

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ
IN THE INCOME TAX APPELLATE TRIBUNAL,
“A”BENCH, AHMEDABAD

(CONDUCTED THROUGH VIRTUAL COURT AT AHMEDABAD)

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
AND
SHRI T.R. SENTHIL KUMAR, JUDICIAL MEMBER

Sr. No.	ITA No.	Asstt. Year	Name of Appellant	Name of Respondent
1.	No.1320/Ahd/2014	2009-10	Shivam Water Treaters Pvt. Ltd., Shivam House, Parshana Padmavati, Vasna Bus Stop, Dr. Jivraj Mehta Hospital, Vasana, Ahmedabad-380007. PAN:AAFCS5613R	A.C.I.T.,(OSD) Circle-8, Ahmedabad
2.	No.1447/Ahd/2014	2009-10	D.C.I.T.,(OSD) Circle-8, Ahmedabad	Shivam Water Treaters Pvt. Ltd., Shivam House, Parshana Padmavati, Vasna Bus Stop, Dr. Jivraj Mehta Hospital, Vasana, Ahmedabad-380007. PAN:AAFCS5613R
3.	No.187/Ahd/2020	2011-12	Shivam Water Treaters Pvt. Ltd., Shivam House, Parshana Padmavati, Vasna Bus Stop, Dr. Jivraj Mehta Hospital, Vasana, Ahmedabad-380007. PAN:AAFCS5613R	D.C.I.T.,(OSD) Circle-8, Ahmedabad

4.	No.2557/Ahd/2017	2012-13	Shivam Water Treaters Pvt. Ltd., Shivam House, Parshana Padmavati, Vasna Bus Stop, Dr. Jivraj Mehta Hospital, Vasana, Ahmedabad- 380007. PAN:AAFCS5613R	D.C.I.T., Circle-4(1)(1), Ahmedabad
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(Applicant)		(Responent)
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Assessee by	:	Shri Mahesh Chhajed, A.R
Revenue by	:	Shri Vijaykumar Jaiswal, CIT DR with Shri Urjit Shah, A.R

सुनवाई की तारीख/**Date of Hearing** : 16/02/2022

घोषणा की तारीख /**Date of Pronouncement**: 06/05/2022

आदेश/ORDER

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeals have been filed at the instance of the Assessee and the Revenue against the separate orders of the Learned Commissioner of Income Tax (Appeals)-XIV, Ahmedabad, arising in the matter of assessment order passed under s. 143(3) of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the Assessment Years 2009-10, 2011-12 & 2012-2013.

First we take up ITA No.1320/Ahd/2014, an appeal by the assessee for A.Y. 2009-10

2. The assessee has raised the following grounds of appeal:

1. Addition of Rs. 48,85,005 on account of disallowance of depreciation on plant and machinery installed by the appellant company be deleted. It is so held now.
2. Addition of Rs.872145 on account of disallowance of depreciation on cars be deleted. It be so held now.
3. Addition of Rs.6,99,82,515/- u/s.68 be deleted, it be so held now.

4. *Addition of Rs.1500000 u/s.40A (2)(b) be deleted, it be so held now.*

5. *Such other reliefs as may be admissible in case of the Appellant may also be granted to the Appellant.*

3. The 1st issue raised by the assessee is that the learned CIT-A erred in confirming the disallowance made by the AO for Rs. 48,85,005/- representing the depreciation claimed on the plant and machinery.

4. The necessary facts as arising from the order of the authorities below are that the assessee in the present case is a private limited company and engaged in the business of manufacturing & marketing of water treatment plants and parts. The assessee was awarded a contract by Water and Sanitation Management Organization (In short WASMO) under the scheme of Government of Gujarat to install the RO plant in the rural areas of Gujarat under BOOT system vide agreement dated 4th October 2008. The assessee accordingly, in the year under consideration, has purchased the RO being plant and machineries of ₹ 6,51,33,397/- which were capitalized in the books of accounts. The assessee on such addition of plant and machineries claimed depreciation amounting to Rs. 48,85,005/- only. However, the assessee in support of the addition of the plant and machineries failed to furnish the details of the bills in order to establish the date of purchase, date of installation, date of commissioning and the date of put to use. The reason for not furnishing the details was submitted by the assessee vide letter dated 23rd August 2011 that all the relevant documents have been seized by the VAT department as a result of search conducted on 24-06-2011. However, the assessee to justify the purchase of the plant and machineries filed the loan sanctioned letter for the purchase of impugned assets from the UCO bank for Rs. 450 Lacs. The assessee has also filed the copy of the payment advice in order to demonstrate that the loan was disbursed to the assessee in the month of March 2009.

4.1 However, the AO was not satisfied with the contention of the assessee in the absence of necessary details such as date of purchase, installation, commissioning

and put to use. Likewise, the assessee has also not furnished the copies of the ledger for the plant and machinery and fixed assets register. Thus the AO disallowed the claim of the assessee for the depreciation of Rs. 48,85,005/- and added to the total income of the assessee.

5. Aggrieved assessee preferred an appeal to the learned CIT-A.

6. The assessee before the learned CIT-A submitted that it failed to furnish the requisite details to the AO during the assessment proceedings for the reasons which were beyond its control. As such there was a search operation by the VAT department dated 24th of June 2011 and all the books of accounts including the purchase bills of the plant and machineries were seized by the VAT department. Thus, it was prayed to the AO to call for the necessary and requisite details from the VAT department but the AO has not done so. Likewise it was also prayed to the AO to obtain the necessary details from the WASMO department to establish the fact that the plant and machineries were duly installed and put to use in the year under consideration. But the AO has not done so.

6.1 The assessee during the appellate proceedings furnished the bills for the purchase of plant and machineries in duplicate before the learned CIT-A which are sufficient enough to establish the fact that the machineries were purchased and installed in the year under consideration. The assessee also furnished the invoices raised by it in the month of April 2009 to WASMO for the services rendered out of the use of the plant and machineries. The invoices raised pertains to the services rendered by the assessee in the month of March 2009. Thus there remains no ambiguity to the fact that the plant and machineries were installed in the year under consideration.

7. The learned CIT-A called for the remand report from the AO vide letter dated 23rd May 2013 on the detail submitted by the assessee. The assessing officer filed the remand report vide letter dated 5th November 2013. The AO in the remand

report submitted that the assessee has only furnished 25 bills for the purchase of the plant and machineries against the 35 items of the plant and machineries. At the same time, there was no detail furnished by the assessee to justify the date of installation of the plant and machineries which becomes important in the given facts and situation as all the machineries were purchased at the fag end of the financial year i.e. February and March 2009.

7.1 The ledger copy of the invoice raised to WASMO against the services provided by the assessee pertains to the month of April 2009 and does not relate to the year under consideration.

7.2 The learned CIT-A considered the assessment order, submission of the assessee and the remand report of the AO and found that there was no rejoinder furnished by the assessee with respect to the remand report of the AO despite having granted several opportunities.

7.3 The learned CIT-A further observed that the assessee has not furnished any details to establish that the plant and machineries were installed and put to use in the year under consideration. Thus in the absence of such details, the learned CIT-A confirmed the order of the AO.

8. Being aggrieved by the order of the learned CIT-A, the assessee is in appeal before us.

9. The learned AR before us filed a paper book running from pages 1 to 381 and contended that the relevant documents were not filed by the assessee as the same were seized by the VAT department in the search conducted upon it. However, there were bank loan related documents for the purchase of machineries which were filed before the AO to establish the fact for the purchase of the machineries. Likewise, there were bills raised to the parties pertaining to the year under

consideration which evidence that all the machines were put to use in the year under consideration.

10. On the contrary, the learned DR submitted that it is one of the prerequisite that the asset on which the depreciation was claimed by the assessee was put to use during the relevant year. But the assessee has not furnished any evidence with regard to the same. Thus the learned DR vehemently supported the order of the authorities below.

11. We have heard the rival contentions of both the parties and perused the materials available on record. For claiming the depreciation under section 32 of the Act, the assessee has to satisfy the conditions mentioned therein. Section 32 of the Act stipulates that Building machinery plant or furniture on which depreciation is claimed should be owned by the assessee and Building, machinery, plant or furniture should be used for the purposes of business or profession.

11.1 In the present case, there was the addition of the plant and machineries amounting to Rs. 6,51,33,397/- only. In this regard, we have perused the purchase ledger which is placed on page 66 of the paper book. Based on purchase ledger, we find that all the plant and machineries were purchased by the assessee at the fag end of the financial year under consideration. Thus it becomes imperative to ascertain whether the plant and machineries were put to use in the year under consideration. Indeed the onus lies upon the assessee to establish this fact based on the documentary evidence. However, we note that the assessee has not discharged its onus by submitting the primary documents.

11.2 We have also seen the bank sanctioned letter placed on page 72 of the paper book which states that the commercial operation shall commence from the month of June 2009. From the above letter, we find that the project was commercially due to start from June 2009.

11.3 Admittedly, there was also difficulty with the assessee to provide the necessary details on account of search operation of the VAT department. Therefore, the assessee time and again has requested to the AO to collect the necessary details from the VAT department as well as from the WASMO, a unit of Government of Gujarat. The relevant extract of the submission of the assessee reads as under:

11.4 Before the AO:

That as regards the bills for new machinery purchased for WASMO Project is concerned, we have made addition of Rs.65133397/- in the Machinery Account, but we are unable to file the copy of bills as the VAT Department has seized out sales and purchase files.

11.5 Before the learned CIT-A:

a. After filing the return of income for the assessment year in question, VAT department of the Gujarat Government had conducted a search in the premises of the assessee company on 24.06.2011 i.e the date prior to giving ample opportunity for submitting the details to the Ld.AO. The AR of the appellant had categorically stated this fact from time and again to the Ld.AO and requested to call for the details from the VAT department. This is because of the fact the one government department will definitely give proper details to the other government department, but unfortunately the Ld.AO has never attempted to write a letter directly to the VAT department or given an authority to the AO of the appellant for getting the details from the VAT department. Because of this the assessee could not submit certain relevant documents during the course of the hearing.

11.6 But we note that the authorities below have not exercised its powers granted under the statute i.e. under section 133(6)/131 of the Act in order to find out whether the commercial operation began in the year under consideration.

11.7 We are also conscious to the fact that the genuineness of the plant and machinery has not been doubted by the authorities below. It is also the settled law that the actual use of the plant and machinery is not necessary for claiming the depreciation. As such when the plant and machinery is ready to use becomes eligible for depreciation. In holding so we draw support and guidance from the judgment of Hon'ble Punjab and Haryana Court in the case of **Commissioner of Income-tax, Karnal v. Shahbad Co-op. Sugar Mills Ltd., Shahbad** reported in 12 taxmann.com 421 wherein it was held as under:

"Reference was also be made to dictionary meaning of the word 'depreciation' as also the object of allowing depreciation. In the present case, the machinery in question is vapour cell, juice clarifier and fly ash arrester paid pweitier which according to the assessee had to be kept ready for use for its business expediency. Stand of the assessee is that it resulted in increase of capacity of the plant and that on account of technical justification for the said machinery, items of the machines were installed. Even though the auditors may not have accepted the said stand, the assessee was entitled to free play in joints in taking a decision to install the machinery if in its view the same was necessary for its business. If the assessee was to install such a machinery on its bona fide business consideration, mere absence of proof of actual use thereof was not enough to deny the claim for depreciation. Accordingly, we do not find any ground to interfere with the finding of the Tribunal, holding that the assessee was entitled to depreciation on the machinery, as claimed."

11.8 However, in the absence of necessary details, we are inclined to give one more opportunity to the assessee to raise its point of contention before the AO in support of its arguments. It is also seen that the assessee has filed additional papers demonstrating the list of villages where RO Plant has been installed, charts of parties with details & remark of Wasmo Project and 9 bills of machineries of WASMO project which are available in the paper book. These papers are necessary to be considered by the AO for adjudicating the issue on hand. Thus in the interest of justice and fair play, we set aside the issue to the file of the AO for fresh adjudication as per the provisions of law. The assessee is also at the liberty to furnish the necessary details before the AO and should extend the full cooperation without fail. Hence the ground of appeal of the assessee is allowed for the statistical purposes.

12. **The next** issue raised by the assessee is that the learned CIT-A erred in confirming the order of the AO by sustaining the disallowance of the depreciation claimed by it (the assessee) with respect to the additions of 5 cars in the block of assets in the year under consideration.

13. The assessee in the year under consideration has purchased 5 cars which were claimed to be registered in the name of the directors. The necessary details of the additions of cars stand as under:

1. Audi car A4 Rs 3430776 dated 14.12.2008
2. Audi Car A6 Rs.4100000 dated Nil as no bill wa given
3. BMW CAR Rs.8857717 dated 14.07.2008
4. SONATA CAR Rs.1635120 dated Nil as no bill wa given
5. INNOVA Car Rs.978085 dated Nil as no bill was given

13.1 However, the AO during the assessment proceedings found that the assessee failed to supply the copy of the invoice for the purchase of cars namely Audi A-6, Sonata and Innova. The AO in the ledger of the car namely Audi-6 found that the assessee has shown payment of ₹41 Lacs against the purchase of the impugned car. But the copy of the ledger is not the proof for the purchase of the car and therefore the date put to use of the same is also doubtful.

13.2 Likewise, the AO from the ledgers of other cars namely Sonata and Innova found that these cars were booked dated 23rd March 2009 and 30th March 2009 respectively after making the payment of ₹ 1 Lacs and ₹ 9,78,085/- only. Thus the AO disbelieved the claim of the assessee by holding that these cars were not purchased by the assessee in the year under consideration but merely these cars were booked. The view of the AO was based in the absence of the supporting documents to be furnished by the assessee in support of its claim. Thus the AO disallowed the hundred percent depreciation claimed by the assessee on these 3 vehicles amounting to ₹ 5,03,490/- and added to the total income of the assessee.

13.3 The AO with respect to the remaining cars namely Audi-A4 and BMW found that the assessee has failed to furnish the logbook and therefore he was of the view that the personal use of the car cannot be ruled out. Thus the AO made a disallowance of 20% of the depreciation amounting to ₹ 3,68,655/- with respect to these cars namely Audi-A4 and BMW and added to the total income of the assessee.

14. Aggrieved assessee preferred appeal to the learned CIT-A. The assessee before the learned CIT-A has filed the duplicate copies of the invoices for the purchase of 5 cars but the assessee has not filed the RC book with respect to two cars namely Innova and BMW.

15. The AO in his remand report found that the copies of the RC/invoices in connection with the purchase of the car were not legible/readable. Accordingly, the

AO in the remand report has not considered the invoices filed by the assessee. Accordingly the AO in the absence of the RC books and the invoices, requested to the learned CIT-A to uphold the disallowance, who confirmed the order of the AO.

16. The learned CIT-A after considering the submission of the assessee held that the AO in his remand report has clearly recorded a finding that the documents in the form of RC books and the invoices are not readable/legible. Therefore in the absence of necessary evidences, the learned CIT-A confirmed the order of the AO.

17. Being aggrieved by the order of the learned CIT-A the assessee is in appeal before us.

18. The learned AR before us reiterated the arguments made before the authorities below.

19. On the other hand the learned DR vehemently supported the order of authorities below.

20. We have heard the rival contentions of both the parties and perused the materials available on record. The 1st issue that arises for our consideration whether the assessee is eligible to claim the depreciation on the purchase of cars in the manner as provided under section 32 of the Act. To claim the depreciation under section 32 of the Act, the following conditions needs to be specified/satisfied.

- (a) Assets should be owned wholly or partially and
- (b) Used for the business purpose

20.1 From the above, the 1st condition arises for adjudication whether the assessee is the owner of the cars in dispute. The assessee has shown purchase of 5 cars in in the year under consideration. Out of the 5 cars, 2 cars namely Audi-A4 and BMW, there is no dispute as far as the ownership of the cars is concerned. However, the AO has disallowed the depreciation claimed by the assessee with respect to the remaining 3 cars namely Audi-A6, Sonata, Innova on the reasoning

that the assessee has failed to furnish the ownership of the cars in dispute which is one of the prerequisite to claim depreciation. Admittedly, the assessee has furnished the purchase invoices and RC book which are placed on pages 145 to 158 of the paper book. However on perusal of the invoice/ RC book and the copy of the ledger furnished by the assessee, we find certain discrepancies as detailed in following paragraph.

20.2 With respect to the car namely Audi 6, the copy of the RC book and invoice were not legible which is placed on pages 149 to 150 of the paper book. Likewise, the assessee claimed to have incurred the cost for the purchase of the car at Rs. 41 Lacs as on 20th March 2009 which is also reflecting in the ledger account but the same is not matching with the invoice i.e. of Rs. 37,27,150/-. Accordingly the question comes to determine the amount at which depreciation has to be claimed. Thus, we are of the view that the issue with respect to the car namely Audi A-6 needs reconsideration at the level of the AO.

20.3 With respect to the car namely INNOVA, we note that the assessee has filed the copy of the RC book 1st time before us which is placed on pages 155 of the paper book which is not properly visible. We have perused the copy of the invoice for the car on hand which is placed on pages 154 of the paper book but the same is not legible. It is the onus of the assessee to furnish the necessary documents to satisfy its contention. Once the invoice itself is not visible and keeping in view the fact that the copy of the RC book was made available to us 1st time, we are of the view that the entire issue for the purchase of the INNOVA car needs to be determined/reconsidered at the level of the AO. It was noticed that the assessee claimed to have made payment of ₹ 9,78,085/- whereas the amount as per the invoice furnished by the assessee stands at ₹ 8,78,198/- which also creates doubt on the value at which the depreciation is to be claimed. Accordingly we are of the view that the impugned issue needs to be verified at the level of the AO.

20.4 With respect to Sonnata Car, we find mismatch in the value of car as disclosed in the ledger viz-a-viz the invoice for the purchase of the car. Furthermore, the RC book furnished by the assessee was not legible. In view of the above and after considering the facts in totality we are of the view that the issue with respect to the depreciation for the cars as discussed above namely Audi A-6, INNOVA and SONATA car needs to be reconsidered by the AO for fresh adjudication as per the provisions of law.

20.5 For the remaining 2 cars, we find that the ownership of these cars were not in dispute. It was disputed by the authorities below that the cars are registered in the name of the directors and the assessee was not maintaining the logbook. Therefore the AO was of the view that the possibility of personal use of the car cannot be ruled out. There is no dispute to the fact that all the cars were purchased in the name of the directors but the payment was made through the assessee company. Thus it is transpired that the legal ownership though vest with the individual directors but the Dominion ownership rest with the assessee. For the reason that, the assessee has made the payment for the purchase of the car from its books of accounts. Therefore the assessee is very much eligible for depreciation on these cars. The assessee being a body corporate, there is no possibility for the directors to use the car for the personal purposes. Assuming the assessee doesn't maintain the logbook and the director of the company uses the car for the personal purposes. Then in such a situation, at the most such facility extended by the company to the directors can be treated as perquisites under the provisions of section 17(2) of the Act which can be brought to tax in India hands of the director as part of salary.

20.6 It is also interesting to note that the depreciation is an allowance and not an expenditure which has to be allowed in pursuance to the provisions of section 32 of the Act irrespective of its use by the director or the company.

20.7 It is also important to note that the assessee cannot be denied the depreciation merely on the reasoning that the cars were registered in the name of the directors. It is for the reason that there is no dispute raised by the Revenue as far as the payments for the purchase of the car is concern. Thus, we are interpreting that the payments made by the assessee, as reflected in the books of accounts, amounts to beneficial ownership of the assessee and eligibility to claim depreciation. In this regard we find support from the judgment of the Hon'ble Gujarat High Court in the case of PCIT vs. Asian Mills (P.) Ltd reported in [2022] 135 taxmann.com 163 (Guj) where in was held as under:

16. The Revenue challenged the same before the Tribunal. It also relied on the decision of ITO v. Electro Ferro Alloys Ltd. [2012] 25 taxmann.com 458 (Ahd. - Trib.). According to the ITAT, the material available on record, when looked at, the assessee though was not the legal owner of the vehicle, it has made the payment for acquisition of cars and thus, it is a beneficial owner. It is, therefore, held to be entitled for depreciation on the car. It has drawn the support from the decision of Electro Ferro Alloys Ltd. (supra) and the decision of the Rajasthan High Court in CIT v. Mohd. Bux Shokat Ali [2001] 118 Taxman 712/[2002] 256 ITR 357 and the decision in the case of CIT v. Basti Sugar Mills Co. Ltd. [2002] 123 Taxman 693/257 ITR88 (Delhi).

17. The Tribunal has rightly distinguished the concept of dominion ownership of the car. The question raised is answered accordingly.

20.8 Thus we are of the view that there cannot be any disallowance on adhoc basis as far as depreciation is concerned. In view of the above and after considering the facts in totality, the ground of appeal of the assessee is partly allowed for the statistical purposes in the manner as indicated above.

21. The next issue raised by the assessee is that the learned CIT-A erred in confirming the order of the AO by sustaining the addition for Rs. 6,99,82,515/- under the provisions of section 68 of the Act.

22. The assessee has issued shares at premium to its directors namely Shri Ami G Dave and Shri Gaurav H Dave in the year under consideration who have subscribed the shares. The AO from the bank statement of the directors found that there was the credit entry immediately before the debit entry shown for the investment of shares in the assessee company. As per the AO the amount was credited from the proprietary concern of Smt. Hema Tripathi and Smt. Ushma Dave

namely Water Parts Co and Monarc Engineers. On examination of the proprietors by the AO during the assessment proceedings, it was discovered that both the proprietors failed to provide any satisfactory reply for the source of funds in their respective hand. The AO also found that, both the proprietors who have transferred the fund to the directors of the assessee company were related parties of the assessee. One of the proprietor namely Smt. Hema Tripathi was the employee of the assessee since more than 12 years and Smt. Ushma Dave is the wife of one of the director's brother. Furthermore, the AO found that the income declared by the directors namely Shri Ami G Dave and Shri Gaurav H Dave for Rs. 22.04 Lacs and Rs. 55.58 Lacs respectively in the year under consideration does not match with the amount of investment made by them in the shares of the assessee company. Similarly, these directors in the earlier years have shown huge investments, more than the income declared by them in the income tax return. Thus, it can also be concluded that there was no opening balance available with the directors of the company for making the investment in the shares of the company. Considering the all the facts, the AO held that the assessee failed to discharge the creditworthiness of the parties and genuineness of the transactions. Therefore the AO treated the amount of share capital along with premium as unexplained cash credit under section 68 of the Act and added the same to the total income of the assessee.

23. Aggrieved assessee preferred an appeal to the learned CIT-A

24. The assessee before the learned CIT-A contended that it has duly discharged the source of funds by demonstrating that the shares were issued to the directors of the company. But the assessee is not expected to justify the source of source in the hands of the directors of the company. Likewise, the allegation of the AO that there was deposit in the bank account of the directors immediately before making the investment in the shares is far off from the reality by any logic. It is for the reason that the credit entries in the bank statement of the directors may be on account of various reasons. It may be possible that the directors have made investment in the earlier years which they received in the year under consideration

or the directors have taken fresh loan for making the investment in the assessee company.

24.1 The assessee to justify the amount of cash credit has furnished the copy of the ITR, balance sheet of the directors and their bank statements. Thus, according to the assessee, the impugned amount of share capital cannot be treated as unexplained cash credit in the hands of the assessee under the provisions of section 68 of the Act.

24.2 However the learned CIT-A, disregarded the contention of the assessee by observing that it is onus of the assessee of the assessee to furnish the satisfactory documents to justify the cash credit entries reflecting therein. Merely, filing the return of income and other details does not mean that the assessee has discharged the obligation imposed upon the assessee under the provisions of section 68 of the Act. As such, the source of funds in the hands of the directors was not free from doubts and this conclusion was arrived by the AO after carrying out necessary verification. Thus the learned CIT-A confirmed the order of the AO.

25. Being aggrieved by the order of the learned CIT-A the assessee is in appeal before us.

26. The learned AR before us submitted that out of the total addition of ₹ 6,99,82,420, a sum of Rs. 2.7 crores was received by the assessee in the earlier year. As such the assessee has shown the opening balance of share capital and premium of ₹ 2.70 crores. Thus the learned AR contended that the addition to the tune of ₹2.70 crores being opening balance cannot be sustained. For the remaining amount of Rs. 4,29,82,420/-, the assessee contended that it has discharged the onus cast upon it by furnishing the details about the source of investment in the hands of the directors namely Shri Gaurav H Dave and Shri Ami G Dave. In this connection the learned AR filed ledger copy of share capital, Bank passbook of

investors, their ITR, ledger from the books of director, Audit Report of Director Gaurav Dave and ledger copy of director in the books of proprietary concern etc.

27. On the other and the learned DR vehemently supported the order of the authorities below.

28. We have heard the rival contentions of both the parties and perused the materials available on record. The provision of Section 68 of the Act fastens the liability on the assessee to provide the identity of the lenders, establish the genuineness of the transactions and creditworthiness of the parties. These liabilities on the assessee were imposed to justify the cash credit entries under Section 68 of the Act by the Hon'ble Calcutta High Court in the case of CIT Vs. Precision Finance (P) Ltd. reported in 208 ITR 465 wherein it was held as under:

"It was for the assessee to prove the identity of the creditors, their creditworthiness and the genuineness of the transactions. On the facts of this case, the Tribunal did not take into account all these ingredients which had to be satisfied by the assessee. Mere furnishing of the particulars was not enough. "

28.1 Now first we proceed to understand the identity of the party. The identity of the party refers existence of such party which can be proven based on evidences. As such the identity of a party can be established by furnishing the name, address and PAN detail, bank details, ITR etc.

28.2 The next stage comes to verify the genuineness of the transaction. Genuineness of transaction refers what has been asserted is true and authentic. A genuine transaction must be proved to be genuine in all respect not merely on a piece of a paper. The documentary evidences should not be a mask to cover the actual transaction or designed in way to present the transaction as true but same is not. Genuineness of transaction can be proved by submitting confirmation of the party along details of mode of transaction but merely showing transaction carried out through banking channel is not sufficient. As such the same should also be proven by circumstantial surrounding evidences as held by the Hon'ble supreme

court in case of Durga Prasad More reported in 82 ITR 540 and in case of Smt. Sumati Dayal reported in 214 ITR 801.

28.3 The last stage comes to verify the creditworthiness of the parties. The term creditworthiness as per Black Law Dictionary refers as:

"creditworthy, adj. (1924) (Of a borrower) financially sound enough that a lender will extend credit in the belief default is unlikely; fiscally healthy-creditworthiness."

28.4 Similarly in The New Lexicon Webster's Dictionary, the word "creditworthy" has been defined as under:-

"creditworthy, adj. of one who is a good risk as a borrower."

28.5 It the duty of the assessee to establish that investor has capacity to make investment having requisite fund in its books of account and banks. The capacity to invest can be established by the showing sufficient income, or other fund in the hands of investor. It required by the AO to find out the financial strength of the investor to make investment with judicious approach and in accordance with material available on record but not in arbitrary and mechanical manner.

28.6 In the light of the above discussion, we proceed to adjudicate the issue in hand. As per the AO, the assessee has received share capital and premium on share capital for Rs. 6,99,82,420/- from two Directors which has been held by the AO as bogus transaction and added to the total income under section 68 of the Act and confirmed by the learned CIT-A. However the learned AR for the assessee before us submitted that share capital and premium for Rs. 4,29,82,420/- only received during the year. As such, the AO inadvertently treated the opening balance of share capital and premium of Rs. 2.7 crores as received during the year. In this regard we perused the share capital and premium ledgers available on pages 180 to 181 of the paper book and page 200 of paper book and found the contention of the learned AR true. Thus, the dispute relates only to the tune of Rs. 4,29,82,420/- credited during the year. Admittedly both the lower authorities has not doubted the identity

of the investor/director but doubted the genuineness of transaction and credit worthiness.

28.7 The case of the learned AR before us is that the burden of the assessee under section 68 of the Act has been absolved by the fact that the assessee has furnished necessary detail being bank statement, ledger and contra ledger copy, financial statements of directors, copies of ITR and sources of fund in their hand. It is not the duty of the assessee to prove the sources of source.

28.8 We find force in the contention of the learned AR that assessee cannot be expected to explain the sources of source. In this regard we find support and guidance from the judgment of Hon'ble Gujarat High Court in case of in the case of CIT vs. Paragati Co. Op. Bank Ltd reported in 278 ITR 170, the relevant extract of the observation of Hon'ble Bench reads as under:

This Court is in respectful agreement with the aforesaid principles. In the case of Dy. CIT v. Rohini Builders [2002] 256 ITR 360¹ (Guj.), this Court has, while dismissing Departmental tax appeal, upheld the approach of the Tribunal based on the judgment of Patna High Court that an assessee can be asked to prove source of credit in books but cannot be asked to prove source of source.

28.9 It is pertinent to mention that that there was an amendment brought in the provision of section 68 of the Finance act 2012 where assessee was required to explain the sources of source if cash credited in the form of share capital and premium. However such amendment is applicable from 1st April 2013 and case on hand relates to A.Y. 2009-10. Therefore such amendment is not applicable to the assessee on hand.

28.10 Going ahead we find the assessee in order to establish the genuineness of the transaction and credit worthiness of the directors furnished necessary detail but the revenue authority without pointing any defect in the submission of the assessee treated the amount of share and premium as unexplained cash credit merely on the basis of individuals who lend fund to the directors were not able to explain the sources of funds in their hand. Therefore, we are of the view that assessee had

been able to explain the sources of credit of share capital and premium in its books of account. The assessee cannot be made suffer due to some third parties who provided fund to the investor was not able to properly explain the sources fund in their hands. Hence, considering the fact in totality we hereby direct the AO to delete the addition made under section 68 of the Act. Thus the ground of appeal raised by the Assessee is hereby allowed.

29. The next issue raised by the assessee is that the learned CIT-A erred in confirming the addition made by the AO for ₹ 15 Lacs under the provisions of section 40A(2)(b) of the Act.

30. The AO during the assessment proceedings found that one of the employee being relative of the director was paid a salary of ₹ 18 Lacs by the assessee. According to the AO the salary paid by the assessee was unreasonable on the reasoning that the directors of the company are getting salary only for ₹ 12 Lacs despite having rich experience in the business area whereas the experience of the employee was not at par with the directors. Furthermore, the assessee has not filed any documentary evidence qua the qualification of the employee. Likewise, the nature of the services rendered by such employee were not furnished by the assessee. Thus the AO disallowed the salary to the tune of ₹15 lakhs treating the same is unreasonable and excessive in pursuance to the provisions of section 40A(2)(b) of the Act and added to the total income of the assessee.

31. Aggrieved assessee preferred an appeal to the learned CIT-A

32. The assessee before the learned CIT-A submitted that the employee was the qualified engineer and the gold medalist in his education. The assessee to justify the qualification of the employee has also filed the details of the project report submitted during the study period and certificates before the learned CIT-A. Therefore, the amount of salary paid to the employee was reasonable.

32.1 However the learned CIT-A confirmed the order of the AO by observing as under:

I am inclined with A.O. that, in the absence of appointment letter with details of duties & responsibility of Shri Vishal Dave or explanation about nature of services rendered by him over & above the services of existing director with linking of improvement in turnover & profit and details / evidences to substantiate the reasonableness & justification of salary, invocation of provision of 40A(2)(b) of the Act is justified. Shri Vishal Dave is a fresh graduate engineer and not done any research in the field of appellant's business. He is not even M.B.A. and therefore considering his qualification reasonable salary of Rs. 3,00,000/- per annum and not ? 3,00,0007- per month as incorrectly mentioned by A.O. inimpugnedd order, is justified. It is therefore disallowance of Rs.15,00,000/- so made are justified and upheld. The grounds are therefore dismissed.

33. Being aggrieved by the order of the learned CIT-A the assessee is in appeal before us:

34. The learned AR before us submitted that the Revenue in the subsequent year has accepted the salary paid to the employee for ₹18 Lacs. Accordingly it was the contention of the learned AR that the same cannot be disallowed in the year under consideration keeping in view the principal of consistency. The learned AR also drew our attention on the appointment letter of the employee, qualification and copy of the ledgers which are placed on pages 245 to 250 of the paper book.

35. On the other hand the learned DR vehemently supported the order of the authorities below.

36. We have heard the rival contentions of both the parties and perused the materials available on record. The revenue in the case on hand has treated the salary paid to the employee being the relative of the director as excessive and unreasonable in pursuance to the provisions of section 40A(2)(b) of the Act. The provisions of section 40A(2)(b) of the Act reads as under:

[Expenses or payments not deductible in certain circumstances.

⁵⁴**40A. (1)*******

(2)(a) Where the assessee incurs any expenditure in respect of which payment has been or is to be made to any person¹⁰referred to in clause (b) of this sub-section, and the ¹¹[Assessing] Officer is of opinion that such expenditure is excessive or unreasonable having regard to the fair market value of the goods, services or facilities for which the

payment is made or the legitimate needs of the business or profession of the assessee or the benefit derived by or accruing to him therefrom, so much of the expenditure as is so considered by him to be excessive or unreasonable shall not be allowed as a deduction :

36.1 On perusal of the above provision, it is noted that the salary can be assumed as unreasonable and excessive having regard to the market value. But from the preceding discussion we note that nothing has been brought on record by the authorities below by making the comparison of the salary of the employee after having regard to the market which was one of the precondition for invoking the provisions of section 40A(2)(b) of the Act. On this reasoning only, the case of the revenue fails and assessee succeeds.

36.2 Be that as it may be, it is also important to note that the amount of salary was accepted by the revenue in the subsequent year. This contention of the learned AR was not doubted by the learned DR appearing on behalf of the Revenue. Thus, we are of the view that the revenue cannot take different stand for different assessment years. In other words, once the revenue has accepted the salary to the employee reasonable to the tune of ₹18 lacs, the same cannot be disturbed in the year under consideration. Accordingly, we set aside the finding of the learned CIT-A, and direct the AO to delete the addition made by him. Hence the ground of appeal of the assessee is allowed.

37. The next issue raised by the assessee is that the learned CIT-A erred in confirming the order of the AO in part by sustaining the disallowance of Rs. 3.2 Lacs being 20% of legal and miscellaneous expenses.

38. The AO during the assessment proceedings requires the assessee to furnish the supporting evidences with respect to certain indirect expenses as detailed below:

(i)	Car Repairing expenses	Rs.271331
(ii)	Petrol and Diesel	Rs.922409
(iii)	Legal Expenses	Rs.999155

(iv)	<i>Business promotion expenses</i>	1149226
(v)	<i>Telephone Expenses</i>	Rs.310369
(vi)	<i>Miscellaneous Expenses</i>	Rs.609243
(vii)	<i>Staff Welfare Expenses</i>	Rs.744870
(viii)	<i>Travelling expenses (including foreign travelling)</i>	Rs.2485004
		Rs.7491607

39. However, the assessee expressed its inability to produce the supporting evidences on the reasoning that all the necessary documents have been seized by the VAT department. Nevertheless, the AO was of the view that VAT department has nothing to do with the indirect expenses incurred by the assessee. According to the AO, the VAT department is concerned with the purchase and sales, opening stock and closing stock of the goods which are the trading items whereas the expenses in dispute represents the indirect expenses. Thus, the AO disbelieved the plea taken by the assessee that the supporting evidences were seized by the VAT department and made ad hoc disallowance of Rs. 14,98,321/- being 20% or 1/5th of the expenses as listed above and added to the total income of the assessee.

40. Aggrieved assessee preferred an appeal to the learned CIT-A

40.1 The assessee before the learned CIT-A submitted that the identical expenses were allowed by the Revenue in the immediate preceding assessment year which was subject to scrutiny assessment under the provisions of section 143(3) of the Act. Accordingly the assessee submitted that the same should be allowed in the year under consideration also.

40.2 The assessee also filed some additional evidences before the learned CIT-A in support of the expenses. However the AO in the remand report contended that the additional evidences furnished by the assessee are not sufficient enough to discharge the onus imposed upon the assessee.

41. The learned CIT-A after considering the submission of the assessee and the remand report of the AO deleted the addition made by the AO in part by observing as under:

I am not inclined with AO for such disallowances, particularly in view of audited books of account of appellant and during previous year the appellant computed Fringe benefit tax liability of Rs.5,02,080/- and paid FBT of Rs.5,57,560/- As held by Hon'ble ITAT Mumbai in the case of JKH Export. Navi Mumbai (ITA No.137 of 2012) vide order dt. 31/03/13 following the principles laid down by its earlier order in the case of hansraj mathurdas Vs ITO in ITA no.2397/Mum/2010 dt. 16/09/11 and Board circular No. 08/05 dt. 20/08/05 that "Once FBT was levied on Expenses incurred, the same are treated as fringe benefit provided by assessee as employer to its employee and the same have to be allowed as expenses incurred wholly and exclusively for the purpose of business." Hon'ble Chandigarh ITAT also in the case of M/s Yamuna oils (ITA No. 1435/chd/2010) vide order dt. 16/04/03 held similar view. Considering the facts that all eight heads under which such expenses are incurred, claimed and disallowed by A.O. are part of valuation of FBT, except legal expense, and Misc. Expenses. The total of these two expenses are Rs.16,00,000/- (about) {9,99,155 + 6,09,243}. The appellant neither in asstt.proceedings nor in appeal has furnished any details 7 bills etc. for these two expenditure. It is therefore 20% of these expenditure i.e. disallowance & addition of Rs.3,20,000/- (20% of 16,00,000) are upheld and confirmed. The A.O. is directed to delete the balance addition of Rs.11,78,321/- (14,98,321 -3,20,000). The appellant" gets part relief. These grounds are partly allowed.

42. Being aggrieved by the order of the learned CIT-A, both the assessee and the Revenue are in appeal before us. The relevant ground of Revenue's appeal **in ITA No 1447/Ahd/2014** reads as under:

2). The Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad has erred in law and on facts in deleting the addition of Rs.11,78,321/- out of total addition of Rs.14,98,321/- made on account of various expenses not proved to have been incurred wholly & exclusively for Assessee's business.

43. The learned AR before us contended that there were certain expenses on which the assessee has paid the fringe benefit tax. Thus according to the learned AR the same cannot be disallowed under the provisions of section 37 of the Act.

43.1 The learned AR with respect to the expenses which were not subjected to fringe benefit tax namely legal and miscellaneous expenses submitted that all the expenses were incurred in the course of the business and therefore the same cannot be disallowed as deduction. The learned AR in support of his contention has drawn our attention to the copies of the ledgers of the legal and miscellaneous expenses which are placed on pages 275 to 352 of the paper book.

44. On the other hand the learned DR contended that the assessee failed to furnish the supporting evidences. Thus, the genuineness of the expenses cannot be relied upon.

45. Both the learned AR and the DR before us vehemently supported the order of the authorities below to the extent favourable to them.

46. We have heard the rival contentions of both the parties and perused the materials available on record. As regards the expenses which were subject to fringe benefit tax, we note that the Hon'ble Mumbai ITAT in the case of Hansaraj Mathurdas vs. ITO bearing ITA No. 2397/Mum/2010 vide order dated 16/09/2011 has held as under:

17. We have heard the arguments of both the sides and also perused the relevant material on record. The learned counsel for the assessee has taken us through the CBDT Circular No. 8/2005 dated 29-08-2005 giving explanatory notes on the provisions relating to fringe benefit tax as introduced by the Finance Act, 2005 and 17. We have heard the arguments of both the sides and also perused the relevant material on record. The learned counsel for the assessee has taken us through the CBDT Circular No. 8/2005 dated 29-08-2005 giving explanatory notes on the provisions relating to fringe benefit tax as introduced by the Finance Act, 2005 and invited our attention to the relevant portion thereof to explain the object behind levying fringe benefit tax. As indicated in the said circular, the fringe benefit tax has been introduced as a surrogate tax on employer with the objects of resolving the problems in taxing some perquisites/fringe benefits in the hands of the employees in terms of section 17. Further, as explained in para No. 3.2 of the Circular, the scope of the term "fringe benefits provided" is defined in section 115WB(1) to mean any consideration for employment provided by way of any privilege, service facility or amenity, directly or indirectly, provided by an employer, whether by way of reimbursement or otherwise, to his employees. Moreover, as clarified in the said circular while answering frequently asked question No. 15, fringe benefit is deemed to have been provided if the employer has incurred expenses for any of the purposes referred to in the relevant provisions and there is no requirement to segregate such expenses between those incurred for official purposes and personal purposes. It was further clarified while answering question No. 81 that when expenditure on running and maintenance of motor cars is liable to fringe benefit tax, the employees will not be liable to income tax on the perquisite value of motor car provided by the employer. As rightly contended by the learned counsel for the assessee, circular No. 8/2005 dated 29-08-2005 issued by the Board explaining the provisions relating to fringe benefit tax thus makes it clear that fringe benefit tax is levied on the expenses incurred by the employer irrespective of whether the same are incurred for official or personal purposes. In our opinion, once fringe benefit tax is levied on such expenses as has been done in the present case, it follows that the same are treated as fringe benefits provided by the assessee as employer to its employees and the same have to be appropriately allowed as expenses incurred wholly and exclusively incurred by the assessee for the purpose of its business. In that view of the matter, we delete the disallowance made by the AO and confirmed by the learned CIT(Appeals) out of conveyance and telephone expenses and allow ground No. 4 and 5 of the assessee's appeal.

46.1 In view of the above, we are of the opinion that such expenses cannot be disallowed as the assessee has already paid the taxes in the form of fringe benefit tax to the revenue.

46.2 For the balance amount of the expenses being legal and miscellaneous expenses we note that the assessee failed to discharge the onus imposed upon it. However, the fact that the relevant supporting documents were seized by the VAT department cannot be ruled out. It is for the reason that it was not possible for the assessee furnish the necessary details. Therefore it was prayed by the assessee to the AO and learned CIT-A for collecting the necessary details from the VAT department. But we note that the Revenue has not exercised its powers granted under the statute. However to meet the end of justice and to put the end of the ongoing litigation, we are of the view that disallowance of 5% of the legal and miscellaneous expenses will render the justice to the assessee and the Revenue. Hence, the ground of appeal of the assessee is partly allowed whereas ground of appeal the Revenue is dismissed.

47. In the Result appeal of the assessee is partly allowed for statistical purposes

Coming to ITA No. 1447/Ahd/2014 an appeal by the Revenue for the AY. 2009-10

48. The Revenue has raised following ground of appeal:

1). *The Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad has erred in law and on facts in deleting the addition of Rs.1,76,15,098/- made on account of disallowance of gross profit & rejection of books of accounts u/s.145(3) of the Act when Assessee completely failed to discharge its onus of proving the value of its stocks .*

2). *The Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad has erred in law and on facts in deleting the addition of Rs.11,78,321/- out of total addition of Rs.14,98,321/- made on account of various expenses not proved to have been incurred wholly & exclusively for Assessee's business.*

3). *On the facts and in the circumstances of the case, the Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad ought to have upheld the order of the Assessing Officer.*

4). *It is therefore, prayed that the order of the Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad may be set-a-side and that of the order of the Assessing Officer be restored. The first issue raised by the revenue is that the learned CIT-A erred in deleting the addition of Rs. 1,76,15,098/- made on account gross profit after rejecting the books under section 145(3) of the Act.*

49. The first issue raised by the Revenue is that the Id. CIT-A erred deleting the addition made by the AO for Rs. 1,76,15,098.00 after rejection the books of the accounts.

50. The AO, in the absence of necessary documents/records/informations which were to be furnished by the assessee, doubted on the genuineness of the transactions shown by the assessee in the financial statements for the year ending as on 31st March 2009. The observations of the AO reads as under:

1. *Opening and closing stock valuations are one of the most important ingredients for depicting the real trading result of any business. Since the assessee failed to furnish any evidences in support of valuation of Opening and closing stock, the accounts of the assessee cannot be accepted as correct nor can be considered as complete to depict the real trading results.*

2. *The assessee was repeatedly asked to furnish further contra confirmation in respect of one major party, Mis. GSEC Ltd. from where the assessee company had made purchase of Rs.56.3 crores out of total purchase of Rs.6G.35 crores, but the assessee did not furnish contra confirmation despite being afforded various opportunities.*

3. *The assessee had made major sales of Rs.42.55 crores to its related party, M/s. Monarch Engineers out of total sales of Rs.76,89 crores. During the course of hearing, the A.R. of the assessee expressed its inability to produce any evidences proving that the transactions were made at arm's length price.*

4. *The assessee had failed to furnish any justification with regard to non-production of inventory of opening stock with the basis of valuation as to whether it was on market price or at cost price. Similarly, the assessee did not give any valuation basis with regard to closing stock.*

5. *The assessee did not furnish any cost audit report.*

6. *The assessee did not furnish any stock reconciliation statement given to the bank or excise department.*

7. *Further, as per the requirement of Schedule 6 for preparing Balance Sheet under the Companies Act, the licensed capacity, installed capacity, actual production and sales quantity is required to be furnished but the assessee has not complied the requirement under the Companies Act.*

51.1 In view of the above the AO held that the books of accounts of the assessee are not reliable and therefore he rejected the same under the provisions of section 145(3) of the Act. Thus the AO estimated the gross profit at ₹ 12,30,29,978/- being 16% of the sales of ₹ 76,89,37,364/- and added the difference of ₹ 1,76,15,098/- between the gross profit shown by the assessee for ₹ 10,54,14,880/- viz a viz gross profit calculated by the AO. The necessary finding of the AO reads as under:

<i>Sales for the year of</i>	<i>Rs.768937364</i>
<i>Gross Profit@ 16%</i>	<i>Rs. 123029978</i>
<i>Less ; G.P. disclosed by as per</i>	
<i>Annexure to Form 3CD Report</i>	<i>Rs.105414880</i>
<i>Addition on account of G.P.</i>	<i>Rs. 17615098</i>

*Thus, the difference in the gross profit amounting to **Rs.17615098** is accordingly added to the total income of the assessee.*

52. Aggrieved assessee preferred an appeal to the learned CIT-A

53. The assessee before the learned CIT-A contended that opening stock shown in the year under consideration was carried forward from the earlier assessment year which was also accepted by the revenue as closing stock in the earlier assessment year. Therefore the same cannot be disturbed in the year under consideration. With respect to the valuation of the closing stock, it was contended that assessee has been valuing closing stock either at cost or the realizable value which ever is lower and the fact is also highlighted in tax audit report.

53.1 It was also submitted by the assessee that the company is not subject to cost audit as well as excise law. Therefore, the assessee was not maintaining any records qua to cost audit as well as excise law. Accordingly, there was no possibility of furnishing all these details to the AO.

53.2 The assessee further submitted that the party from which it was purchasing the raw materials has not furnished the confirmation/contra ledger. Thus it was requested to the AO to get the same from the party by exercising the power granted under section 133(6) of the Act. But the AO has not done so.

53.3 The assessee has been making sales to the sister concern since many years but in none of the previous year, any doubt was raised by the revenue. Therefore, based on the principle of consistency the transaction for the sales made to the sister concern cannot be doubted.

53.4 It was further submitted that the amount of gross profit ratio is showing increasing trend, meaning thereby, it is increasing year after year. In the immediate preceding year, the gross profit ratio was shown at 8.47% whereas the GP ratio of the current year stands at 13.71% which is much higher than the immediate preceding year. As such, the GP of the earlier year was accepted by the revenue and therefore there is no question of rejecting the books accounts of the assessee.

54. The learned CIT-A after considering the submission of the assessee allowed the ground of appeal by observing as under:

I am inclined with the contention of appellant that its books of accounts are audited under company's Act as well as Income tax Act and such audited results provide details of valuation and working of opening stock as well as closing stock. This report was with A.O.. I am also inclined with appellant that during the previous year relevant to A.Y. 08-09, books results of appellant were accepted there by the question of opening stock of impugned previous year, gross profit reflected during impugned previous year at substantially high rate, no cost audit report, sale transactions with associated partly etc. does not give any discrepancy as pointed out by A.O.. The appellant's books of accounts, bills, vouchers were with the VAT department and non production of ! such books / bills / vouchers does not amount to discrepancies which j can lead to rejection of books of account (audited) and estimating substantially higher G.P. results at 20% of G.P. without any comparable, reasonableness has any justification. Specific discrepancies for ' depreciation, disallowances of other expenditure are sufficient to take care of the net profit reflected by appellant. It is therefore, in my view, rejection of books of accounts u/s 145(3) of the Act and estimation of G.P. at 20% and thereby addition of r 1,76,15,0987- is neither justified nor sustainable in law. The A.O. j\$. jdjrected to deletejne addition so made on presumption and surmises. The appellant gets relief accordingly. These grounds are allowed.

55. Being aggrieved by the order of the learned CIT-A the Revenue is in appeal before us.

56. Both the learned DR and the AR before us vehemently supported the order of the authorities below.

57. We have heard the rival contentions and gone through the facts and circumstances of the case, including the materials available on record. As per section 145 of the Act, the AO is empowered to reject the books of accounts of the assessee and make best judgment assessment in the manner as specified under section 144 of the Act if he is not inter-alia satisfied with the completeness or correctness of the books of accounts of the assessee. Generally, the instances for the rejection of books of account include when entries in respect of certain transactions are altogether omitted or incorrect or where the accounts show an abnormally low rate of profit or where there is an inherent lacuna in the system of accounting. However, the AO cannot use this power as a tool to reject the books of accounts merely due to non-maintenance of the stock register, variation in gross profit and non-furnishing of certain vouchers or its explanation or non-confirmation of sundry creditors. Anyway, before rejecting the books of accounts, the AO must record the specific reasons for rejecting the books of accounts. Such satisfaction has to be established and substantiated based on facts and figures, which further depends on the circumstances of each case. Mere minor mistakes/typological errors/absence of stock registers/ lower GP may not *ipso facto* amount to incorrectness/incompleteness of accounts in terms of section 145(3) of the Act. But the case would be different where the above-mentioned mistakes are coupled with other findings. In the given case, AO has rejected the book results of the assessee based on the facts and figured culled out by him during the assessment proceedings as detailed hereunder:

- i. Valuation of opening stock and supporting evidences were not provided.
- ii. Supporting document with respect closing stock and method of valuation not provided.
- iii. Stock report maintained as per excise law and for cost audit were not provided.
- iv. Contra ledger and confirmation from major supplier were not provided.
- v. Major sales were made to related party but no supporting evidence was provided in order to verify arm length of transaction

57.1 In the light of the above facts, the AO invoked the provisions of section 145(3) of the Act and thereby he has enhanced the value of GP and made the addition of Rs. 1,76,15,098/- only.

57.2 From the preceding discussion we find that the AO has rejected the books result declared by the assessee mainly for the reason that supporting document were not provided as required by the AO. At this juncture it is necessary to note that there was search and seizer operation conducted by the VAT department which prevented the assessee to file necessary supporting evidences during the assessment proceeding. It pertinent to highlight that books account of the assessee has been duly audited by the auditor and there was upward trend in GP ratio and in previous year as well in subsequent year, the book results were accepted by the Revenue.

57.3 Therefore, without bringing any corroborative material on record suggesting books result in the year under consideration not representing true the book result cannot be rejected merely for not providing the confirmation of the suppliers and supporting bills and voucher with respect to closing stock. In holding so we draw support and guidance from the judgment of Hon'ble Allahabad High Court in case of Awadshesh Pratap Singh Adbul Rehman & Bros v/s. CIT 201 ITR 404(All) which reads as;

"It is difficult to catalogue the various types of defects in the account books of an assessee which may render rejection of account books on the ground that the accounts are not complete or correct from which the correct profit cannot be deduced. Whether presence or absence of stock register is material or not, would depend upon the type of the business. It is true that absence of stock register or cash memos in a given situation may not per se lead to an inference that accounts are false or incomplete. However, where a stock register, cash memos, etc., coupled with other factors like vouchers in support of the expenses and purchases made are not forthcoming and the profits are low, it may give rise to a legitimate inference that all is not well with the books and the same cannot be relied upon to assess the income, profits or gains of an assessee. In such a situation the authorities would be justified to reject the account books under section 145(3) and to make the assessment in the manner contemplated in these provisions."

57.4 Without prejudice to the above, we also note that the AO after rejecting the books accounts has estimated the GP on one hand but at the same time, the AO has made addition on account of cost incurred by the assessee with respect to various expenses and other income. In other words, the AO has relied upon the same set of data/figures as shown by the assessee. To our mind, once the books of accounts have been rejected, the AO has to estimate the profit and he has no right to make any individual addition to the total income of the assessee. However in the case on hand, the AO has enhanced the value of the GP as well as disallowed other expenses and allowances independently by treating them as bogus, which is not permissible under the provisions of law. In holding so we draw support and guidance from the judgment of this tribunal in case of Hynope Food and Oil Industries Pvt. Ltd reported in 48 ITD 202 where it was held as under:

Section 145 deals with two situations : (a) where the method of accounting is faulty, and (b) where the accounts are not correct or complete. In the case of the former, the Assessing Officer is empowered to compute the income upon such basis and in such manner as he may determine. So far as the latter is concerned, the Assessing Officer is empowered to make a best judgment assessment as provided in section 144, that is, after taking into account all relevant materials which he has gathered. Further, section 145(1) is an enabling provision. It is intended to enable the Assessing Officer to make the correct assessment which is the paramount object. It is not intended to confer any right or benefit upon an erring assessee. Thus, this section is intended to make the correct assessment in compliance with the law and not to by-pass the statutory provisions.

It is a fair proposition that if an overall estimate of income has been made, there would not be any scope for making any disallowances and applying section 40A(3). This is not because the statutory provisions can be ignored or excluded but because they must be deemed to have been applied in making the estimate so that there is no scope for any further deductions. Thus, if an estimate is made on the basis of gross profit by using comparative instances, there would be no scope for further deductions applying section 40A(3). Therefore, all depended upon the manner of making the estimate. If it had been made in a way which covered the entire position regarding income and expenditure, naturally there would not be any scope for further deductions.

57.5 At this juncture, we also find pertinent to note that even assuming the closing stock declared by the assessee is undervalued, then also it has tax neutral effect. It is for the reason that such closing stock shall become the opening stock in the next year and therefore there will not be any impact on the income of the assessee except the income of one year will shift to the income of another year. On this reasoning as well, we do not find any merit in the order of the AO. In view of the

above and after considering the facts in totality, we do not find any infirmity in the order of the learned CIT (A). Accordingly, we uphold the same. Hence the ground of appeal of the revenue is **dismissed**.

58. The next issue raised by the Revenue is that the learned CIT-A erred deleting addition by the AO for Rs. 11,78,321/- being 1/5th of the certain indirect expenses in absence of supporting evidences.

59 At the outset we note that the ground of appeal raised by the assessee has been adjudicated along with ground no. 5 of the assessee's appeal in ITA No. 1320/Ahd/2014. The issue has been decided partly in favour of the assessee and against the Revenue vide paragraph no. 46 of this order. Accordingly the ground of appeal raised by the Revenue is hereby dismissed.

60. In the result appeal filed by the Revenue is dismissed.

Coming to ITA No. 187/Ahd/2020 an appeal by the assessee for A.Y. 2011-12

61. The assessee has raised the following grounds of appeal:

1. *The Ld.CIT Appeals 8 Ahmedabad has erred in law and on facts in passing appellate order dated 28/02/2019 for A.Y. 2011-12 in the case of appellant by confirming disallowance/additions made in the assessment order and justify the converting the limited scrutiny assessment in to the complete scrutiny by the A.O.*
2. *The Ld.CIT(Appeals) erred in law and on facts in confirming disallowance of depreciation on plant & machinery of Rs7681670/-*
3. *The Ld.CIT(Appeals) erred in law and on facts in confirming disallowance of depreciation on Cars amounting to Rs.1008134/-*
4. *The Ld.CIT(Appeals) erred in law and on facts in confirming disallowance of expenses debited in profit and loss account of Rs.658464/-*
5. *The Ld.CIT(A) (Appeals) erred in law and on facts in confirming addition on account of difference in income as per TDS reconciliation ofRs.1026466/-*

6. *The Ld.CIT(Appeals) erred in law and on facts in confirming disallowance of EMD expenses written off of Rs.100750/-*

62. The 1st issue raised by the assessee is that the learned CIT-A erred in confirming the disallowances/additions made by the AO though the same were not subject to the assessment as the case was selected for limited scrutiny.

63 At the outset we note that the learned AR has not brought anything on record at the time of hearing in support of the ground of appeal. We have also perused the assessment order and the learned CIT-A order and find that there was no issue whether the case of the assessee was selected for the scrutiny for the limited purpose or it was a regular assessment. Thus in the absence of any contrary information available on record, we do not find any merit in the ground of appeal raised by the assessee. Hence we dismiss the same.

64. The next issue raised by the assessee is the learned CIT-A erred in confirming the disallowances made by the AO for the depreciation of Rs. 76,81,670/- on plant machineries.

65. At the outset we note that the issues raised by the Assessee in its grounds of appeal for the AY 2011-12 are identical to the issues raised by the assessee in ITA No. 1320/AHD/2014 for the assessment year 2009-10. Therefore, the findings given in 1320/AHD/2014 shall also be applicable for the year under consideration i.e. AY 2011-12. The appeal of the assessee for the assessment 2009-10 has been decided by us vide paragraph No. 11 of this order in favour of the assessee for statistical purposes. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2009-10 shall also be applied for the year under consideration i.e. AY 2011-12. Hence, the grounds of appeal filed by the assessee is hereby allowed for statistical purposes.

66. **The next** issue raised by the assessee is the learned CIT-A erred in confirming the disallowance of depreciation of Rs. 10,08,134/- on car.

67. At the outset we note that the issues raised by the Assessee in its grounds of appeal for the AY 2011-12 are identical to the issues raised by the assessee in ITA No. 1320/AHD/2014 for the assessment year 2009-10. Therefore, the findings given in 1320/AHD/2014 shall also be applicable for the year under consideration i.e. AY 2011-12. The appeal of the assessee for the assessment 2009-10 has been decided by us vide paragraph No. 20 of this order partly in favour of the assessee for statistical purposes. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2009-10 shall also be applied for the year under consideration i.e. AY 2011-12. Hence, the grounds of appeal filed by the assessee is hereby partly allowed for statistical purposes.

68. **The next** issue raised by the assessee is that the learned CIT-A erred in confirming the disallowances of 1/5 of the expenses debited in profit loss account for Rs. 6,48,464/- only.

69. At the outset we note that the issues raised by the Assessee in its grounds of appeal for the AY 2011-12 are identical to the issues raised by the assessee in ITA No. 1320/AHD/2014 for the assessment year 2009-10. Therefore, the findings given in 1320/AHD/2014 shall also be applicable for the year under consideration i.e. AY 2011-12. The appeal of the assessee for the assessment 2009-10 has been decided by us vide paragraph No. 46 of this order partly in favour of the assessee. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2009-10 shall also be applied for the year under consideration i.e. AY 2011-12. Hence, the grounds of appeal filed by the assessee is hereby partly allowed.

70. The next issue assessee by the assessee in ground No. 5 is that the learned CIT-A erred in confirming the difference between the income shown by the assessee viz a viz reflected in TDS certificate amounting to ₹ 10,26,466/-.

71. The AO during the assessment proceedings observed certain differences between the income shown in the books of accounts viz a viz in the TDS certificate. The details of the same stand as under:

<i>Sr.No.</i>	<i>Name of the party</i>	<i>Income as per TDS certificate</i>	<i>Income as per P & L A/C</i>	<i>Difference as per TDS certificate</i>
1.	State bank of India	669643	319197	350466
2.	Kandla Port Trust	676000	NIL	676000
	Total			1026466

72. The above difference was treated as income of the assessee and therefore the same was added to the total income of the assessee. However, the assessee has not challenged the impugned addition before the learned CIT-A.

73. Nevertheless, the assessee has raised the ground of appeal before us. However, at the time of hearing the learned AR has not advanced any argument or pointed out any infirmity in the order of the AO. Thus in the absence of any argument from the side of the learned AR of the assessee, we do not find any reason to interfere in the finding of the AO. Hence we confirm the same. Thus the ground of appeal of the assessee is hereby dismissed.

74. The next issue raised by the assessee in ground No. 6 is that the learned CIT-A erred in confirming the order of the AO by sustaining the disallowance of EMD expenses.

75. The assessee has filed some tenders and deposited the EMD in connection with such tender. But the assessee on a later date did not pursue the same under the impression that the same is not profitable. Such EMD was later forfeited. As per the assessee such EMD is a loss to the business and therefore the same should be allowed for deduction. However the AO disagreed with the contention of the assessee on the reasoning that such EMD expense was not incurred in the course

of the business. Thus he disallowed the same and added to the total income of the assessee.

76. Aggrieved assessee preferred an appeal to the learned CIT-A, who confirmed the order of the AO by observing as under:

*8.3 On careful consideration of entire facts and submission of Appellant, it is observed that the Appellant has claimed EMD Written off expenses of Rs.1,00,750/- explaining the same to be business loss incurred by Appellant while applying for tender. However the Appellant has not provided any proof or evidences regarding such EMD forfeited by various authority and the details of tender pertaining to which such expenses have been incurred. Thus in the absences of any evidences which proves that such expenses are incurred during the course of business the claim of Appellant is not justified and this ground of appeal of the Appellant is treated as **dismissed**.*

77. Being aggrieved by the order of the learned CIT-A the assessee is in appeal before us.

78. The learned AR before us submitted that the forfeiture of the EMD is the business loss and therefore the same should be allowed as deduction. On the contrary, the learned DR vehemently supported the order of the authorities below.

80. We have heard the rival contentions of both the parties and perused the materials available on record. From the preceding discussion, we find that there is no issue to the fact that such forfeiture of the EMD is a business loss which is eligible for deduction. The learned CIT-A has disallowed the same on the reasoning that the assessee failed to furnish the necessary details about the EMD. Indeed, it is the onus upon the assessee to furnish the necessary details for the claim made by it in the income tax return. The assessee has only filed the copy of the ledger which is placed on pages 94-95 of the paper book. To our understanding, the copy of the ledger is not sufficient enough to admit the claim of the assessee until and unless it is supported by the documentary evidence. However at the same time, we find that generally these EMD's are provided by way of fixed deposits which are made through the banking channel. It is also a normal practice if the contract is not awarded to the party, the same is returned back to the assessee. But all these

details are not available on record. However in the interest of justice and fair play we are inclined to give one more opportunity to the assessee to furnish the necessary details before the AO for fresh adjudication as per the provisions of law. The assessee is at the liberty to furnish the necessary details without delay. It is also directed to the assessee to extend full cooperation during the assessment proceedings. Hence the ground of appeal of the assessee is allowed for the statistical purposes.

81. In the result appeal of the assessee is partly allowed for statistical purpose.

Coming to ITA No. 2557/Ahd/2017 an appeal by the assessee for A.Y. 2012-13

82. The assessee has raised the following grounds of appeal:

1.1 *The order passed u/s.250 on 06.09.2017 for A.Y.2012-13 by CIT(A)-8, Abad upholding the disallowance of depreciation of Rs.65,29,420/- in respect of plant and machinery and Rs.8,99,378/- in respect of motor cars made by AO is wholly illegal, unlawful and against the principles of natural justice.*

1.2 *The Ld. CIT(A) has grievously erred in law and or on facts in not considering fully and properly the submissions made and evidence produced by the appellant with regard to the impugned disallowances.*

2.1 *The Ld.CIT(A), has grievously erred in law and on facts in confirming the disallowance of depreciation of Rs.65,29,420/- in respect of plant and machinery and Rs.8,99,378/- in respect of motor car.*

2.2 *That in the facts and circumstances of the case as well as in law, the Ld.CIT(A) ought not to have upheld disallowance of depreciation of Rs.65,29,420/- in respect of plant and machinery and Rs.8,99,378/- in respect of motor car.*

It is, therefore, prayed that the disallowance of depreciation of Rs.65,29,420/- in respect of plant and machinery and Rs.8,99,378/- in respect of motor car upheld by the CIT(A) may kindly be deleted.

83. The first issue raised by the assessee is that the learned CIT-A erred in confirming the disallowances of depreciation of Rs. 65,29,420/- claimed on the plant and machineries.

84. At the outset we note that the issues raised by the Assessee in its grounds of appeal for the AY 2011-13 are identical to the issues raised by the assessee in ITA No. 1320/AHD/2014 for the assessment year 2009-10. Therefore, the findings given in 1320/AHD/2014 shall also be applicable for the year under consideration i.e. AY 2012-13. The appeal of the assessee for the assessment 2009-10 has been decided by us vide paragraph No. 11 of this order in favour of the assessee for statistical purposes. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2009-10 shall also be applied for the year under consideration i.e. AY 2012-13. Hence, the grounds of appeal filed by the assessee is hereby allowed for statistical purposes.

85. The next issue raised by the assessee is the learned CIT-A erred in confirming the disallowances of depreciation of Rs. 8,99,378/- on car.

86. At the outset we note that the issues raised by the Assessee in its grounds of appeal for the AY 2012-13 are identical to the issues raised by the assessee in ITA No. 1320/AHD/2014 for the assessment year 2009-10. Therefore, the findings given in 1320/AHD/2014 shall also be applicable for the year under consideration i.e. AY 2012-13. The appeal of the assessee for the assessment 2009-10 has been decided by us vide paragraph No. 20 of this order partly in favour of the assessee for statistical purposes. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2009-10 shall also be applied for the year under consideration i.e. AY 2012-13. Hence, the grounds of appeal filed by the assessee is hereby partly allowed for statistical purposes.

87. In the result appeal of the assessee is partly allowed for statistical purposes.

88. In the combined Result, appeal of the Revenue is dismissed where appeal of the assessee for all three years are partly allowed for statistical purposes.

Order pronounced in the Court on 06/05/2022 at Ahmedabad.

Sd/-
(T.R. SENTHIL KUMAR)
JUDICIAL MEMBER

Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER

Ahmedabad; Dated **(True Copy)**
06/05/2022
Manish