

**IN THE INCOME TAX APPELLATE TRIBUNAL
ALLAHABAD BENCH, ALLAHABAD**

**BEFORE SHRI.VIJAY PAL RAO, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

**ITA No. 62/ALLD/2020
Assessment Year: 2015-16**

Income Tax Officer, Ward-2(2), Allahabad	v.	Monad Infrsolution Limited, C-80 GTB Nagar Kareli, Allahabad, 211016 U.P.
		PAN-AAJCM2155J
(Appellant)		(Respondent)

**C.O. No. 01/ALLD/2021
In
ITA No. 62/ALLD/2020
Assessment Year: 2015-16**

Monad Infrsolution Limited, C-80 GTB Nagar Kareli, Allahabad, 211016 U.P. PAN-AAJCM2155J	v.	Income Tax Officer, Ward-2(2), Allahabad
(Appellant)		(Respondent)

Appellant by:	Mr. Rabin Chaudhuri, CIT. D.R.
Respondent by:	Mr. Ashish Bansal, Adv.
Date of hearing:	15.12.2022
Date of pronouncement:	15.12.2022

ORDER

PER BENCH:

This appeal by the Revenue and C.O. by the assessee are directed against the order dated 25th February, 2020 of CIT(A) for the assessment years 2015-16.

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

“1. The Ld. CIT(A) erred in deleting the entire addition of Rs.20.72.15.014/- on the ground that the AO has estimated the income u/s 144 and this addition is made on ad-hoc basis, whereas the fact is that in spite of receipt of notices, the assessee has failed to explain with evidences the sundry creditors, advances from customers and TDS payable, hence the finding of the Ld. CIT(A) is factually incorrect.

2. The Ld.CIT(A) has erred in presuming that the AO has made ad-hoc addition under various heads on account of non-compliance of various notices, whereas fact is that no ad-hoc addition has been made, rather it has been made on account of complete failure of the assessee as it has furnished no explanation and on evidence of such sundry creditors and advances from the customers, hence it is not a case of ad-hoc addition. Ld. CIT(A) therefore has based his judgments on surmises, conjectures and presumption ignoring the reasons given by the AO.

3. The Ld. CIT(A) has wrongly presumed that estimation of income has been done u/s 144 whereas has failed to explain the sundry creditors and advances from the customers, and has submitted no evidences thereof

4. The Ld. CIT(A) is not justified in deleting the addition of Rs3,52,49,419/- on account of commission expenses, not verifiable by the A.O. due to non-production of books of account by the assessee during assessment proceedings. 5. The Ld. CIT(A) is not justified in deleting the addition of Rs.1,12.02.665- on account of professional/consultancy by the assessee during assessment proceedings.

6. The Ld. CIT(A) has stated that following his notice dated 12.04.2019 the assessee has submitted response, but Ld. CIT(A) has failed to mention as to whether all the books of accounts were produced before him and he has rally examined and have communicated the outcome of his observation to the AO for his counter representation Ld. CIT(A) has done so, hence acted illegally without following the appellate procedure and legal convention.

7. The Ld. CIT(A) has erred in deleting all the additions merely on the ground that income of the assessee has been estimated and books of accounts were not rejected and for reaching to the conclusion has relied upon various case laws disrespecting the fact that the income has not been disallowed for want of evidences, and additions of sundry creditors and advances from customer have been made considering the complete failure of furnishing explanation with necessary evidences, by the assessee.

8. The Ld. CIT(A) has erred in not giving opportunity to the AO and has proceeded merely on the basis of submission of the appellant which is legally not tenable.

9. Right is reserve to alter, modify and to file any fresh ground of appeal.”

3. The assessee company is engaged in the business of Real Estate Development and filed its return of income on 31st March, 2017, declaring total income at Rs. 3,34,613/-. It is stated that this is the first year of the business of the assessee company. The case of the assessee was selected under CASS for the limited scrutiny on the following issues:

- (i) Whether Sales Turnover/receipts has been correctly offered for tax.
- (i) Whether deduction claimed on account of business expenses is admissible.
- (ii) Whether the current liabilities shown are genuine.

4. The AO issued notice under Section 143(2) on 19th September, 2017 and thereafter, the notices under Section 142(1) dated 26th October, 2017 and 4th December, 2017. Since, there was no compliance by the assessee of the notice issued under Section 142(1) dated 26th October, 2017. The AO also initiated the penalty proceedings under Section 271(1)(b) and levied the penalty vide order dated 20th November, 2017. There was no response to the notices issued by the AO therefore, the AO proceeded to frame the assessment under Section 144 of the Income Tax Act whereby, the AO made three additions on account (i) Current liabilities, (ii) Commission expenses and (iii) Consultancy fees. Accordingly, the AO assessed the total income of the assessee at Rs. 25,40,01,710/- as against the return of income of

Rs. 3,34,610/- . The assessee challenged the action of the AO before the CIT(A) and explained that the current liabilities shown in the books of accounts are representing the aggregate amount of sundry creditors, advance from customers against booking and the amount of TDS payable. It was further explained that the brokerage / commission expenses are paid to the agents/brokers who help the assessee company in its business of real estate development at the initial stage of the business.

5. Similarly, the assessee explained that the expenses shown under the head consultancy fees in fact, represents the site development expenses. Thus, these are the necessary business expenditure as the site development is the basic requirement of the business of the assessee. The CIT(A) asked to assessee to produce the relevant documentary evidence, books of accounts and after considering these records produced by the assessee the additions made by the AO have been deleted by the CIT(A) while passing the impugned order.

6. Aggrieved by the impugned order of the CIT(A), the revenue has filed the present appeal. The Ld. CIT DR has submitted that despite the repeated notices issued by the AO, the assessee did not appear or response to these notices during the assessment proceedings and consequently the Assessing Officer has framed the assessment under Section 144 of the Income Tax Act. The AO has made the additions on two issues out of three issues which were taken up for limited scrutiny under CASS. There was a complete failure on the part of the assessee to furnish the explanation as well as supporting evidence in respect of all three claims. He has further contended that the CIT(A) has accepted the explanation of the assessee ignoring the crucial fact that the assessee failed to discharge the primary onus in respect of the current liabilities shown in the books, the expenses claim under the head commission expenses as well as consultancy fees. The primary onus is on the assessee to establish that the expenditure incurred by the assessee is wholly and

exclusively for the purpose of business and when the assessee has failed to discharge his onus, the AO has rightly disallowed these claims.

7. Similarly, the assessee has shown the current liability without giving the details and particulars of the sundry creditors as well as the other creditors and therefore, the claim of the assessee was not acceptable and liable to be disallowed. The CIT(A) without verifying the details and relevant records in respect of all three issues has deleted the additions made by the AO and that too without providing an opportunity to the AO to examine the evidence and to submit its comments and response against the record/material first time produce before the CIT(A).

8. Thus, the Ld. DR has submitted that it is a clear case of violation of principles of natural justice when the assessee did not appear before the AO nor file any documents or details in support of the claims of expenditure and current liabilities but first time produced the record before the CIT(A), which was considered by the CIT(A) without giving an opportunity to the AO to counter the said material/evidence produced by the assessee. Therefore, the record first time produced before the CIT(A) was not given to the AO for examination or rebuttal on the part of the AO. Even the said record has not been properly examined by the CIT(A) before passing the impugned order but it is stated in the impugned order that only text checking was done.

9. Hence, the Ld. DR has submitted that the impugned order of the CIT(A) is not sustainable and liable to be set aside. He is pointed out that the CIT(A) has proceeded on the basis of the wrong presumption of the fact and citing the irrelevant provisions such as 145(3) of the Income Tax Act whereas, the AO has not made any *ad hoc* addition or disallowance while passing the impugned order but when the assessee has not responded to the notices issued by the AO nor appeared or filed any evidence in support of the claims than the AO was left with no option but to pass the assessment order under Section 144 of the Income Tax Act by

disallowing the claim of current liability, expenses on account of commission and consultancy fees.

10. The Ld. DR has further contended that the CIT(A) has cited the irrelevant judicial precedents in respect of the rejection of books of account under Section 145(3) as well as *ad hoc* disallowance or estimation of the income by the AO whereas, in the case of the assessee there is no *ad hoc* disallowance or estimation of the income by the AO. Therefore, all those decisions as well as reasoning of the CIT(A) is absolutely irrelevant for the issues involved in this case.

11. On the other hand, the Ld. AR has submitted that as per the provisions of Section 250(4) of the Income Tax Act, the CIT(A) can conduct the necessary inquiry as he think fit or direct the AO to make further inquiry and report the result of the same. In the case of the assessee the CIT(A) directed the assessee to produce all these records including books of accounts which were produced by the assessee for the examination of the CIT(A). Thus, when the CIT(A) was satisfied on examination and conducting the inquiry from the record produced by the assessee as per his direction then it was not necessary to give an opportunity to the AO for examination of the said evidence or to file any rebuttal to the said record. He has further submitted that the assessee produced all the relevant records including the ledger accounts, the details of the creditors and the persons from whom advances are received by the assessee in respect of the sale / bookings which were subsequently completed by sale-deeds. The copies of the sale-deeds were produced by the assessee before the CIT(A) and therefore, on the basis of the relevant record, the CIT(A) was satisfied with the claim of the assessee. He has further submitted that the expenditure incurred by the assessee in respect of the commission paid to the commission agent and towards the development of the site are absolutely incurred for the business activity of the assessee. He has pointed out that since, it was the first year of the business of the assessee therefore, without the involvement of the

commission agent, the assessee could not sale the properties. Similarly, the development of site is the inevitable part of the business activity of the assessee and hence, the said expenditure cannot be disallowed. He has relied upon the impugned order of the CIT(A).

12. We have considered the rival submissions as well as relevant material on records. The Assessing Officer has recorded the facts of issuing the notices under Section 143(2), 142(1) and show cause notice for initiation of penalty under Section 271(i)(b) and when no response was received from the assessee to these notices the AO framed the assessment under Section 144 of the Income Tax as under:

"In this case return was filed electronically on 31.03.2017 at a total income of Rs. 3,34,613/-. The case was selected for scrutiny assessment u/s 143(3) of the IT Act through CASS for limited scrutiny on the following reason:-

- (i) Whether Sales Turnover/receipts has been correctly offered for tax.*
- (ii) Whether deduction claimed on account of business expenses is admissible.*
- (iii) Whether the current liabilities shown are genuine.*

Accordingly notice U/s 143(2) was issued on 19.09.2017 through email/registered post and property served upon the assessee fixing the date of compliance on 22.09.2017.No compliance was made .Notice u/s 142(1) dated 26.10.2017 was issued through registered post fixing the date of compliance on 07.11.2017. No compliance was made. Consequently penalty proceedings u/s 271(1)(b) of the Income Tax Act, 1961 was initiated and show cause notice was issued through registered post/email on 10.11.2017 fixing the date of compliance on 16.11.2017 .No compliance was made A penalty order u/s 271 (1) (b) of the Income tax Act, 1961 dated 20.11.2017 was passed Imposing Rs. 10,000/-. Final Show cause notice dated 04.12.2017 was issued through registered post /email, fixing the date of compliance on 11.12.2017 at 12.50 P.M at 38 M.G Marg, Kayaker Bhawan and show cause why following addition may not be made in your case for A.Y 2015-16 :-

1. Current liabilities of Rs. 20,72,15,014/- [(Part A-BS.4A(la).]
2. Commission expenses of Rs. 3,52,49,419/- [(Part A-P&L S.No.22 (ii)].
3. Consultancy fees of Rs. 1,12,02,665/- [(Part A-P & L S. No. 24(ii)].
as it stands unverified due to non-compliance on your part. Show cause why Rs. 25,36,67,098/- (i.e. Rs. 20,72,15,014/- + Rs. 3,52,49,419/- + Rs.1,12,02,665/-) may not be added to your income for A.Y. 2015-16. No compliance was made. It is a time barring assessment. Accordingly, I have no other option but to complete the assessment on merits based on the material available on records. Hence Rs. 25,36,67,098/- (i.e Current liability of Rs.20,72,15,014/- + Commission expenses of Rs. 3,52,49,419/ and Professional/Consultancy fees of Rs.1,12,02,665/-) is added to the total income of the assessee.

Subject to the above narration of facts, the assessed income of the assessee is computed as under:-

Income as per return	Rs. 3,34,610/-
Add:(i) Current liability as discussed above	Rs. 20,72,15,014/-
(ii) Commission expenses as discussed above	Rs. 3,52,49,419/-
(iii) Consultancy fees as discussed above	Rs. 1,12,02,665/-
Total Income	Rs. 25,40,01,708/-
Or	
TOTAL INCOME	Rs.25,40,01,710/-

Assessed as above u/s 144 of the Income Tax Act 1961. Interest u/s 234A is charged for late filing of return and Interest u/s 234B is charged for defaults in payment of advance tax. Demand Notice alongwith challan of Rs.12,93,70,470/- is issued for payment of tax within stipulated time. Assessee has not e-filed return and Form No 3 CB with in the stipulated time. Therefore notice u/s 274 r.w.s 271B is being issued separately. Notice u/s 274 r.w.s 271(1) (c) is also issued.”

13. It is clear from the assessment order that the AO issued notice under Section 143(2) through e-mail as well as registered post but there was no compliance. The AO then issued notices under Section 142(1) on 26.10.2017 and 04.12.2017 but

again there was no response or compliance on the part of the assessee. Accordingly, the AO has completed the assessment under Section 144 of the Income Tax Act and made the additions on account of current liabilities of Rs. 20,72,15,014/- as shown by the assessee, commission expenses of Rs. 3,52,49,419/- and consultancy fees which was explained by the assessee as site development expenses of Rs. 1,12,02,665/-. These additions were made by the AO for want of any explanation, supporting evidence or record produced by the assessee. Though, the AO has not disturbed the sales and purchases shown by the assessee however, the current liability and expenditure claimed by the assessee were disallowed in toto. Therefore, the disallowance of the entire current liabilities representing the sundry creditors and advance from the purchasers as well as the expenses is also not justified.

14. The CIT(A) has deleted the entire additions made by the AO as under:

“Decision:

I have gone through the facts and written submission filed along with the details filed enclosed therein. The Assessing Officer made adhoc addition under various heads by passing an order u/s 144 of the Act for the reason that the appellant did not produce before AO any books of account and bills and vouchers for verification of expenses claimed. Appellant also did not comply with notices u/s 142(1). It is a fact that AO made the addition without rejecting the books of accounts u/s 145(3) of IT Act and estimating the income without any basis whatsoever of any kind purely on the basis of conjecture.

It is a trite law that AO in order to ascertain what would constitute a fair and reasonable estimation of income u/s 144 has to bring some material on record before making any additions. Appellant's history is one of the good source of such material on the basis of which additions can be made u/s 144 of IT Act. Appellant is a Limited company and is in first year of operation. Complete books of accounts are maintained and its audit are done for Companies Act and for Income Tax Act. Returns of income

and all other statutory returns are filed on the basis of such audited accounts. Appellant has submitted that non-compliance was due to the fact that management was not informed about the assessment proceedings by the accountant who withheld all the notices with him due to some internal problems with him, resulting into the ex-parte assessment." Appellant has submitted that issuance of notice is not being challenged but the non-compliance is being explained. It is evident from the records that not even a single appearance was made by appellant before AO. Appellant filed copies of ledgers and produced books of accounts and registered sale deeds of the customers from whom the Advances were received for sale of properties during the appellate proceedings, which were examined on test check basis.

The A.O may proceed under Section 145(3) under any of the following circumstances:

- (a) Where he is not satisfied about the correctness or completeness of the accounts; or*
- (b) Where method of accounting cash or mercantile has not been regularly followed by the assessee; or*
- (c) Accounting Standards as notified by the Central Government have not been regularly followed by the assessee.*

Though the broad parameters have been laid down in the Section itself under which the provisions are required to be invoked for rejection of books of account in a particular case, yet, a definite ground work is sine-qua-non on part of the Assessing Officer before resorting to the provisions of section.

Though the non-production of books of accounts definitely provides a ground to the AO for invocation of the provisions of Section 145(3) yet it is not a sufficient condition for making any adhoc addition as per Best of AO's Judgment. The AO is required to analyse various other parameters which have the effect on the income of the appellant for the relevant period, before drawing any conclusion on the merit of such claim. However, it is the duty of the AO to pin point the malice and bring it out in the Assessment Order by marshaling the facts encompassing the same. It is legally valid proposition that once

the AO reaches a conclusion that books of a/c are not available or not produced knowingly for the best reasons known to appellant for verification then book results are liable to be rejected, then a fair estimate of income is required to be made on the basis of material available on record or some extraneous material like net profit rate of comparable cases or appellant's history.

It is a fact in this case that the books of a/c were not produced and the bills and vouchers pertaining to all the expenses were not made available for verification before the AO, but the AO did not invoke S. 143(3) and did not reject the books of accounts and went on to form 'Best Judgment' u/s 144 of IT Act absolutely without any basis. The Hon'ble Allahabad High Court in the case of CIT V/S. Surjeet Singh Mahesh Kumar (1994) 210 ITR 83 has held that in every case of Best Judgment, the element of guess work cannot be eliminated so long as Best judgment has a nexus with material on record and discretion in that behalf has not been exercised arbitrarily or capriciously. Therefore in absence of any material on record, AO's discretion in estimating the income of the appellant is held to be exercised arbitrarily. It is clear from the fact that the appellant's gross turnover during the FY 2014-15 is only Rs.8,42,91,909/- but the AO made total additions of Rs. 25,36,67,098/- which is more than three times of the total turnover of the assessee. Such an act cannot be said to be judicious.

The rejection of books of accounts u/s 145 and the Best Judgment assessment under Section 144 go together with each other, in the process of making an assessment, where the assessee does not produce relevant records relating to Its day to day business and in holding that the fact of AO is not getting satisfied about the fairness or correctness of the accounts of the assessee. Therefore, in the absence of non-production of books of account, the results in the books of accounts were to be rejected and in this case rather books were accepted by making additions on account of disallowance of the expenses claimed and adding balance of Sundry Liabilities in total. In such case, the AO's action in not rejecting the books of accounts and making judgment u/s 144 by making adhoc additions is held to be not justified.

Hon'ble ITAT Bengaluru in the case of Shri G.T. Umesh Vs. ITO in ITA No.1321/Bang/2017 dated 29.03.2019 relying on the law laid down by Hon'ble High Courts in the matter of CIT v. Anil Kumar & Co., [(2016) 67 Taxmann.com 278 (Kar)]1, CIT v. Symphony Comfort System Ltd [(2013) 35 taxmann.com 533 (Guj)]1 and PCIT v. Marg Ltd [(2017) 84 taxmann.com 52 (Mad)], have held that no addition can be made on estimated basis without rejecting books of account of assessee.

4. In the case of Marg Ltd (supra), HELD:

"the assessment order is passed u/s.144 of the Act, without rejecting the books of account. However, if we look into the provision of Section 144 of the Act then, it is clear that section 144 works in various situations mentioned in 144(1)(a), (b) and (c). Besides that a special provision is also given u/s.145 (3) where the AO has been given the power to estimate the income, in case he is not satisfied with the correctness or completeness of the account, to make an assessment u/s.144 of the Act. In the present case, the AO estimated the Income based on the information obtained from KSBCL authorities disclosing the percentage of profit on sale fixed by the Karnataka government. It is not the case of the AO that the books were not properly maintained. Not even a word has been whispered by the AO that the books were not in accordance with the method of accounting or were incorrect/incomplete. In our view, the laws commands us to set aside the assessment made on the basis of estimation, if the AO made the estimation without rejecting the books of account.

"In the matter of Anil Kumar (supra), the Hon'ble jurisdictional High Court has held as under:

"11.... Section 145(3) of the Act lays down that the Assessing Officer can proceed to make assessment to the best of his judgment under section 144 of the Act only in the event of not being satisfied with the correctness of the accounts produced by the assessee. In the instant case the Assessing Officer has not rejected the books of account of the assessee. To put it differently the Assessing Officer has not made out a case that conditions laid in Section 145(3) of the Act are satisfied for rejection of the books of

account. Thus, when the books of account are maintained by the assessee in accordance with the system of accounting, in the regular course of his business, same would form the basis for computation of income. In the instant case it is noticed that neither the Assessing Officer nor CIT(Appeals) have rejected the books of account maintained by the assessee in the course of the business. As such tribunal has rightly rejected or set aside the partial addition made by Assessing Officer for arriving at gross profit and sustained by the CIT(Appeals) and rightly held that entire addition made by the Assessing Officer was liable to be deleted. The said finding is based on sound appreciation of facts and it does not give rise for framing substantial question of law."

In view of the above, we do not find that the order passed by the CIT (A) is in accordance with law. Therefore we hold that the assessee is entitled to the relief claimed."

It is the law well settled that an act has to be done in accordance with the provisions of law. If it not so done, it is to be treated as if the "act has not been done at all". There are large number of cases decided by the jurisdictional High Court on this issue. Hon'ble Allahabad High Court in the case of CIT vs. Kanpur Plastipack Ltd. (ITA No.238 of 2009), relevant portion of which is reproduced hereunder:-

"The requirement of law is well known under a statute of certain act is required to be done in a certain manner which must be done in that manner, failing which, proceeding stands vitiated. The question of law, therefore, is decided in favour of the assessee and against the department. The appeal has no merit and is, accordingly, dismissed. No costs."

In the instant case AO has flouted the provisions of Section 145(3) of the Act that lays down that the AO can proceed to make assessment to the best of his Judgment under section 144 of the Act only in the event of rejection of books of account for not being satisfied with the correctness of the accounts produced. In the Instant case the AO's

action in not rejecting the books of account of the assessee but making the best judgment assessment is contrary to process laid down in statute.

During the appellate proceedings the appellant produced the complete books of accounts for F.Y. 2014-15 relevant vouchers and supporting documents including copy of sale deed along with copy of agreements as under:-

- a) Cash Book & Bank Book*
- b) Complete Ledger Including Party Ledger, Expenditure Ledger.*
- c) Sale/Purchase Register, Stock Register including other subsidiary register.*
- d) Copy of agreement, sale deed and other supporting bills and vouchers.*

Without commenting on the correctness of these books and supporting evidence produced during the appellate proceedings, it can still be appreciated that the books of accounts are being maintained which were subject to two audits during the year as evident from the audit report submitted by appellant. AO could have used it as a good material to base his assessment.

In the case of Tolaram Daga Vs. CIT reported in (1966) 59 ITR 632(Gau) wherein their lordships have observed and held as under:-

"It would appear that the accounts of the firm which had been produced in the case had been accepted and acted upon by the department and no serious challenge had been made to their genuineness or that they were kept regularly in the course of business. That being the case, the accounts are relevant and afford prima facie proof of the entries and the correctness thereof under section 34 of the Evidence Act.

Hon'ble Delhi High Court in the case of CIT vs. Jay Engineering Works Ltd. reported in (1978) 113 ITR 389 wherein their lordships have observed and held as under:-

"While the word "evidence" may recall the oral and documentary evidence as may be admissible under the Indian Evidence Act, the use of the word

"material" shows that the Income-tax Officer not being a court can rely upon material which may not be strictly evidence admissible under the Indian Evidence Act for the purposes of making an order of assessment. Court often take judicial notice of certain facts which need not be proved, while administrative and quasi-judicial authorities can take "official notice" of wider varieties of facts which need not be proved before him. Thus, not only in respect of the relevancy but also in respect of proof the material which can be taken into consideration by the Income-tax Officer and other authorities under the Act is for wider than the evidence which is strictly relevant and admissible under the Evidence Act." (389).

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The question arises, therefore, whether the reports of the auditors could be said to be 'material' on which reliance could be placed by the Income-tax authorities." Unlike the proof required of such reports as also of the account books under the Indian Evidence Act, it is quite competent for the income-tax authorities not only to accept the auditors' report, but also to draw the proper inference from the same. The income-tax authorities could, therefore, come to the conclusion that since the auditors were required by the statute to find out if the deductions claimed by the assessee 's in their balance sheets and profit and loss accounts were supported by the relevant entries in their account books, the auditors must have done so and must have found that the account books supported the claims for deductions, when the deductions were disallowed, by the Income-tax Officer on the ground that detailed information regarding them was not available. Justice was not done to the assessee. It was not possible for the assessee's to produce the original account books, which were destroyed in fire. There was, however, other material mainly consisting of the auditors' reports were material, But the question of law is well settled and is not capable of being disputed and does not, therefore, call for reference.

The Tribunal has stated that, though, ordinarily, the adjustments relating to expenses should have been made by the assessee in the accounts of the year to which the

adjustments relates and noting a subsequent year, it is often inevitable that such adjustments relating to earlier years have to be made in subsequent years. This is specifically so, when the business, as of the assessee, is of giant proportions and the branches are farflung. The Tribunal has also very properly relied upon the auditor's report to draw the proper inference from the same".

In the present case, the AO has estimated the income without any basis or any available information obtained from any independent source and disregarding the facts available in the audit report filed with the return of income. As held by Hon'ble Court in the case of Jay Engineering (Supra) even if it was not possible for the assessee 's to produce the original account books, AO should have relied upon auditors' reports that constitutes relevant material for making assessment. It is not the case of the AO that the books were not properly maintained. Not even a word has been whispered by the AO that the books were not maintained in accordance with the method of accounting or were incorrect or incomplete. If the books of account are being maintained by the appellant in accordance with the accepted system of accounting, in the regular course of his business, then only same would form the basis for computation of income. In absence of any evidence being brought on record by AD against the claim of current liabilities of Rs.20,72,15,014/-; commission expenses of Rs.3,52,49,419/- and site development expenses of Rs.1,12,02,665/- the addition made is held to be not justified and is accordingly deleted."

15. It is manifest from the impugned order of the CIT(A) that he has proceeded on the premises that instead of making the additions by the AO while passing the order under Section 144 the AO ought to have estimated a fair and reasonable income on the basis of the material available on record. This proposition and analogy is applicable only in the case when, the AO after rejecting the books of accounts under Section 145(3) proceeded to estimate the Income on some reasonable and proper basis. Therefore, in such cases, where there is no response or appearance on behalf of the assessee, the AO may propose to frame the assessment by making the estimation of the income on some reasonable and proper basis after

considering the material available on record. Therefore, only when the AO proposed to frame the assessment on best judgment basis the estimation of income is required to be made but when the AO has made specific disallowance of the claim then this proposition of estimation of income does not apply. In any case, the AO while framing the assessment cannot take an arbitrary decision or make improper additions but the AO being an adjudicating authority is supposed to assess the real income of the assessee. Hence, we do not subscribe to this reasoning of the CIT(A) that the AO ought to have invoked the provisions of Section 145(3) before framing the assessment under Section 144 of the Act.

16. Secondly, the CIT(A) duly acknowledged the fact that the assessee did not produce the books of account, bills and vouchers as well as other relevant records before the AO despite the notices issued under Section 142(1) of the Income Tax Act and thereby, the assessee has failed to prove its claim on account of current liabilities as well as the expenditures and particularly to establish that these expenses are incurred wholly and exclusively for the business of the assessee. Therefore, instead of allowing the assessee to discharge its primary onus in support of these claims, the CIT(A) on its own ask the assessee to produce the complete books of accounts, relevant vouchers and supporting documents including the copy of sale-deeds/agreements. The CIT (A) has stated that without commenting on the correctness of the books of accounts and supporting evidence produced during the appellate proceedings as the books of accounts are audited, the AO could have used it a good material to base his assessment. While making this observation the CIT(A) has completely ignored the fact that when there was no response or participation of the assessee in the assessment proceedings, the question of considering the books of accounts and supporting evidence as the basis of assessment does not arise. Further, once the books of accounts and other relevant records was produced by the assessee first time during the appellate proceedings before the CIT(A), the

principles of natural justice demands that the other party should be given an opportunity to verify the evidence first time produced at the appellate stage. The CIT(A) without giving any reason in the impugned order as to why the books of accounts and other relevant material produced by the assessee was not referred to the AO for his examination and report has passed the impugned order. Both the parties have fairly agreed before us that the matter can be restored to the file of AO for *de novo* assessment. This in our considered opinion is a clear violation of principles of natural justice, as the AO was not even given an opportunity to verify this material/evidence and give his comments/report.

17. Accordingly, in the facts and circumstances of the case and in the interest of justice we set aside the impugned order of the CIT(A) and the matter is remanded to the record of the AO for passing the assessment order afresh after verification and examination of the relevant record, books of accounts to be produced by the assessee as well as affording a proper opportunity of hearing to the assessee.

18. In the Cross Objection No. 01/Alld/2021 in ITA No. 62/Alld/2020, the assessee has raised the following grounds:

1. *“BECAUSE the Id. CIT(A) after having issued notice to the appellant under section 250(1) of the Act, non-representation of the appeal having been made from the side of the department cannot at all be treated that opportunity of hearing to them had been denied.*
2. *2 BECAUSE the powers of the first appellate authority being co- terminus with that of the Assessing Officer, keeping in view of the principle laid down by the Hon'ble Apex Court in the case of CIT vs. Nirbheram Daluram reported in (1997) 224 ITR 610 and after having exercised the same by examining the records and information furnished by the cross objector, the appellate order dated 25.02.2020 passed by Ld. CIT(A) does not at all suffers from any infirmity.*

3. BECAUSE the Id. CIT(A) having inherent powers under section 250(4) of the Act, issued notice dated 12.04.2019 during appellate proceedings and directed the cross objector/ assessee to produce complete books of accounts and other records (in compliance to which cross objector placed complete books of account, sale deeds, agreements, supporting bills and vouchers) which were examined also, so the relief allowed by the Id. CIT(A) in the appellate order under consideration is fully correct, based on sound footings and duly supported by various case laws.
4. . BECAUSE the Id. Assessing Officer not having disputed the audit statement of accounts for the year under consideration including purchases made by the cross objector/ assessee during the year, disallowance of Rs.25.51,250/-forming part of the 'Current Liabilities' is wholly unjustified, accordingly relief allowed by Ld. CIT(A) in his appellate order dated 25.02.2020 does not at all suffers from any infirmity.
5. BECAUSE the TDS payable aggregating to Rs.34.43,109/- forming part of Current Liabilities as on 31.03.2015 was duly supported by the challans, amounts having been deposited in the government exchequer well within time, so there remains no basis for the addition so made by the Id. Assessing Officer in the assessment order be sustained in the appellate proceedings.
6. BECAUSE advances from customers aggregating to Rs.20,12,20,655/- were duly supported by books of account and other details, adjustments on materialization of deals with sale deeds in subsequent years, so the addition made by the Id. Assessing Officer of the entire figure as standing credit in the balance sheet is wholly erroneous and unjustified.
7. BECAUSE there being no dispute on the veracity of the audited books of account having been raised by the Assessing Officer at the time of assessment proceedings as also not initiation of provisions of section 145(3) of the Act, complete disallowance of "Brokerage and Commission" of Rs.3,52.49.419/- and "Site Development Charges" (considered as consultancy fees) of Rs.1,12,02,665/- is wholly erroneous and bad too.
8. BECAUSE the observation made by the Id. CITA) in the appellate order as regards relief on account of "Brokerage and Commission of Rs.3.52.49.419/- and "Site

Development Charges" (considered as consultancy fees) of Rs.1,12,02,665/- does not at all suffers from any infirmity and the order passed by Id. CIT(A) deserves to be upheld by this hon'ble court."

19. All the grounds of the Cross-objection are in support of the impugned order of the CIT(A) and do not raise any separate issue. In view of our finding on the appeal of the revenue, the Cross-objection filed by the assessee, stand dismissed.

20. In the result, the appeal of the revenue is allowed for statistical purpose and the Cross-objection of the assessee are dismissed.

The order pronounced in the Open Court after conclusion of hearing on 15.12.2022, the same is reduced in writing and signed on the date as indicated below.

Sd/-
RAMIT KOCHAR
(ACCOUNTANT MEMBER)

Dated:19.12.2022

Kd Azmi

Copy forwarded to:

1. Appellant- Monad Infrsolution limited, Kareli, Allahabad
2. Respondent- Income Tax Officer, Allahabad
3. CIT(A), Allahabad
4. CIT
5. DR –

Sd/-
VIJAY PAL RAO
(JUDICIAL MEMBER)

By order
Sr. P.S.