

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

**BEFORE SHRI PAWAN SINGH, JM & DR. A.L.SAINI, AM**

आयकर अपील सं./ITA Nos.1442 & 1443/AHD/2017  
(निर्धारणवर्ष / Assessment Years: (2011-12 & 2012-13)  
(Physical Court Hearing)

Mumtaz Dilawar Gani 6, White House, Near Railway Crossing, Dahej Bypass Road, Bharuch-392001	<b>Vs.</b>	Income Tax Officer, Ward-1, Bharuch Income Tax Officer, Ward-1(2), Bharuch
स्थायी लेखासं./जीआइआरसं./PAN/GIR No.: <b>ADCPG 1175 D</b>		
(अपीलार्थी /Assessee )		(प्रत्यर्थी /Respondent)

निर्धारिती की ओर से /Assessee by : Shri Krutarth Desai, Advocate &  
Ms. Disha Kharod, C.A

राजस्व की ओर से /Respondent by : Shri Vinod Kumar, Sr.-DR

सुनवाईकीतारीख /Date of Hearing : 31/03/2023

घोषणाकीतारीख/Date of Pronouncement: 23/05/2023

**आदेश / ORDER**

**PER DR. A. L. SAINI, ACCOUNTANT MEMBER:**

Captioned two appeals filed by the assessee, pertaining to Assessment Years 2011-12 and 2012-13, are directed against the separate orders passed by the Learned Commissioner of Income-tax (Appeals)-3, Vadodara [in short “the ld. CIT(A)”] dated 23.03.2017 and 31.03.2017, which in turn arise out of separate assessment orders passed by the Assessing Officer (‘AO’ for short) under section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as ‘the Act’), vide order dated 28.03.2014 and 30.03.2015 respectively.

2. Since, the issues involved in all the appeals are common and identical; therefore, these appeals have been heard together and are being disposed of by this consolidated order. For the sake of convenience, the grounds as well as the facts narrated in ITA No.1442/AHD/2017 for assessment year 2011-12, have been taken into consideration for deciding these two appeals *en masse*.

3. Grounds of appeal raised by the assessee in lead case in ITA No.1442/AHD/2017, are as follows :-

*“1) The learned Commissioner of Income Tax (Appeals)-III has erred in upholding addition of Rs.1426541/- toward estimated gross profit by rejecting books of accounts and Rs.12513000/- towards unexplained cash credits.*

*2) The learned Commissioner of Income Tax (Appeals)-III ought not to have upheld addition of Rs.1426541/- towards estimated gross profit by rejecting books of accounts and Rs.12513000/- towards unexplained cash credit.*

*3) The learned Commissioner of Income Tax (Appeals)-III has erred in not considering the facts of the case submitted to the learned Commissioner of Income Tax (Appeals)-III.*

*4) The assessee craves to leave add to or amend any of the ground(s) of appeal.”*

4. Succinctly, the factual panorama of the case is that assessee before us is an Individual. The assessee is a proprietor of M/s Shital Distributors and is engaged in business of trading in TV, Refrigerator, Washing machine etc, on wholesale basis. For the year under consideration, the assessee had shown gross profit to the tune of Rs.23,27,044/- @ 4.89% and net profit of Rs.2,26,964/- @ 0.48%, on total turnover of Rs.4,75,51,369/- as against gross profit declared at Rs.19,92,894/- @ 6.79% and net profit at Rs.2,35,595/- @ 0.80%, on total turnover of Rs.2,93,56,224/- in the immediate preceding year. Therefore, the assessing officer noted that there is fall in gross profit by 1.89% and in net profit by 0.32% for the year as compared to the last year.

5. Therefore, during the course of assessment proceedings, the assessing officer has issued notice under section 142(1) of the Act, dated 17.10.2013, and by way of this notice, the assessee was asked to produce books of accounts with supporting bills/vouchers, bank reconciliation statement for verification purpose and was also asked to furnish reason for fall in gross profit / net profit. However, in response to notice u/s 142(1) of the Act, issued on 17.10.2013, the assessee had submitted only part of the details on 12.11.2013 and thereafter submitted part details on 26.11.2013. The part details, so submitted by the assessee include confirmations of creditors, name, address, PAN number and bank statements and copy of ledger accounts of creditors.

6. The assessee was again asked to produce remaining details along with books of accounts, bills/vouchers with supporting evidences for verification in response to questionnaire u/s 142(1) of the Act. In response to this notice, the AR of the assessee appeared but did not file the remaining details. Therefore, in absence of any concrete reply from the assessee and production of supporting evidences, the assessee was asked to explain why books of accounts should not be rejected u/s 145(3) of the Act and why gross profit should not be enhanced by 3% on total turnover shown by the assessee of Rs.4,75,51,369/-. Despite of this, the assessee has not submitted details. Therefore, assessing officer rejected the books of accounts of the assessee for the year under consideration u/s 145(3) of the Act and gross profit of the assessee was estimated by the Assessing Officer to Rs.14,26,541/- @ 3% of Rs.4,75,51,369/-. Thus, gross profit of Rs.14,26,541/- determined for the year under consideration was added to the total income of the assessee.

7. Therefore, after rejection of books of accounts under section 145(3) of the Act, the assessing officer had enhanced the gross profit by Rs.14,26,541/- @ 3% on turnover at Rs.4,75,51,369/-. This enhancement by the assessing officer is over and above the gross profit declared by the assessee to the tune of Rs.23,27,044/- @ 4.89% on turnover.

8. After rejection of books of accounts, the assessing officer also proceeded to make addition on estimate basis of various expenses claimed in the profit and loss account. The assessing officer observed that in absence of any bills/vouchers and other documentary evidences, veracity of expenses claimed in the profit and loss account of Rs.21,00,146/- could not be verified, therefore assessing officer made an addition at a lump sum amount of Rs.2,50,000/-, on estimate basis.

9. After rejection of books of accounts, the Assessing Officer also proceeded to make addition on estimate basis of creditors/unsecured loan. During the course of assessment proceedings, on perusal of statement of loans and deposits taken or accepted and repaid forming partly in the year under consideration, it was noted by Assessing Officer that the assessee had accepted unsecured loans. Vide

questionnaire issued u/s 142(1) of the Act dated 17.10.2013, the assessee was asked to furnish confirmation of depositors including squared up loans and was also asked to furnish documentary evidences to prove identity of depositor, genuineness of transactions and creditworthiness of depositors. In response, the assessee had furnished part details like confirmation of creditors containing their PAN number, name and address and amount repaid during the year. The assessee also submitted bank statement to prove the genuineness of creditors. The assessee also furnished the ledger account of creditors. However, assessing officer rejected the above documents and evidence and held that these part details are not sufficient to prove genuineness and creditworthiness, therefore made addition of Rs.1,25,13,000/- as unexplained credit u/s 68 of the Act.

10. Aggrieved by the order of Assessing Officer, the assessee carried the matter in appeal before Ld. CIT(A) who has deleted the addition of Rs.2,50,000/- holding that after rejection of books of accounts the profit was estimated by Assessing Officer on turnover, so separate addition should not be made. Thus, Ld. CIT(A) partly allowed the appeal of the assessee. Aggrieved by the order of Ld. CIT(A), the assessee is in further appeal before us.

11. Shri Krutarth Desai, Learned Counsel for the assessee, begins by pointing out that in assessee's case under consideration, the books of accounts were rejected by the assessing officer under section 145(3) of the Act. After rejection of books of accounts, the assessing officer had estimated the gross profit by Rs.14,26,541/- @ 3% on turnover at Rs.4,75,51,369/-. However, the gross profit declared by the assessee to the tune of Rs.23,27,044/- @ 4.89% on turnover, has not been reduced by the Assessing Officer from the overall estimated gross profit on turnover made by the Assessing Officer after rejection of books of accounts. That is, the gross profit declared by the assessee to the tune of Rs.23,27,044/- should be set off against overall gross profit estimated by the Assessing Officer at Rs.14,26,541/-, after rejection of books of accounts. If such set off is not allowed then total gross profit would be  $4.89\% + 3\% = 7.89\%$ , which is approximate to 8% on total turnover and such gross profit had never been earned by the assessee in the preceding previous years as per audited books of accounts. Therefore, Id

Counsel pointed out that after rejection of books of accounts, the Assessing Officer has estimated the gross profit very higher side, which is not acceptable.

12. Shri Desai, also pleaded that once the books of accounts are rejected, the assessing officer should not have made other line by line addition. The ld Counsel pointed out that Assessing Officer, after rejection of books of accounts made estimated (ad-hoc) disallowance of various expenses at Rs.2,50,000/-, however, on appeal by the assessee, the ld CIT(A) deleted the same holding that Assessing Officer cannot make other ad-hoc disallowance, after rejection of books of accounts. The Assessing Officer also made addition on account of sundry creditors/loan which is not tenable, as the assessee took unsecured loan to purchase goods for trading/business. The assessee is engaged in business of trading in TV, Refrigerator, Washing machine etc, on wholesale basis. The assessee has felt shortage of cash flow therefore he took temporary loan for trading/his business purposes, hence disallowance of sundry/temporary loan should not be made after rejection of books of accounts especially when such temporary loan was taken to purchase trading goods.

13. In respect of sundry creditors/temporary loan, Shri Desai, further pleaded that the assessee had furnished details and documents before the Assessing Officer such as, confirmation of creditors containing their PAN number, name and address and amount repaid during the year. The assessee also submitted bank statement to prove the genuineness of creditors. The assessee also furnished the ledger account of creditors. If the Assessing Officer had any doubt about the genuineness of the creditors/temporary loan depositors, he could have summoned the creditors under section 133(6) of the Act or the Assessing Officer could have conducted enquiry under section 131 of the Act, as the Assessing Officer had in his possession the confirmation of creditors containing their PAN number, name and address and amount repaid during the year, bank statement and ledger account of these creditors/ temporary loan depositors. However, the Assessing Officer has failed to do so. This way, ld Counsel stated that assessee has submitted sufficient evidences and documents during assessment stage and during appellate proceedings, therefore addition made by the Assessing Officer may be deleted.

14. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position. We note that during the appellate proceedings assessee has referred to the decision of Hon'ble High Court of Jharkhand in the case of Amitabh Construction Pvt. Ltd. v/s Addl. CIT 20 taxmann.com 385 wherein as per the assessee it was held that where the Assessing Officer had passed a contradictory order by making addition u/s 68 holding that books of accounts were not reliable, while deciding issue of sundry creditors, but relied upon for accepting profit shown to be correct which was supported by books of accounts, addition u/s 68 was not justified. The findings of the Hon`ble Court is reproduced below:

*“3. Learned counsel for the assessee vehemently submitted that the assessee- assessee discharged all its obligations to justify the entries made in the books of account showing the credit balance as sundry creditors amounts of 12 persons by disclosing the identity of those persons who supplied the materials to the assessee and admittedly the assessee is the contractor engaged in the construction activities and out of 12 persons 8 persons were summoned under s. 131 of the Act of 1961 by the assessing officer and they have deposed that they have supplied the materials to the assessee.*

*4. It is submitted that the assessee discharged its obligations and thereafter it was the duty of the Department to proceed further in the matter and it was not the duty of the assessee to find out more about the creditworthiness of the persons who supplied the materials. It is also submitted that even such was not necessary in the matter of trade creditors which may be necessary in the matter of cash deposit.*

*5. In the alternative, it has been submitted that once the assessing officer has rejected the books of account after appreciation of the evidence of the alleged materials suppliers then the assessing officer should have proceeded to assess the income of the assessee under s. 144(3) of the Act of 1961. It is submitted that non-proving of the genuineness of the transaction shown by the assessee in his books of account itself cannot be a ground to treat those entries to be a taxable sum under s. 68 of the Act of 1961 as it has not been held that the said amount is cash credit in terms of s. 68. It is submitted that s. 68(1) has been enacted for taxing the sum where there are entries of sum in the books of account of the assessee and those transactions have not been proved genuine transactions to the satisfaction of the assessing officer then such transactions only could have been taxed under s. 68A.*

*6. Learned counsel for the assessee in support of his contention relied upon the two judgments of the Division Bench. The first judgment is dt. 28th Jan., 2009, passed by the Division Bench of the Rajasthan High Court in the case of CIT v. G.K. Contractor & Anr. (2009) 19 DTR (Raj.) 305 judgment is passed by the Division Bench of the Allahabad High Court in the case of CIT v. Pancham Dass Jain (2006) 205 CTR (All.) 444 : (2006) 156 Taxman 507 (All.).*

7. Learned counsel for the Revenue submitted that from the evidence of the persons whose identities have been disclosed by the assessee himself it is fully proved that the transaction recorded in the books of account of the assessee was not genuine transaction and for this the assessing officer as well as the Tribunal has given cogent reasons and that finding of fact may not be interfered with by this Court.

8. However, it is submitted that since the transactions were in the form of cash entry only though having been described in the head of amount of persons alleged to have supplied the material to the assessee but when the transactions were found not to be genuine then that entry can be treated to be a cash amount in the hands of the assessee for the purpose of taxing under s. 68 of the Act of 1961.

9. We have considered the submissions of the learned counsel for the parties and perused the above judgments. It is not in dispute that the names of the persons, who were alleged to have supplied the materials to the assessee, were disclosed by the assessee and the assessing officer summoned 8 persons out of 12 persons and they gave their statements before the assessing officer and we after perusal of the reasons given in the assessment order and after considering the reasons given by the CIT(A) and reasons given by the Tribunal while considering the credibility of those persons and the genuineness of the transactions we are of the firm opinion that the transactions shown in the books of account were not genuine in the light of the statements given by those persons who were examined by the assessing officer. We may mention a few facts which have been taken by the assessing officer as well as by the Tribunal that none of the alleged suppliers of the materials was maintaining the books of account, none of them have filed any return of income, none of them have any evidence regarding purchase of goods supplied by them, none of them have any evidence regarding transport of goods supplied by them and even though a number of them had claimed to have bank accounts, none of the payments was ever received by those persons for the goods from the assessee's bank account and even though the transaction of each of the sundry creditors run into several lakhs not even a single rupee out of the cash (bearer cheque) received was deposited into their bank accounts.

10. We have mentioned these reasons only because of the reason that the learned counsel for the assessee tried to assail the findings of fact recorded by the Tribunal but we are satisfied that the findings of fact recorded by the assessing officer and the Tribunal were based on some reasons and cannot be interfered with.

11. However, so far as the assessment of the income of the assessee is concerned, for that purpose a few facts are very relevant and which are that the total gross receipts of the assessee were Rs. 4,51,01,011 the disclosure of his income is Rs. 14,13,624 and interestingly this income was accepted by the assessing officer himself which is apparent from the assessment order. Then the assessing officer added the amount shown in the accounts of the sundry creditors to the tune of Rs. 1,59,90,274 and assessed the total income as Rs. 1,74,03,900 meaning thereby by this order of assessment the assessing officer accepted the books of account for the purpose of finding out the profit shown by the assessee to be correct as disclosed in the return and thereafter added the amount of the credits shown in the account of the sundry creditors. In view of the above, it appears that the assessing officer has passed the contradictory order by holding that the books of

*account are not reliable while deciding the issue of the sundry creditors but relied upon the return for accepting the profit shown to be correct which is supported by the books of account. The other fact relevant is that for gross receipts of Rs. 4,51,01,011 the assessing officer has not declared that the gross receipt is the correct figure and yet added the income of Rs. 1,59,90,274 merely on account of cash entries.*

*12. In the facts of the case, the assessing officer has committed an error of law by adding that amount under s. 68 of the Act of 1961 straight-away merely because of the reason that the genuineness of the transaction shown in the heading of the sundry creditors was not found genuine.*

*13. In view of the above reasons, following s. 145(3) the assessing officer should have proceeded under s. 144 and should have followed the procedure of assessment of the tax.*

*14. In view of the above reasons the question is answered that the Tribunal and the assessing officer though recorded finding of fact correctly that the transaction of sundry creditors were not genuine but so far as the assessment order is concerned that deserved to be set aside and the assessing officer should assess the income afresh under s. 145(3).*

*15. The appeal is accordingly allowed and the order of the Tribunal, Circuit Bench, Ranchi and the assessing officer are set aside. The matter is remanded back to the assessing officer for passing a fresh assessment order and the parties are directed to appear before the concerned authority on 13th June, 2011.”*

15. However, Id CIT(A) noted that the facts of the above referred case of Amitabh Construction Pvt. Ltd. are different from the facts of case of the assessee. The Id CIT(A) noted that the Assessing Officer has rejected the books of accounts of the assessee for limited purpose i.e. for making only gross profit addition.

16. We note that in this particular case of Amitabh Construction P. Ltd (supra), though on the basis of same sets of books of accounts, the GP has been relied upon by the Assessing Officer and the order passed by Assessing Officer was not under section 144 of the Act, therefore, Hon`ble High Court remitted the issue back to the file of the Assessing Officer with the direction to frame assessment order under section 144 of the Act. However, in the case of assessee under consideration, the Assessing Officer had rejected the books of accounts of the assessee under section 145(3) of the Act and estimated the profit on the total turnover of the assessee and framed the assessment under section 144 of the Act. Hence, we note that findings of the case of Amitabh Construction P. Ltd (supra) do not apply to the assessee under consideration.

17. We also do not agree with the findings of Id CIT(A) (vide para 5.5 of his order) to the effect that **“assessing officer has rejected the books of accounts of the assessee for limited purpose i.e. for making only GP addition”**. We note that there is no concept to reject the books of accounts for limited purposes under section 144 of the Act read with section 145(3) of the Act. Moreover, the Assessing Officer did not mention in his assessment order that he is rejecting the books of accounts of the assessee for limited purposes. We find merit in the submission of Id Counsel for the assessee to the effect that the books of accounts were rejected by the Assessing Officer under section 145(3) of the Act and after rejection of books of accounts, the Assessing Officer had estimated the gross profit by Rs.14,26,541/- @ 3% on turnover at Rs.4,75,51,369/-. The gross profit declared by the assessee, *suo-motu* was to the tune of Rs.23,27,044/- @ 4.89% on turnover, has not been reduced by the Assessing Officer from the overall estimated gross profit on turnover made by the Assessing Officer after rejection of books of accounts. That is, the gross profit declared by the assessee to the tune of Rs.23,27,044/- should be set off against overall gross profit estimated by the Assessing Officer at Rs.14,26,541/-, after rejection of books of accounts. If such set off is not allowed then total gross profit would be  $4.89\% + 3\% = 7.89\%$ , which is approximate to 8% income estimation under section 44AD of the Act, and such gross profit had never earned by the assessee in the preceding previous years as per audited books of accounts. It has been attempted to be brought on record by the Id Counsel that the Hon'ble Apex Court, in its several judgements had held that the Department must not act dishonestly or vindictively or capriciously, while passing the order under section 144 of the Act and must be guided by judicial consideration and by rule of justice, equity and good conscience. And also that there must be honest and fair estimate of the proper figure of assessment, for which consideration of local knowledge and repute, besides the previous returns an assessment of the assessee concerned, and all other matters must be taken into account for fair and proper estimate which of course, would fall in the category of guesswork, but a honest guesswork.

18. Therefore, we note that Assessing Officer has rejected the books of accounts and estimated gross profit by Rs.14,26,541/- (@ 3% on turnover at Rs.4,75,51,369/-), which is over and above the gross profit declared by the assessee, *suo-motu* to the tune of Rs.23,27,044/- @ 4.89% on turnover of Rs.4,75,51,369/-, therefore total gross profit would be 4.89% + 3%= 7.89%, which is more than the audited profit and loss account declared by the assessee in previous year as per his audited books of accounts. Therefore, we are of the view that other line by line addition on account of creditors/temporary deposits should not be made in the hands of the assessee. We note that the Assessing Officer could have ventured into estimation only after rejecting the books of accounts of the assessee u/s 145(3) and thereafter by best judgment assessment u/s 144 of the Act. Here in this case, the Assessing Officer has passed order u/s 144 of the Act, therefore other line by line addition on account of sundry creditors/temporary deposits should not be made in the hands of the assessee. We note that Hon`ble High Court of Karnataka in the case of Bahubali Neminath Muttin, [2016] 73 taxmann.com 100 (Karnataka) held that where books of account of assessee had been rejected by assessing authority, same books of account could not be relied upon in an addition on account of trade creditors and also for arriving at closing stock. The findings of the Hon`ble Court are reproduced below:

*“12. In the light of the above contentions and on a perusal of the impugned orders, we notice that the learned Counsel for the appellants had re-worded the substantial questions of law as framed in the appeal memoranda and as framed by this Court at the stage of final hearing as on 14.06.2016 as above. It is evident from a reading of Section 260A of the I.T. Act that the appeal would lie to this Court from an order of the ITAT only if there is a substantial question of law that arises for consideration. In Vijay Kumar Talwar's case (supra), the Supreme Court has held that it is mandatory for the High Court to formulate the substantial question of law on which the appeal would be considered. But that the expression "a substantial question of law" is not defined in the I.T. Act. However, it has acquired a definite connotation through various judicial pronouncements. The learned Counsel has drawn attention to the judgment of Sir Chunilal V. Mehta & Sons Ltd. v. Century Spg. & Mfg. Co. Ltd. AIR 1962 SC 1314, a Constitution Bench of the Apex Court has held as follows:*

*'18. The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in*

*determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law."*

19. Similarly, in *Santosh Hazari v. Purushottam Tiwari* [2001] 3 SCC 179, a three-judge Bench of this Court observed that:

*"A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be 'substantial' a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law 'involving in the case' there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis."*

20. In *Hero Vinoth (Minor) v. Seshammal* reported in [2006] 5 SCC 545, 556 this Court has observed that:

*"The general rule is that High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to 'decision based on no evidence', it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."*

21. A finding of fact may give rise to a substantial question of law, inter alia, in the event the findings are based on no evidence and/or while arriving at the said finding, relevant admissible evidence has not been taken into consideration or inadmissible evidence has been taken into consideration or legal principles have not been applied in appreciating the evidence, or when the evidence has been misread. (See: *Madan Lal v. Mst. Gopi* [1980] 4 SCC 255; *Narendra Gopal Vidyarthi v. Rajat Vidyarthi* [2009] 3 SCC 287; *Commissioner of Customs (Preventive) v. Vijay Dasharath Patel* [2007] 4 SCC 118; *Metroark Ltd. v. Commissioner of Central Excise, Calcutta* [2004] 12 SCC 505; *West Bengal Electricity Regulatory Commission v. CESC Ltd.* [2002] 8 SCC 715).'

13. Further, in *Mangalore Ganesh Beedi Works case* (supra) the Supreme Court has held as follows:

*'19. xxx There is a clear finding of fact by the Tribunal that the legal expenses incurred by the assessee were for protecting its business and that the expenses were incurred after November 18, 1994. There is no reason to reverse this finding of fact particularly since nothing has been shown to us to conclude that*

*the finding of fact was perverse in any manner whatsoever. That apart, if the finding of fact arrived at by the Tribunal were to be set aside, a specific question regarding a perverse finding of fact ought to have been framed by the High Court. The Revenue did not seek the framing of any such question. In this regard, reference may be made to K. Ravindranathan Nair v. Commissioner of Income Tax [2001] 247 ITR 178, (SC) wherein it was observed:*

*"The High Court overlooked the cardinal principle that it is the Tribunal which is the final fact-finding authority. A decision on fact of the Tribunal can be gone into by the High Court only if a question has been referred to it which says that the finding of the Tribunal on facts is perverse, in the sense that it is such as could not reasonably have been arrived at on the material placed before the Tribunal. In this case, there was no such question before the High Court. Unless and until a finding of fact reached by the Tribunal is canvassed before the High Court in the manner set out above, the High Court is obliged to proceed upon the findings of fact reached by the Tribunal and to give an answer in law to the question of law that is before it."*

*20. Accordingly, we hold that the High Court was not justified in upsetting a finding of fact arrived at by the Tribunal, particularly in the absence of a substantial question of law being framed in this regard. Therefore, we set aside the conclusion arrived at by the High Court on this question and restore the view of the Tribunal and answer the question in favour of the Assessee and against the Revenue.'*

*14. In M. Janardhana Rao's case (supra), Sudarshan Silks & Sarees case (supra) and K. Ravindranathan Nair's case (supra), the Apex Court has again reiterated the principles laid down in the aforesaid decisions.*

*15. The principle that if a finding of fact is not challenged as being perverse, the High Court is bound to accept such finding. Therefore, as no such substantial question of law has been framed and the questions pertain to findings of fact, which cannot be said to be perverse as it is evident that the books of accounts of the respondent had been rejected by the assessing authority, in which case the same books of accounts could not be relied upon in an addition on account of trade creditors and also for arriving at the closing stock. This is an established principle as has been held in the decisions relied upon by the respondent namely Indwell Constructions case (supra), Banwari Lal Banshidhar's case (supra), Aggarwal Engg. Co.'s case (supra) and Amman Steel & Allied Industries case (supra).*

*16. In the light of the above, there is no substantial question of law that arises for consideration and the findings of the Tribunal cannot be said to be perverse, as the reasons assigned by the Tribunal are certainly acceptable and do not warrant interference. Consequently, the appeals are dismissed."*

19. From the above judgment of Hon'ble Karnataka High Court (supra) it is clear that where Assessing Officer rejected books of account u/s145(3) of the Act and made estimated addition on turnover, then such books of accounts should not be relied to make addition on account of sundry creditors/ trade creditors. Thus, respectfully following the judgment of Hon'ble Karnataka High Court (supra) the addition made by the Assessing Officer, in case of assessee under consideration,

on account of creditor/ temporary loan taken for trading purpose should be deleted.

20. Coming to the merits of the case (alternative argument of Id Counsel), we note that in response to notice u/s 142(1) of the Act, issued by Assessing Officer on 17.10.2013, the assessee had submitted before the assessing officer, the name and address of the parties, PAN Number of parties, Bank statements and copy of ledger account and confirmation of parties. We note that assessee has produced sufficient documents and evidences before the assessing officer and the solitary reason of not serving of summons on few creditors cannot be relied only by ignoring the other relevant material produced by the assessee. The judicial pronouncement in the case of CIT-2 vs. D.&H Enterprises (2016) 722 taxmann.com 91 (Gujarat High Court) in which it was held that the solitary reason of not serving of summons cannot be relied only by ignoring the other relevant material produced by the assessee. The relevant part of this judicial pronouncement in the case of CIT-2 vs. D &H Enterprises (2016) 72 taxmann.com 91 (Gujarat High Court) is reproduced as under:

*“.... ....It was pointed out that all the summons were issued to the alleged parties at the address mentioned in their respective latest return of income, however, none of them were found at the given address, not only by the employee of the Department, but also by the postal authorities. It was submitted that the assessee had failed to produce any of such persons before the Assessing Officer. It was submitted that it is by now well settled that merely because payments are made by cheques would not establish the genuineness of the transactions. In support of his submissions, the learned counsel placed reliance upon the decision of this court in the case of Manoj Kumar Saraf v. ITO [2014] 45 taxmann.com 63/223 Taxman 43. It was, accordingly, urged that the impugned order passed by the Tribunal does give rise to a substantial question of law, as proposed or as may be formulated by this court.*

*5. This court has considered the submissions advanced by the learned counsel for the appellant and has perused the orders passed by the authorities below. A perusal of the order passed by the Commissioner (Appeals) reveals that he has, upon appreciation of the material on record, found as a matter of fact that during the assessment proceedings, the assessee had furnished all the customers' details like name, address, PAN, copy of income tax returns, bank statement, etc. and had, thus, discharged its primary onus as has been held by the Supreme Court in the case of CIT v. Orissa Corpn. (P) Ltd. [1986] 159 ITR 78/25 Taxman 80 (SC). He was further of the opinion that it was the duty of the Assessing Officer to verify the genuineness of these transactions by strictly enforcing the provisions of section 131 of the Act if at all those customers were required to be produced before him. According to the Commissioner (Appeals), the physical presence of*

*the customers was not required at all as all the relevant details related to them were available with the Assessing Officer and merely because the parties did not appear before him, the transactions cannot be held to be non- genuine. He was further of the opinion that the advances remained unproved but not disproved as held by the Jurisdictional High Court in the case of National Textiles v. CIT [2001] 249 ITR 125/114 Taxman 203 (Guj.), wherein the court held that if an assessee gives an explanation which is unproved but not disproved, that is, it is not accepted but circumstances do not lead to a reasonable and positive inference that the assessee's case is false, the explanation cannot help the department because there will be no material to show that the amount in question was the income of the assessee. The Commissioner (Appeals) was of the view that all the transactions, that is, advances received were through bank only and that the Assessing Officer should have verified these transactions with the relevant banks and should have made further inquiries in this regard, which he has failed to do so. He further took note of the fact that in most of the cases, the customers were filing their returns on regular basis and that during the appellate proceedings, the assessee had produced copies of the returns of income for assessment year 2009-10 for verification in support of his case. He further observed that it was not the case of the revenue that any evidence had been brought on the record which even remotely indicated that the money originally belonged to the assessee and it had returned back to the assessee again. In the light of the above findings of fact recorded by him, the Commissioner (Appeals) allowed the appeal and set aside the additions made by the Assessing Officer.*

*6. The Tribunal, in the impugned order, has concurred with the above findings recorded by the Commissioner (Appeals) and has noted that the solitary grievance of the Assessing Officer was that he had tried to serve the notice upon the investors but failed to serve them. The Tribunal, after considering the material on record, was of the view that as to how the Assessing Officer could not serve the notices upon these persons was not specifically discernible. It took note of the fact that there were two sets of evidences. The alleged assertions of the Assessing Officer on the basis of the alleged report of the process server which has not been placed on record by the revenue, nor reproduced by the Assessing Officer in the assessment. The Assessing Officer has not even made reference to any particular witness in whose presence the process server had tried to locate the alleged investors. Whereas on the other hand, the assessee has furnished copies of the income tax returns, bank statement, PAN coupled with the fact that the amounts have been returned through account payee cheques, which had been accepted by the Commissioner (Appeals). Considering the material on record, the Tribunal found that the findings recorded by the Commissioner (Appeals) were required to be accepted and accordingly, upheld his order.*

*7. Thus, from the facts noted hereinabove, it is evident that the assessee had produced all relevant details in its possession, namely, names, permanent account numbers, income tax returns, and bank statements of all the investors. The amounts in question had been received by way of account payee cheques. Having regard to the fact that the permanent account numbers and the income tax returns of all the investors had been furnished by the assessee, the Assessing Officer could have easily verified the same. He, however, placed reliance upon the fact that the summons issued to the parties under section 131 of the Act could not be served and hence, did not accept the genuineness of the transactions. In the opinion of this court, taking into account the concurrent findings of fact recorded by the Commissioner (Appeals) and the Tribunal, it cannot be said that the*

*conclusion arrived at by the Tribunal is, in any manner, contrary to the record or that the same suffers from any legal infirmity so as to give rise to any question of law, much less a substantial question of law warranting interference.”*

21. On the identical facts, our view is also fortified by the judgment of Hon`ble Jurisdictional High Court in the case of CIT v. Apex Therm Packaging P. Ltd. ITA No.1070 of 2013 vide which the Hon'ble High Court of Gujarat held that in case full particulars, inclusive of the confirmation with the name, address and PAN number, copy of the income tax returns, balance sheet, profit and loss account and computation of the total income in respect of all the creditors, lenders were furnished and the loans were received through cheques, the loan account are duly reflected in the balance sheet; then the assessing office was not justified in making the addition.

22. We have noticed that in the case of the assessee, the confirmation with the name, address, copy of ledger account, copy of bank statement and PAN number in respect of the parties were filed before the Assessing Officer, therefore addition should not be made in the hands of assessee, for that reliance can be placed on the judgment of Hon'ble jurisdictional High Court of Gujarat in the case of CIT V/s Ranchhod Jivabhai Nakhava [2012] 21 taxmann.com 159 (Guj) wherein it was held as follows:

*“where lenders of assessee are income-tax assessee whose PAN have been disclosed. Assessing Officer cannot ask assessee to further prove genuineness of transactions without first verifying such fact from income-tax returns of lenders and held that additions were not justified on account of cash credits, where it was found that in respect of said credits assessee had filed PAN of creditor, their confirmation and their bank statement which established their creditworthiness and moreover, transactions were made through banking channels.”*

23. In the judicial pronouncement in the case of CIT-Rajkot Vayachi Chandrashekhar Narsangi in which the Hon'ble jurisdictional High Court held that the loan amount has been repaid by the assessee in the immediate next financial years that indicate that the department has accepted the repayment of loan without proving it otherwise. As observed earlier, it is undisputed fact that the assessee had repaid the some amount of the loans to the Lenders in the same year along with the interest amount. The assessment records of all the lenders are available with the income tax department itself and the assessing officer could have easily verified or

enquired into the same. It is also noted that no Lender has made any denial of extending any loan to the assessee and that all the transactions have been made through proper banking channels. The submission made by the assessee that the net worth of the lending companies were very high, the identity, creditworthiness genuineness of the transactions have not been disproved by the Assessing Officer with cogent and concrete supporting evidences. The amounts in question had been received by way of account payee cheques. Further, any evidence has not been brought on the record which even remotely indicated that the money originally belonged to the assessee and it had returned back to the assessee again.

24. The main plank on which the Assessing Officer made the addition was because the creditors/person who gave the temporary loan, did not turn up before him, as discussed in the assessment order. In such a case the Hon'ble Apex Court in the case of Orissa Corpn. (P) Ltd. (supra) 159 ITR 78 and the Hon'ble Gujarat High Court, in the case of Dy. CIT v. Rohini Builders [2002] 256 ITR 360 / [2003] 127 Taxman 523 , has held that onus of the assessee (in whose books of account credit appears) stands fully discharged if the identity of the creditor is established and actual receipt of money from such creditor is proved. In case, the Assessing Officer is dissatisfied about the source of cash deposited in the bank accounts of the creditors, the proper course would be to assess such credit in the hands of the creditor (after making due enquiries from such creditor). In arriving at this conclusion, the Hon'ble Court has further stressed the presence of word "may" in section 68. Relevant observations at pages 369 and 370 of this report are reproduced hereunder:-

*"Merely because summons issued to some of the creditors could not be served or they failed to attend before the Assessing Officer, cannot be a ground to treat the loans taken by the assessee from those creditors as non-genuine in view of the principles laid down by the Supreme Court in the case of Orissa Corporation [1986] 159 ITR 78. In the said decision the Supreme Court has observed that when the assessee furnishes names and addresses of the alleged creditors and the GIR numbers, the burden shifts to the Department to establish the Revenue's case and in order to sustain the addition the Revenue has to pursue the enquiry and to establish the lack of creditworthiness and mere non-compliance of summons issued by the Assessing Officer under section 131, by the alleged creditors will not be sufficient to draw and adverse inference against the assessee. in the case of six creditors who appeared before the Assessing Officer and whose statements were recorded by the Assessing Officer, they have admitted having advanced*

*loans to the assessee by account payee cheques and in case the Assessing Officer was not satisfied with the cash amount deposited by those creditors in their bank accounts, the proper course would have been to make assessments in the cases of those creditors by' treating the cash deposits in their bank accounts as unexplained investments of those creditors under section 69."*

25. Taking into account the documents and evidences submitted by the assessee before the assessing officer, we are of the view that assessee has proved the source of money and the assessee need not to prove 'source of the source', as held by the Hon`ble High Court of Jharkhand in the case of Prayag Tendu Leaves Processing Co, 88 taxmann.com 23 (Jharkhand). Further, we note that assessee`s case is covered by the judgment of Hon`ble Jurisdictional High Court of Gujarat in the case of Gopal Heritage (P.) Ltd, [2021] 133 taxmann.com 173 (Gujarat), wherein the Court held that where assessee had taken unsecured loans from some persons and Assessing Officer made addition under section 68 on ground that assessee had not been able to prove immediate source of cash-in-hands of party, since all ingredients contemplated under section 68 had been duly satisfied in aspect of identity of creditors, genuineness of transactions and their creditworthiness, said addition was to be deleted. The findings of the Hon`ble Court is reproduced below:

*"We have heard both the sides. At the outset, the decision of the Apex Court in case of Omar Salay Mohamed Sait v. CIT [\[1959\] 37 ITR 151](#) requires reference which holds that the ITAT is a fact finding tribunal and once it arrives at any conclusion after due consideration of evidence, this Court is not to interfere. What is required is to consider every fact with due care and the Tribunal is required to give its findings on the questions which arise for determination along with the evidence pro and contra in regard to each one of them. The findings reached on the evidence on record before it and the conclusions reached by the Tribunal should not be coloured by any irrelevant considerations or prejudice and if there are any circumstances which are required to be explained by the assessee, the assessee should be given an opportunity of so doing.*

*4. We could notice that the assessee and the Revenue preferred cross appeals against the order of CIT(Appeals), Ahmedabad-II for the assessment year 2012-13. In Revenue's appeals, the Tribunal examined the grievance of the Revenue of CIT(Appeals) having deleted the addition of Rs. 4,03,34,000/- which was added by the Assessing Officer with the aid of section 68 of the Act. It was revealed to the Assessing Officer that assessee had taken unsecured loans of the said amount from the following persons: - (1) Mit G. Shah - Rs. 5,75,000/-, (2) Sejal Shah - Rs. 67,30,000/-, (3) Shaan Leisure Ltd. - Rs. 1,07,05,000/-, (4) GSM Infra Projects Ltd. -Rs. 92,60,000/-, (5) Yuva Sports Academy Pvt. Ltd. - Rs. 5,00,000/-, and (6) Manibhadra Tradelink Pvt. Ltd. - Rs. 1,25,64,000/-. The Assessing Officer directed to submit the identity of the creditors, their creditworthiness and*

*genuineness of the transactions and since when he disbelieved the creditworthiness of the creditors, he made the additions.*

*4.1 The CIT(Appeals), as could be noticed, threadbare examined the entire material in case of each of these persons and entities and eventually held that the identity of the depositors had been proved as they had filed the return of income along with the PAN. Moreover, loans have been granted through banking channels and in respect of the same copy of the bank statement also has been provided and hence, genuineness also has been believed by the CIT(Appeals) and further the return of income had been filed by the said depositors and hence, the creditworthiness also has been proved. The appellant provided a copy of audited balance sheet and profit and loss account for the year under consideration in respect of depositors to the Assessing Officer and after verification, the Assessing Officer has the only objection that the company was not having fresh funds in its books of accounts and negligible operational income was derived.*

*4.2 The CIT(Appeals) has rightly opined that since the depositor company had duly recorded the deposits/loans given to the appellant in its books of accounts out of its own funds or borrowed funds, no addition in the hands of the appellant is permissible so far as the transactions are recorded in the books of depositor company.*

*4.3 It relied on the judgment of the Apex Court in case of CIT v. Orissa Corpn. (P.) Ltd . [\[1986\] 25 Taxman 80F/159 ITR 78](#) to hold that once the appellant duly discharges the primary onus cast upon it by making available the details and copies of supporting documents in the form of conformation, copy of bank account and return of income, it is for the Assessing Officer then to make further inquires through issuing summons and notices under section 133(6) to the depositors for further verification, which in the instant case, has not been done and for which the appellant could not be held responsible. In case of every person and entity, it has gone into these details and accordingly allowed the appeal of the appellant.*

*4.4 The ITAT on detailed representation of this, concluded thus: —*

*"11. A perusal of the finding of the ld. CIT(A) extracted (supra) it would reveal that the ld. CIT(A) has examined each transaction in detail in the light of conditions enumerated in section 68. For example, in the case of Shri Mit Gopalbhai is concerned a sum of Rs. 5,75,000/- was taken by the assessee as unsecured loan during this year. The ld. CIT(A) as a matter fact found that there was an opening balance as on 1-4-2011 at Rs. 1,77,24,000/-. Source of this opening balance was not doubted in the earlier assessment year. He has confirmed the transaction. He has given his identity and other details. The ld. CIT(A) was of the view that when such a huge amount received from this person in the last year can be treated as genuine, then why to doubt a small amount of Rs. 5,75,000/- in this year. It is also pertinent to note that the assessment order of Shri Mit G. Shah for the Asstt. Year 2012-13 passed under section 143(3) r.w.s. 147 of the Act has been placed on record by the ld. DR. This order has been passed on 3-10-2019 i.e. after decision of the ld. CIT(A) and nothing adverse could be collected by the AO. Similarly, the ld. CIT(A) has examined the facts with regard to Sejal G. Shah and observed that the assessee has fulfilled all necessary conditions contemplated in section 68 of the Act. We also find that the ld. CIT(A) has examined these details in light of decisions of the Hon'ble Gujarat High Court as well as of*

*Hon'ble Supreme Court. The ld. CIT(A) has made reference to the ratio of law laid down in all these decisions from pages no. 22 to 27 of the impugned order, and we have gone through the proposition in these decisions and examined as to how the ld. CIT(A) has appreciated the facts of the assessee's case in the light of these propositions. After looking to the well reasoned finding of the ld. CIT(A) coupled with absence of any incriminating evidence in the subsequent assessment orders of the creditors, we are of the view that no interference is called for in the finding of the ld. CIT(A). This ground of Revenue is dismissed."*

*5. We could notice the concurrent findings of both the authorities on facts which deserve no interference from this Court. The ITAT as a final fact finding body, in absence of any material under section 133(6) with the AO, has chosen to uphold the version of CIT(Appeals) which also elaborately treated the material evidence and concluded with sound reasoning. We do not see any reason for us to interfere as addition contemplated was under section 68 of the IT Act which provides that any sum found credited in the books of account of an assessee maintained for any previous year and if the assessee does not offer any explanation about the nature and source thereof or even when explanation is given and the Assessing Officer (AO) is dissatisfied, the sum shown credited in the accounts can be questioned by him. All the ingredients contemplated under section 68 have been duly satisfied on the aspect of identity of the creditors, genuineness of the transactions and their creditworthiness.*

*6. We see no reason to entertain this Tax Appeal which is in limine dismissed."*

26. Therefore, it is evident that the assessee had produced all relevant details and documents in its possession, namely, names and addresses, PAN numbers, confirmations, bank statements and copy of ledger accounts. The amounts in question had been received by way of account payee cheques. Having regard to the fact that the permanent account numbers and the income tax returns of all the creditors had been furnished by the assessee, the Assessing Officer could have easily verified the same, hence there is no failure on the part of the assessee to furnish relevant documents and evidences before the Assessing Officer. We note that onus of the assessee (in whose books of account credit appears) stands fully discharged if the identity of the creditor is established and actual receipt of money from such creditor is proved. In case, the Assessing Officer is dissatisfied about the source of the amount deposited in the bank accounts of the creditors, the proper course would be to assess such credit in the hands of the creditor (after making due enquiries from such creditor). Therefore, considering the legal and factual matrix of the case, as stated above, the Assessing Officer was not justified in treating of Rs.1,25,00,000/- as unexplained cash credit. The assessee has satisfactory explained the source. Hence, the addition made by the Assessing

Officer needs to be deleted, and accordingly we delete the addition. This ground of assessee's appeal is allowed.

27. Since we have adjudicated the issue under consideration by taking lead case in ITA No.1442/AHD/2017 for assessment year 2011-12. The facts in ITA No.1443/Ahd/2017 for A.Y. 2012-13 are similar and identical, to those considered in the case of ITA No.1442/AHD/2017 for assessment year 2011-12, therefore, our decision in the case of ITA No.1442/AHD/2017 for assessment year 2011-12 shall apply *mutatis mutandis* in the case of ITA No.1443/Ahd/2017 for A.Y. 2012-13 also. Therefore, we allow assessee's appeal in ITA No.1443/Ahd/2017 for A.Y. 2012-13.

28. In the combined result, both appeals filed by the assessee (ITA No.1442/AHD/2017 & ITA No.1443/Ahd/2017) are allowed.

A copy of the instant common order be placed in the respective case file(s).

Order pronounced on 23/05/2023 by placing the result on the notice board.

**Sd/-**  
**(PAWAN SINGH)**  
**JUDICIAL MEMBER**

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

सूत /Surat/दिनांक/ Date: 23/05/2023

Dkp Outsourcing Sr.P.S.

**Copy of the Order forwarded to**

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

By Order

// True Copy //

Senior Private Secretary/Private Secretary/  
Assistant Registrar, ITAT, Surat