

**IN THE INCOME TAX APPELLATE TRIBUNAL
"F" BENCH, MUMBAI**

**BEFORE SHRI VIKAS AWASTHY, HON'BLE JUDICIAL MEMBER AND
SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER**

ITA No. 103/MUM/2021 (A.Y. 2014-15)

Income Tax Officer – 33(1)(2) Room No. 945, 9 th Floor Kautilya Bhavan, Bandra Kurla Complex Bandra(E), Mumbai - 400051	v.	Shri VikramBajjnath Agarwal 2003/04, Birchwood Raheja Villows Lokhandwala Township NR Mahindra Gate 4 Kandivali (E), Mumbai - 400101 PAN: ADEPA8582C
Appellant		Respondent

**C.O. No. 11/MUM/2022
[ARISING OUT OF ITA No. 103/MUM/2021 (A.Y. 2014-15)]**

Shri VikramBajjnath Agarwal 2003/04, Birchwood Raheja Villows Lokhandwala Township NR Mahindra Gate 4 Kandivali (E), Mumbai - 400101 PAN: ADEPA8582C	v.	Income Tax Officer – 33(1)(2) Room No. 945, 9 th Floor Kautilya Bhavan, Bandra Kurla Complex Bandra(E), Mumbai - 400051
Appellant		Respondent

Assessee Represented by	:	Shri Ajay R. Singh
Revenue Representedby	:	Vranda U Matkarni
Date of Hearing	:	24.08.2022
Date of pronouncement	:	07.11.2022

ORDER

PER S. RIFAUR RAHMAN (AM)

1. This appeal and cross objection are filed by revenue and assessee against the order of the Learned Commissioner of Income Tax (Appeals)—45, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 13.08.2020 for the A.Y.2014-15.

2. Brief facts of the case are, Assessee filed return of income for A.Y.2014-15, declaring total income of ₹.4,92,570/- and the return of income was processed u/s. 143(1) of the Income-tax Act, 1961 (in short "Act"). Subsequently, the case was selected for scrutiny under CASS and notice u/s. 143(2) and 142(1) of the Act were issued and served on the assessee. In response AR of the assessee attended and submitted the relevant information as called for.

3. Assessee is an individual engaged in business of trading in pure Gold, Bullion, Ornaments in name of Hari Om Exports, filed return of income for A.Y.2014-15, declaring total income ₹.4,92,570. Assessee maintains regular books of account on computer system with tally software and quantitative details of purchase, sale and stock. Assessee carries business over several years and regularly files return of income.

Same is subject to scrutiny assessment in various years including A.Y.2013-14. Returned income of Assessee is duly accepted by same Assessing Officer for A.Y.2013-14 i.e. immediately preceding assessment year.

4. During assessment proceedings, Assessing Officer issued a show cause notice dated 7.12.16 proposing special audit of accounts under section 142(2A) pointing out following discrepancy:

- (i). Method of valuation of stock on FIFO method is incorrect and should be valued at cost or market value whichever is less.
- (ii). Gold sales made on 12.4.13 for Rs. 2928 per gram and purchased for ₹.2,940 per gram. However, closing stock on 12.4.2013 is valued at ₹.2971. This shows that there is either a manipulated purchase or manipulated sale or manipulated stock.
- (iii) AO observed that more than 95 percent of sales is in cash and Gross profit is only 0.30 percent and valuation of closing stock is not in tandem with cost price of purchase or market value existing on that date, correctness of account is not proved beyond doubt.

5. In response, Assessee submitted that the stock maintained on weighted average cost method. Stock valuation was done automatically by tally software as such was not manipulated. Stock being valued on weighted average method, could be higher than a particular purchase or sale price. Assessee is dealing in gold with walk in customers who made purchases in cash. Cash collection is regularly deposited in bank account and purchases were made through banking channels. Assessee gave tally data in support of its contention which shows complete correctness of accounts of assessee along with all information, documents, purchase parties ledger, confirmation and other requirements of Assessing Officer. It submitted the nature of business of dealing in bullion is of low margins.

6. Assessee pleaded before the Assessing Officer that there is no requirement of special audit since ingredients of section 142(2A) are not present in instant case, namely nature, complexity, volume of accounts, correctness of accounts, multiplicity of transactions, specialized nature of business activity and interest of revenue. However, Assessing Officer did not accept request and applied to Principal CIT for approval of special audit vide letter dated 26.12.16 and approval was accorded by Pr.CIT on 27.12.16. Assessing Officer appointed special auditor directing assessee

to get his accounts audited. Assessing Officer granted an extension of 2 months up to 26.4.17 at request of assessee.

7. It is brought to our notice that during course of special audit on request of Assessing Officer, a spot inspection was conducted by ITO Siliguri. As spot inspection report was not received, further extension of one month up to 26.5.2017 was granted by Assessing Officer suomoto. Since spot inspection report was not received before fixed date, Assessing Officer again granted suo moto extension of one month up to 26.6.2017 for special auditor to submit their audit report.

8. It was submitted that Assessee values consistently and regularly its stock on weighted average method, accordingly it was valued at ₹.1,30,61,572, worked out by tally software automatically. Special auditor instead valued closing stock manually at ₹.1,41,45,769. Assessing Officer accordingly added difference of ₹.10,84,198 to income of assessee as increase in value of closing stock.

9. Subsequently, Special auditor compared purchase rates with average market price on that day. Accordingly, he worked out a sum of ₹.50,93,964 being amount where purchases were made at prices higher than average market price. Assessing Officer added said amount of

₹.50,93,964 to the gross income. In response before AO, Assessee submitted that special auditor did not consider favorable cases where purchases were made at prices lower than average market price. The special auditor should have considered adverse as well as favorable values, result would be in favor of assessee of ₹.14,98,672. Assessing Officer ignored argument of Assessee.

10. Special auditor compared sales rates with average market price on that day. Accordingly, he worked out a sum of ₹.64,60,179 being amount where sales were made at prices lower than average market price. Assessing Officer added said amount of ₹.64,60,179 to income of Assessee. Assessee submitted that special auditor has not considered favorable cases where sales were made at prices higher than average market price. If calculation of entire sales considering adverse as well as favorable circumstances, result would be in favor of assessee of ₹.15,04,281. Assessing Officer ignored argument of Assessee.

11. Assessee made total purchases of ₹.51,80,65,817, out of which cash purchases were ₹.184,50,501, this is 3.56 per cent of total purchases. Each cash purchase made was below ₹.20,000. Special auditor observed that all cash purchases were above ₹.20,000, without

any evidence. Assessing Officer added entire cash purchase of ₹.184,50,501 under section 40A(3). The assessee submitted that no single purchase is found to be false or bogus or in cash for ₹.20,000 or more.

12. Assessee paid freight charges to carriers for transporting gold and silver, as per prevailing local practice. He gave details of persons to whom paid with proper vouchers. Assessing Officer disallowed entire freight charges of ₹.1,54,125 and assessee submitted that which was wholly incurred for purpose of business. Assessee paid refining charges for converting old Jewellery to gold. Expenses incurred wholly for business and fully vouched. Assessing Officer disallowed entire amount of ₹.9,940.

13. Assessee incurred car expense amounting to ₹.292,533 and suomoto disallowed towards personal purpose ₹. 117,609 and claimed ₹.174,942 being incurred for business. Assessing Officer disallowed entire claim of ₹.174,942.

14. Assessee paid donation ₹.40,000 and claimed deduction under section 80G. Assessing Officer has not granted said deduction.

15. Assessee made cash sales each below ₹. 2 Lakhs. Assessing Officer observed that these sales were made in cash in excess of ₹.2 lakhs, and referred matter to TDS officer claiming violation of TCS provisions.

16. Considering the above facts on record and not convinced with the submissions of the assessee, Assessing Officer assessed the income of the assessee at ₹.3,19,60,720/- by making addition of ₹.3,14,28,149.

17. Aggrieved assessee preferred appeal before the Ld.CIT(A) and Ld.CIT(A) considering the submissions of the assessee and averments of the Assessment Order, partly allowed the grounds raised by the assessee with the following observations: -

"3. Ground no.1 is that the assessment order is high pitched and contravenes with CBDT instruction 767 in this regard. Though the ground is taken on the issue of high pitched assessment, neither any submissions have been made by the appellant in writing nor have any arguments been made by the AR on the issue during the appeal proceedings. I have considered the assessment order and the Special audit Report. Since, the additions have been made after considering Special Auditor's report u/s 142(2A), it cannot be said that there is high pitched assessment in the case in violation of the Board circular. Therefore, this ground of appeal is dismissed.

4. Ground no.2 and 3 relates to reference and appointment of special auditors for conducting special audit u/s. 142(2A) and grant of extension of time on two occasions. The appellant has claimed that nature of his business is very simple to understand i. e. trading of gold and silver which cannot be said as complex in nature as the books of accounts were maintained in 'Tally' software. It further claimed that volume of turnover was as low as Rs. 52 Crores, there was no doubt about the correctness of the accounts, there was no multiplicity of transactions in the accounts. He also claimed that mere meager profit is was not against the interest of the revenue and ingredients of section 142(2A) of the Act were not present in the case. In ground no 3 the

appellant has claimed that The learned officer suo-moto granted extension u/s. 142(2C) under the pretext of awaiting commission report called by him under section 131(1)(d) from ITO at Siliguri, which is not related to special audit. Appellant argued that the extension of period of special audit was without any good and sufficient reason therefore, the assessment order being time barred needs to be treated as null and void.

4.1. I have perused the assessment order and the submissions of the appellant. The AO in the assessment order in paragraphs 3 to 3.4 has very clearly spelt out the reasons as to why the assessee case was fit for special audit. Relevant provisions of Special Audit are as under.

(2A) If, at any stage of the proceedings before him, the Assessing Officer, having regard to the nature and complexity of the accounts, volume of the accounts, doubts about the correctness of the accounts, multiplicity of transactions in the accounts or specialised nature of business activity of the assessee, and the interests of the revenue, is of the opinion that it is necessary so to do, he may, with the previous approval of the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner, direct the assessee to get the accounts audited by an accountant, as defined in the Explanation below sub-section (2) of section 288, nominated by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner in this behalf and to furnish a report of such audit in the prescribed form duly signed and verified by such accountant and setting forth such particulars as may be prescribed and such other particulars as the Assessing Officer may require

Provided that the Assessing Officer shall not direct the assessee to get the accounts so audited unless the assessee has been given a reasonable opportunity of being heard.

(2B) The provisions of sub-section (2A) shall have effect notwithstanding that the accounts of the assessee have been audited under any other law for the time being in force or otherwise.

(2C) Every report under sub-section (2A) shall be furnished by the assessee to the Assessing Officer within such period as may be specified by the Assessing Officer:

Provided that the Assessing Officer may, suo motu, or on an application made in this behalf by the assessee and for any good and sufficient reason, extend the said period by such further period or periods as he thinks fit; so, however, that the

aggregate of the period originally fixed and the period or periods so extended shall not, in any case, exceed one hundred and eighty days from the date on which the direction under sub-section (2A) is received by the assessee.

4.2 From the provisions of the Special audit, it can be seen that the AO has duly complied with all relevant provisions in this regard such as granting opportunity to assessee prior to appointing to special auditors, obtaining due approval of commissioner, granting extension of time to ITO Siliguri etc. It is also seen from the Special Audit Report /record that the Special Auditor (hereafter referred to as SA) also gave full opportunity to assessee to present his case. The assessment order is within statutory time limit therefore it cannot be said that the order is time barred. In view of these facts do not find any merit in the arguments taken by the assessee in these grounds. Therefore, the ground of appeal numbers 2 and 3 are dismissed.

5. Ground No. 4 relates to addition of Rs. 10,84,198 on account of valuation of closing stock. The inventory of Gold (fineness 99.50) is 4,779.912 grams as on 31.03.2014 which was valued by assessee at Rs. 1,30,61,572 as per weighted average method. The Special Auditors (SA) examined the working of stock valuation done by the assessee and opined that the assessee undervalued the inventory. As per working of Special auditors the correct value of inventory on 31.3.2014 should be Rs.1,41,45,769 as per weighted average method (calculated on daily basis) and Rs. 1,41,46,714 as per FIFO method. The SA reported that the stock is undervalued by Rs.10,84,198 as per weighted average method and by Rs. 10,85,142 as per FIFO method. AO gave opportunity to the assessee to explain. Not accepting the explanation filed by the assessee, the AO made addition of Rs. 10,84,198 on account of difference in valuation of closing stock.

5.1. The AR in his submissions argued that the appellant consistently and regularly values its closing stock at Cost. Further, Cost of closing stock is determined on the basis of weighted average method. Valuing closing stock on weighted average method is as per AS2 (Accounting Standard 2) prescribed by Institute of Chartered Accountants of India. Special auditors on Page 12 of audit report has accepted that the "method of valuation of inventory i.e. Weighted Average method can be said to be in line with the Accounting Standard-2". However, while determining value of closing stock, the SA followed the weighted average method calculated on daily basis and valued the stock at Rs.1,41,45,769 as against valuation done by the appellant on the formula of weighted average method, calculated on annual basis, which is adopted by tally software and valued the stock at Rs. 1,30,61,572.

5.2 Appellant submitted that the SA erred in considering the period as daily instead of year' taken by the appellant. Appellant submitted that weighted average method taken on yearly basis is consistently followed by the appellant and also by Tally software. He argued that the Ld. SA has intentionally distorted the term "period" considering it as 'one day'. whereas it has to be much larger period considering a business cycle. The SA also ignored the regularly followed system by the appellant, which is also followed by the most popular Tally accounting program as per AS2 of ICAI Appellant has also claimed that the learned officer erred in ignoring the vital fact that opening stock and closing stock both have to be valued by same method, disturbing one side of valuation gives distorted result in computing taxable income of the year. If he were to change the formula, he ought to have changed the same for opening stock as well, to work out correct taxable income of the relevant year.

5.3 I have perused the assessment order and submissions of the appellant and. I agree with the appellant that method of valuation of closing stock has to be same as that of opening stock. Disturbing the closing stock valuation method without applying the same method to the opening stock may increase the profit of the year, as sought to be done by the AO. However, the closing stock of this year will be opening stock of the next assessment year, which will reduce the profit of the next year. If the tax is payable because of disturbing the method this year, then the assessee will get refund in the next year. In other words, it is revenue neutral. Since the appellant has followed accepted method of valuation of inventory i.e. Weighted Average method which is in line with the AS-2, as agreed by the SA, it is incorrect on the part of the special auditor to tinker the period for valuation method from year to daily basis for no reason.

5.4 The effect of the assessment is that the AO has changed accounting method regularly followed by the appellant over the years. He has not considered the effects of such disturbance of accounting method on the results of later years. A method of accounting adopted by the trader consistently and regularly cannot be discarded by the departmental authorities taking a view that the assessee should have adopted a different method of keeping account or of valuation. Courts have also held that the real profits of a particular year cannot be ascertained by merely raising the valuation of the closing stock, not taking into consideration the similar under valuation of the opening stock. Reliance is placed on the following judicial precedents.

Assessee has the choice on method, but such method should be shown as regularly followed The choice of the method of accounting lies with the assessee; but the assessee must show

that he has followed the method regularly for his own purposes- CIT v. McMillan & Co. [1958] 33 ITR 182 (SC).

A taxpayer is free to employ, for the purpose of his trade, his own method of keeping accounts, and for that purpose to value his stock-in-trade either at cost or market price. A method of accounting adopted by the trader consistently and regularly cannot be discarded by the departmental authorities on the view that he should have adopted a different method of keeping account or of valuation. The method of accounting regularly employed may be discarded only if, in the opinion of the taxing authorities income of the trade cannot be properly deduced there from - Investment Ltd. v. CIT [1970] 77 ITR 533 (SC).

In case of accounting system regularly followed Accounting method followed by an assessee continuously for a given period of time needs to be presumed to be correct till Assessing Officer comes to conclusion for reasons to be given that said system does not reflect true and correct profits - CIT v. Woodward Governor India (P.) Ltd. [2009] 179 Taxman 326 (SC).

Where both opening and closing stock are undervalued, both should be altered -When the opening and closing stocks of a business are both undervalued, if the method of altering both valuations is not adopted, it is perfectly plain that the profit which is brought forward is not the real one. In such cases, the real profits of a particular year cannot be ascertained by merely raising the valuation of the closing stock, not taking into consideration the similar under valuation of the opening stock CIT v. Ahmedabad New Cotton Mills Co. Ltd. 4 ITC 245 (PC).

5.5 In the present case as already mentioned, it is not the case of the AO that the appellant did not follow the same method regularly or that true and correct income could not be derived from the accounting method followed by the appellant. Further reliance in this regard is also placed on the decision of Hon'ble Supreme Court of India in the case of Radhasoami Satsang Vs. Commissioner Of Income Tax [(1991) 100 CTR (SC) 267 (1992) 193 ITR 321 (SC) (1992) 60 Taxman 248], where in the Court held as under:

9. We are aware of the fact that, strictly speaking, res judicata does not apply to IT proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a

subsequent year. On these reasoning's, in the absence of any material change justifying the Revenue to take a different view of the matter-and, if there was no change, it was in support of the assessee-we do not think the question should have been reopened and contrary to what had been decided by the CIT in the earlier proceedings, a different and contradictory stand should have been taken. We are, therefore, of the view that these appeals should be allowed and the question should be answered in the affirmative, namely, that the Tribunal was justified in holding that the income derived by the Radhasoami Satsang was entitled to exemption under ss. 11 and 12 of the IT Act of 1961"

5.6. The above decision of the Hon'ble SC clearly shows that consistency has to be maintained where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order. In this case the appellant is consistently followed a particular method of accounting year after year and the same was accepted by the department. The opening WIP is the closing WIP of earlier year, and so on for earlier years also. Courts have held that if the issue is that of valuation of closing stock, then both opening and closing stock have to be revalued, disturbing only one value is not correct. CIT v. Ahmedabad New Cotton Mills Co. Ltd. 4 ITC 245 (PC). Therefore, there is no reason to disturb the method of accounting only this year which is regularly followed, by valuation of closing stock by taking the weighted average of bullion on daily basis. Therefore, respectfully following the decision of the Apex Court, I do not find the reason to disturb the method regularly followed by the assessee in valuation of closing inventory. Accordingly, the addition of Rs. 10,84, 198 made on account of valuation of closing stock by changing the weighted average method to daily basis is deleted. Ground number 4 of the appellant is allowed.

6. Ground No.5 and 6 Ground No. 5 relates to addition of Rs.50,93,964 on account of deviation in purchase rates of gold and silver as compared to average market rate. Ground No.6 relates to addition of Rs.64,60,179 on account of deviation in sale rates of gold and silver as compared to average market rate. During the course of assessment proceedings the assessee was asked to justify the purchase and sale rates of gold and silver. In response the assessee referred to the rates as per www.goldpriceindia.com. In the Special Audit Report, the auditors have compared the sale and purchases rates of gold and silver of the assessee with the market rates taken from the above website www.goldpriceindia.com. Special Auditors examined the purchases, sales and stock registers along with the invoices with date, name of party, quantity and amount. Detailed working of the variances

on comparison of actual rates market rates is placed in auditor's report. SA observed that on numerous instances the purchases and sales are not accordance with the market rates. On many occasions the goods have been purchased and sold at non existing prices ie, on many occasions the goods are purchased at rates higher than the highest market rate on a particular date and sales are made at rates lower than the lowest market rate on a particular date, owing to which the profit of the assessee is affected.

6.1 Summary of details of the comparison is given in the table by assessing officer. According to this table purchases rates taken by the assessee when compared with the highest market rate of the day, there are 356 instances where assessee purchased at price more than highest market rate and the difference in such cases worked out as Rs.33,82,026. Further, purchases rates taken by the assessee when compared with the average market rate of the day, there are 377 instances where assessee purchased at price higher than average market rate and the difference in such cases worked out as Rs.50,93,964. After giving opportunity, not accepting the explanation filed by the assessee, the assessing officer made an addition on account of deviation in purchases rates of gold and silver as compared to average market rate of Rs.50,93 964.

6.2 Appellant in his submissions stated that was shocking to him to note that the special auditors chose to work on their whims and fancies ignoring vital evidences of purchase made with proper supporting invoice and payment made by account payee cheques which are reflected in bank statements and confirmation of these parties were also produced before special auditor. More over purchases were made from most reliable, prominent dealers of Gold and bullion from Kolkata. Neither the learned officer nor the special auditor has raised doubts on any of such supplier. Even they have not found any discrepancies on the supporting evidence for purchase supplied by your appellant. Special auditor considered only one website and took average value quoted therein. The value given in different web sites are different and are only indicators and not absolute truth like share market quotations

6.3 The AR explained that delivery mechanism in sales of Gold and silver by various reputed suppliers is made in T / T+1 /T +2/ or T+3 terms, where delivery of gold / silver is made on same day (T), second day of order (T+1) or third day of order (T+2) and so on and prices are fixed on day of booking. As such certain purchase of gold / silver may be at prices applicable one, two or three days earlier, whereas special auditors has considered the prices of day of delivery only, ignoring earlier days prices, which is wrong. Though gold and silver markets are volatile in nature and the rates vary throughout the day. Comparison of purchase rate with average market rate for making addition to income

is absurd, illogical and without any base. It has a vital shortcoming, since one would not know average market price until the end of the day, whereas purchases have to be made during different times of the day. Comparison must not be capricious and it should have reasonable nexus to the available material and circumstances of the case.

6.4 The AR further submitted that the Special auditors and AO gave distorted picture in considering selective comparison of average market price of purchases only where purchase was higher than average price and ignoring cases where purchases were made at prices lower than average price. Though the comparison with average price is absurd and illogical as already submitted, if favorable variation were to be considered, net difference of adverse circumstances and favorable circumstance, would have been in favor of appellant amounting to Rs. 14,31,397. Therefore, he requested to delete the addition made by considering selective comparison of average market price of purchases only where purchase was higher than average price and ignoring cases where purchases were made at prices lower than average price.

6.5 I have perused the appellant submissions and the assessment order. I agree with the appellant that vital evidences of purchases such invoices received for purchases during the normal course of business, payments made by account payee cheques duly reflected in bank statement, confirmation of these parties who are prominent dealers of gold and silver cannot be ignored and more so when nothing is found against the assessee during the survey/inspection to indicate inflation of expenditure to suppress of profits. I also agree that websites quotations of gold and silver cannot be taken as absolute truth and the same may vary with other websites and actual market prices. It is also a fact that gold and silver prices vary slightly from place to place in a day. There is force in the argument of the appellant that it is illogical to compare actual purchase price with average quoted market rate of that date, since no assessee can wait to know average price of that day before making purchases during the day. The assessee is doing the bullion business in Siliguri town far away from Kolkata. Assessee's purchases are mainly from Kolkata. The purchases orders placed with seller parties in Kolkata cannot be received/delivered in Siliguri same day. Therefore, terms of delivery involving delay of one or two days makes it difficult to compare with quoted price of a particular date, since market price of gold and silver fluctuates every now and then Courts have held that the AO cannot decide how the businessman should conduct business sitting in his arm chair. Hence in view of availability of proper supporting documentation for purchases and no discrepancies therein pointed out by neither the special auditors nor the AO, the addition made by imposing the condition that the assessee should have purchased the gold and silver below the average price is farfetched against the realities of the business. Hence addition of

Rs.50,93,964 made on account of deviation in purchase rates of gold and silver is hereby deleted. Ground No.5 is allowed.

7. Ground No.6 relates to addition of Rs.64,60,179 on account of deviation in sale rates of gold and silver as compared to average market rate. Summary details of the comparison are given in the table by assessing officer in para 8.5 of the assessment order. According to this table sales rates taken by the assessee when compared with the lowest market rate of the day, there are 706 instances where assessee sold at price less than lowest market rate and the difference in such cases worked out as Rs.50,33,722. Further, sales rates taken by the assessee when compared with the average market rate of the day, there are 1013 instances where assessee sold the bullion at price lower than average market rate and the difference in such cases worked out as Rs.64,60,179. Accordingly, the assessing officer made an addition on account of deviation in sales rates of gold and silver as compared to average market rate of Rs.64,60,179.

7.1. Appellant submitted that the gold and silver markets are volatile in nature and the rates vary throughout the day. Comparison of sales rate with average market rate for making addition to income is absurd, illogical and without any base. It has a vital shortcoming, since one would not know average market price until the end of the day, whereas sales have to be made during different times of the day. Comparison must not be capricious ought to have reasonable nexus to the available material and circumstances of the case particularly when neither Special auditors nor the AO could find any discrepancy in any of appellant's sales bills. The AR argued that the Special Auditor made two comparisons of Sales, one with lowest market value of the day and found the difference of Rs.50,33,722 and second with the average price and found the difference of Rs.64,60,179. These itself reflects fallacy of procedure, where assessing officer conveniently added the higher difference, with a predetermined mind set to assess exorbitant income. He further argued that Special auditors gave distorted picture by cherry picking of average market price of sales, only where sales were lower than the average price and ignoring cases where sales were made at prices higher than average price. He submitted that if calculation of entire sales considering adverse as well as favourable circumstances, the result would be in favour of your appellant of Rs. 15,04,281. The AR placed reliance on the decision of Apex Court in the case CIT vs Daulat Ram Rawatmull (1973) 87 ITR 28 (SC) where in the Hon'ble Court observed "There should, in our opinion, be some direct nexus between the conclusion of fact arrived at by the authority concerned and the primary facts upon which that conclusion is based. The use of extraneous and irrelevant material in arriving at that conclusion would vitiate the conclusion of fact because it is difficult to predicate as to

what extent the extraneous and irrelevant material has influenced the authority in arriving at the conclusion of fact."

7.2. I have perused the assessment order and submissions of the appellant. I agree with the appellant that vital evidences of sale bills generated during the normal course of business, payments received duly reflected cash book and bank book, bank statement cannot be ignored and more so when nothing is found against the assessee during the survey/inspection to indicate suppression of profits. The rates as per website are extraneous material. As mentioned in para 6.4 above the websites quotations of gold and silver cannot be taken as absolute truth and the same may vary with other websites and actual market prices from place to place. It is illogical to compare actual sales price with average quoted market rate of that date, since no assessee can wait to know average price of that day before making any such sale above that rate. Moreover, there are two comparisons one with lowest market price of that day and one with average price both giving different results, and the AO added the one with higher difference, without any logic. Further, the appellant has validly pointed out that while comparing with average price there would be cases favouring appellant and net difference would be in favour of appellant. As neither the auditors nor the AO could point out any specific discrepancy in any sales bills the addition arrived based on comparison of the selected sales which are below the average market selling rate is not logical and against the ground situation of business where the sales are made as and when orders are received or to the walk-in customers. Hence addition of Rs.64,60,179 made on account of deviation in sales rates of gold and silver is hereby deleted. Appellant gets relief and the Ground No.6 is allowed.

8. Ground no. 7 relates to disallowance of cash purchase Rs.1,84,50,801 u/s. 40A(3) of the Act. The Special Auditor has pointed out that the assessee during the year under consideration has made purchase of gold ornaments amounting to Rs. 1,84,50,801 in cash. He also noted that all such cash purchases of gold ornaments are made below Rs.20,000. The gold ornaments are refined and thereafter sold to the parties. The AO has given such details in tabular form in the assessment order in para 8.6, as per the analysis out of 977 number of transactions of cash purchases, 497 number of transactions were in the range of Rs. 19000 to Rs. 20000; the other 480 number of transaction were below Rs.19,000. Ornaments so purchased weighed in the range of 2 grams to 8.84 Grams only. AO has stated that it seems that the assessee purposely not purchased any gold ornaments in excess of Rs. 20,000 which will violate the provisions of section 40A(3) of the Act. If the cash purchases are made exceeding Rs.20,000, the identity proof is required to be maintained. AO raised a specific issue as to how assessee managed to handle 191 customers personally in a single day

on 30.08.2013. The purchase invoices are prepared by the assessee himself only writing name and city of the selling party. It is also observed by the SA that the percentage of loss of grams due to refining is not consistent as it ranges from 8.1% to 18%. It is further noted that refining bills and sales invoices suggest that most of the times buying and selling the refined gold happened on the same day. AO gave a notice proposing the addition u/s 40A(3) of the Act and the assessee filed his reply on 05.08.2017. AO did not agree with the explanation given by the assessee. The AO observed that the assessee may have made large amount of gold exceeding Rs.20,000 in cash, but to avoid the consequence of disallowance u/s 40A(3), the assessee may have resorted to splitting of cash purchases thereby making each purchase amount less than Rs 20,000. Hence the AO considered entire cash purchases of Rs.1,84,50,801 as purchases in cash exceeding Rs. 20,000 and disallowed u/s 40A (3) of the Act.

8.1. During the appeal proceedings the appellant reiterated the argument made before the AO and filed submissions as under.

Special Auditors has reported that your appellant did not make any purchases from any hawala dealers, declared by Maharashtra Vat Department. Though auditors were asked only about purchases from Hawala Dealer, special auditors went for other details that were not asked from them Le. to find abnormalities in cash purchases, this reflects their prejudiced mind.

Special Auditors has raised doubts on cash purchases of Rs.1,84,50,801/ which is meager 3.56% of appellant's total purchases of Rs. 51,80,65,817/ during the relevant year. Your appellant entire cash purchases below Rs. 20,000/- is in compliance of income tax laws. It has been doubted by Special Auditor as to why there are no cash purchases exceeding Rs. 20,000/-, compliance of law ought not to have been treated as doubtful transaction by Special Auditors.

Your appellant also submitted that each purchase was made by cash was less than Rs. 20,000/- Further, there was a hike in duty of Gold and Silver by the government on August 13, 2013 and it took a lot of time for the market to normalize. So the rate offered by regular suppliers, were not feasible for your appellant. Since your appellant had working capital therefore, appellant started purchasing of gold ornaments in cash from walk in sellers. Further when gold prices increase people try selling their old ornaments so that they can get more value and profit. Number of people increase during such time through mouth publicity and can vary upon price hike, sometimes it can

be 10 or sometimes 200, it is unpredictable about walk-in sellers' frequency. Number increases with perceptions and mouth publicity. Usually walk-in sellers do not carry large quantity of gold so purchases made by appellant are all of small value. The amounts recorded in the books of accounts are actual purchases made by appellant.

Your appellant states that if sellers were willing to sale gold in smaller quantity, to avoid the hassle and ease in the transaction there is no reason for appellant that he should not have made purchases in such small quantities. After all selling and purchasing us very basic part of his business.

Your appellant is a proprietorship concern, capable to make fast and quick decision based on available opportunities: So, It was possible for your appellant to adopt change in the business practice to purchase from local parties as against purchase from suppliers, without taking any time.

Many of these sellers are low income and illiterates. They cannot be expected to issue invoice for sales amounting to below Rs. 20,000/- For them the transaction is simple of giving gold against cash. Most of these people do not understand and are not capable making compliances of issuing bills, receipts etc. As such your appellant himself prepared purchase invoices in such cases.

Special auditor did not appreciate that in this kind of purchase of old jewellery business pricing is not based on bangle, jewellery, necklace, earringpendant, bracelet, ring, etc. but on the basis of purity of gold. Ultimately they are sent to refinery for melting. Due to small amount of transactions full address and contact number could not be taken on record. At times seller deny sharing such details and feels offended with more inquiry. Sellers feel that they are delivering gold worth for asking money.

Your appellant would like to state that the refining loss totally depends upon the quality of jewellery and refinery and not appellant. Moreover there are only 6 days in the entire year, such transactions happened and that too of 2.690 kg against gold sales during the year of 132.692 kg, which is a minuscule 2.03% It was wrong on the part of the Auditor to see everything only with suspicious mind and doubting every activity of appellant with prejudiced and premeditated mind.

Special auditors / learned officer ignored that (i) your appellant books were duly audited for tax audit by an independent CA (ii)

Sales Tax department has accepted purchase and Sales of your appellant in totality (iii) Income tax department has accepted valuation of stock purchases, sales etc in scrutiny assessment of appellant in earlier year

Reason for lower quantity of purchase is obvious no one would sale gold more quantity for a sum below Rs. 20,000/- Special auditor ignored the vital factor that old jewellery when melt through, refinery can be converted in large quantity and gold is a peculiar metal where gold coins weighing 1 gms, 2 gms or 5 gms are sold regularly in the bulion market

Special Auditors themselves are not sure and concluded based on probabilities without any proper or concrete evidence. Your appellant is atpains to state that without any credential evidence special auditors preparedthe report on presumption, assumptions and imaginations, which is not tenableas per law.

Special auditors themselves have accepted that your appellant did not make purchases from hawale dealers. As such your appellant's all purchases are genuine. Hence additions towards purchases made from registered dealers are unwarranted.

The AR placed reliance on the decision of Bombay High Court in the case of R B Jessaram Fatehchand (Sugar Dept) vs CIT (1970) 75 ITR 33 (Bom), where in Hon'ble jurisdictional High Court observed in para 4 ofthe order "The names of the customers are also entered in respect of the transaction. All that is not done is that the addresses are not entered and on enquiry the assessee was unable to supply the addresses. Since, having regard to the nature of the transactions and the manner in which they had been effected, there was no necessity whatsoever for the assessee to have maintained the addresses of cash customers, the failure to maintain the same or to supply them as and when called for cannot be regarded as a circumstance giving rise to a suspicion with regard to the genuineness of the transactions."

8.2. I have carefully gone through the assessment order andsubmissions of the appellant. It is a fact that the SA did not point out after examination of the purchase bills that there are multiple purchases from the same person on the same day below Rs. 20,000. It is also not a case of the AO that assessee purchased from the same person on consequent days. It is only a suspicion which is the basis for the addition of all the cash purchases u/s 40A(3) which are actually below Rs. 20,000 in the books and supported by vouchers. Assessee is doing business in a small town Siliguri in west Bengal, Assessee explained various reasons for the purchases of small items weight ranging from 2 grams to 8 grams, on limited number of days in August 2013. Varying loss in old gold purchased cannot be a reason for such

addition. As is known the gold ornaments are made of 14ct to 22 ct. In small villages and towns, purity of small gold ornament worn on ears and noses is less important compared to cities where there is more quality consciousness. Therefore, small gold items have varying purity and hence there will be varying loss on refining. It is not the case of the AO that the assessee had a refinery where he manipulated the loss on melting the purchased items.

8.3 The AO made certain assumptions like the assessee may have actually purchased gold and silver for more than Rs 20,000 but to overcome the provisions of IT Act, he prepared purchase bills for less than Rs.20,000. This is purely assumption without any evidence in his possession. Even if for time being the assumption is considered as correct, there is no supporting evidence. All the evidence on record shows that each purchase is below Rs.20,000 and from the analysis of the data of sellers, it cannot be said any seller's name is repeating on the same day or any other days before or after that. Courts have held that presumption however real it may appear to be, it cannot take the place of evidence. Theory of human probability cannot be applied in the facts of the case, looking into the place of business and the nature of business. Therefore, the conclusion of the AO that the assessee made entire cash purchase exceeding Rs. 20,000 is erroneous and against the material on record. Hence addition of Rs.1,84,50,801 made u/s. 40A(3) based on assumption is hereby deleted. Appellant gets relief and the Ground No.7 is allowed.

9. Ground no. 8 relates to disallowance of freight charges Rs.1,54,125. The Special Auditor noticed that the assessee claimed Rs.1,54,125 as freight charges in the books accounts, for the movement of goods from Kolkata to Siliguri. The assessee submitted that there are workers in their line of business called as carriers which are involved in carrying goods from Kolkata to Siliguri by train or other means. The freight charges are paid to them for performing this work, Special auditors have stated that the assessee has only provided confirmations of the above persons and has not provided any evidence like Train ticket Bus ticket, goods receipt, inward register of goods, etc. to substantiate the claim of expenses. Therefore, we are unable to comment on the genuineness and sufficiency of the freight expenses debited in the books of accounts of the assessee. AO has stated that he is not satisfied with the claim of freight expenses of Rs.1,54,125 by the assessee, therefore disallowed and added to the total income of the assessee.

9.1. Appellant during the appeal proceedings explained that he had sales office in Siliguri and procured most of the gold, silver from Kolkata. He paid freight charges to persons acting as carriers for transporting gold and silver generally from Kolkata to Siliguri. He

explained that this is only prevailing practice locally and given details of persons to whom the same is paid and submitted proper vouchers. Special auditors asked for tickets of these couriers, however since these couriers travelled through private buses no tickets were available. Further, these couriers worked for other people also, hence they gave their own confirmations and no other supporting. Special Auditor unnecessarily doubted appellant's business process of handling through carriers, out of own imaginations, without any evidence. They ought to have appreciated economic efficiency of your appellant.

9.2. I have carefully considered the assessment order and the submissions of the appellant. Special auditors and AO has not doubted the business of the assessee and the movements of goods between Kolkata and Siliguri. AO did not find any discrepancy with the confirmations of courier boys. Only because amount spent is very low, no train or bus tickets of the carriers are available on record; special auditors doubted the expenses and the AO disallowed the full amount. When the business of the assessee is accepted and the source of goods procured is not doubted, the expenses cannot be disallowed. Most important criteria u/s 37(1) of the Act for allowing an amount as expenditure is whether the expenditure was wholly and exclusively incurred for business purposes. It is not the case of the AO that there was other method of transportation of the gold and silver between Kolkata and Siliguri for which the expenditure is already allowed and this is not genuine expenditure. Therefore the addition is without any merit. However, considering the doubt expressed by the AO regarding the non availability of basic vouchers, an amount of Rs.50,000 is confirmed and the balance Rs. 1,04,125 is deleted. Appellant gets part relief and ground number 8 is partly allowed.

10. Ground no. 9 relates to disallowance of refining expenses Rs. 9,940. The refining expenses are in respect of gold ornaments. The assessee, during the course of special audit, has furnished the copies of bills of refining expenses. AO in the assessment order has stated that the undersigned is not satisfied with the claim of the assessee and disallowed the refining expenses of Rs.9,940. The appellant during the appeal proceedings has stated that he has paid refining charges for converting old Jewellery to gold. Expenses were incurred wholly for business and were fully vouched. The learned Officer has disallowed entire amount of Rs. 9,940, in spite of no adverse comments from special auditor.

10.1 I have perused the assessment order submissions of the appellant. Special auditors and AO has not pointed out any discrepancies in the supporting evidence for refining expenses. AO without specifying any reason cannot say that am not satisfied with explanation of assessee, hence disallow the refining expenses. The AO himself accepted that

there were some purchase of old gold and refining of the same was done where there is loss of gold while refining. Having accepted the factum of refining the gold, the AO cannot say there is no such expenditure for refining. Therefore the addition of Rs.9,940 is deleted. Appellant gets relief and ground number 8 is allowed.

11 Ground no. 10 relates to disallowance of car expenses Rs.174,942. The assessee incurred car expenses Rs.2,92,553 and suo moto made an adhoc disallowance of 50% of certain car expenses amounting to Rs.1,17,609 in the Return of income. The SA reported that the assessee has not provided any satisfactory explanation to justify the fact that the car was used for the business of the assessee. AO has disallowed the remaining car expenses (car insurance, car depreciation, Interest on car loan, vehicle maintenance expenses.

11.1 The appellant submitted that motor car expense were incurred wholly for the purpose of business and is fully vouched. He also argued that motor car expenses were duly allowed in assessments made u/s 143(3) in the earlier year. The AR stated further that the car was mainly used for business purposes and only to avoid any litigation the appellant disallowed 50% of these expenses, which was actually not needed. AR submitted that the appellant spent separately on fuel for personal use, as such there was no need for disallowance thereof. Acrimoniously, he stated that appellant carrying business with turnover exceeding Rs. 50 O Crores, is expected by the Special Auditor to travel on foot or public transport while stating that there was no use of car for business purpose. Car was used for your appellant for commute to and fro shops to home. for visits to suppliers, customers etc.

11.2. I have perused the assessment order and submissions of the appellant. Special auditors and AO's opinion that there was no use of car for business purpose is without any basis and disallowing entire car expenses ignoring assessee's suo moto disallowance towards personal use expenses is unjustified. I agree with appellant that for a business having annual turnover exceeding Rs. 50 Crores, use of car for business purpose cannot be denied. Therefore, the disallowance of Rs.1,74,942 made by the AO is deleted. Appellant gets relief and ground number 9 is allowed.

12. Ground no. 11 relates to disallowance of deduction u/s. 80G of Rs. 40,000. AO noticed that the appellant made a donation of Rs. 40,000 to Uttar BangaAnath Ashram in cash. According to section 80G, donations in cash which are in excess of Rs.10,000 are not allowed as deduction u/s.80G. Hence, the assessee's claim of deduction of Rs.40,000 u/s.80G is disallowed by the AO. Appellant filed copy of donation receipt of Rs.40,000 given to Uttar BangaAnath Ashram and stated that the trust

having certificate of eligibility for 80G, hence requested that the deduction u/s 80G be allowed. POME

12.1 I have perused the appellant order. The AO made the disallowance stating that the amount was Submi and the assessment donated in cash which is against the provisions of the Act. The appellant has nowhere claimed that donation was not paid in cash. As per the provisions of section 80G donation above Rs.10,000 if paid in cash, deduction u/s 80G is not allowed. I, therefore, reject the ground number 11 of the appellant and confirm the disallowance made by AO u/s. 80G. Ground number 9 is dismissed.

13 Ground no 12 relates to the matter of reference made by AO to TDS officer u/s. 206C. AO has referred appellant's case u/s 206C(1d) to TDS officer, under the pretext that cash sale has been found to be made for Rs. 2 Lakhs or more. This ground of appeal does not have any merit,

as no prejudice is caused to the appellant on mere intimation to the concerned officer. Therefore, this ground of appeal is pre-mature and the same is hereby dismissed.

In result, the appeal is partly allowed.'

18. Aggrieved with the above order of the Ld.CIT(A), revenue filed appeal and assessee filed cross objection before us.

19. First we deal with the appeal of the revenue in ITA.No. 103/MUM/2021. Revenue has raised following grounds in its appeal: -

"1. Whether the Ld. CIT(A) is correct in deleting the addition of Rs.10,84,198/- on account of valuation of closing stock as the AO has duly established the basis of addition made on account of valuation of closing stock by mentioning it in para 8:4 of the assessment order dated 14.08.2017.

2. Whether the Ld. CIT(A) is correct in deleting the addition of Rs.50,93,964/- on account of deviation in purchase rates of gold and silver as compared to average market rate as the AO has duly established the basis of addition made on account of deviation in purchase rates of gold and silver as compared to

average market rate by mentioning it in para 8.5 of the assessment order dated 14.08.2017.

3. *Whether the Ld. CIT(A) is correct in deleting the addition of Rs.64,60,179/- on account of deviation in sale rates of gold and silver as compared to average market rate as the AO has duly established the basis of addition made on account of deviation in sale rates of gold and silver as compared to average market rate by mentioning it in para 8.5 of the assessment order dated 14.08.2017*

4. *Whether the Ld. CIT(A) is correct in allowing the entire cash purchase of Rs.1,84,50,801/- u/s.40A(3) of the Act as the AO has duly established the basis of addition made on account of disallowance of cash purchase u/s. 40A(3) of the IT Act by mentioning it in para 8.6 of the assessment order dated 14.08.2017.*

5. *Whether the Ld. CIT(A) is correct in partly allowing the freight charges Rs.1,04,125/- out of total freight charges of Rs.1,54,125/- as the AO has duly established the basis of addition made on account of freight expenses by mentioning it in para 8.8 & 8.8.1 of the assessment order dated 14.08.2017.*

6. *Whether the Ld. CIT(A) is correct in allowing the refining expenses of Rs.9,940/- as the AO has duly established the basis of addition made on account of disallowance of refining expenses by mentioning it in para 8.8 & 8.8.1 of the assessment order dated 14.08.2017.*

7. *Whether the Ld. CIT(A) is correct in allowing the car expenses of Rs.1,74,942/- as the AO has duly established the basis of addition made on account of car expenses by mentioning it in para 8.8 & 8.8.1 of the assessment order dated 14.08.2017.*

8. *The appellant prays that the order of the CIT(A) on the above ground be set aside and that of the Assessing Officer be restored.*

9. *The appellant craves leave to amend or alter any grounds or add a new ground which may be necessary."*

20. At the outset, we observe that the cross objection filed by the assessee is with a delay of 58 days. Ld.AR prayed for condonation of delay in the interest of justice. Ld. DR objected for condonation of delay.

21. Considered the submissions of both parties, it is fact on record that assessee has filed the CO with delay of 58 days and observed that the order of the CIT(A) was passed on 13.08.2020 and the assessee also filed affidavit with the reasons for delay, however during this period, the Covid Pandemic was at peak, there is reasonable cause for such delay in filing the appeal. Therefore, we condone the delay in filing the CO.

22. Coming to the main appeal filed by the revenue, at the time of hearing, Ld.DR brought to our notice relevant facts of the case and submitted his written submissions vide letter dated 07.07.2022, for the sake of clarity it is reproduced below:-

"1. Addition of Rs. 10,84,198/- on account of valuation of Closing stock

The Learned CIT (A) has not only failed to appreciate that the difference in the closing stock valuation was not only because of daily and yearly averages but also to appreciate that the AO has clearly demonstrated the assessee's incorrect working of stock valuation in Para 8.4 of the Assessment Order.

The learned CIT (A) has only decided on the basis of self-serving arguments of the assessee without controverting the

facts and figures of incorrect stock valuation given by the AO in the above referred para.

The assessee actually does not maintain stock records. The stock register is in fact maintained by the accounting software - Tally, which gets automatically generated after due recording of purchase and sale entries in the software. The assessee does not possess any manual stock record, Goods receipts, transport receipts and other documents in support of goods movement. The same was also not produced for verification before the A.O.

Even during Spot inspection, none of the above documents / registers were found by the inspection officer / official. The Learned CIT(A) has erred in considering the closing stock adjustment as tax neutral and failed to appreciate that even if the opening stock is adjusted accordingly, the corresponding effect also needs to be given in the closing stock of previous year.

In view of the above, the addition on this issue deserves to be upheld.

2. Addition of Rs. 50,93,964/- on account of deviation in Purchaserates:

The learned CIT (A) failed to appreciate that there had been adverse variation in the rate of purchases of gold & silver in 377 instances when the assessee's purchase rate is compared with the average market rate of that particular date as categorically worked out by the special auditors. The total amount of variance being Rs. 50.93 lakhs as mentioned at page no. 13 of their report.

The learned CIT (A) failed to appreciate that the assessee has also made purchases of gold ornaments amounting to Rs. 1,84,50,801/ from unverifiable sources and completely in cash. Numerous anomalies were noticed in these purchases which had been elaborately discussed by the special auditors in their audit report in reply to Terms of reference no.4.

The Ld. CIT(A) has failed to appreciate the facts of the case and the Special Audit Report.

In view of the above, the addition on this issue deserves to be upheld.

3. Addition of Rs. 64,60,179/- on account of deviation in sale rates:

The learned CIT (A) failed to appreciate that the assessee has made majority (90%) of his sales in cash and that the assessee failed to provide name, address and PAN of the parties to whom goods were sold by the assessee in cash.

The learned CIT (A) also failed to take into account the following anomalies pointed out by the special auditors which are clearly indicative of the sham arrangements made by the assessee:

a) 195 transactions of cash sales amounting to Rs. 3.69 crores have amounted to Rs. 1,99,000/-, however, not even a single transaction crossed the limit of Rs. 2,00,000/-.

b) All the 2558 sale transactions during the year are made to different buyers. Gold / silver is not sold to any party more than once.

c) The sales invoices do not bear address, contact no. or PAN of the buyer. The assessee has not provided confirmation / address / contact no. of even a single buyer out of around 2558 cash buyers. Eventhough that the assessee conducts his business in a small town, it is hard to believe that the assessee does not have the address and contact number of even one such customer who has given advances against sale. Since, the assessee failed to provide the address and contact no. of the parties whose credentials are assured to be good, the genuineness of the said number of transactions of cash sales remained unproved.

d) The assessee's submissions that it is his practice to ask for PAN from the buyers only if the sale amount exceeds Rs. 5,00,000/ seems highly illogical considering the fact that all the cash sales made by the assessee are below Rs. 2,00,000/-.

e) The assessee has not conducted business throughout the year. No trading activity was conducted on 108 days during the

year (after excluding Sundays). In fact, no sale of gold was made to the walk in customers during peak season when Indian festivals are celebrated and when the customers generally buy gold. During the year, there was a hike in the duty in case of both gold and silver but the only gold trading of the assessee was affected due to this and surprisingly the trading in silver of the assessee was not affected at all.

f) On many occasions, sales have been made at huge losses. These transactions go against the very grain of selective and profit oriented nature of the assessee's business.

g) There are no machineries/appliances available with the assessee to evidence that huge silver bars were cut into smaller pieces and sold. (only ordinary gold cutters were available during spot inspection). Neither are such machineries/appliances appearing in the Balance Sheet of the assessee. The expenses relating to cutting of silver is not debited to the P&L account which is very strange. This suggests that the silver bars must have not been cut and assessee must have sold the silver bars "as it is" without cutting the same.

h) Large number of buyers is claimed to have been handled in a single day which seems unconvincing. The miniscule gross profit margin on the huge value transactions in a day is also not convincing.

i) Many instances of pairing of full name and surname of sales and purchase parties are observed indicative of dummy names of parties having been created. In fact, 62 purchase parties were identified whose full name is also the same as the full name of the parties to whom gold is sold in cash but such parties have different address. Such high levels of co-incidences in names of purchase and sale parties is unconvincing and thus unbelievable. The learned CIT (A) has ignored all the above findings and deleted the addition without controverting the above clinching evidences of sham transactions.

In view of the above, the addition on this issue deserves to be upheld.

4 Disallowance of Rs. 1,84,50,801/- u/s 40A(3) for cash purchases:

The learned CIT (A) failed to appreciate that the special auditors have clearly indicated that owing to the following anomalies observed by them, the assessee seems to have split the cash purchases below 20,000/-:

- a) All the purchases of gold ornaments are made in cash.*
- b) Out of a total of 977 transactions, not even a single purchase has exceeded Rs. 20,000/- and 497 transactions were in the range of Rs. 19000/- to Rs. 20000/-..*
- c) All the gold ornaments purchased during the year were less than 8.84 gms in weight which makes the purchase amount less than Rs. 20,000/-. The assessee's claim that it is his practice to purchase only from those parties having gold ornaments worth less than Rs. 20000/- thereby restricting the weight of gold ornament to 8.84 gms seems to be highly unrealistic and completely against the general practice of a prudent businessman considering the unfavorable market conditions and infeasibility of purchases from the regular dealers due to price hike as stated by the assessee himself.*
- d) The assessee has failed to explain as to how the assessee managed to attract large number of parties within a short period of time considering the fact that the bullion industry was not in a stable situation during the period under consideration.*
- e) The address and contact no. of even a single party is not mentioned on the invoices. The description of gold ornaments i.e. bangle, jewellery, necklace, earring, pendant, bracelet, ring, etc. is not mentioned on the purchase invoices. Further, all the gold ornaments belong to 91.60 fineness' category. Hence, the authenticity of the purchase invoices is highly doubtful.*
- f) The assessee has not furnished the complete addresses and contact number of the purchase parties and hence, these parties are verifiable. Confirmation of the parties to whom cash is paid is also not available for verification. Further, the assessee operates from Siliguri which is a small town and in such*

circumstances, it is hard to believe that the assessee is not in contact with any of the party.

g) Huge number of parties are claimed to have been handled in a single day by the assessee and his family members as if the assessee is running a grocery store. It seems that the assessee's recourse to splitting of cash purchases in order to make each purchase less than Rs. 20,000 has resulted in increase in the number of parties in a single day to the number which is absurd and unrealistic. Eg. 191 parties on 31-08-2013 & 106 parties on 02-09-2013.

h) The series of activities of parties visiting assessee's shop at Siliguri in huge numbers, purchase only from those parties who have ornaments costing less than Rs. 20,000/- and making payment to them, checking ornaments, weighing and arranging them, accumulating gold ornaments purchased from various parties, sending the gold ornaments to Kolkata, refining of Gold ornaments, obtaining the refined gold and sale of Refined gold happening on a single day is not possible.

i) The refining of gold ornaments was done on 9 occasions during the period 30-08-2013 to 12-12-2013. On first 3 occasions, the refining was done by M/s. Vijay Assay Centre P Ltd, Kolkata wherein the loss on refining was 8.4% on all the occasions. On subsequent occasions, the refining was done by other refineries wherein the loss due to refining was in the range of 16% to 18% barring only one occasion wherein loss was 9.20%. Such huge gap of normal loss on different occasions seems to be highly unconvincing. Further, the assessee's claim that loss due to refining vary from ornament to ornament does not stand justified considering the fact that the type and grade of the gold ornaments is not mentioned on the invoices. Moreover, the fact that the loss on refining was exactly same on 3 consecutive occasions also defy the assessee's above claim of variable nature of gold ornaments.

j) Many instances of pairing of full name and surname of sales and purchase parties to create dummy names of parties are observed. In fact, 62 purchase parties are such that whose full name is also the full name of the parties to whom gold is sold in cash and such parties are also different as they have different

address. Such high level of co-incidence in names of purchase and sale parties is highly unconvincing.

The learned CIT (A) failed to appreciate that "All the evidences on record shows that each purchase is below Rs. 20,000/- and that the evidences on record are all self-made vouchers and self-made bills. No third party evidence has been produced to justify the various observations raised by the special auditors.

In view of the above, the addition on this issue deserves to be upheld.

3. In view of the above discussed facts, it is pleaded that the Ld. CIT(A)'s order be dismissed and that of the AO be upheld."

23. Ld. DR relied heavily on the order of the Assessing Officer and prayed to set-aside the order of the Ld.CIT(A).

24. On the other hand, Ld. AR relied on the order of the Ld.CIT(A) and submitted his submissions. For the sake of clarity, the submissions of the assessee are reproduced below: -

"Dept Ground No. 1: Addition of Rs. 10,84,198/- in valuation of closing stock,:[AO para 8.4/CIT(A) para 5 pg 10-14]

7. Assessee consistently and regularly values its closing stock at Cost.

8. Cost of closing stock is determined on the basis of weighted average method. Valuing closing stock on weighted average method is prescribed and acceptable as per AS2 (Accounting Standard 2) prescribed by Institute of Chartered Accountants of India. decisions. Pg.44 -51. The same is also recognized by several

9. Extract of AS2 of ICAI in this regard:

17. A variety of cost formulas is used to determine the cost of inventories other than those for which specific identification of individual costs is appropriate. The formula used in determining the cost of an item of inventory needs to be selected with a

view to providing the fairest possible approximation to the cost incurred in bringing the item to its present location and condition. The FIFO formula assumes that the items of inventory which were purchased or produced first are consumed or sold first, and consequently the items remaining in inventory at the end of the period are those most recently purchased or produced. Under the weighted average cost formula, the cost of each item is determined from the weighted average of the cost of similar items at the beginning of a period and the cost of similar items purchased or produced during the period. The average may be calculated on a periodic basis, or as each additional shipment is received, depending upon the circumstances of the enterprise,

10. Special auditors on Page 12 of audit report has accepted that the "method of valuation of inventory i.e. Weighted Average method can be said to be in line with the Accounting Standard -2". However, while determining value of closing stock distinguished the formula of weighted average method (calculated on daily basis) and valued the stock at Rs. 1,41,45,769/-. (AO pg 8)

11.AO erred in considering the word "period" as 'daily instead of entire 'year, which is consistently followed by assessee and also by Tally software. The learned special auditor has intentionally distorted the term "period" considering it as one "day", whereas it has to be much larger period considering a business cycle. He has ignored regularly followed system by assessee, which is also followed by the most popular "Tally" accounting program as per AS2 of ICAI.

12. Assessee had closing stock of 4,780 grams of Gold Bars fineness), quantity of closing stock has also been accepted by the Special auditors. Assessee valued the same at Rs. 1,30,61,572/- as per calculation worked out hereunder:

	Quantity in Grams	Rate Per gram INR	Amount Rs.
Opening stock	4,834.632	3,015.382	1,45,78,264
Purchases	1,32,637.036	2,722.289	36,10,76,359
Total	1,37,471.668	2,732.597	37,56,54,624
Closing stock	4,779.912	2,732.597	1,30,61,571

Accordingly assessee has valued its closing stock at Rs. 1,30,61,572/-.

13. No Hawala dealers, accommodation entry provider etc involved in any transaction, finding by AO & Spl auditor (AO pg 15) Sales & Purchases match with VAT return (AO pg 23)

14. The AO accepted wrong method of taking weighted average on daily basis, instead of annual basis taken by assessee regularly as well as by Tally software system. Special auditor has not accepted valuation of assessee and valued the closing stock at Rs. 1,41,45,769. The AO has accepted the said valuation of special auditor and accordingly difference of Rs. 10,84,198 was added to the income of assessee on account of increase in value of closing stock.

R.B. Bansallal Abirchand Spinning and Weaving Mills vs. CIT (1970) 75 ITR 260 (Bom) (282)

AluminiumInd P Ltd v/s. CIT (1995) 80 Taxman 184 (Gauh)

15. Assessee has been consistently following formula of valuing closing stock on weighted average method, which is in accordance with accounting standard 2 namely AS2 prescribed by ICAI. The same is also accepted by the department in investment Ltd. vs. CIT (1970) 77 ITR 533 (SC) 'para 8'the scrutiny assessment of the earlier year.

CIT v/s. McMillan & CO (1958) 33 ITR 182 (SC)

16. Special auditors erred in deviating from the regular practice of the assessee of calculating valuation of stock under the formula of weighted average method considering year as a period to weighted average on daily basis formula. This is against income tax law, section 145 of the Act provides that income chargeable under the head Business is to be computed in accordance with either cash or mercantile system of accounting regularly employed by the assessee.

17. The AO erred in ignoring the vital fact that opening stock and closing stock both has to be valued in same method, disturbing one side of valuation gives distorted result in computing taxable income of the year. If he were to change the formula, he ought to have changed the same for opening stock as well to work out correct taxable income of the relevant year.

18. The Ld AO also erred in ignoring that consistent method of valuation of stock neutralizes revenue impact in subsequent year. This is due to the fact, lower value of closing stock of a year, would mean lower value of opening stock and the profit of subsequent year will increase. Hence, valuation if under one method comes lower in a particular year, the same gets neutralized with higher income in the subsequent year with no overall impact on revenue. [CIT(A) para 5.2]

CIT v/s. Ahmedabad New Cotton Mills Co. Ltd 4 ITC 245 (PC)

19. Moreover, the Ld AO and special auditor also erred in not changing value of opening stock applying same formula for valuing opening and

closing stock. Thus the revenue authorities committed a mistake in determining taxable income.

20. Section 145A merely provides that the valuation of inventory shall be in accordance with the method of accounting regularly employed by the assessee. The Act thus mandates that the valuation of inventory should be made in accordance with the method of accounting regularly employed by the assessee. Assessee followed. regularly applied formula weighted average method of valuing stock considering the year as one period, special auditor as well as learned officer erred in changing the formula of weighted average method considering period as daily one, without any reason. It was wrong on their part to disturb the method of accounting regularly employed by assessee.

21. The method followed by the assessee is recognized by the Apex Court in CIT vs. British Paints India Ltd. 188 ITR 45 (SC) pages 51 & 52

22. Assessee is consistently following the method since number of years. ACIT vs. Jagdish Chand Prop. (2004) 2 SOT 112 (Chd.) Weighted average cost method for valuation of closing stock adopted by assessee goldsmith is correct and addition made on account of enhancement of value of closing stock by Assessing officer by holding such method to be incorrect, was not justified.

23. ACIT v/s. Uday M Ghare

*[Bench: F Mumbai; ITA no 4125 /M/2012; (AY 2009-10); dt 19/7/2013]
 : The average cost method is one of the accepted method of valuation*

24. ACIT vs. GopaldasVallabhdas (1997) 59 TTJ 768 (Ind) (para 4) - Valuation of stock of silver bullion and silver ornaments. In the absence of point to point tally of sales with purchases, the principle of LIFO or FIFO was not applicable. The CIT(A), therefore rightly held that the closing stock should be valued at the average cost price calculated on the basis of value of opening stock and the purchases made during the year.

25. DCIT vs. Shri Chimanlal H. Soni, Ahmedabad ITAT, ITA 1663/Ahd/2009, dt. 25 04-2012, A.Y. 2006-2007, page 6, para 8

"the assessee has valued the stock at weighted average cost in the current year and the same method was followed by assessee in earlier years and it was accepted by the Department while finalizing the assessment u/s. 143(3)...." "In the case of ACIT vs. Shantilal Nagardas & Co. (supra) the co-ordinate bench has held when Revenue department accepted a method of valuation of closing stock in earlier years, on the same set of facts and circumstances of the case of the business of assessee, then the principle of consistency should be

followed by Department while making the assessment though the principle of res-judicata does not apply to Income tax proceedings."

26. Investment Ltd. vs. CIT (1970) 77 ITR 533 (SC) 'para 8'

In the balance sheet, it is true, the securities and shares are valued at cost, but no firm conclusion can be drawn from the method of keeping accounts. A taxpayer is free to employ, for the purpose of his trade, his own method of keeping accounts, and for that purpose to value his stock-in-trade either at cost or

market price. A method of accounting adopted by the trader consistently and regularly cannot be discarded by the Departmental authorities on the view that he should have adopted a different method of keeping account or of valuation. The method of accounting regularly employed may be discarded only if, in the opinion of the taxing authorities, income of the trade cannot be properly deduced therefrom. Valuation of stock at cost is one of the recognized methods.

27. ChainrupSampatram vs. CIT (1953) 24 ITR 481 (SC) (para 10) - It is a misconception to think that any profit "arises out of the valuation of the closing stock" and the situs of its arising or accrual is where the valuation is made. As already stated, valuation of unsold stock at the close of an accounting period is a necessary part of the process of determining the trading results of that period, and can in no sense be regarded as the "source" of such profits.

28. D. Subhaschandra& Co. vs. ACIT (2010) 123 ITD 635 (Ahd) (para 7) The Assessing Officer, in the instant case, had valued the stock at average cost which would be less than the realizable value as the assessee had shown the gross profit at the rate of 13.81 per cent and valuing the stock at average cost, when it was less than realizable value was well recognized method of valuation of closing stock and duly recognized by AS-2. In view of the aforesaid, it was to be held that the Assessing Officer had rightly valued the closing stock of the polished diamonds at average cost by adopting per carat rate.

29. ACIT vs. VallabhbaiDhanjibhai& Co. (1996) 55 TTJ 425 (Ahd) (para 7) The AO rightly adopted the average cost price for valuation because such average purchase price is inclusive of purchase price of inferior as well as superior rough diamonds.

30. Astt CIT v/s. Agrawal Enterprises (2013) 59 SOT 17 (Pune) / 154 TTJ 12

Weighted avg method is a recognised method of valuation of stock and therefore, value taken on basis of weighted avg Method cannot be held as notional.

Concordia Corporation Limited vs CIT (1952) 22 ITR 344 (Trav-Cochin)

The stock may be valued at the option of the assessee at the average cost price of the entire stock purchased in the course of that year and need not be at the actual cost of the closing stock for the purpose of ascertaining the real profits earned during the year.

32. KurisettiSatyanarayanamurty vs. ITO (1988) 25 ITD 18 (Hyd) Assessee valued paddy by taking average cost price of the entire quantity purchased during the year- there is no guarantee that the last purchase is the only quantity in the stock-weighted average method followed by the assessee was justified and addition should be deleted.

33. Method regularly followed cannot be disturbed. AO is bound to accept the method of accounting preferred by the assessee and he cannot impose another method on the assessee

CIT vs. Indo Nippon Chemical vs. UOI (2003) 261 ITR 275 (SC) (277) United Commercial Bank v/s. CIT (1999) 240 ITR 355(SC)

34. Resjudicata Not applicable to income tax assessment. But there must be substantial ground for one ITO to differ from the view taken by another. (1991) 192 ITR 619 (Cal.) CIT vs. Hindustan Motors Ltd.

35. Strictly speaking, resjudicata does not apply to income tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or other and parties have allowed that position to be sustained by not challenging the order it would be at all appropriate to allow the position to be changed in a subsequent year. (1992) 193 ITR 321 (329) RadhasoamiSatsgang vs. CIT ,Pr. CIT v M/s. Quest Investment Advisors Pvt. Ltd. [2018] 409 ITR 545 (Bom) Bharat Sanchar Nigam Ltd. Vs. Union of India 282 ITR 273(SC)

36. Finding of earlier years on same facts relevant.

Lalludas Children Trust vs. CIT (2001) 251 ITR 50 (Guj)

37. Without prejudice to above the assessee has adopted the recognised method of valuation. The rate of tax being the same the method adopted by the Assessee may to be directed to be followed. Without prejudice to above if the method adopted by the A.O. is accepted the

A.O. may be directed to value the opening stock, purchase and sales during year on same principle as well as next years opening stock may be directed to be changed.

Since assessee correctly values its closing stock at Rs. 1,30,61,572/- as per weighted average formula the same also being consistently and regularly followed by your appellant, the Ld AO erred in valuing closing stock at Rs.. 1,41,45,769 adopting different formula of Weighted average method, addition made by Ld AO of Rs. 10,84,198/- on account of value in closing stock was rightly deleted by CIT(A).

Dept. Ground No. 2 Addition of Rs. 50,93,964 under the pretext of deviation in purchase rate of silver and gold as compared to average market rate : LCIT(A) para 6 pg 14-17/AO para 8.51

1. Special auditor in their report has stated that on many occasions the gold and silver has been purchased at non existing prices. He has compared the purchase

rates with average market price on that day. He selected those cases where the purchases were more than average price and worked out difference in purchase price with average market price. Accordingly he has worked out a sum of Rs. 50,93,964 being the amount where purchases were made at prices higher than average market price. The AO has added the said amount of Rs. 50,93,964 to the income of assessee.

2. During the course of proceedings submitted that special auditor has considered only those cases which were adverse to assessee but has not considered favorable cases where purchases were made at prices lower than average market price. If we calculate the other side of cases where assessee made purchases at prices lower than average price the amount would work out to be Rs. 65,25,361/-. If calculation of entire purchases considering adverse as well as favorable circumstances, the net result would be in favor of assessee of Rs. 14,31,397. The AO ignored the argument of your appellant and made the additions. (AO pg33)(CIT(A) para 6.1)

3. The assessing officer erred in making an addition of Rs. 50,93,964 under the pretext of deviation in purchase rate of silver and gold as compared to average market rate. Comparison of purchase rate with average market rate for making addition to income is illogical and without any base. It has a vital shortcoming since one would not know average market price until the end of the day whereas purchases have to be made during different times of the day Comparison must not be capricious and it should not be wild one and ought to have reasonable nexus to the available material and the circumstances of the case.

4. Special auditors and AO gave distorted and half picture in considering selective comparison of average market price of purchases only where purchase was higher than average price and ignoring cases where purchases were made at prices lower than average price.

Though the comparison with average price is absurd and illogical if favorable variation were to be considered, net difference of adverse circumstances and favorable circumstance, would have been in favor of assessee amounting to Rs. 14,31,397. [CIT(A) para 6.4]

5. *It was shocking to note that the special auditors as well as AO chose to work on their whims and fancies ignoring vital evidences of purchase made with proper supporting invoice and payment made by account payee cheques. More over purchases were made from most reliable, prominent, leaders and dealers of Gold and bullion RSBL (Riddi Siddhi Bullions Limited) has consistently been ranked amongst the top 10 unlisted public companies in India by Business Standard 1000. It is one of the largest delivery participants across major Indian commodity exchanges and is awarded STAR TRADING House status under the EXIM policy of Ministry of Commerce, Government of India. Doubting purchases from such a supplier ignoring their bills, account payee cheque payments and replacing them with average price of the day, speaks volume of whims and fancies of the special auditors having worked with predetermined mind.*

Similarly the other supplier is Frost International, who is recognised as an export trading house by the Ministry of Commerce and Industry, India, and has been consistently exporting according to the policies and guidelines of the Government of India and Federation of Indian Export Organizations... Frost is a registered partner of MMTTC Ltd., State Trading Corporation (STC) of India, and Handicrafts and Handloom Export Corporation of India HHEC).

Assessee made purchases from all such reputed suppliers with due bills and payments by account payee cheques. Neither the AO nor the special auditor has raised doubts on any of such supplier. Even they have not found any discrepancies on the purchase supporting supplied by your appellant such as invoice payments by account payee cheque. (AO pg 15)

6. *The AO grossly erred in inferring that since the net profit ratio is low, the transaction of purchase and sales are not conducted as per normal practice. Further the AO erred in ignoring the fact that gross margin ratio was in lime with the earlier year and the same is duly accepted by him. The purchases and sales match with VAT return (AO pg 23)*

7. *It may be noted that special auditor considered only one website and took average value quoted therein. The value given in different web sites are different and are only indicators and not absolute truth. India is a large country. gold and silver prices even differ from city to city. chart depicting different prices of gold on same day in different cities in India enclosed in paper book pg 69-72*

8. Moreover, delivery mechanism in sales of Gold and silver by various reputed suppliers is made in T/T+1/T +2/or T+3 terms, where delivery of gold/silver is made on same day (T), second day of order (T+1) or third day of order (T+2) and so on and prices are fixed on day of booking. As such certain purchase of gold/silver may be at prices applicable one, two or three days earlier, where as special auditors has considered the prices of day of delivery only, ignoring earlier days prices, which is wrong. Term sheet issued by RSBL pg 62-68 Once purchases and sales are accepted by VAT authority the same cannot be doubted by AO on presumption basis. In view of these facts Ld CIT(A) rightly deleted the addition.

The assessee submits that genuine purchases from reputed suppliers with due supporting of invoice and payment made by account payee cheques, AO having not found any inconsistency in the said supporting of purchases. Further, the AO having erred in considering deviation in purchase rate of silver and gold as compared to average market rate more so ignoring cases favourable to assessee, addition made by the learned officer of Rs. 50,93,964 on account of purchases rightly deleted by CIT(A).

Dept Ground No. 3 Addition of Rs. 64,60,179 under the pretext of deviation in sale rate of silver and gold as compared to average market rate, your appellant humbly submits as under: CIT(A) para 7 pg 17-19 /AO para 8.5:

1. Special auditor in their report has stated that on many occasions the gold and silver has been sold at non existing prices. He has compared the sales rates with average market price on that day. He selected those cases where the sales were less than average price and worked out difference in sales price with average market price. Accordingly he has worked out a sum of Rs. 64,60,179 being the amount where sales were made at prices lower than average market price. The AO has added the said amount of Rs. 64,60,179 to the income of the assessee.

2. Special auditor has considered only those cases, which were adverse to assessee but has not considered favorable cases where sales were made at prices higher than average market price. If we calculate in other way sales made at prices higher than average price, amount would work out to be Rs. 79,64,459/- If calculation of entire sales considering adverse as well as favorable circumstances, the result would be in favor of assessee of Rs. 15,04,281/-. The AO ignored the submission and made the additions. (CIT(A) para 7.1/AO pg 33)

3. Purchases and sales match with VAT Return. Verified and accepted by AO.

4. Comparison of sales rate with average market rate for making addition to income is illogical and without any base. It has a vital shortcoming, since one would not know average market price until the end of the day, whereas sales have to be made during different times of the day. Comparison must not be capricious and it should not be wild one and ought to have reasonable nexus to the available material and the circumstances of the case.

5. Special auditors and AO gave distorted and half picture in considering selective comparison of average market price of sales, only where sales were lower than the average price and ignoring cases where sales were made at prices higher than average price. Though the comparison with average price is absurd and illogical, if favorable variation were to be considered, net difference of adverse circumstances and favorable circumstance, would have been in favor of assessee amounting to Rs. 15,04,281/-.

6. A low profit would not itself be a reason for disbelieving the accounts. The Ld AO ought to have looked in to the accounts to show that there was material to conclude that there was something false in the account books, which he did not. Since in bullion business of Gold and Silver margins are based on per kg and not on value. The nature of business is of high volume and low margins.

7. The AO grossly erred in inferring that since the net profit ratio is low, the transaction of purchase and sales are not conducted as per normal practice.

8. The AO erred in ignoring the fact that gross margin ratio was in line with the earlier year and the same is duly accepted by him in earlier year. This is evident from the fact that Gross margins in the relevant AY 14-15 was 0.30% which is quite comparable with earlier years AY 13-14 as 0.38% and AY 12-13 0.25% and accepted in scrutiny assessment.

9. It may be noted that special auditor considered only one website and took average value quoted therein. The value given in different web sites are different and are only indicators and not absolute truth. India is a large country, gold and silver prices even differ from city to city. As such assuming same sale price in entire India on a given date, that too throughout the entire day, in a volatile market is absurdity.

10. The AO erred in making addition on comparison with average price The special auditors has acted on whims and fancies and based his working on imaginary situations, ignoring actual business life and dealings.

11. Addition cannot be made merely on suspicion surmises and conjectures in the hands of the assessee.

A. Gujarat High Court in the case of MargabhaiKisanbhai Patel & Co. vs CIT(1977) 108 ITR 54 wherein it was held that "Unless the transaction is proved as sham or not bonafide, it is not open to the Tax authorities to disregard figures of transaction shown in the assessee's books of accounts".

B. The Hon'ble Supreme Court in the case of Lalchand Bhagat Ambica Ram v CIT (1959) 37 ITR 288 has held that correctness of accounts books cannot be doubted on suspicion conjectures and surmises.

C. The Hon'ble Supreme Court in the case of Dhakeshwari Cotton Mills Ltd. vs CIT,(1954) 26 ITR 775 has observe that the A.O is not entitled to make a pure guessand make an assessment without reference to any evidence or any material atall. This proposition has been followed in case of-Raj Mohan Saha& Others vs CIT (1962) 52 ITR 231 - A.K.A.CT.V.CT.AlagappaChettiar& Others vs CIT (1963) 56 ITR 605

D. There must be something more than bare suspicion to support the assessmentu/s 23 (3) of IT Act as held in the following cases

Dhakeshwari Cotton Mills Ltd. vs CIT, (1954) 26 ITR 775
Gopinath Agarwal vs CIT (1955) 28 ITR 753,
Madura Knitting Co.vs CIT (1956) 30 ITR 764
BansidarOnkarmal v CIT 23 ITR 35

12. The courts have held that a low G.P. rate may not per se lead to an inference that the accounts are false.

Case Laws.

i) *International Forest Co. vs. CIT (1975) 101 ITR 721 (J&K) (727)* Mere low yield cannot be taken as indication of suppression of sales by the assessee.

ii) *R.B. BansailalAbirchand Spinning and Weaving Mills vs. CIT (1970) 75 ITR 260 (Bom) (282)*

The Assessee has made genuine sales, the AO erred in considering deviation in sales rate of silver and gold as compared to average market rate more so ignoring cases favourable to assessee, addition made by the Ld AO of Rs. 64,60,179/- on account of sales rightly deleted by CIT(A).

Dept Ground No. 4 against disallowance of purchases u/s. 40A(3) of Rs. 184,50,501 under the allegation that entire cash purchases were paid above Rs. 20,000/-(AO para 8.6/CIT(A) para 8 pg 19-21)

1. Total purchases of Rs. 51,80,65,817, out of which cash purchases amounted to Rs. 184,50,501, this works out to only 3.56 per cent of total purchases. Cash purchases are of old scrap ornament.

2. Out of total purchases of gold Rs. 51,80,65,817/- only purchase of old gold ornament amounting to Rs. 1,84,50,801/- is in cash. All such purchase of old gold ornament are below Rs. 20,000/ 3. Usually walk-in sellers do not carry large quantity of ornaments so purchases made by appellant are all of small value. The amounts recorded in the books of accounts are actual purchases made by appellant.

4. Each cash purchases made were below Rs. 20,000. The Special auditor has created doubt on such purchases without any evidence and has assumed that all cash purchases were above Rs. 20,000. Accordingly entire cash purchase of Rs. 184,50,501 has been added by the AO u/s 40A (3). The AO has not found a single purchase to be false or bogus or in cash for Rs. 20,000 or more and has without rejecting books of account made addition on imagination that each purchase were made in cash exceeding above Rs. 20,000 at a time.

4. Section 40A(3) provides for disallowance only in the case where payment for purchase is made above Rs. 20,000/-, since all purchases were made below Rs. 20,000 no disallowance is attracted y/s. 40A(3) of the Act.

5. The AO ignored the vital fact that neither he himself nor special auditors has found a single purchase to be false or bogus. They have also not found any evidence of cash purchase of Rs. 20,000 or above. The AO grossly erred in making addition without any plausible explanation, evidence and credible justification. An addition made purely on assumptions and presumptions basis have no sanctity in the eyes of laws.

6. Section 145(3) specifies that "Where the assessing officer is not satisfied about the correctness or completeness of the accounts of the assessee, the assessing officer may make assessment in the manner provided in section 144." The officer having not passed order u/s. 144 proves that he accepts the correctness or completeness of the accounts. 7. As per the report of special auditors in the case there is no hawala dealer, no accommodation entry, no excessive payment to related party, not a single transaction is proved to be false or bogus, not a single purchase party found to be bogus, no difference in quantitative details. Addition is made purely on imaginary, prejudice and surmises basis.

8. The double addition is also reflected with the fact that certain amount of purchases is added twice in the income, once under the pretext of comparison with average market price and second time

under section 40A(3). RB JessaramFatehchand (Sugar Dept) v/s.CIT (1970)75 ITR 33 (Bom)

Assessee made cash purchases of gold ornaments making individual payments below Rs. 20,000 in cash, as such provisions of section 40A(3) are not attracted, therefore disallowance made u/s. 40A(3) of Rs. 184,50,501 rightly deleted by CIT(A).

Dept Ground No. 8 Disallowance of freight charges of Rs. 1,54,125/- partly allowed by CIT(A): [CIT(A) para 9 pg. 24-25 /AO para 8.8.1]

1. Assessee had sales office in Siliguri and procured most of the gold, silver etc from Kolkata. Assessee has paid freight charges to carriers for transporting gold and silver from Kolkata to Siliguri.

2. During assessment proceeding explained that this is only prevailing practice locally and given details of persons to whom the same is paid and has submitted proper vouchers. Special auditor has doubted that amount paid is very low and absence of railway or bus receipts. He has ignored that assessee did not pay railway fare or bus fare but has gave assignment to carriers. The AO has disallowed entire freight charges of Rs. 1,54,125, which was wholly incurred for the purpose of business.

3. The AO ignored the fact that purchase invoices has specifically stated spot delivery in Kolkata. Enclose some purchase invoices on this regard pg 73-75. On other hand your appellant made sales of these gold, silver etc. from Siliguri and had no shop or office in Kolkata. The learned officer ignored the vital fact that how these precious goods can move from Kolkata to Siliguri free of charge. These goods are brought by couriers through bus services at a lower price, since proper transporter's charges are phenomenally high and unviable in competitive business. In the nature of assessee business this is the only prevalent practice.

4. Only due to observation of special auditor that the expense incurred is on lower side AO disallowed entire freight charges paid Rs. 1,54,125. Thus AO created an imaginary business situation where goods moved from Kolkata to Siliguri free of charge.

5. It is settled law that Dept cannot decide how a business man should run his business, through economical courier or thorough payment of costly freight charges.

The said expense being incurred wholly and exclusively for business purpose and is duly supported by vouchers and books of account maintained, disallowance by LdAO merely on apprehension of special auditor same being at lower side, disallowance of freight Rs. 1,04,125/- rightly deleted by CIT(A)

Dept Ground No. 6 Disallowance of refining charges Rs. 9,940/-:

[AO para 8.8.1/CIT(A)para10pg25]

1. Assessee has paid refining charges for converting old Jewellery to gold. Expenses were incurred wholly for business and were fully vouched. The learned Officer has disallowed entire amount of Rs. 9,940, in spite of no adverse comments from special auditor.

2. Entire payment made is duly supported with proper vouchers and supporting. Same were produced before spl auditors (CIT(A) para 10)

Since your appellant incurred refining expenses Rs. 9,940 wholly and exclusively for business purpose and is duly supported by vouchers and books of account maintained, disallowance rightly deleted by CIT(A)

Dept Ground No. 7 Disallowance of motor car expenses Rs. 174,942/- : [CIT(A) para 11 pg 26-27]

1. Assessee has incurred car expense amounting to Rs. 292,533 out of which assessee suo moto disallowed towards personal purpose amounting to Rs. 117,609 (approx. 40%) and claimed expenses of Rs. 174,942 being incurred for the purpose of business. Assessee incurred Rs. 174,942/- motor car expense wholly for the purpose of business and is fully vouched.

Car expenses were duly allowed assessments made u/s. 143(3) in the earlier year.

However, the AO disallowed entire claim of motor car expense Rs. 174,942, without appreciating the fact that your appellant has suo moto made disallowance of Rs. 117,609/- on account of use of car for personal purposes, while filing return of income.

Since assessee has claimed car expenses incurred for business purpose Rs. 174,942/- and has suo moto disallowed other car expenses Rs. 117,609/- on account of personal use, further ignoring earlier year precedents, disallowance of car expenses rightly deleted by CIT(A)."

25. Further, in reply to the Ld.DR submissions, Ld. AR of the assessee submitted as under: -

"1. Addition of Rs. 10,84,198/-on account of valuation of closing stock(Page 37 Para 8.4 of assessment order)

1. The assessing officer has accepted the quantity of closing stock of the appellant. The addition is made on account of alleged difference in method of valuation of inventory. The assessee has taken value of inventory based on "weighted average cost on annual basis" vs special auditor has taken value based on "weighted average cost based on daily basis".

2. The addition amount on this account of Rs. 10,84,198/- is derived from special auditors report. It has also been specified in (Asst order page 8 para. 5.d.)

3. Assessee maintains regular books of account on computer system with tally software such as Purchase register, Sales register, bank book, cash book, Ledger, stock register, etc. Assessee maintains quantitative details of purchase, sale and stock. As mentioned by special auditors (AO pg 5; 1(d))

4. Further no error or omission or discrepancy has been pointed out in the records maintained by appellant in tally software. Books are in line with Audited Financial statements as mentioned by special auditors (AO pg 7)

5. This is not a case where any Hawala dealers or accommodation entries are found. As mentioned by special auditors (AO pg 15 point (n) and pg 23 point (15))

6. The details of VAT return had been provided the sales and purchase match with the details given in VAT return AO pg 23 point(14)]

Therefore no adverse inference can be drawn merely on general statement.

7. Supplementary Submissions before CIT (Appeals): Page 85 point no.4

Therefore points stated in dept submissions are devoid of any merits.

8. Addition made by AO is only on account of difference in two methods of valuations. Dept cannot be permitted at stage of ITAT to add/alter/modify the asst order.

9. The AO accepted wrong method of taking weighted average on daily basis, Instead of annual basis taken by assessee regularly as well as by Tally software system. Special auditor has not accepted valuation of assessee and valued the closing stock at Rs. 1,41,45,769. The AO has accepted the said valuation of special auditor and accordingly difference of Rs. 10,84,198 was added to the income of assessee on account of increase in value of closing stock.

DCIT vs. Shri Chimanlal H. Soni, Ahmedabad ITAT, ITA 1663/Ahd/2009, dt. 25-04-2012, A.Y. 2006-2007, page 6,

10. *Assessee has been consistently following formula of valuing closing stock on weighted average method, which is in accordance with accounting standard 2 namely AS2 prescribed by ICAI. The same is also accepted by the department in the scrutiny assessment of the earlier year. Investment Ltd. vs. CIT (1970) 77 ITR 533 (SC) 'para 8' CIT v/s. McMillan & CO (1958) 33 ITR 182 (SC)*

11. *Special auditors erred in deviating from the regular practice of the assessee of calculating valuation of stock under the formula of weighted average method considering year as a period to weighted average on daily basis formula. This is against income tax law, section 145 of the Act provides that income chargeable under the head Business is to be computed in accordance with either cash or mercantile system of accounting regularly employed by the assessee. Same is accepted by AO in earlier year in scrutiny. asst.*

12. *The AO erred in ignoring the vital fact that opening stock and closing stock both has to be valued in same method, disturbing one side of valuation gives distorted result in computing taxable income of the year. If he were to change the formula, he ought to have changed the same for opening stock as well to work out correct taxable income of the relevant year.*

13. *It is settled position in law "Method regularly followed cannot be disturbed"*

II Addition of Rs. 50,93,964/-on account of deviation in purchase rates

[Page 38-41 Para 8.5 of assessment order (50,93,964/-)]

1. *Supplementary Submissions before CIT (Appeals): Point 6. Page 87 & 88*

2. *Evidences of purchase made with proper supporting invoice and payment made by account payee cheques which are reflected in bank statements and confirmation of these parties were also produced before special auditor.*

3. *Neither the AO nor the special auditor has raised doubts on any of such supplier. Even they have not found any discrepancies on the purchase supporting supplied by your appellant.*

4. *Ignoring purchases from such suppliers, their bills, account payee cheque payments, confirmations and replacing them with average price*

of the day, speaks volume of whims and fancies of the special auditors having worked with predetermined mind.

5. *It may be noted that special auditor considered only one website and took average value quoted therein. The value given in different web sites are different and are only indicators and not absolute truth. India is a large country, gold and silver prices even differ from city to city.*

6. *Moreover, delivery mechanism in sales of Gold and silver by various reputed suppliers is made in T/T+1 /T +2/ or T+3 terms, where delivery of gold/ silver is made on same day (T), second day of order (T+1) or third day of order (T+2) and so on and prices are fixed on day of booking. As such certain purchase of gold / silver may be at prices applicable one, two or three days earlier, whereas special auditors has considered the prices of day of delivery only, ignoring earlier days prices, which is wrong.*

7. *Though gold and silver markets are volatile in nature and the rates vary throughout the day. Comparison of purchase rate with average market rate for making addition to income is absurd, illogical and without any base. It has a vital shortcoming, since one would not know average market price until the end of the day, whereas purchases have to be made during different times of the day.*

8. *Auditor made two comparisons of purchases, one with highest market value of the day and found the difference of Rs. 33,82,026/- and second with the average price and found the difference of Rs. 50,93,964/-. These itself reflects fallacy of procedure, where assessing officer ignoring the first conveniently added the higher difference, with a predetermined mind set to assess exorbitant income.*

9. *Special auditors gave distorted and half picture in considering selective comparison of average market price of sales, only where sales were lower than the average price and ignoring cases where sales were made at prices higher than average price. If calculation of entire purchase considering adverse as well as favourable circumstances, the result would be in favour of your appellant of Rs. 14,31,397-. [AO pg 32 & 33]*

10. *Though the comparison with average price is absurd and illogical if favorable variation were to be considered, net difference of adverse circumstances and favorable circumstance, would have been in favor of assessee amounting to Rs. 14,31,397. [CIT(A) para 6.4]*

11. *Even they have not found any discrepancies on the purchase supporting supplied by your appellant such as invoice payments by account payee cheque. (AO pg 15) AO having not found any inconsistency in the said supporting of purchases.*

III. Addition of Rs. 64,60,179/-on account of variation in sale rate (Page 38 Para 8.5 of assessment order Rs. 64,60,179/-)

1. Here the addition is on account of variation in sales rates. As such various issues raised by DR based on 185 transaction of cash sales, 2558 sale transactions, PAN etc of buyer or transaction exceeding Rs.2 lakhs or Rs. 5 lakhs or assessee carrying business how many days etc. are of no relevance.

2. Supplementary Submissions before CIT (Appeals): Point 6. Page 87

Though gold and silver markets are volatile in nature and the rates vary throughout the day. Comparison of sales rate with average market rate for making addition to income is absurd, illogical and without any base. It has a vitalshortcoming, since one would not know average market price until the end of the day, whereas sales have to be made during different times of the day.

3. Special Auditor made two comparisons of Sales, one with lowest market value of the day and found the difference of Rs. 50,33,722/- and second with the average price and found the difference of Rs. 64,60,179/-. These itself reflects fallacy of procedure, where assessing officer ignoring the first conveniently added the higher difference, with a predetermined mind set to assess exorbitant income.

4. Special auditors gave distorted and half picture in considering selective comparison of average market price of sales, only where sales were lower than the average price and ignoring cases where sales were made at prices higher than average price., if we calculate in other way sales made at prices higher than average price, amount would work out to be Rs. 79,64,459/-. If calculation of entire sales considering adverse as well as favourable circumstances, the result would be in favour of your appellant of Rs. 15,04,281/

5. Further, neither special auditors nor the assessing officer could find any discrepancy in any of appellant's sales bills.

6. A simple Hand Gold Cutter is used to cut the gold into smaller parts.. Silver maximum purchases were in form of granules. This is pure silver which comes in smaller grains for ease of measurements and further selling in retail market. silver bars are cut from the local lathe cutters

7. Comparison of sales rate with average market rate for making addition to income is illogical and without any base. It has a vital shortcoming, since one I would not know average market price until the end of the day, whereas sales have to be made during different times of the day.

IV. Disallowance of purchases u/s. 40A(3) of Rs. 184,50,501/

1. Total purchases of Rs. 51,80,65,817, out of which cash purchases amounted to Rs. 184,50,501, this works out to only 3.56 per cent of total purchases. Cash purchases are of old scrap ornament. All such purchase of old gold ornament are below Rs.20,000/-.

2. Section 40A(3) provides for disallowance only in the case where payment for purchase is made above Rs. 20,000/-, since all purchases were made below Rs. 20,000 no disallowance is attracted y/s. 40A(3) of the Act.

3. The AO ignored the vital fact that neither he himself nor special auditors has found a single purchase to be false or bogus. They have also not found any evidence of cash purchase of Rs. 20,000 or above.

4. The AO grossly erred in making addition without any plausible explanation, evidence and credible justification. An addition made purely on assumptions and presumptions basis have no sanctity in the eyes of laws.

5. Section 145(3) specifies that "Where the assessing officer is not satisfied about the correctness or completeness of the accounts of the assessee,, the assessing officer may make assessment in the manner provided in section 144." The officer having not passed order u/s. 144 proves that he accepts the correctness or completeness of the accounts.

6. As per the report of special auditors in the case there is no hawala dealer, no accommodation entry, no excessive payment to related party, not a single transaction is proved to be false or bogus, not a single purchase party found to be bogus, no difference in quantitative details. Addition is made purely on imaginary, prejudice and surmises basis.

7. The double addition is also reflected with the fact that certain amount of purchases is added twice in the income, once under the pretext of comparison with average market price and second time under section 40A(3) Inview of the above the dept appeal may be dismissed and the CIT(A) order may be upheld."

26. Ld. AR heavily relied on the above submissions and prayed that the order of the Ld.CIT(A) be upheld in respect of the grounds raised by the revenue.

27. Considered the rival submissions and material placed on record, we observe from the record that the assessee is a regular trader and files its return of income and several assessment years were selected for regular scrutiny. The revenue has consistently accepted the method of accounting followed and result declared by the assessee. In the impugned assessment year, the Assessing Officer doubted the results declared by the assessee and believed that the accounts maintained by the assessee is complex, doubt about correctness as well as special nature of business and has to be rejected. He proposed and got the approval of the PCIT to proceed with the special audit. Accordingly, appointed a special auditor and received the special audit report. Based on the findings of the special auditor proceeded to make the additions, the special auditor not only challenged the method of valuation but also the purchase and sales value declared by the assessee by relying on the market rates found in the site: www.goldpriceindia.com. The Assessing Officer as well as special auditor questioned the whole business module and valuation method adopted by the assessee in the operation and result declared by the assessee. Let us analyse the issues ground wise.

28. Coming to the ground no 1 raised by the revenue, we observe that the Assessing Officer made addition of ₹.10,84,198/- on account of valuation of closing stock and Assessing Officer based on the recommendation of the special auditor proceeded to revalue the closing stock based on the average value of the market price on daily basis whereas assessee followed the average value on the yearly basis by following the accounting software 'Tally'. The Ld CIT(A) held that the method adopted by the assessee is one of the method as per AS 2 of the ICAI and nothing was brought on record by the special auditor on the aspect of change of method of valuation on the closing stock alone ignoring the impact on the opening stock as well as impact in the subsequent assessment year, merely it leads to a situation of revenue neutral. Further, we observe that there are no discrepancies found by the special auditor and Assessing Officer on the quantity of closing stock or stock traded by the assessee during the year nor found any adverse report from any other authorities. Hence, we are in agreement with the finding of Ld.CIT(A) and we do not see any reason to interfere with the findings of Ld CIT(A). Therefore, we are inclined to dismiss the ground no 1 raised by the revenue.

29. With regard to ground no 2 and 3, we observe that the special auditor by relying on the market rates available on the bullion website, he analysed the purchase and sales transactions carried on by the assessee and carried on with selective method and ignored the overall transactions carried by the assessee during the year. He just analysed the transactions which are favourable to the purpose of audit and ignored the other transactions for which the Ld CIT(A) has countered with the material submitted by the assessee and gave a convincing reasons to accept the submissions of the assessee. We are also in agreement with the findings of the Ld CIT(A) that the method has to be applied consistently to whole transactions carried on by the assessee and analyse both the favourable as well as negative results of each transactions and cannot over look the favourable and beneficial transactions which are not in line with the object of the special audit. Therefore, we are inclined to accept the findings of the Ld CIT(A) and accordingly ground nos. 2 and 3 raised by the revenue are dismissed.

30. With regard to ground no 4 on disallowance u/s 40A(3) wherein Assessing Officer has duly established the basis of addition on account of cash purchases exceeding Rs. 20,000/-. We observe from the record that

the Assessing Officer has only observe from the special audit report that the assessee has purchased all the gold less than 2 grams to 8.84 grams, the purchase prices are less than ₹. 20K and how the assessee could possibly maintain such purchases consistently and expressed doubt that this is not possible and handled 191 customers on a single day. In our view, the business of the assessee is trading and he buys the old gold and sell the new gold to the same customers, it is normal in this type of business. No records were found to show that the assessee has actually bought the gold above Rs. 20K and settled the same in cash. Both Assessing Officer and special auditor cannot apply presumption to make addition on the factual matter, they have to bring on record how much assessee has actually purchased gold in cash which exceeds specified limits allowed as per law. Further, the transaction recorded by the assessee in such cash purchases are only 3.56% of overall purchases. Considering the overall situation, we are inclined to accept the findings of Ld CIT(A) in this regard and dismiss the ground no 4 raised by the revenue.

31. With regard to ground no. 5, disallowance of freight charges, we observe that the Assessing Officer disallowed the freight charges

considering the fact that the assessee could not produce the proper documentary evidences in support of the charges but it is brought to the notice of the Ld CIT(A) that the assessee has office in Siliguri and procures gold from Kolkatta, most of the goods are transported through the messenger in the form of Couriers who travel by local buses and trains, considering the fact the gold does not need special packaging and also small package which can be transported by hand. The couriers are paid on the basis of travel with some allowances, which they invariably claim it as expenses. There are certain peculiarities to certain industry and these sort of arrangements are peculiar to this industry. One has to see the practical side and not too technical. Further, the expenditure claimed are not abnormal and inclined to agree with the findings of Ld.CIT(A), accordingly, the ground raised by the revenue is dismissed.

32. With regard to ground no 6 and 7, Ld DR submitted that he relies on the findings of Assessing Officer, we observe that the refining charges claimed by the assessee is small and Assessing Officer and Special auditor has not really specified any reason for disallowances, at the same time, Assessing Officer himself agreed that the assessee deals with the

old jewellery and refining charges are integral part of this business. Therefore, we are inclined to agree with the findings of the Ld CIT(A).

33. Further, with regard to car expenses, Assessing Officer has deleted 50% of the car expenses claimed by the assessee as not used for the business. Assessing Officer and Special auditor opined that the assessee has not substantiated this expenses with proper reasons for utilization in the business and whether it is necessary for the business. Whereas the Ld.CIT(A) accepted the submissions of the assessee considering the quantum of the business done by the assessee and claim of ₹.292,553/- is reasonable with the turnover of ₹. 50 crores are so. Since the amount involved and the reasonableness of the claiming the expenses, we are incline to accept that there is certain element of personal use, therefore, in our considered view, the estimation of disallowance @50% is on higher side and to meet the ends of justice we direct Assessing Officer to restrict it to 10% of the total car expenses. Accordingly, the grounds 6 and 7 raised by the revenue are partly allowed.

34. Coming to the cross objection filed by the assessee, assessee has raised following grounds in its cross objection: -

"1. The learned CIT(A) erred in rejecting the assessee ground in regards to reference made and granting extension for getting the Special audit u/s 142 (2A) of the Act without appreciating the facts and assigning any reasons.

2. The Ld CIT(A) failed to appreciate that reference to special audit u/s.142(2A) by the Assessing Officer was not in accordance with law as assessee had consistently following method of valuing closing stock on weighted average method which is in accordance with AS 2 prescribed by ICAI and the same is also accepted by the same Assessing Officer in scrutiny assessment for A.Y. 2013-14 no defects in books of accounts pointed out nor there was any complexity of accounts etc, therefore the reference u/s. 142(2A) of the Act is arbitrary and without any reasons

3. On perusal of the orders /reports reveals that purpose of reference to Special Auditor u/s 142 (2A) of the Act was for audit and not for valuation, further there was neither complexity of accounts or circumstance enumerated in the provision existing nor pointed out by the special auditor, thus the reference itself was contrary to the provision of the Act and Special auditor exceeded its jurisdiction by venturing in areas other than referred.

4. The learned officer granted suo moto extension under section 142(2C) under the pretext of awaiting commission report called by him under section 131 (1)(d) of the Act from ITO at Siliguri, which is not related to special audit. Thus extension of period of special audit was without any good and sufficient reason, as such special audit report submitted, beyond statutory prescribed time, becomes time barred and invalid.

5. The respondent craves leave to add, amend, alter or vary the grounds of appeal at the time of or before the date of the hearing."

35. At the outset, we observe that the cross objection is filed with a delay of 58 days, in view of our above discussion in respect of condonation of delay in the appeal of the revenue, in the overall interest

of justice we condone the delay and proceed to dispose the cross objection on merits.

36. Ld. AR filed its written submissions, for the sake of clarity it is reproduced below:-

"With regard to Assesses Cross objection: Referring case for special audit: [CIT(A) para 4 pg 8-10]

Application for condonation of delay of 58 days was filed along with CrossObjection and Affidavit of Assessee enclosed: Case Laws

Delay being due to reasonable cause bonafide reason the same may be condoned. Collector, Land Acquisition vs. Mst. Katiji& Ors. (1987) 167 ITR 471 (SC) N. Balakrishnan vs. M. Krishnamurthy (1998) 7 SCC 123 Rafiq and Anr. Vs. Munshilal and Anr. 1981 AIR (SC) 1400 Improvement Trust v. Ujagar Sing and Other (2010) 6 SCC 786

1. During assessment proceeding the learned AO issued a show cause notice dated 7.12.16 proposing special audit of accounts u/s 142(2A) pointing out following discrepancy: pgs 22-23

i. It is assumed that method of valuation of stock is taken by your appellant as on FIFO method which is incorrect and should be valued at cost or market value, whichever is less.

ii. Gold sales made on 12.4.13 for Rs. 2928 per gram and purchased for Rs. 2,940 per gram. However, closing stock on 12.4.2013 is valued at Rs. 2971. This shows that there is either a manipulated purchase or manipulated sale or manipulated stock.

iii. More than 95% of sales is in cash and Gross profit is only 0.30 per cent and the valuation of closing stock is not in tandem with cost price of purchase or the market value existing on that date, correctness of account is not proved beyond the doubt.

2. Assessee responded vide letter dt 9/12/2016 (AO pg 2) that stock has been maintained on weighted average cost method and not LIFO method. The stock valuation was done automatically by tally software

as such was not manipulated. Stock being valued on weighted average method, could be higher than a particular purchase or sale price.

Assessee is dealing in gold had walk in customers who made purchases in cash. The cash collection is regularly deposited in bank account and purchases were

made through banking transactions. Assessee has given tally data which shows the complete correctness of accounts of the Assessee along with all information, documents, purchase parties ledger, confirmation and other requirements of the AO. Nature of business of dealing in bullion is of low margins.

Therefore, Assessee pleaded that there was no requirement of special audit since ingredients of subsection 2A of section 142 of the Act are not present in the instant case, namely the nature, complexity, volume of the accounts, correctness of the accounts, multiplicity of transactions, specialized nature of business activity and the interest of revenue.

3. The AO did not accept the request and applied to the Principal CIT for approval of special audit vide letter dated 26.12.16 and approval of the same was accorded by Principal CIT on 27.12.16. AO appointed special auditor directing the assessee to get his accounts audited.

Extension dt: 24/4/2017 and 26/5/2017 by AO:

4. During the course of special audit on the request of AO a spot inspection was conducted by ITO Siliguri. As the spot inspection report was not received, further extension of one month up to 26.5.2017 was granted by the AO suo moto. Since the spot inspection report was not received before fixed date, AO again granted suo moto extension of one month up to 26.6.2017 for special auditor to submit their audit report.

5. The assessee had filed all details and explanation in course of Spl audit. The Spl Auditor observed that Books of accounts are in line with audited Financial statement of the assessee. The special audit was completed vide report dt 21/6/2017

BRIEF PROPOSITION:

6. Section 142(2A) of the Act provides that if at any stage of the proceedings before him the AO having regard to the below mentioned reasons can direct for Special Audit.

Nature and complexity of the accounts: Special audit should not be directed on a cursory look at the accounts. There should be an honest attempt to

understand the accounts of the assessee. The nature of his business is very simple to understand i. e. trading of gold and silver which cannot be said as complex in nature as the books of accounts were in tally backup and all the required information and details were provided by your appellant from time to time before AO in the course of assessment proceedings and also timely submissions were made respect of queries raised by him.

A. O. before directing special audit must apply his mind and make an honest attempt to understand the accounts. A mechanical perfunctory order directing special audit is liable to quashed.

Volume of the accounts: It is clear from the books of accounts that assessee had turnover of only Rs. 52 Crores during the year under consideration. By any stretch of imagination this turnover do not in any way considered to be voluminous transactions as the appellant trades in bullion.

Doubts about the correctness of the accounts: During the ongoing assessment proceedings, timely submissions with all the explanations as required by the learned officer were made. No doubt or point was left unexplained and assessee's book of accounts and tally backup was also provided to AO.

Multiplicity of transactions in the accounts or specialized nature of business activity of the assessee: The nature of business is not of specialized natures which need any special auditor to audit the same as they are simply into trading of gold and silver which can be considered as a normal business activities carried out by the assessee.

In the interests of revenue: Mere meager profit in no way is against the interest of the revenue. The same being duly vouched by a Chartered Accountant during conducting tax audit and supported by all purchase, sales invoices, expenses etc. with compete quantitative details of

inventories. Coupled with fact that previous year assessment completed u/s. 143(3).

7. Therefore on the facts and circumstances of the case and in law, the learned AO grossly erred in referring the case for special audit u/s. 142(2A). Ingredients of section 142(2A) of the Act are not present in the case, namely the nature, complexity, volume of the accounts, correctness of the accounts, multiplicity of transactions, specialized nature of business activity and interest of revenue as such power of the said section is used in gross violation. This is also evident from the fact that the same AO passed order u/s. 143(3) for AY 2013-14 accepting the accounts. Copy of order is enclosed pg 77.

8. Entire exercise of invoking provisions of section 142(2A) by the assessing officer is done merely for collateral purpose of extending the limitation which expired on 31.12.2016. This is also evident from the fact that the learned officer exercised power u/s. 131 (1)(d) of issuing commissions during the period of special audit.

9. It is also submitted that the PCIT 33 erred in mechanically granting the approval for special audit, this is evident from fact that the same was granted in just one day.

10. The AO granted suo moto extension u/s. 142 (2C) under the pretext of awaiting commission report called by him u/s. 131(1)(d) from ITO at Siliguri, which is not related to special audit. Thus extension of period of special audit was without any good and sufficient reason, as such special audit report submitted, beyond statutory prescribed time, becomes time barred and invalid.

11. The Ld CIT(A) has not dealt with the contentions of the assessee nor given any findings on the same. Except extracting the section and agreeing with the reference.

Since the reference to special auditor itself being bad in law, assessment order becomes time barred u/s 153(1) of the Income Tax Act and needs to be treated as null and void.

Since the initial action of audit beyond time limit was not in consonance with law as such subsequent proceedings would not sanctify the proceedings; hence the assessment order being time barred needs to be treated as null and void.

37. In view of the above submissions, Ld. AR prayed that the order of the Ld.CIT(A) be set-aside in respect of the above grounds of the cross objection and necessary direction be given to the Assessing Officer.

38. On the other hand, Ld. DR relied on the order of the Ld.CIT(A).

39. Considered the rival submissions and material placed on record, we have already dismissed the appeal of the revenue on merits and adjudicating on the issue of reference to special audit is mere academic interest, therefore, we are not inclined to adjudicate at this stage and the grounds raised by the assessee in the cross objections are kept open.

40. In the result, appeal filed by the revenue is partly allowed and cross objection filed by the assessee is dismissed.

Order pronounced in the open court on 07th November, 2022.

Sd/-
(VIKAS AWASTHY)
JUDICIAL MEMBER
Mumbai / Dated 07/11/2022
Giridhar, Sr.PS

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum