to the extent of failure if any on the part of the assessee, it is not possible to form the opinion that there had been a failure on the assessee's part to truly and fully disclose the material facts. A notice issued without a record of the Assessing Officer's reasonable belief that there was such failure on the part of the assessee would be indicative of a failure on the part of the Assessing Officer to apply his mind to material facts, and on that ground also the notice issued would be vitiated."*(emphasis supplied)**

(viii) In the case of Cadila Healthcare Ltd. Vs ACIT [2017] 85 taxmann.com 257 (Gujarat), it was held by the Hon'ble High Court of Gujarat that:

"Claim of exemption of income of Rs.130 crores by way of remuneration as a partner of the firm had come up for consideration before the Assessing Officer in the original assessment proceedings. The Assessing Officer had called upon the assessee to explain the said deduction as remuneration from partnership firm. He called upon the assessee to state how such income was exempt in the hands of the company. In reply to such question, the assessee had explained that such income was not chargeable to tax since the same was added to the total

income of the firm and disallowed under section 40(b), the assessee would therefore get the benefit of section 28(v). The assessee also drew the attention of the Assessing Officer to the addendum to the partnership deed, in which, the provision for payment of remuneration to the partner at the prescribed percentage was made. The assessee also pointed out that identical question had come up for consideration during the scrutiny assessments for the assessment years 2008-09 and 2009-10 and the claim of the assessee was accepted. [Para 14]

■ It was after such consideration that the Assessing Officer passed the order of assessment and made no disallowance on the assessee's claim of exempt income of Rs.130 crores. Two things thus immediately become clear. **First is that, there was no failure on the part of the assessee to disclose the relevant facts truly and fully. The claim was made in the return with full disclosures in the statement of income and the accounts maintained by the assessee. The fact that the claim was also supported by an addendum in the partnership deed was pointedly brought to the notice of the Assessing Officer in reply to the queries raised by him. There was thus, true and full disclosure of all material facts. The second thing is that this very issue with all its elements had come up for consideration before the Assessing Officer during the original assessment for very assessment year. The notice for reopening must fail both on the ground of no failure on the part of the assessee to disclose truly and fully all material facts and also on the ground of attempt on part of the Assessing Officer to re-examine the claim which was originally scrutinized and therefore on the principle of change of opinion. [Para 15]** "(emphasis supplied)

(ix) In the case of Oracle India (P.) Ltd. Vs ACIT [2017] 83 taxmann.com 368 (Delhi), it was held by the Hon'ble High Court of Delhi that:

“■ It requires to be noticed that this is a case where the original assessment for assessment year 2003-04 took place under section 143(3). A very detailed assessment order has been passed in the first instance by the Assessing Officer. The re-opening has been made by the notice dated 31-3-2010 which is after the expiry of 4 years from the end of the relevant assessment order. Therefore, the first proviso to section 147 is attracted.[Para 20]

■ **The jurisdictional requirement that has to be fulfilled for justifying such re-opening of assessment where an assessment originally has been made under section 143(3) and where the re-opening is after the expiry of 4 years from the end of the relevant assessment is that the revenue has to show that some income chargeable to tax escaped assessment by reason of the failure on the part of the assessee 'to disclose fully and truly all material facts necessary for his assessment, for that assessment year'. [Para 21]**


■ It has been repeatedly emphasized in several decisions that the re-opening of an assessment on the same material that was available with an Assessing Officer during the original assessment proceedings would be a case of mere change of opinion.[Para 23]

■ What Explanation (1) does is to clarify that the mere production of the account books or other evidence by the assessee before an Assessing Officer from which the Assessing

Officer, with due diligence, could have discovered 'material evidence' would not necessarily amount to disclosure. In other words, the fact of production of the account books and other evidence should not be presumed to be the making of a disclosure of 'all material facts' by the assessee. Nevertheless, the burden is on the Assessing Officer to show that there has been a failure by the assessee to disclose fully and truly all material facts necessary for the assessment.[Para 24]

■ *In a situation where the assessee has already produced all the account books and other evidence, while Explanation (1) may not lead to an automatic presumption of disclosure, unless there is some fresh tangible material available with the Assessing Officer, he will not be able to show that there was a failure on the part of assessee to disclose fully and truly all material facts. If the material is that which was already available during the original assessment proceedings, the Assessing Officer will be unable to show that there has been a failure by the assessee to disclose fully and truly all material facts.[Para 25]*

■ *The expression 'will not necessarily amount to disclosure' as used in Explanation 1 to section 147 brings in an element of subjectivity and also the requirement of assessing on a case-to-case basis where in fact there has been a full disclosure by virtue of the assessee producing the account books and other evidence in the first instance. This explanation, therefore, would not relieve the Assessing Officer of the burden of demonstrating the assessee's failure to make a full and true disclosure of all material facts necessary for the assessment for the assessment year in question.[Para 26]*



■ **A second aspect of the matter is that the above jurisdictional requirement should be shown to have been fulfilled from the reasons for re-opening of the assessment. In other words, the reasons must speak for themselves. The mandatory jurisdictional requirement in terms of the first proviso to section 147 will not be fulfilled if the reasons do not themselves clearly indicate that there was in fact a failure by the assessee to make a full and true disclosure of all material facts. The reasons have to explain what the material was that was not disclosed by the assessee which the assessee ought to have disclosed in the first instance. This should be apparent from a reading of the reasons themselves. The reasons have to go beyond merely repeating the language of the provision regarding the failure of the assessee to make a full and true disclosure of material facts. They should indicate in what manner was there such a failure.[Para 27]**

■ *In many of the cases, where the re-opening of an assessment is challenged, the revenue tries to make up for the obvious defect in the reasons themselves which do not spell out the reasons by providing a justification at the stage of disposal of the objections or later in the counter-affidavit when the re-opening is challenged by a writ petition. This, again, is impermissible in law. Since the reasons must speak for themselves, a subsequent attempt to supply the omission at the stage of an order disposing of the objections raised by the assessee or providing them in the counter-affidavit in reply to the writ petition or even worse, making good that defect in the course of arguments before the Court, will simply not suffice.[Para 28]"*

(x) In the case of CIT Vs Hindustan Zinc Ltd. [2016] 70 taxmann.com 262 (Rajasthan), it was held by the Hon'ble High Court of Rajasthan that:

■ *In the matter of Calcutta Discount Co. Ltd. v. ITO [1961] 41 ITR 191, the Supreme Court while dealing with the ambit and scope of the provisions of section 34 of the Indian Income Tax, 1922, which were similar to the provisions of section 147 of the Act of 1961 observed that **it is duty of every assessee to disclose fully and truly all material facts necessary for his assessment. But, his duty does not extend beyond this. The Supreme Court opined that once all primary facts are before the Assessing Authority, he requires no further assistance by way of disclosure. It is for him to decide what inferences of facts can be reasonably drawn and what legal inferences have ultimately to be drawn. [Para 6] (emphasis supplied)***

(xi) It may be mentioned that in the case of Akshar Developers Vs ACIT [2018] 95 taxmann.com 104 (Bombay), it has been held by the Hon'ble High Court of Bombay that:

"3. This petition under Article 226 of the Constitution of India challenges the re-opening notice dated 30th March, 2017 issued under Section 148 of the Income Tax Act, 1961 (the Act) seeking to re-open the assessment for Assessment Year 2010-11. The assessment for the Year 2010-11 was completed on 20th March, 2014 under Section 143(3) read with Section 153A of the Act. The reasons in support of the impugned notice is the information received from the Deputy Director of Income-Tax (INV) Unit 7(4) stating that the petitioner had a Bank Account bearing No.

36/CD/441 with Abhudaya Co-operative Bank Limited, APM, Vashi Branch, Navi Mumbai. It is alleged in the reasons that the petitioner had failed to disclose the aforesaid bank account during the assessment proceedings. The petitioner had filed its objections by letter dated 23rd May, 2017 to the reasons inter-alia pointing out that during the course of assessment proceeding, the petitioner had submitted details of its Bank Accounts including that of the Abhudaya Co-operative Bank Limited. Besides, the same Bank Account is also reflected even in their Balance Sheet which is a subject matter of consideration during the assessment proceedings. The order disposing off the objection is completely silent with regard to the petitioner's contention that there was no failure on its part to disclose all facts with regard to the subject Bank Account during the assessment proceedings to the Department. The impugned notice being beyond the period of four years is hit by the first proviso to Section 147 of the Act and in absence of any failure to disclose the facts fully and truly, the Assessing Officer cannot exercise jurisdiction. Prima-facie, it appears that the impugned notice is without jurisdiction. Accordingly, there shall be interim stay restraining the Revenue from acting further upon the impugned notice dated 30th March, 2017 for Assessment Year 2010-11."

Reliance is also placed on the judgement of Hon'ble ITAT, Jaipur dated 13.12.2017 in the case of Navrattan Kothari vs. ACIT in ITA No. 425/JP/2017 wherein similar view was taken by the Hon'ble ITAT.

(xii) Therefore, in view of the above discussion and looking to the totality of facts and circumstances of the case, it is held that the

initiation of proceedings u/s 147 of the Act by the AO for the year under consideration was not in conformity with the provisions of section 147 of the Act. Further, the assessment was reopened after 4 years from the end of the relevant assessment year, which was earlier completed u/s 143(3) of the Act, therefore, proviso to the section 147 of the Act is clearly applicable to the facts of the instant case under consideration.

(xiii) It has already been discussed in the earlier part of this order that the details of unsold portion of the closing stock was stated in the tax audit report and 'Notes to Accounts' to the audit report filed under the Companies Act and thus, there was no failure on the part of the appellant to disclose, truly and fully all material facts, which are necessary, for its assessment for the year under consideration, at the time of original assessment proceedings. Hence, it is held that the conditions required for initiation of reassessment proceedings, as stipulated in the proviso to section 147 of the Act were not satisfied. Therefore, in view of the above discussion, looking to the facts and circumstances of the case, it is held that the reassessment proceedings initiated by the AO under consideration were bad in law and consequently, the assessment order based on such bad initiation cannot be allowed to be sustained and thus, hereby quashed.

Thus it is clear that the Id. CIT (A) has followed various decisions including the decision of Hon'ble Jurisdictional High Court in case of CIT vs. Hindustan Zinc Ltd. 393 ITR 264 (Raj.) Accordingly, in view of the above facts and circumstances as well as the binding

precedents on the issue, we do not find any error or illegality in the impugned order of the Id. CIT (A) qua this issue.”

In the said case the Id. CIT (Appeals) as well as the Tribunal has considered the judgment of Hon’ble Jurisdictional High Court in case of CIT vs. Hindustan Zinc Ltd. 393 ITR 264 (Raj.) wherein it was held that the duty of the assessee to disclose fully and truly all material facts necessary for his assessment does not extend beyond the furnishing of all the primary facts before the assessing authority and the AO was satisfied with the said disclosure of the assessee in the original assessment. Therefore, once the assessee has disclosed all the relevant facts whatever assessee was supposed to disclose, then treating a particular transaction as bogus would not amount to non disclosure of the necessary facts by the assessee. In view of the above facts and circumstances of the case as well as the various decisions as relied upon by the Id. A/R of the assessee, we are of the considered view that when there is no allegation of the AO in the reasons recorded that income assessable to tax has escaped assessment due to failure on the part of the assessee to disclose all facts necessary for assessment, the notice issued by the AO under section 148 on 5th February, 2015 after 4 years from the end of the assessment year is hit by the first proviso to section 147 and thereby the AO cannot exercise the jurisdiction to reopen the assessment. Hence we hold that the initiation of proceedings under section 147/148 of the I.T. Act is bad in law. The same is quashed.”

There is no dispute that in the case in hand, the assessee disclosed all necessary and primary facts during the scrutiny assessment which were duly examined and verified by the A.O. while passing the assessment order. The requirement of assessee to disclose fully and truly all material

facts necessary for assessment does not extend beyond furnishing of the primary facts before the assessing authority. Hence, in absence of any failure on the part of the assessee to disclose fully and truly all relevant material facts for reopening of the assessment is not valid as the condition precedent for exercising the power of reopening of assessment as provided U/s 147 of the Act was absent and consequently the A.O. acted beyond his power while issuing notice U/s 148 of the Act. Accordingly, the reopening of the assessment for the A.Y. 2008-09 and 2010-11 are invalid and the same is quashed.

8. For the A.Y. 2011-12, since the assessment was not completed U/s 143(3) of the Act and return was processed U/s 143(1), therefore, the proviso to Section 147 of the Act cannot be invoked. Therefore, ground No. 1 of the appeal for the A.Y. 2011-12 is dismissed.

9. Ground No. 2 of the appeals is regarding the addition made by the A.O., which was partly sustained by the Id. CIT(A) on account of unverifiable purchases. For the purpose of recording the facts, appeal for the A.Y. 2008-09 is taken as a lead case for deciding this issue in ground No. 2, which is common in all three appeals.

10. In the reassessment proceedings, the A.O. rejected the books of account of the assessee by invoking provisions of Section 145(3) of the

Act and thereafter made addition @ 25% of the purchases made from these two parties namely Impex Gems and Jewel Diam. Thus, the A.O. made trading addition equivalent to 25% of alleged unverifiable purchases. On appeal, the Id. CIT(A) has restricted the addition to a lump sum amount after considering the G.P. declared by the assessee for the preceding years.

11. Before us, the Id AR of the assessee has submitted that the Id. CIT(A) has not considered the average of G.P. declared by the assessee for the preceding years but sustained the addition on lump sum basis which is not in accordance with the principle laid down by the Hon'ble Jurisdictional High Court. In support of his contention, he has relied upon the following decisions:

- (i) ITAT, Jaipur Bench, Jaipur in case of Vijay Kedia (HUF) Vs. ACIT (ITA No. 197 & 248/JP/2016) decided on 29-01-2018
- (ii) ITAT, Jaipur Bench, in case of DCIT Vs. Gem Paradise (ITA No. 747 & 65/JP/12) vide order dated 26-12-2017.

Thus, he has pleaded that the addition sustained by the Id. CIT(A) may be deleted when the G.P. declared by the assessee for these assessment years is better than the past history of the G.P. declared by the assessee.

12. On the other hand, the Id DR. has submitted that the A.O. has made a disallowance of 25% of the alleged bogus/unverifiable purchases

which is on the basis of decision of Hon'ble Gujarat High Court as well as the Hon'ble Supreme Court in the case of Vijay Proteins Ltd. Vs CIT (2015) 58 taxmann.com 44 (Guj). However, the Id. CIT(A) has already granted a substantial relief by reducing the addition by considering the past history of the G.P. declared by the assessee. He has relied on the orders of the authorities below.

13. We have considered the rival submissions as well as relevant material on record. The A.O. rejected the books of account of assessee by invoking provisions of Section 145(3) of the Act. Once the A.O. has rejected books of account U/s 145(3) of the Act, the income of the assessee is required to be estimated by considering some proper and reasonable basis. The A.O. has to pass a best judgment assessment in terms of Section 144 of the Act and therefore, the income of the assessee has to be estimated by considering either the G.P. declared by the assessee in past years or the G.P. prevailing in the particular trade and business. It is settled proposition of law that for estimation of the income after rejection of books of account, the average of the past history of the G.P. declared by the assessee is a proper guidance. The Hon'ble Jurisdictional High Court in the case of CIT(A) Vs. Gupta K.N. Construction Co. 371 ITR 325 as well as in the case Clarity Gold (P) Ltd. Vs PCIT 102 taxmann.com 421 has held that the average of past history

by the assessee is a reasonable and proper guidance for estimation of the income of the assessee after rejection of books of account. The Id. CIT(A), though, considered the G.P. declared by the assessee in the preceding years and also considered the decision of this Tribunal in the case of Allied Gems Corporation in ITA No. 794/JP/2011 and in the case of Rajkumar Agarwal in ITA No. 504/JP/2013, however, while restricting the addition, the Id. CIT(A) has not strictly followed the principle as laid down by the various binding precedents. For ready reference, we reproduce the finding of the Id. CIT(A) in para 3.3.2 and 3.3.4 as under:

“3.3.2 Since, certain purchases remained unverifiable and even in reopened proceedings, assessee could not get them verified by producing the parties for verification therefore books of account are not reliable. Once provision of Section 145(3) are applicable, income is to be estimated by seeing past history. The Hon’ble ITAT Jaipur Bench in various decisions as cited by Id AR of the assessee also held that the basis of estimation should be the past history of the assessee.

In the recent decision of Allied Gems Corporation ITA No. 794/JP/2011 and Rajkumar Agarwal ITA No. 504/JP/2013 the Hon’ble ITAT restricted the addition to the average GP rate based on past years.

Thus, in view of above judicial pronouncement after rejecting Books of Accounts, the past history of the assessee has to be seen for estimating the profit of the appellant.

3.3.4 *In view of these facts, the addition made by the Assessing Officer is restricted to Rs. 15,00,000/- which is upheld. The balance addition of Rs. 22,56,116/- is deleted. These grounds of appeal are partly allowed.”*

Thus, it is clear that the Id. CIT(A) has principally followed the decisions of this Tribunal for estimation of the income after rejection of books of account. However, the addition sustained by the Id. CIT(A) is not based on the average G.P. declared by the assessee in the preceding years. For ready reference, we reproduce the G.P. declared by the assessee in the preceding years as well as for the A.Y. 2008-09 as under:

A.Y.	Turnover	Gross Profit	Gross Profit rate
2005-06	13,82,02,480/-	(-) 54,99,656/-	-3.98%
2006-07	11,38,66,205/-	(-) 43,30,227/-	-3.80%
2007-08	38,23,48,612/-	27,77,251/-	0.73%
2008-09	51,82,95,195/-	(-) 35,79,872/-	- 0.69%

From the above details, it is clear that for the A.Y. 2005-06 to 2007-08, the average G.P. declared by the assessee is (-2.38%) where for the A.Y. 2008-09 the G.P. declared by the assessee is (-0.69%) which is better than the average of past history of the G.P. declared by the assessee. Similarly, for the A.Y. 2010-11, the assessee has declared G.P. of (-4.64%) which is less than the average of past history and therefore, the income of the assessee is required to be estimated by taking average of G.P. declared by the assessee in the preceding year at (-2.38%). However, since we have quashed the reopening of the assessment for the

A.Y. 2008-09 and 2010-11, therefore, no consequential addition is called for.

14. For the A.Y. 2011-12, the assessee has declared G.P. of (-1.38%) which is better than the average of past history of (-2.38%), accordingly, no addition is called for even after rejection of books of account U/s 145(3) of the Act. It is settled proposition of law that the rejection of books of account would not ipso facto result to an addition if the G.P. declared by the assessee is better than the past history of the gross profit. Accordingly, in view of the above facts and circumstances of the case, the addition made by the A.O. for the A.Y. 2011-12 is deleted.

15. In the result, appeals for the A.Y. 2008-09 and 2010-11 are allowed and the appeal for the A.Y. 2011-12 is partly allowed.

Order pronounced in the open court on 24th August, 2020.

Sd/-
(विक्रम सिंह यादव)
(VIKRAM SINGH YADAV)
लेखा सदस्य / Accountant Member

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

जयपुर / Jaipur

दिनांक / Dated:- 24/08/2020

*Ranjan

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

1. अपीलार्थी / The Appellant- M/s Vaibhav Global Ltd., Jaipur.
2. प्रत्यर्थी / The Respondent- The A.C.I.T., Circle-5, 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. 1346, 1347 & 1348/JP/2019)

आदेशानुसार/ By order,

सहायक पंजीकार/Asst. Registrar