

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT
BEFORE SHRIPAWAN SINGH, JM & DR. A.L.SAINI, AM
आयकरअपीलसं./ITA No.699/SRT/2018
(निर्धारणवर्ष / Assessment Years: (2015-16)
(Virtual Court Hearing)

The ACIT, Valsad Circle, Valsad.	Vs.	M/s. Mangaldeep, 1 st Floor, Shankeshwar Complex, Dhobiwad, Valsad, Valsad-396001.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AAHFM7130L		
(Appellant)		(Respondent)

Cross Objection No.11/SRT/2021
[Arising in ITA No.699/SRT/2018]
(निर्धारणवर्ष / Assessment Years: (2015-16)
(Virtual Court Hearing)

M/s. Mangaldeep, 1 st Floor, Shankeshwar Complex, Dhobiwad, Valsad, Valsad-396001.	Vs.	The ACIT, Valsad Circle, Valsad.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AAHFM7130L		
(Applicant-Co-objector)		(Respondent)

Assessee by	Shri Rajesh Upadhyay, Advocate
Respondent by	Shri H. P. Meena, CIT(DR)
Date of Hearing	11/01/2022
Date of Pronouncement	27/01/2022

आदेश / ORDER

PER DR. A.L. SAINI, AM:

Captioned appeal filed by the Revenue and Cross-Objection filed by the assessee, pertaining to Assessment Year (AY) 2015-16, are directed against the order passed by the Commissioner of Income Tax (Appeals), Valsad, [in short “the ld. CIT(A)”] in Appeal No. CIT(A)/VLS/1023/17-18/748 dated 20.08.2018, which in turn arise out of an assessment order passed by the Assessing Officer under section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as “the Act”) dated 29.12.2017.

2. Grounds of appeal raised by the Revenue are as follows:

- (i) Whether on the fact and circumstances of the case and in law, the Ld.CIT(A) is right in allowing the appeal of the assessee and deleting the addition made by the A.O on account of u/s 69A on the basis of documents impounded during the course of survey proceedings.*
- ii) Whether on the facts and circumstances of the case, the Ld. CIT(A) has erred in not appreciating the fact that had the Department not conducted survey u/s 133A of the IT Act, 1961 at the premises of the assessee firm and impounded the documents found, the assessee firm would not have disclosed the above unaccounted amount to the Department for taxation.*
- (iii) Whether on facts and the circumstances of the case, the CIT(A) is right in deleting the addition made out of certain expenses amounting to Rs.1,58,061/- even though similar addition was made for A.Y. 2013-14, which was confirmed in first appeal.*
- (iv) Whether on facts and the circumstances of the case, the CIT(A) is right in deleting the addition of Rs.36,060/- made on the basis of impounded material, during the course of survey.*
- v) It is therefore, prayed that the order of the CIT(A), be set-aside and that the order of the Assessing Officer be restored.*
- vi) The assessee craves to add, modify or alter any grounds during the course of appeal proceedings.”*

3. Grounds of appeal raised by the assessee in Cross Objection No. 11/SRT/2021, are as follows:

- 1. Ld. CIT(A), Valsad has erred in law and on fact to uphold AO's disallowance of Rs.57,867/- U/s 14A of the Act without considering the fact that the assessee has not incurred any expenses to earn dividend income from reliance Mutual Fund. He also erred in following his own order in assessee's case for earlier year.*
- 2. Ld. CIT(A), Valsad has erred in law and on fact to confirm Ao's addition of Rs.27,467/- being income u/s 36(1)(va) r.w.s 2(24)(x) of the Act on account of Employee's Contribution towards PF and ESIC ignoring the fact that there is no late payment considering date of payment of Salary to employees.”*

4. First, we shall adjudicate Revenue's appeal in ITA No.699/SRT/2018 for AY.2015-16. Ground No.1 and 2 raised by the Revenue relates to addition made by the Assessing Officer of Rs.3,37,03,023/-, under section 69A of the Act.

5. We advert to the relevant facts. The assessee before us is a partnership firm and filed its return of income for assessment year (A.Y.) 2015-16, on 21.09.2015 declaring total income of Rs.2,73,42,365/-. The assessee is engaged in the business of trading of cloths. It is deriving income from profit and gains of business or profession. The assessee's case was selected for scrutiny and notice u/s 143(2) of the Act was issued on 16/08/2016. In assessee's case a survey u/s 133A of the Act was conducted on 15.10.2014. During the course of survey proceedings, certain incriminating material was found and discrepancies were noticed. To seek clarification/explanation on these incriminating material and discrepancies, statement on oath of Shri Rajeshbhai Kapoorchand Shah, Partner of assessee firm was recorded during the course of survey proceedings wherein difference of Rs.3,37,03,023/- in stock between physical stock and stock as per books of account was noticed, hence, he declared unaccounted stock of Rs.3,37,03,023/- as additional income in addition to regular income for the year under consideration in the name of assessee firm. On perusal of the Profit and loss account, it was noticed by AO that assessee has credited Rs.3,37,03,023/- in its Profit and Loss account being unaccounted stock. Further, it was also noted by assessing officer that assessee has also claimed partner remuneration and interest to partner as expenses against the said income apart from various expenses. Since, the aforesaid income of Rs.3,37,03,023/- which was declared as additional income in addition to its regular business income, therefore, assessing officer issued notice to the assessee and assessee was asked to explain as to why the aforesaid income of Rs.3,37,03,023/- should not be treated as income under section 69A of the Act and the expenses claimed against the same should not be disallowed.

6. In response to the notice of the Assessing Officer, the assessee submitted its reply before the assessing officer, which is reproduced below:

"Justification for disclosure of Undisclosed Income under the head" Income from Business & Profession":

Sir there was a survey action u/s 133A, on 15.10.2014 on the premises of the assessee firm. During the course of such proceedings, the assessee firm had voluntarily disclosed an additional income of Rs.3,37,03,203/- being discrepancies found in stock in trade. Now your goodself had asked the AR as to

why undisclosed income should be chargeable under the head "income from business and profession" and not under 69,69A, 69B and 69C of the Income Tax Act, 1961.

In this regard we would like to state that during the course of survey proceedings, the survey officers had physically verified the inventories of the assessee firm and had evaluated the same at Rs.7,53,52,181/-. The survey officers had then calculated the cost of such inventories by subtracting the G.P. percentage of 19% and had valued the inventories at Rs. 6,10,35,000/-. Since the value of such inventories in the books of the assessee firm was Rs.2,73,31,977/-, the partner of the assessee firm had disclosed the difference of Rs.3,37,03,023/- as business income for the year under review. Now, first and foremost ingredient for invoking the provisions of section 69,69A, 69B and 69C of the Act is that there should be a clearly identifiable asset or expenditure. In the present case the entire physical stock of Rs.6,10,35,000/-, was part of the business and it included the disclosed as well as the undisclosed stock.

It is pertinent to note that the survey officers could not distinguish the stock that was recorded in the books of accounts with that which was found during the survey proceedings. The difference in stock so worked out by the authorities had no independent identity of its own and it is part and parcel of entire lot of stock. Thus in a case where source of investment/expenditure is clearly identifiable and alleged undisclosed asset has no independent existence of its own or there is no separate physical identity of such investment/expenditure then first that is to be taxed is the undisclosed business receipt invested in unidentifiable unaccounted asset and only on failure it should be considered to be taxed under section 69 on the premise that such excess investment is not recorded in the books of account and its nature and source is not identifiable. Once such excess investment is taxed as undeclared business receipt then taxing it further as deemed income under section 69 would not be necessary. Since the assessee firm had admitted that the differential amount in the stock as business income, the same has to be accepted as such and not under any other provisions of sections 69, 69A and 69C.

Our this view is fully supported by the judgment of Hon'ble ITAT Ahmedabad in the case of Chokshi Hiralal Maganlal vs DCIT. Also during the course of survey proceedings, the assessee firm had stated that the difference in the stock is nothing but its business income since no material has been brought before the assessee to show that the assessee was engaged in any other activity. Our this view is fully supported by the judgment of Hon. ITAT Ahmedabad in the case of M/s Nilkanth Developers vs. Income Tax Officer.

The assessee firm had duly disclosed the income in its return of income for the year and hence the said has to be taxed u/s 28 of the Income Tax Act, 1961 and not under any heads of 68,69,69A, 69B or 69C as the source of stock was explained to the survey officers. Once it is proved that the undisclosed income is from "Business & Profession" all the expenses claimed by the assessee should be allowed including the interest and remuneration paid to partners. Our this view is upheld by the judgment of Hon'ble High Court of Gujarat in the case of CIT Vs Mhaskar General Hospital wherein it was held that "since the sole business was that of running a hospital. It had no other source of income and that therefore, treating such undisclosed income from other source was not justified. Also, once it is proved that the additional income was from business

then in that case, the remuneration paid to partners had to be deducted while considering profit and loss. Our this view is fully supported by judgment of Hon High Court of Karnataka in the case of CIT Vs S. S. K Srigiri & Bros. (Copy attached) Also, the assessee firm had paid interest on capital and remuneration to partners amounting to Rs.43,59,944/- and Rs.2,75,00,000/- respectively which was offered to tax by its partners in their Return of income. Without prejudice to above in the case the said interest and remuneration is disallowed then in that case, the said tax paid on such income should be refunded. In any case said exercise would be a futile exercise since the result would be tax neutral.

In the light of the above submission, we humbly pray before your good self kindly tax the undisclosed income u/s 28 and not any other sections of 68, 69A, 69B, 69C."

7. However, the Assessing Officer has rejected the contention of the assessee and held that since the excess stock was declared on the basis of difference in physical stock as per books of accounts which was not recorded in its regular books of accounts and the assessee was very well aware that as the above stock was not recorded in its regular books of accounts maintained by it and the same was confirmed by the partner in his statement recorded during the course of survey action. Thus, the entire excess stock found during the course of survey should be assessed as income under section 69A of the Act. Accordingly, the amount of Rs.3,37,03,023/- was treated as income of the assessee under section 69A of the Act and expenses claimed against the said income were also disallowed.

8. Aggrieved by the order of the Assessing Officer, the assessee carried the matter in appeal before the Id. CIT(A) who has deleted the addition made by the Assessing Officer. Aggrieved, the Revenue is in appeal before us.

9. Shri H. P. Meena, Ld.CIT(DR) for the Revenue vehemently argued that during the assessment proceedings, the assessee had admitted that during survey u/s 133A of the Act, the partner of the assessee on oath had offered additional income of Rs.3,37,03,023/- over and above of its regular income being the difference of stock physically found and as per books of account which was not recorded in its regular books of accounts. Since the above stock was declared on the basis of difference in physical stock as per books of accounts which was not

recorded in its regular books of accounts and the assessee was very well aware that as the above stock was not recorded in its regular books of accounts maintained by it and the same was confirmed by the partner in his statement recorded during the course of survey action. Further, the nature and source of acquisition of the above excess stock was not explained by the assessee. Thus, the entire excess stock found during the course of survey should be assessed as income u/s 69A of the Act. Hence, Id DR prays the Bench that addition made by the assessing officer should be confirmed.

10. On the other hand, Shri Rajesh Upadhyay, Learned Counsel for the assessee, begins by pointing out that excess stock of Rs.3,37,03,023/- disclosed during survey was business stock. These were undisclosed business stock, which is taxable under section 28 of the Act. During the survey, the assessee firm had admitted that the difference in the stock is nothing but its business income since no material has been brought before the assessee, by the survey team, to show that the assessee was engaged in any other activity, except business activity. Learned Counsel further submitted that once it is proved that the undisclosed income is from "**Business and Profession**" all the expenses claimed by the assessee should be allowed including the interest and remuneration paid to partners. Learned Counsel also pointed out that income of all the partners are taxable at the maximum marginal rate, hence there is no loss to the revenue. Therefore, Id Counsel pleads that assessee firm had duly disclosed the income in its return of income for the year under consideration and hence the same has to be taxed u/s 28 of the Income Tax Act, 1961. This way, Id Counsel has defended the order passed by Id. CIT(A).

11. We have heard both the parties and carefully gone through the submission put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the fact of the case including the findings of the Id CIT(A) and other materials brought on record. The main issue before us to be adjudicated is that treatment of undisclosed income of Rs.3,37,03,023/- declared during the survey proceedings and consequent disallowance of deduction of

Rs.1,54,98,675/- u/s 40(b)(v) of the Act. Though facts have been discussed in detail in the foregoing paragraphs, however in the succinct manner, the relevant facts and background are reiterated in order to appreciate the controversy and the issue for adjudication. These facts are narrated by Id CIT(A) in his appellate order. In the assessment order, the AO noted that the survey declaration amount in the form of excess stock found during the survey and not recorded in the books of account has to be treated as income from undisclosed sources on the basis of decision of Hon'ble Gujarat High Court in the case of Faqir Mohammad Haji Hasan vs. CIT 247 ITR 290. The AO stated that in the said case of Faqir Mohammad, the Hon'ble High Court held that in cases where the nature of source if investment made by the assessee or nature of source of acquisition of Money Bullion etc. owned by the assessee or the source of expenditure incurred by the assessee are not explained at all or not satisfactorily explained, then such investment/expenditure will be deemed to be income of the assessee. However, when this provision apply and no source of income is disclosed at all on the basis which the income will be classified under the one of the heads of the income u/s 14 of the Act, it would not be to classified as deemed income under any of these heads including income from other sources which have to be sources known or explained. When the Income cannot be classified under any heads of the income u/s 14, it follows that the question of giving deduction under the provision which corresponded to such head of income will not arise.

12. Based on these facts, Id CIT(A) observed that facts of the case of decision of Faqir Mohammad (supra), relied by assessing officer, was distinguishable, as the said person was smuggler involved in anti-social activity whereas the assessee is engaged in genuine business of trading in sarees and dress materials. The assessee had no other business and the physical stock found of Rs.6,10,35,000/- included both recorded as well as unrecorded stock. The differential stock of Rs.3,37,03,023/- had no separate identity as regards to quality, quantity, rate, variety etc. Thus, during appellate proceedings, it was argued by assessee that section 69A cannot be applied. The assessee has also relied on the decision of Hon'ble ITAT Ahmedabad in the case of Nilkanth Developer; Fashion World vs.

ITO in ITA No.1634, dated 12.02.2010, as well as the Hon'ble Gujarat High Court decision in the case of CIT vs. Mahaskar General Hospital,(TA No.1474 of 2009(Guj). In the case of Mahaskar General Hospital, the Hon'ble Gujarat High Court held that since the sole business was that of running a hospital, it had no other source of income and therefore, treating such undisclosed income from other sources was not justified. The facts of the assessee's case, is identical to the decision of Hon'ble Gujarat High Court in Mahskar General Hospital (TA No.1474 of 2009 (Guj), as even after survey proceedings, there was no evidences found to show that the assessee had any other business or source of income apart from the business in trading of saree and dress materials. Hence, considering the binding decision of Jurisdictional High Court and Hon'ble ITAT Ahmedabad, the Id CIT(A) held that disclosed income during the survey proceedings in the form of excess stock Rs. 3,37,03,023/- cannot be sustained as income u/s 69A of the Act. The Id CIT(A) also held that assessee will be eligible to claim deduction under section 40(b)(iv) of the Act, out of book Profits computed which will includethe undisclosed income declared during the survey proceedings. Hence, the disallowance of Rs.1,54,98,765/- as per section 40(b)(iv) of the Act was also deleted by Id CIT(A).

13.We also find merit in the arguments advanced by Shri Rajesh Upadhyay, Learned Counsel for the assessee, to the effect that 'income of all the partners are taxable at the maximum marginal rate, hence there is no loss to the revenue'. We note that interest and remuneration paid to partners by partnership firm is taxable under the head "Business Income", which is subject to maximum marginal rate of income tax @ 30%, and income of the partnership firm is also taxable under the head "Business Income", which is also subject to maximum marginal rate of income tax @ 30%, in this scenario, there should not be any loss to the Revenue. The Id Counsel invited our attention towards paper book page no.54 wherein we find that total income of most of the partners are subject to maximum marginal rate of income tax @30%, hence there should not be any loss to the revenue if partners are getting interest and remuneration out of the amount of excess stock disclosed by the assessee during survey proceedings. At this juncture, it is

appropriate to quote the golden word of Lord Macnaghten, as per Lord Macnaghten, London County Council v Attorney-General 1901 AC 26, 35-6 (HL), 4 TC 265, 293: *“Income Tax, if I may be pardoned for saying so, is a tax on income. It is not meant to be a tax on anything else. It is one tax, not a collection of taxes essentially distinct.”*

14. Since, interest and remuneration paid to partners are **business income** in their respective hands and if the partnership firm does not pay interest and remuneration to the partners then the amount so not paid would be taxable under the head **business income** in the hand of the partnership firm. **Partners and partnership firm** both are subject to maximum marginal rate of income tax @ 30%, hence there is no loss to the Revenue.

15. Besides, the assessee is engaged only in the business of trading of cloths. Therefore, the differential stock of Rs.3,37,03,023/- found during the survey relate to his business, hence it is assessable under the head business income. Reference in this regard can be usefully made to the decision of Hon'ble, Gujarat High Court in Mahskar General Hospital (TA No.1474 of 2009 (Guj), wherein the Hon`ble Court held as follows:

“Respondent assessee is a partnership firm engaged in the business of running a hospital. For the assessment year 2004-05, the assessee filed its return of income. The Assessing Officer, accepted the return substantially except for making disallowance of 10% of the expenses of Rs.5,54,324/- claimed by the assessee and framed the assessment on 21st September 2005. The said order of the Assessing officer dated 21.9.2005 was taken in revision by the Commissioner of Income Tax in exercise of powers under section 263 of the Income Tax Act. The Commissioner noted that during the survey operations under section 133A of the Act at the premises of the assessee firm, the assessee disclosed an additional income of Rs.19,91,000/- which was invested in assets not recorded in the books of accounts. After adding such amount of Rs.19,91,000/- in the income of the assessee for the year in question, the assessee had shown a profit of Rs.7,67,000/- as against the previously arrived at loss of Rs.12,24,000/-. From the said income of Rs.7,67,000/-, the assessee had claimed deduction of a sum of Rs.3,77,000/- towards remuneration of the partners. The Commissioner was of the opinion that such income of Rs.19,91,000/- has to be assessed under section 69 of the Act. The Commissioner, also noted that the assessee had utilized the borrowed funds not for setting up of business, but for expansion of the business inasmuch as the fixed assets of the assessee firm increased and investment in the building also increased substantially. The Commissioner, therefore, was of the opinion that though the interest on borrowed funds utilised for expansion of running business deserves to be allowed, the Assessing Officer should examine the utilization of the borrowed funds for renovation of the building for capitalization. On these two grounds, the Commissioner was of the opinion that the powers under section 263 of the Act are required to be exercised. He accordingly, restored the proceedings to the Assessing Officer for re-framing

the assessment after hearing the assessee. To do so, he came to the following conclusions :
“The assessee has adduced evidence that the interest bearing borrowing funds were not utilized for setting up of the business but the same were utilized for expansion of the business in as much as that fixed assets of the assessee increased from Rs.57,49,512/- to Rs.1,32,36,268/-. The investment in building increased from Rs.37,65,831/- to Rs.65,13,410/- and investment in the plant and machinery incurred by Rs.25,49,930/-. The assessee has not constructed a new hospital and has only added extra facilities in the existing hospital. Therefore, the interest on borrowed funds utilized for expansion of running business deserves to be allowed. However, the A.O. may examine the utilization of borrowed funds for renovation of building for capitalization in the light of the decision of the Hon'ble Supreme Court in the case of Ballimal Naval Kishore 224 ITR 414. The income of Rs.19,91,701/- was declared by the assessee during survey u/s.133A of I.T. Act as investment in assets not recorded in the books of A/c. Once the assessee has admitted the income to represent the investment in assets not recorded in the books of accounts, the income has to be assessed u/s.69 of the I.T. Act. The Department is not to seek or establish any other source of income which could have resulted in such investment.”
The assessee aggrieved by the said order of the Commissioner approached the Tribunal. The Tribunal by the impugned judgment dated 23.2.09 allowed the appeal and set aside the order of the Commissioner. With respect to question of interest bearing borrowed funds not being utilized for setting up of business, the Tribunal observed that though the Commissioner was convinced that such interest was allowable, he required the Assessing Officer to examine the issue in light of the decision of the decision of the Apex Court in the case of Ballimal Naval Kishor v. CIT, (1997) 224 ITR 414. With respect to treatment to undisclosed income of Rs.19,91,000/-, the Tribunal was of the opinion that from the remainder of the profit, the assessee could have claimed deduction for the remuneration paid to the partners. In any case, the Tribunal was of the opinion that when two views are possible, powers under section 263 of the Act could not have been exercised. The Tribunal in this regard relied on the decision of the Apex Court in the case of Malabar Industrial Co. Ltd. v. CIT, 243 ITR 83. The Tribunal also relied on the decision of the Karnataka High Court in the case of CIT v. S.K.Srigiri and Bros. (2008) 298 ITR 13 (Karn). The decision of this Court in the case of Fakir Mohammed Haji Hasan v. CIT 247 ITR 290 (Guj) was distinguished on facts. On behalf of the Revenue, counsel submitted that the Tribunal committed grave error. The Commissioner exercised powers under section 263 of the Act giving cogent reasons and remanded the proceedings before the Assessing Officer for fresh consideration. Such order ought not to have been disturbed. Counsel further submitted that undisclosed income of Rs.19,91,000/- cannot be treated as the business income of the assessee and must be treated to be an income from other source. No deduction from this income can be made for incurring business expenditure. Counsel drew our attention to the decision of this Court in the case of Deputy CIT v. Radhe Developers India Ltd. (Guj) 329 ITR 1. On the other hand, counsel for the assessee submitted that the Assessing Officer committed no error in the assessment order. The Commissioner could not have revised such order even without holding that the order passed by the Assessing Officer is erroneous and is prejudicial to the interest of the Revenue. He submitted that deduction towards interest on borrowed funds would be allowable deduction irrespective of whether the borrowed funds have been utilized for revenue or capital expenditure. Counsel further submitted that the amount of Rs.19,91,000/- was business income of the assessee. It may have been diverted towards construction of building. It nevertheless arose from the sole activity of the assessee, namely, that of business of running hospital. Remuneration to the partners within the limit prescribed under the law was therefore an allowable deduction. He submitted that in any case, even if it is held that two views are possible, powers under section 263 of the Act should not be exercised. Having thus heard the learned counsel for the parties, in so far as the first question on which the Commissioner sought to reopen the assessment by exercising powers under section 263 of the Act is concerned, same permits no debate. It is by now well settled that interest on borrowed funds would be allowable deduction irrespective of whether such funds are utilized for incurring revenue or capital expenditure. Reference in this regard can be made right from the decision of this Court in the case of CIT v. Khedut Sahakari Khand Udyog Mandli, 104 ITR 206. This view was reiterated by this Court in the case of Gujarat State Fertilizer & Chemicals Ltd v. Asst. CIT, (2009) 313 ITR 244 (Guj) as also by the Apex Court in

the case of Deputy CIT v. Core Health Care Ltd., (2008) 298 ITR 194(SC). Therefore, the said ground does not hold valid. With respect to second question, we may notice that the assessee's stand is that its sole business was that of running a hospital. It had no other source of income and that therefore, treating such undisclosed income from other source was not justified. In the case of Deputy CIT v. Radhe Developers India Ltd., (2010) 329 ITR 1(Guj.), this Court while distinguishing the decision in the case of Fakir Mohmed Haji Hasan (supra), observed as under: "The decisions of this Court in the case of Fakir Mohmed Haji Hasan (supra) and Krishna Textiles (supra) are neither relevant nor germane to the issue considering the fact that in none of the decisions the Legislative Scheme emanating from conjoint reading of provisions of sections 14 & 56 of the Act have been considered. The Apex Court in the case of D.P.Sandu Bros. Chembur P. Ltd.,(supra) has dealt with this very issue while deciding the treatment to be given to a transaction of surrender of tenancy right. The earlier decisions of the Apex Court commencing from case of United Commercial Bank Ltd. Vs. CIT (1957) 32 ITR 688 (SC) have been considered by the Apex Court and, hence, it is not necessary to repeat the same. Suffice it to state that the Act does not envisage taxing any income under any head not specified in section 14 of the Act. In the circumstances, there is no question of trying to read any conflict in the two judgments of this Court as submitted by the learned Counsel for the Revenue." In any case, we are convinced that the Tribunal was correct in holding that even if two views are possible, powers under section 263 of the Act could not and ought not to have been exercised. The Apex Court in the case of Malabar Industrial Co. Ltd. observed as under:

"The phrase 'prejudicial to the interests of the revenue has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interests of the revenue, for example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue, or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the revenue unless the view taken by the Income-tax Officer is unsustainable in law. It has been held by this Court that where a sum not earned by a person is assessed as income in his hands on his so offering, the order passed by the Assessing Officer accepting the same as such will be erroneous and prejudicial to the interests of the revenue. Rampyari Devi Saraogi v. Commissioner of Income-tax, (1968) 67 ITR 84 (SC) and in Smt. Tara Devi Aggarwal v. Commissioner of Income-tax, West Bengal, 88 ITR 323." In the case of S.K. Srigiri and Bros. (supra), the Karnataka High Court held as under: "We have perused the orders of the Tribunal. The Tribunal has carefully considered the questions put by the authority and the answer of the partners of the assessee's firm and based on the same, the Tribunal has come to the conclusion that the additional income received by the assessee in the instant case is from business and not from other sources. If the Tribunal has come to the conclusion that the additional income is from business, the remuneration paid to the partners has to be deducted while considering the profit and loss. In the circumstances, we are of the opinion that on facts the Revenue has no case on the merits. So far as the question of law is concerned, we have to answer the same in favour of the Revenue."

In view of the above discussion, we do not find any question of law arises. Tax Appeal is therefore, **dismissed.**"

16. We note that assessing officer has himself stated in his assessment order that "assessee is engaged in the business of trading of cloths", therefore, assessee does not have any income other than business activity, hence, undisclosed income of Rs.3,37,03,023/- declared during the survey proceedings is business income. Considering these facts, and respectfully following the judgment of

jurisdictional Hon'ble, Gujarat High Court in the case of Mahskar General Hospital (supra), we do not find any infirmity in the order of Id. CIT(A). That being so, we decline to interfere with the order of Id. CIT(A) in deleting the aforesaid additions. His order on this addition is, therefore, upheld and the grounds of appeal of the Revenue are dismissed.

17. Coming to Ground No. 3 raised by the Revenue, which relates to deletion of addition of certain expenses amounting to Rs.1,58,061/-. The Revenue has challenged the disallowance of Rs.1,58,061/- @ 1/10th of various business expenses such as depreciation on motor car, interest on car loan, motor car expenses, motor car repairing, mobile phone expenses, telephone expenses and travelling expenses. In the assessment order, the AO noted that the personal and non-business use of the above expenses cannot be ruled out. The Id Counsel contended that books of account are maintained on day to day basis and all business expenses are duly accounted in the books of accounts. The partners had made adequate withdrawal to cover their personal expenses. The AO had not pointed out any single entry of personal expenses during the scrutiny therefore, Id CIT(A) deleted the *ad hoc* addition made by assessing officer.

We note that AO could have ventured into estimation only after rejecting the books of accounts of the assessee u/s 145(3) and thereafter by best judgment assessment u/s 144 of the Act. Here in this case, the AO has not passed any order u/s 144 of the Act. The AO thus without rejecting the books of account of the assessee has gone for estimation on suspicion and conjectures that the assessee may be inflating its expenses. While scrutinizing the expenditure if the expenses claimed are not having any nexus to the business of the assessee or if there is deficiency in the vouchers or there is no bills supporting the incurrence of an expenditure, at the most expenses to the extent that are not supported by the vouchers can be held to be non-genuine and can be disallowed by the AO; and item-wise the AO could have disallowed the expenditure rather than going for *ad-hoc* disallowance of percentage basis of the expenses claimed by the assessee which action of the AO is arbitrary in nature and cannot be

sustained. Considering these facts, we do not find any infirmity in the order of Id CIT(A), therefore, order of the Id CIT(A) is hereby approved and confirmed.

18. Ground No.4 raised by the Revenue relates to deletion of addition of Rs.36,060/- made by the Assessing Officer. The Revenue has challenged the addition of Rs.36,060/- on account of unrecorded purchases from Zenisha Creation Pvt. Ltd. on the ground that the same is already included in the physical stock taken by the department during the survey. In the assessment order, the AO noted that the impounded document BF-1 (page-4) indicated purchases of Rs.36,060/- from Zenisha Creation Pvt. Ltd. but the same was not accounted in the books of the assessee. As no explanation was offered before the AO, the said purchase amount was added to the total income as income u/s 69 of the Act. We have heard both the parties and note that eventhough this purchase was not recorded in the books, however, the physical stock taken during survey and excess stock declared to the tune of Rs.3,37,03,023/- included the said purchase. The Id CIT(A) observed that no finding of the AO as to why this amount could not be considered, as included in the disclosure of excess stock, during the survey. Based on this finding, the Id CIT(A) deleted the addition of Rs.36,060/-. Hence, we are not inclined to accept the contention of the Assessing Officer in any manner and hence the addition so made, has been rightly deleted by Id CIT(A). Hence, we dismiss the ground raised by the Revenue.

19. Now, we shall adjudicate Cross Objection No. 11/SRT/2021 for AY.2015-16. The Ground No. 1 raised by assessee in Cross Objection relates to disallowance of Rs.57,867/- under section 14A of the Income Tax Act. During the assessment proceedings, the assessing officer observed that there must be some expenses are to be incurred. The assessing officer also noted that in assessee's case, various expenses are debited to Profit and Loss account. Thus, the provision of section 14A clearly attracted in the case of the assessee. Accordingly, the assessing officer made addition of Rs.57,867/-. We have heard both the parties and note that no direct expenses were incurred by assessee to earn the dividend income from Reliance Liquid Mutual Fund. There is no fresh investment made by the

assessee during the current year rather it is an old investment made by the assessee out of its own interest free funds. The Id Counsel has referred to several court decision including the decision of Hon'ble Gujarat High Court in the case of CIT v/s Suzlon Energy Ltd (HA No. 223 of 2013) wherein the Hon'ble High Court had deleted the disallowance u/s 14A of the Act on the ground that the investment was made out of interest free fund, had no direct nexus between the interest borrowed funds. Respectfully following the binding precedent of Hon'ble Gujarat High Court in the case of CIT v/s Suzlon Energy Ltd (supra), we delete the addition of Rs.57,867/-.

20. Coming to ground No. 2 raised by the assessee in his Cross Objection, which relates to addition of Rs.27,467/- being incurred under section 36(1)(va) r.w.s 2(24)(x) of the Act on account of Employees Contribution towards Provident Fund (PF) and ESI. Shri Rajesh Upadhyay, has fairly agreed that issue involved in ground no.2 is covered against the assessee by the judgment of the Hon'ble Gujarat High Court in the case of Gujarat State Road Transport Corporation 41 taxmann.com 100 (Guj.), hence the said ground may be dismissed.

21. We have heard both the parties. We note that Ground No. 2 raised by the assessee in his Cross Objection is covered against the assessee by the judgment of the Hon'ble Gujarat High Court in the case of Gujarat State Road Transport Corporation 41 taxmann.com 100 (Guj.) wherein it was held as follows:

“8. In view of the above and for the reasons stated above, and considering section 36(1)(va) of the Income Tax Act, 1961 read with sub-clause (x) of clause 24 of section 2, it is held that with respect to the sum received by the assessee from any of his employees to which provisions of sub-clause (x) of clause (24) of section (2) applies, the assessee shall be entitled to deduction in computing the income referred to in section 28 with respect to such sum credited by the assessee to the employees' account in the relevant fund or funds on or before the "due date" mentioned in explanation to section 36(1)(va). Consequently, it is held that the learned tribunal has erred in deleting respective disallowances being employees' contribution to PF Account / ESI Account made by the AO as, as such, such sums were not credited by the respective assessee to the employees' accounts in the relevant fund or funds (in the present case Provident Fund and/or ESI Fund on or before the due date as per the explanation to section 36(1)(va) of the Act i.e. date by which the concerned assessee was required as an employer to credit employees' contribution to the employees'

account in the Provident Fund under the Provident Fund Act and/or in the ESI Fund under the ESI Act.

9. Consequently, all these appeals are allowed and the impugned judgement and orders passed by the tribunal in deleting the disallowances made by the AO are hereby quashed and set aside and the disallowances of the respective sums with respect to the Provident Fund / ESI Fund made by the AO is hereby restored. The questions raised in present appeal are answered in favour of the revenue. With this, all these appeals are allowed.”

22. Therefore, respectfully following the judgment of the Hon'ble High Court of Gujarat in the case of Gujarat State Road Transportation (supra), we dismiss the ground no. 2 raised by the assessee in his cross objection.

23. In the result, appeals in ITA No.699/SRT/2018 filed by the Revenue is dismissed and CO No. 11/SRT/2021 filed by assessee is partly allowed.

Registry is directed to place one copy of this order in all appeals folder/case files.

Order is pronounced in the open court on 27/01/2022 by placing the result on the Notice Board as per Rule 34(5) of the Income Tax (Appellate Tribunal) Rule 1963.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

सूरत /Surat

दिनांक/ Date: 27/01/2022

SAMANTA

Sd/-
(Dr. A.L. SAINI)
ACCOUNTANT MEMBER

Copy of the Order forwarded to

1. The Assessee
2. The Respondent
3. The CIT(A)
4. CIT
5. DR/AR, ITAT, Surat
6. Guard File

// True Copy //

By Order

Assistant Registrar/Sr. PS/PS
ITAT, Surat