IN THE INCOME TAX APPELLATE TRIBUNAL
AMRITSAR BENCH, AMRITSAR.

BEFORE SH. RAVISH SOOD, JUDICIAL MEMBER
AND Dr. M. L. MEENA, ACCOUNTANT MEMBER

ITA No. 49/(Asr)/2018
Assessment Year: 2014-15

Shri Arvind Kumar, Property Dealer Agency, Jalandhar Road, Hoshiarpur. [PAN: AFWPS0149H]	Vs.	Income Tax Officer, Ward-I, Hoshiarpur.
(Appellant)		**(Respondent)**

Appellant by : Shri Surinder Mahajan, CA
Respondent by: Shri Trilochan Singh PS Khalsa, CIT-D.R.

Date of Hearing: 22.12.2021
Date of Pronouncement: 21.02.2022

ORDER

Per Dr. M. L. Meena, AM:

The appeal has been filed by the Assessee against the impugned order dated 13.01.2017, passed by Commissioner of Income Tax (Appeals)-II, Jalandhar for the Assessment Year 2014-15. In the grounds of appeal, the Assessee has raised the following grounds:

> *"1. That on the facts & circumstances of the case, assessment framed is illegal and bad in law since assessment was required to be made u/s 144 of the Act by invoking provisions of section 145(3) of the Act as against assessment framed u/s 144 of the Act without invoking provisions of section 145(3) of the Act. Conclusion drawn by the learned CIT(A) that*

"assessment has been rightly completed by the AO on the basis of information available on record" is illegal and bad in law.

2. a)That on the facts and circumstances of the case, Learned CIT(A) has grossly erred in confirming addition made by assessing officer of Rs. 200000/- being income from property business by estimating gross receipts at Rs. 10,00,000/- as against gross receipts declared at Rs. 4,46,750/-. Addition confirmed is illegal and bad in law.

b) That Ld CIT(A) has confirmed addition on the basis of assumptions & preemptions and addition confirmed is without any material on records.

3. a) That on the facts and circumstances of the case, Learned CIT(A) has grossly erred in confirming addition of Rs. 35,80,000/- being alleged undisclosed cash deposits in Canara bank.

b) That observations of learned CIT(A) in para 6.7 of appellate order while confirming addition of Rs. 35,80,000/- that "AO has gone through cash flow statement in the course of remand proceedings and given remark that no supporting documents with regard to source of cash which was stated in the statement" are in contradiction with the observation of assessing officer in remand report incorporated in point 7 of para 6.5 of appellate order.

4. That on the facts and circumstances of the case, addition of Rs. 3580000/- made by learned assessing officer u/s 68 of the Act is bad in law since bank pass books are not books of accounts of the assessee.

2. Facts as record are that assessee is an individual engaged in the business of property dealer. He filed return declaring income of Rs. 2,88,309/- on 12.12.2014. The case was selected for limited scrutiny under "CASS" to examine the matter of cash deposits in a saving bank account. The assessee claimed that he filed desired information in response to notices issued u/s 143(2) and 142(1) of the Act, by last attending the proceedings on 26.07.2016. However, a detailed questionnaire issued on 18.10.2016 for attending before the AO on 28.10.2016 vide notice u/s 142(1) dated 17.10.2016 remained uncomplied with. Therefore, the assessment has been completed u/s 144 of the Act as no compliance has been made to the notice u/s

142(1) of the Act dated 17.10.2016. The AO had made addition of undisclosed income of Rs. 2,00,000/- from property business by estimating gross receipts at Rs. 10,00,000/- alleged under stated sales as against Rs. 4,46,750/- declared by the assessee and Rs. 35,80,000/- as unexplained cash deposits in Canara Bank account no. 2719101017729.

3. In ground no. 1, the assessee has alleged that the assessment framed u/s 144 of the Act without invoking provisions of section 145(3) of the Act is illegal and bad in law.

3.1 The Ld. CIT (A) has adjudicated the issue of validity of best judgement assessment u/s 144 of the act vide para 4.5, 4.6 and 4.7 of the impugned order. The learned it CIT appeal observed that Dio has granted number of properties to the appellant assessee as evident from para three of the assessment order. He further observed from the assessment record that appellant assessee has chosen to comply only selectively and filed a copy of bank statement with evidence of some foreign remittances received from abroad but has not produced the books of accounts in response to these specific request made by the AO wide a detailed questionnaire issued under section 1 putted to of one of the act by the AO. It is also noted that the facts has been confirmed by the AO and it is remand report. He landed CIT appeal is further stated that the AO has issued notice under section 142 of the act in the month of June 2016, July 2016 and October 2016 along with a detailed questionnaire. He has discussed that that the additional evidence filed by the appellant assessee at this stage was though objected by the assessing officer but considered after calling for a remand report and the rejoinder of the assessee on the Remand report. The learned it CIT appeal as stated that he is considered the judicial decisions relied upon by the appellant assessee on the issue of show cause notice

required to be given to the appellant before proceeding with ex parte assessment order. After considering the judicial decisions and facts of the case he noted that these decisions were distinguishable on account of factual matrix of the present case. He has also observed that in the present case educator percentage of given by the AO but the appellant had chosen to comply by furnishing information partly. Accordingly, he didn't find any infirmity in the procedure adopted by the AO before proceeding with the completion of assessment on the basis of material available on record. It is further observed that the AO has issued notice under section 142 (1) of the act in the course of assessment proceedings and a questionnaire has also been issued to the appellant for compliance which is not disputed by the appellant. According to the CIT appeal, the AO has been just and fair as he has carefully has been carefully gone through the material brought on record by the appellant in the process of proceedings and has given the benefit of same mile making the addition.

3.2 The Ld. AR for the assessee submitted that the assessment framed is illegal and bad in law since assessment was required to be made u/s 144 of the Act by invoking provisions of section 145(3) of the Act as against assessment framed u/s 144 of the Act without invoking provisions of section 145(3) of the Act and therefore the , conclusion drawn by the learned CIT(A) that "assessment has been rightly completed by the AO on the basis of information available on record" is illegal and bad in law. In support of the ground, he has replicated the written submission made before the CIT(A) as under:

Assessee Submissions

1. That Ld. A.O. has framed assessment on income of Rs. 40,68,309/- as against returned income of Rs. 2,88,309/- by making following additions:-

Net income as per return		*Rs. 2,88,309/-*
Income from property dealership	*Rs. 2,00,000/-*	
Agency as per para 6		
Income from undisclosed cash deposit	*Rs. 35,80,000/-*	
in Canara Bank as per para 7		
Total	*Rs. 37,80,000/-*	*Rs. 37,80,000/-*
	Total taxable income	***Rs. 40,68,309/-***
	Round Off	***Rs. 40,68,310/-***

2. That while making additions, Ld. A.O. in para 5 under the head Income from property dealer Agency etc has observed as under:-

"He was time and again asked to produce books of accounts, vouchers and register etc. if maintained. He was also required to give a brief of his exact nature of his business/profession (refer to query no. 1 & 2 of detailed questionnaire dated 30.05.2016) but he never produced books of account or vouchers etc. Thus his final accounts are not subject to verification and the books of accounts if any maintained although not produced or not reliable. As pointed out supra he ever failed to reconcile the gross receipts from properties although specifically required. No submission in writing in regard to his property business and the nature and source of his bank deposits was ever made before the A.O. Neither any stock in trade is shown as opening stock nor as closing stock which shows that he is conducting property business on attorney basis in which the name of actual owner of the property seldom appear. With such state of affairs of the case I am of the considered view that the turnover of the assessee in the sale/purchase of properties is substantial."

3. That under the head Cash Deposits in para 7 Ld. A.O. has observed as under:-

"There are following cash deposits by the assessee in his account with Canara Bank bearing no. 2719101017729. The assessee was time and again required to explain the nature and source of these deposits with satisfactory evidence. It will be pertinent to mention here that these deposits also appeared as AIR information in the case of the assessee as per this information cash on record. There are as per this information cash deposits of Rs. 54,80,000/- in his account with Canara Bank are detailed as under:-

Sr. No.	***Date***	***Mode of Deposited***	***Amount in Rs.***
1.	*18.06.2013*	*By Cash*	*1,40,000/-*

2.	*11.07.2013*	*By Cash*	*2,00,000/-*
3.	*02.08.2013*	*By Cash*	*16,00,000/-(1300000+1300000)*
4.	*05.12.2013*	*By Cash*	*20,00,000/- (900000+300000+400000+400000)*
5.	*14.12.2013*	*By Cash*	*2,50,000/-*
6.	*19.12.2013*	*By Cash*	*2,50,000/-*
7.	*11.01.2014*	*By Cash*	*70,000/-*
8.	*29.01.2014*	*By Cash*	*1,70,000/-*

From the very beginning, since a detailed questionnaire dated 30.05.2016 was issued to the assessee, the assessee was required to furnish bank pass/bank statements in respect of account maintained by him and also to explain each and every credit entry in these account with satisfactory evidence. In addition to this he was also asked to explain the destination and utilisation of withdrawals of Rs. 10,000/- above. This very requirement was repeated in a subsequent statutory notice u/s 142(1) dated 17.10.2016 (Refer to query no. 4 of this questionnaire). The assessee although filed a copy of bank statement of his account with Canara Bank but he did not submit any explanation/evidence in regard to cash deposits in this account. Similar was the position with reference to withdrawals of Rs. 10,000/- and above."

4. That from the observations made by the Learned Assessing Officer while making additions, it will be observed that assessee has committed two defaults out of any of three defaults required to make the best judgment assessment u/s 144 of the Act.

5. That from the above discussion, it is clear that assessment in this case was required to be made u/s 144 of the Act by invoking provisions of section 145(3) of the Act as against assessment framed u/s 144 of the Act without invoking provisions of section 145(3) of the Act.

6. That at this juncture, section 144 & section 145(3) of the Act are being extracted as under:

"144. *(1) If any person—*
(a) fails to make the return required [31][under sub-section (1) of section 139] and has not made a return or a revised return under sub-section (4) or sub-section (5) of that section, or
(b) fails to comply with all the terms of a notice issued under sub-section (1) of section 142 or fails to comply with a direction issued under sub-section (2A) of that section, or
(c) having made a return, fails to comply with all the terms of a notice issued under sub-section (2) of section 143,
the Assessing Officer, after taking into account all relevant material which the [33][Assessing] Officer has gathered, [34][shall, after giving the assessee an opportunity of

being heard, make the assessment[35]] of the total income or loss to the best of his judgment and determine the sum payable by the assessee [36][* *] on the basis of such assessment :*

Section 145 reads as under:

[81][Method of accounting.[82]

145. *(1) Income chargeable under the head "Profits and gains of business or profession" or "Income from other sources" shall, subject to the provisions of sub-section (2), be computed in accordance with either cash or mercantile system of accounting regularly[82] employed by the assessee.*

(2) The Central Government may notify in the Official Gazette[83] from time to time [83a][accounting standards] to be followed by any class of assessees or in respect of any class of income.

(3) Where the Assessing Officer is not satisfied about the correctness or completeness of the accounts of the assessee, or where the method of accounting provided in sub-section (1) [83b][or accounting standards as notified under sub-section (2), have not been regularly followed by the assessee], the Assessing Officer may make an assessment in the manner provided in section 144.*]*

7. ***From the reading of the provisions of section 144:***

It is evident that one of the three defaults requires the AO to proceed to make best judgment assessment i.e. firstly where the assessee fails to make any return u/s 139(1), 139(4) or 139(5) before making assessment. Secondly, where the assessee has failed to produce accounts, documents, information or a statement of assets and liabilities as required in section 142(1), for the production of which there is a proper requisition, or thirdly, where the assessee, having made a return filed, fails to attend before the AO and to produce or cause to be produced documents or evidence as required by section 143(2) of the Act.

From the reading of section 145(3) of the Act:

It is evident that whenever assessing officer is not satisfied about the correctness or completeness of accounts of the assessee or where the method of accounting provided in section 145(3) has not been regularly followed by the assessee, assessing officer may make an assessment in the manner provided in section 144 of the Act.

From the reading of above two sections:

It is clear that section 144 is to be applied after rejecting books of accounts u/s 145(3) of the Act whereas learned assessing officer has passed the assessment order u/s 143(3) of the Act by making best judgment assessment without rejecting books of accounts.

For this purpose, reliance is being placed on following:

a) DES RAJ NAGPAL vs. ADDITIONAL COMMISSIONER OF INCOME TAX ITAT, AMRITSAR BENCH ITA NO. 75/Asr/2012 Asstt. 2006-07 (2015) 170 TTJ (Asr)(UO) 37

From the reading of the provisions of s. 144, it is evident that one of the three defaults requires the AO to proceed to make best judgment assessment i.e. firstly where the assessee fails to make any return under s. 139(1), 139(4) or 139(5) before making assessment. Secondly, where the assessee has failed to produce accounts, documents, information or a statement of assets and liabilities as required in s. 142(1), for the production of which there is a proper requisition, or thirdly, where the assessee, having made a return filed, fails to attend before the AO and to produce or cause to be produced documents or evidence as required by s. 143(2) of the Act. Apart from the general conditions for invoking s. 144, the importance of proviso to s. 144 is in requiring any opportunity to the assessee by a notice calling upon the assessee to show cause why assessment should not be made to the best of judgment. In the absence of such notice, the default by itself in complying with statutory notice will not be sufficient.

Copy of order is enclosed herewith at page no._____.

Assessment framed without invoking provisions of section 145(3) of the Act makes the assessment framed illegal and bad in law.

8. That in the present case, the assessee has filed the return of income and assessee has not complied with the two situations mentioned in section 144 of the Act i.e. the assessee has not complied with the provisions of section 142(1) where the assessee has failed to produce accounts, documents, information and statement of assets and liabilities. Secondly, having made a return filed and fails to comply with all the terms of a notice issued under section 143(2) of the Act and moreover, as per provisio to section 144 of the Act, no show cause notice for making ex-parte assessment u/s 144 of the Act has been issued to the assessee. Therefore, the AO was required to make best judgment assessment u/s 144 of the Act, after giving opportunity to assessee to show cause why assessment be not completed to the best of his judgment. No opportunity has been given to assessee by serving a notice calling upon the assessee to show cause why assessment should not be completed to the best of his judgment.

9. That sequence of events is as under:-

Sequence of events

Sl.No.	Particulars	Event	Date
1.	Notice u/s 143(3) dated 03.09.2015	This notice was sent by post and received back.	
2.	Notice u/s 143(2) dated 03.09.2015	Served personally on assessee on 15.09.2015	22.09.2015
3.	Notice dated 08.04.2016	Asking for ITR, audit report, balance sheet, bank statement, list of creditors/debtors	28.04.2016
4.	Gourav Garg attended proceedings on 28.04.2016.	Filed copies of ITR's computation of income, trading Profit & Loss, Balance Sheet, Capital A/c filed.	
5.	Notice u/s 143(2) and 142(1) dated 30.05.2016	To produce books of accounts, bank statement, nature of business, destination and utilization of withdrawals of Rs. 10,000/- and above.	Nobody attended
6.	Notice u/s 142(1) dated 10.06.2016	Served on counsel but nobody attended.	13.06.2016
7.	Notice u/s 142(1) dated 17.06.2016	Served on the counsel of the assessee	06.07.2016
8.	06.07.2016 assessee's counsel attended.	Asked for adjournment to file detailed information case adjourned to 26.07.2016.	06.07.2016
9.	26.07.2016 assessee's counsel attended the proceedings.	Filed statement of bank account with Canara Bank alongwith copies of sale/purchase of lands in the name of assessee and his wife to explain credit entries in bank account. Photocopies of foreign remittances were also filed. Books of accounts produced.	
10.	Notice u/s 142(1) dated 17.10.2016	Served on 18.10.2016 Remained uncomplied with.	28.10.2016
11.	Assessment framed u/s 144 on 28.11.2016	Assessment framed in the basis of information on record collected during the proceedings	

		and so on.	

From the above sequence of events, it is clear that assessment has been framed by making best judgment assessment on 28.11.2016 since no reply was furnished and assessment was completed.

10. That it is an established law that assessing officer could not have taken recourse to provisions of section 144 of the Act without giving an opportunity by serving a notice on the assessee to show cause why assessment be not completed to the best of his judgment.

Reliance is being placed on:

a) **HARJINDER SINGH vs. INCOME TAX OFFICER ITAT, AMRITSAR BENCH (2009) 124 TTJ (Asr) 252 : (2010) 122 ITD 476 : (2009) 26 DTR 321**
As per s. 144, inter alia, if a person fails to comply with the terms of a notice under s. 143(2), the AO, after taking into account all relevant material gathered by him shall, after giving the assessee an opportunity of being heard, make the assessment to the best of his judgment. It is important to note here, that the words 'shall, after giving the assessee an opportunity of being heard, make the assessment' have been substituted for the words 'shall make the assessment' w.e.f. 1st April, 1989, by the Direct Tax Laws (Amendment) Act of 1988. It is trite that the legislature uses its words with utmost care. Thus, in its wisdom, the legislature considered it necessary to bring about the above substitution in the section w.e.f. 1st April, 1989. With regard to providing opportunity to the assessee when the AO proceeds under s. 144, the preponderant view has always been in favour of an assessee being given an opportunity to show cause why a best judgment assessment should not be made, before making a best judgment.—Swamy Bros. vs. CIT (1958) 34 ITR 123 (Ker) and K. Baliah & Anr. vs. CIT (1965) 56 ITR 182 (Mys) **relied on.**

b) RAM KISHORE NAND KISHORE vs. INCOME TAX OFFICER ITAT, AGRA BENCH (2004) 89 TTJ 0753
From the amended provisions of s. 144(1), it is seen that w.e.f. 1st April, 1989, it is mandatory to give the assessee an opportunity of being heard. Before the above amendment, there were no provision for giving any opportunity to the assessee before passing ex parte assessment order under s. 144. Prior to the above amendment, there were the words "shall make the assessment". In this case the assessment year under consideration is 1989-90, which starts from 1st April, 1989. The law applicable to any assessment is the law that prevails on the 1st of April of the relevant assessment year.

The AO was statutorily bound to give an opportunity of being heard to the assessee, which could not be given to the assessee. Therefore, the impugned order passed under s. 144 was illegal and bad in law.—Mrs. C. Malathy vs. ITO (2004) 88 ITD 37 (Chennai) followed; CIT vs. Craigmore Plantation India Ltd. (2002) 173 CTR (Mad) 526 : (2002) 253 ITR 447 (Mad) applied.

Under the circumstances, it is most humbly prayed that assessment framed deserves to be annulled since

a) **Provisions of section 145(3) of the Act have not been invoked.**
b) **No notice u/s 144(1) of the Act has been issued prior to framing assessment u/s 144 of the Act.**

3.3 The learner DR stands by the orders of the IT authorities. He submitted that Assessee failed to comply to produce books of accounts and cogent material evidences in compliance to notices u/s 143(2) and 142(1) of the act issued and served time and again on the assessee. Again, one notice u/s 142(1) along with detailed questionnaire before passing the assessment order under section 144 of the Act as to meet out the provision of opportunity to the assessee. Under the facts, the CIT(A) was justified in confirming the validity of the assessement framed u/s 144 of the Act.

3.4 We have heard the rival contentions, perused the material on record and the case laws cited before us. The assessee has not disputed the fact that the AO has issued and served notices under section 143(2) and 142 (1) of the act. Is is also not disputed that subsequently statutory notice u/s 142(1) dated 17.10.2016 issued and served on 18/10/2016 fixing date of hearing on 28/10/2016 with a query no. 4 of the questionnaire regarding unexplained cash deposits in the bank A/c of the assessee which remained uncompiled with as the assessee has only filed a copy of bank statement of his account with Canara Bank but he did not submit any explanation/evidence in regard to cash deposits in this account. It is seen from the table on sequence of events as above that the AO has issued notices under section

143 and 142 to the assessee time and again to produce its books of accounts, cogent documentary evidences to explain the cash deposits in his bank account with Canara bank. The ld. AR argued that the assessment framed u/s 144 of the Act without invoking provisions of section 145(3) of the Act and without granting opportunity under section 144(1) of the act is illegal and bad in law. The ld. CIT(A) has observed that the AO has issued notice under section 142 (1) of the act in the course of assessment proceedings and a questionnaire has also been issued to the appellant for compliance which is not disputed by the appellant. Accordingly, the CIT appeal, was justified in holding that the AO has been just and fair in framing assessment u/s 144 of the act, after carefully going through bank statement filed by the assesse and the material available on record. In order to examine the applicability of section 144 of the act in the present case, we have gone through the provisions which reads as under:

Best judgment assessment.

[50]**144.** [51][(1)] If any person—

(*a*)	fails to make the return required [52][under sub-section (1) of section 139] and has not made a return or a revised return under sub-section (4) or sub-section (5) of that section, or
(*b*)	fails to comply with all the terms of a notice issued under sub-section (1) of section 142 [53][or fails to comply with a direction issued under sub-section (2A) of that section], or
(*c*)	having made a return, fails to comply with all the terms of a notice issued under sub-section (2) of section 143,

the [54][Assessing] Officer, after taking into account all relevant material which the [54][Assessing] Officer has gathered, [55][shall, after giving the assessee an opportunity of being heard, make the assessment[56]] of the total income or loss to the best of his judgment and determine the sum payable by the assessee [57][***] on the basis of such assessment :

[58][**Provided** that such opportunity shall be given by the Assessing Officer by serving a notice calling upon the assessee to show cause, on a date and time to be specified in the notice, why the assessment should not be completed to the best of his judgment :

Provided further that it shall not be necessary to give such opportunity in a case where a notice under sub-section (1) of section 142 has been issued prior to the making of an assessment under this section.]

[59][(2) The provisions of this section as they stood immediately before their amendment by the Direct Tax Laws (Amendment) Act, 1987 (4 of 1988), shall apply to and in relation to any assessment for the assessment year commencing on the 1st day of April, 1988, or any earlier assessment year and references in this section to the other provisions of this Act shall be construed as references to those provisions as for the time being in force and applicable to the relevant assessment year.]

3.5 We have noted the material fact record on record that the assessee had failed to comply with all the terms of notice issued under sub section 1 of section 142 of the act by way of not producing the books of accounts and the other relevant material evidence to explain the cash deposits in the assesses bank account with Canara bank. The second proviso to section 142 of that provides that it shall not be necessary to give such opportunity in a case where a notice under sub-section (1) of section 142 has been issued prior to the making of an assessment under this section as assessment framed by the AO in the present case. It is not the case of the assessee that he has not been issued and served notice under sub section 1 of section 142 of the act. The learned DR contended that the AO has issued the required statutory notices time and again to the assessee before passing the assessment order under section 144 of the act. The case laws relied upon by the landed AR are distinguishable on peculiar facts of the case as in the present case the assessee has neither produced books of accounts in spite of the fact that notices under section 143 (2) and 142(1) were issued as per law before passing the assessment order.

3.6 From the above, it is evident that when books of account were not produced, Assessing Officer could not reject same and make estimated addition against business income and unexplained disputed cash deposits in the

bank account of the assessee by assessing income of the assessee by way of best judgement assessment order u/s 144 of the act. Since the assessee has neither produced the books of account nor the material evidence relevant to explain the quarries raised by the AO regarding the business Income and cash deposits in the bank account except foreign remittances credited as per bank statement and hence the Assessing Officer, under the circumstances, was just and fair framing the assessment u/s 144 of the act where it was not rejection of books as such, but impliedly it was assessment of income as per section145(3) of the act. In the backdrop of the discussion, this ground of appeal of the assessee is rejected.

4. In the second ground of appeal, the assessee has alleged that on the facts, Learned CIT(A) has grossly erred in confirming addition made by assessing officer of Rs. 200000/- being income from property business by estimating gross receipts at Rs. 10,00,000/- as against gross receipts declared at Rs. 4,46,750/-. Addition confirmed is illegal and bad in law as that Ld CIT(A) has confirmed addition on the basis of assumptions & preemptions and without any material on records.

4.1 During the course of assessment proceedings, the AO found that the appellant has failed to furnish the details of business income declared in the return of income filed. The AO noted in the order that appellant had shown gross receipts of rupees for 4,,4 6750 from the property dealing business but in response to the notices showed by the AO appellant failed to produce the books of accounts and vouchers for the expenses claimed, an admitted fact on record. The appellant only objection is that the estimation of income made by the AO without rejecting books of accounts is required under section 145(3) of the act is not justified.

4.2 The landed CIT appeal after considering the material on record, observed that AO has carefully examined the information of 11 record with the return of income with reference to the details of the property transactions exhorted by the appellant and the period under consideration as detailed on page 3 to 4 of the assessment order. He further noted that the appellant has not disputed these transactions before the AO and that after taking the entirety of the facts of the case, the AO estimated gross receipts from the property business at 10 lakhs. The learned CIT appeal further noted that the AO has given a clear findings in paragraph 5 of the assessment order that *"thus, his final accounts are not subject to verification and the books of accounts if any maintained although not produced or not reliable"*. Thus, it clear cut findings has been given by the AO in the assessment order before rejecting the books of accounts and proceedings with the estimation turnover. Accordingly, he confirmed the addition by holding that AO has been fair in estimating the profit at 2 lakhs considering it down claimed in the property business for the last decade.

4.3 We have heard both the sides on the issue of estimation of gross receipt from the property business of the assessee at 10 lakhs. The facts of the case as discussed hereinabove regarding assessee's non-compliance of notices issued and served under section 143(2) and 142(1) by the AO, we have noted that when books of account were not produced, Assessing Officer could not reject same and estimated business receipt at Rs. 10 lacs addition against business receipts of Rs. 4,,4 6750 shown from the property dealing business as in response to the notices issued by the AO, appellant failed to produce the books of accounts and vouchers for the expenses claimed, an admitted fact on record. Thus, assessing business income of the assessee by way of best judgement assessment order u/s 144 of the act in the facts and circumstances where the assessee has

neither produced the books of account nor the material evidence relevant to explain the quarries raised by the AO regarding the business Income from the property transactions and therefore, the Assessing Officer, was just and fair framing the assessment u/s 144 of the act where it may not bet rejection of books as such, but impliedly it was assessment of income as per section145(3) of the act.

4.4 In the case of **'**Income-tax Officer, Ward-1 (2), Rajkot *v.* Smt. Jayaben K. Ghelani**'**[2017] 79 taxmann.com 249 (Rajkot - Trib.) held that Where assessee failed to produce relevant books of account in scrutiny assessment, Assessing Officer was justified in making addition on estimation basis. Head note of the judgement reproduced as under:

> **Section145 of the Income-tax Act, 1961 - Method of accounting - Estimation of income (Estimation of income) - Assessment year 2009-10 - Assessee, filed her return declaring certain taxable income - Assessee's case was selected for scrutiny and a notice under section 143(2) was issued to producebooks of account - Since assessee failed to producebooks of account and other details, Assessing Officer estimated gross profit at 20 per cent of turnover and, accordingly, made addition to assessee's income - Commissioner (Appeals) took a view that when books of account were not produced, Assessing Officer could not reject same and make estimated addition - Whether since books of account were not produced before Assessing Officer, it was not rejection of books as such, but impliedly it was estimation of income as per section145(3) - Held, yes - Whether, therefore, impugned**

order of Commissioner (Appeals) deleting addition was not sustainable - Held, yes [Para 10]

4.5 In the present case, assessee failed to produce books of accounts and required expense vouchers in compliance to notice a issued under section 143 to and 142 one time and again and even in compliance to final notice issued under section 142 one along with a detailed questionnaire. The case laws relied upon by the learned AR are distinguishable on facts as in those cases, the assessees have produced books of accounts whereas in the present case assessee has neither produced the books of accounts nor expense bills. In the backdrop of the above discussion, we hold that the authorities below are just fair and estimating the business turnover of the assessing from the property dealership business and estimating income thereof with due consideration of distress sale in the property business. We do not find any merit in the contentions of the assessee and therefore, this ground of appeal of the assessee is also rejected.

5. Ground number 3 and 4 are interlinked to each other with regards to confirmation of addition of Rs. 35,80,000/- being alleged undisclosed cash deposits in Canara bank.

5.1 From the information available in the ITD database, the AO found that cash deposit of 54 80,000 been made by the appellant in his bank account with Canara bank and the year under consideration. When the appellant was asked to substantiate the source of deposits, only part information was furnished by the appellant with regard to the source of deposits in the form of foreign remittances received from abroad, commission income with copy of bank statement. The assessing officer after carefully examining the same as per para 5 of the assessment order stating therein that having given the benefit of deposits out of

commission income, refunds, and foreign remittances to the extent of 19 lakhs, the balance amount of 3,580,000 was held to be unexplained income of the appellant assessee for the assessment year under consideration.

5.2 The learned CIT appeal has confirmed the addition vide para 6.7 to 6.10 of the impugned order. He has stated that he is carefully considered the assessment order passed by AO, submissions filed by the appellant including counter comments filed and noted that the main issue was regarding addition of 35 80,000 made by AO on account of unexplained cash deposits in the bank account of the assessee. The main grievance of the assessee was that firstly cash flow statement is to be considered before considering the quantum of unexplained cash deposits and secondly the addition has to be quantified on the basis of peak credit in the bank account. The CIT appeal has further stated that in the remand report the AO has submitted that he has gone through the cash flow statement in the course of remand proceedings where no supporting evidences with regard to the source of cash deposit could be brought on record by the appellant and that in the absence of any evidence the amount of unexplained cash deposit has been rightly computed in the assessment order.

5.2.2 CIT appeal further stated that the appellant in the counter comments merely reiterated the submissions and placed reliance on certain judicial decisions to support his contentions. The learned ACIT appeal has observed that having considered the evidence placed on record by the appellant which was admitted in the interest of principles of natural justice as the evidence was critical for working out the quantum of unexplained deposits, he finally agreed with the contentions of the AO as no supporting evidence has been brought on record by the appellant. He was of the opinion that mere filing of cash flow statement parent cash receipts has been stated to be on account of commission income without giving evidence

of the same as to how this commission, has been earned and on which deal it has been earned and as to how it has been accounted for in the books of accounts, it is not acceptable without supporting evidence. The learned CIT noted that the AO has been just and fair at the stage of assessment proceedings in giving credit of cash withdrawals made from the bank account, remittances received from abroad and also the opening cash in hand. Since, the appellant has failed to make out a case and did not furnish any evidence even in the course of the appellate proceedings before him. As regards to the computation of peak deposits is concerned, he found that the stage of assessment has already given benefit of corresponding receipts from abroad, corresponding withdrawals in case and also opening balance of cash in hand while working out the quantum of unexplained deposits. Accordingly, the learned ACIT appeal has held that the AO was justified in treating the deposits to the extent of 3,850,000 as unexplained income of assessee was up assessment year under consideration and he confirmed the same.

5.3 The Ld. AR challenged the observations of learned CIT(A) being made in para 6.7 of appellate order while confirming addition of Rs. 35,80,000/- that "AO has gone through cash flow statement in the course of remand proceedings and given remark that no supporting documents with regard to source of cash which was stated in the statement" are in contradiction with the observation of assessing officer in remand report incorporated in point 7 of para 6.5 of appellate order and that on the facts and circumstances of the case, addition of Rs. 3580000/- made by learned assessing officer u/s 68 of the Act is bad in law since bank pass books are not books of accounts of the assessee. The Ld. AR has filed a brief written submission as under:

a) That Ld. CIT(A) while confirming addition of Rs. 35,80,000/- has observed in last six lines of para 6.7 is as under:

"AO has gone through the cash flow statement in the course of remand proceedings and given a finding that no supporting evidence with regard to the sources of cash which was stated in the statement could be brought on record by the appellant. AO has further stated that in the absence of any evidence the amount of unexplained cash deposits have been rightly computed in the assessee order."

Whereas AO in the remand report in para6 has observed as under:

"Further the AR of the assessee produced additional evidence under Rule 46 of the Income Tax Rules, 1962 with regard to cash deposits in bank account maintained with Canara Bank. Further submitted that credit of following entries not given at the time of passing order u/s 144 of the Income Tax Act, 1961:-

Date	*Particulars*	*Amount*	*Remarks*
05.04.2013	*Commission received*	*60000*	
26.05.2013	*Commission received*	*32000*	

……
……..
……

04.03.2014	*Self Cheque No. 783333*	*100000*	
11.03.2014	*Self Cheque No. 78335*	*100000*	

With regard to the above, AR of the assessee furnished copy of ledger for the period 01.04.2013 to 31.03.2014 of Amarjit Singh S/o Sh. Ganesh Dass and Parveen Bala D/o Sh. Chote Lal, Hoshiarpur which confirm the entry of Rs. 179000/- and Rs.190000/- reflected in the bank account of the assessee. Also filed copies of cash book and cash summary of the assessee Sh. Arvinder Kumar Sood for the period 01.04.2013 to 31.03.2014 which observe that cash deposited in the bank is from books of account and there are no excess cash deposit and no cash has been deposited out of books of accounts.

Although the assessee has furnished additional evidence with documentary evidence, but during the course of assessment proceedings no documentary evidence was filed with regard to cash deposits in bank account maintained with Canara Bank. The A.O. also give the benefit of Rs. 19,00,000/- as explained cash deposit. For the remaining entries of deposit in cash the assessee could not lead any satisfactory evidence during the course of assessment proceedings.

In view of the above submissions and facts of the case, the appeal of the assessee be decided on merits."

b) That observations made by Ld. CIT(A) while confirming addition are altogether different as to observations of the Assessing Officer in the remand report. Assessing Officer in para 6.1 has observed that AR of the assessee has filed copy of ledger for the period from 01.04.2013 to 31.03.2014 of Amarjit Singh and Parveen Bala, has also filed copy of cash book and cash summary from 01.04.2013 to 31.03.2014 as per which cash deposited in the bank is from books of account and no cash has been deposited out of books of accounts. In para 7 he has observed that during assessment proceedings no documentary evidence was filed though now assessee has filed additional evidence with documentary evidence and finally Assessing Officer concluded that appeal of the assessee be decided on merits.

c) That observation of the Assessing Officer in remand report are very clear as to source of cash deposit in the bank account. Assessing Officer in the chart given in para 6 has taken the entries from cash flow statement which matched with the documentary evidence filed by the assessee during assessment proceedings and remand proceedings in the shape of copy of saving bank account, registration deed and copy of ledger accounts. Perusal of the saving bank account will reveal that benefit for cash withdrawn from the bank has not been given during assessment proceedings and same has been considered by the Assessing Officer in remand report.

d) That Assessing Officer has given a positive finding in the remand report that cash deposited in the bank is from books of accounts and no cash has been deposited out of books of accounts.

A. <u>Ground of Appeal No. 4</u>

a) That addition has been made u/s 68 of the Act on account of cash deposited in saving bank account. Addition made u/s 68 of the Act is opposed to following judgments since bank passbook is not part of books of accounts of the assessee.

<u>For this proposition reliance is being placed on:</u>

- **COMMISSIONER OF INCOME TAX vs. BHAICHAND H. GANDHI HIGH COURT OF BOMBAY SOURCE : (1983) 141 ITR 67 (BOM) : (1982) 11 TAXMAN 59**
- **SUNDAR LAL JAIN vs. COMMISSIONER OF INCOME TAX HIGH COURT OF ALLAHABADSOURCE : (1979) 117ITR316 (ALL)**
- **YADWINDER SINGH vs. INCOME TAX OFFICER AMRITSAR TRIBUNAL (2016) 46 CCH 0660**
- **SANJEEV KUMAR vs. INCOME TAX OFFICER WARD 6(3) PATHANKOT, AMRITSAR TRIBUNAL (2016) I.T.A NO. 445 TO 449(Asr)/2015**

5.4 Per Contra, the ld. DR supported the orders of the revenue authorities. He contended that the AO has examined the bank statement and discussed that having given the benefit of explained deposits on account of remittances, commission income and refunds to the extent of 19 lakhs, the balance amount of 3,580,000 was held to be unexplained income of the appellant assessee for the assessment year under consideration. The appellant had not been able to show that there existed any nexus whereby the amount deposited in cash had been withdrawn in cash and thereafter redeposited to take benefit under peak credit theory. He argued that the appellant was in the business of property dealership where major part of the transaction is executed in cash and in the instances of once cash withdrawals, the amount must has been invested in the property and the source of cash deposit would be either sale transaction or realization of reaccept against earlier transaction and therefore, the assessee was required to establish live nexus between the cash withdrawals and source of deposits in the bank account, although the AO has given benefit to the assessee as per law. As regards to addition made u/s 68 of the Act on account of cash deposited in saving bank account, the Ld. AR contended that assessee not produced books of account either before the AO or the CIT(A) gives the understanding that he has not maintained books of account and under these circumstances, addition made u/s 68 of the Act

is justified on the basis of bank passbook/ bank statement of the assessee. In support, the Ld. DR placed reliance on the following judgement:

1. [2017] 88 taxmann.com 547 (Punjab & Haryana) HIGH COURT OF PUNJAB AND HARYANA Naresh Kumar v. Commissioner of Income Tax, Patiala.

2. [2016] 72 taxmann.com 124 (Punjab & Haryana) HIGH COURT OF PUNJAB AND HARYANA Namdev Arora v. Commissioner of Income-tax, Jalandhar.

3. [2014] 46 taxmann.com 340 (Punjab & Haryana) HIGH COURT OF PUNJAB AND HARYANA Sudhir Kumar Sharma (HUF) v. Commissioner of Income-tax -III, Ludhiana

5.5 We have heard both the sides, perusing the material on record, the remand report furnished by the AO, the rejoinder filed by assessee in rebuttal to the remand report and the case laws cited on the issue of disputed cash deposited in the camera bank account of the assessee and objection of the assessee to the addition made under section 68 as well.

5.6 Admittedly, the assessee has made cash deposit of 54, 80,000 in his bank account number no. 2719101017729 with Canara bank in the year under consideration. The AO has made an addition of Rs. 35,80,000/- as unexplained cash deposit out of the aforesaid disputed cash deposit in his saving bank account and the same has been confirmed by the CIT appeal after considering the remand report of the assessing officer on the additional evidence filed by the assessee and the rejoinder of the assessee in rebuttal to the remand report.

5.7 The ld. AR argued that Ld. CIT(A) while confirming addition has observed altogether different as to observations of the Assessing Officer in the remand report. Assessing Officer in para 6.1 has observed that AR of the assessee has filed copy of ledger for the period from 01.04.2013 to 31.03.2014 *of* Amarjit Singh S/o Sh. Ganesh Dass and Parveen Bala D/o Sh. Chote Lal, Hoshiarpur which confirm the entry of Rs. 179000/- and Rs.190000/- reflected in the bank account of the assessee. Also filed copies of cash book and cash summary of the assessee Sh. Arvinder Kumar Sood for the period 01.04.2013 to 31.03.2014 which abserve that cash deposited in the bank is from books of account and there are no excess cash deposit and no cash has been deposited out of books of accounts.

5.8 It is seen that the Ld. AR referred to the part of the remand report by choose and pick up of the point and interpreting to its convenience. He did offer any explanation to the AO's observation on the additional evidence that during the course of assessment proceedings no documentary evidence was filed with regard to cash deposits in bank account maintained with Canara Bank, even though the A.O. had also given the benefit of Rs. 19,00,000/- as explained cash deposit. For the remaining entries of deposit in cash the assessee could not lead any satisfactory evidence during the course of assessment proceedings. Again the year of the assessee has furnished of Amarjit Singh and Parveen Bala, Hoshiarpur which confirm the entry of □ 179,000 and □ 190,000 respectively reflected in the bank account of the assessee. However, he has not produced the Ledger of the appellant assessee for the assessment year under consideration. Merely filing of copy of cash summary statement and bank statement in the form of cash book would not in any manner constitute the books of account of the assessee. Thus, the cash deposit to the extent of □ 179,000 and 1,90,000 as per copy of Ledger

account of Amarjeet Singh and Parveen Bala as above stand explained as already considered by the assessing officer while allowing benefit of 19 lakhs as explained cash deposits out of the total disputed cash deposit of 54,80,000 in the account of the assessee with Canara bank.

5.9 From the above discussion, it is evident that the contentions raised by learned counsel for the assessee that the observation of assessing officer in remand report are very clear as to source of cash deposits in bank account and stands explained is factually incorrect. The AO has stated that he has carefully gone through the assessment record for the year under appeal and the submissions filed by the assessee and facts of the case. No doubt the assessee filed copies of sales/purchase deed of property in his own name and in the name of his wife, but he has not reconciled the gross receipts from the property as specifically required. No submission in writing in regard to his property business and the nature and source of his bank deposit were ever made. He has not shown any stock in trade as opening stock or closing stock which shows that he is conducting property business on attorney basis in which the name of actual owner of the property seldom appears. Thus, the turnover of the assessee, in the business of sale/ purchase of the properties is substantial.

5.7 The learned ACIT appeal has admitted additional evidence. He called for remand report on the additional evidence submitted by the assessee and the appellant assessee's rebuttal to the remand report. In the interest of principles of natural justice as the evidence was considered for working out the quantum of unexplained deposits, however, he finally agreed with the contentions of the AO as no supporting evidence has been brought on record by the appellant. He was of the opinion that mere filing of cash flow statement represents cash receipts, as as explained to be partly received on account of commission income without giving

evidence of the same as to how this commission, has been earned and on which deal it has been earned and as to how it has been accounted for in the books of accounts, and hence it was not acceptable without supporting evidence. The learned CIT noted that the AO has been just and fair at the stage of assessment proceedings in giving credit of cash withdrawals made from the bank account, remittances received from abroad and also the opening cash in hand. The appellant has failed to make out a case as he failed to furnish any evidence even in the course of the appellate proceedings before CIT(A) and before us. As regards to the computation of peak deposits is concerned, we find that at the stage of assessment the assessee has already been given benefit of corresponding receipts from abroad, corresponding withdrawals in cash and also opening balance of cash in hand while working out the quantum of unexplained deposits. In our view, the learned ACIT appeal was justified in holding that the AO was fair in treating the deposits to the extent of 3,850,000 as unexplained income of assessee for the assessment year under consideration.

5.8 In the case of "Parveen Kumar v. Commissioner of Income-tax, Ludhiana", (Supra) the Honorable Jurisdictional HIGH COURT OF PUNJAB AND HARYANA has held as under:

> *10. Tribunal re-appreciated the evidence and concluded that though the authorities below have given the benefit of Rs. 3 lakh of re-deposit of cash but have not considered that during the previous years, the appellant would have accumulated funds, for which a further benefit of Rs. 5 lakh was given. The Tribunal came to the conclusion that there was no specific evidence to support the opening balance of Rs. 8,86,639/- as on 01.04.2010. The evidence was not there to explain the cash deposits made to the tune of Rs. 23,39,420/-There was nothing on record to support the fact that the amounts withdrawn from the salary account were re-deposited. The FDRs of the appellant indicated that he was intelligently investing the*

amount with the bank. The benefit of re-deposits and of accumulated funds for the previous year has already been given

5.9 It is pertinent to mention that the Ld. AR failed to explain any nexus whereby the amount deposited in cash had been withdrawn in cash and thereafter redeposited to take benefit under peak credit theory. The appellant was in the business of property dealership where major part of the transaction is executed in cash and in the instances of once cash withdrawals, the amount has been invested in the property and never kept at home. Under the circumstances, the source of cash deposit would be either from the cash sale transaction or sale proceeds realization against earlier transaction but the assessee failed to establish live nexus between the cash deposits to cash withdrawals or other source of cash deposits in the bank account, however AO has already given benefit of his cash withdrawn earlier, cash receipts, refunds and rotatation from time to time to the assessee of Rs. 19,00,000/- lacs by considering evidences furnished during the assessment proceedings and remand proceeding before the AO and the appellate proceedings before the CIT(A) in the form of the cash flow statement, commission income and foreign remittances. The Case law referred by the Ld. AR are distinguishable on peculiar facts of this case and he has not furnished any judgement of Jurisdictional High court or Apex Court on the issue.

6. In the backdrop of the aforesaid discussion, since, there was no specific evidence to explain assessee's stand that amount to the extent of Rs. 35, 80,000/- deposited in bank was actually his cash withdrawn earlier and rotated from time to time and that same was redeposited in cash, addition made as undisclosed income was justified.

7. In another case of "Namdev Arora v. Commissioner of Income-tax, Jalandhar"'(Supra) the Honorable Jurisdictional HIGH COURT OF PUNJAB AND HARYANA has held as under:

> *14. The submission is not well founded. This is merely a case of a wrong section being mentioned in the assessment order and in the order of CIT (A). All the jurisdictional facts for invoking section 68 existed. More importantly, the enquiries made by the Assessing Officer in the assessment proceedings were not stated to be under any particular provisions of the Act. The enquiries were merely factual relating to the source of acquisition of the money. Had the Assessing Officer on the very same facts mentioned section 68 instead of SB section 69-A it would not have been open to the assessee to contend that he had not been put to notice that the Assessing Officer intended invoking section 68 of the Act. If he could not have done so in respect of the assessment order, he cannot do so in respect of the orders in appeal by the CIT (A) or by the Tribunal. 15. This as we mentioned is not a case where in the assessment proceedings the queries were raised specifically in relation to section 69-A of the Act. The queries were raised generally only to ascertain the facts. If for instance it had been found in the assessment proceedings that the amounts received by the assessee had not been recorded in his books of accounts, the additions could have been made under section 69-A of the Act. Merely because it was found on such facts that the money was recorded in the assessee's books of accounts it would not exclude the operation of section 68 of the Act. That is an independent ground/provision open to be invoked by the authorities. 16. The assessee has not been prejudiced in any manner whatsoever on account of the Assessing Officer having mentioned the wrong section. Where in the assessment proceedings the enquiries are made by the Assessing Officer of facts and the Assessing Officer after considering the facts and circumstances of the case including the assessee's response, if any, thereto, makes an addition, which is justified and permissible under the provisions of the Act but inadvertently or even wrongly mentions a wrong provision of the Act, the assessment order cannot be set aside on that ground. It is open in such circumstances to the Appellate Authority or to CIT (A) or the Tribunal to uphold the addition under the correct section. This ofcourse would be in circumstances where the error has not prejudiced the assessee in any manner whatsoever. At the cost of repetition it is not even the assessee's case that during*

the assessment proceedings he was given to understand that the queries were raised by the Assessing Officer and/or that he responded to the same only on the basis of the provisions of section 69-A of the Act.

7.1 The Hon'ble Jurisdictional High Court led down the principle in the case of "Namdev Arora", (Supra) that where assessing officer after considering that in circumstances that case including assessee's response, made a justified addition but inadvertently wrongly mentioned wrong provision of section 68 instead of section 69A assessment order could not be set aside on that ground. The Ld. AR has not filed any judgement of the Jurisdictional High Court of Apex Court on the issue before us.

7.2 In the backdrop of the above discussion and factual matrix of the case we are not inclined to accept the request made by the assessee. Respectfully, following the honorable jurisdictional High Court, we hereby sustain the impugned order and upheld the addition of 3,580,000 made under section 68 of the act on account of cash deposits in bank account of the assessee as its unexplained income.

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

Order pronounced under Rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1963 by placing the details on the notice board.

Sd/-	Sd/-
(Ravish Sood)	(Dr. M. L. Meena)
Judicial Member	Accountant Member

Date: 21.02.2022
prabhat

Copy of the order forwarded to:

(1) The Appellant:
(2) The Respondent:
(3) The CIT(Appeals)
(4) The CIT concerned
(5) The Sr. DR, I.T.A.T

By Order