

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'ए', मुंबई ।
IN THE INCOME TAX APPELLATE TRIBUNAL "A", BENCH MUMBAI

BEFORE SHRI R.C.SHARMA, AM
&
SHRI SANDEEP GOSAIN, JM

आयकर अपील सं./ITA No.4411/Mum/2014

(निर्धारण वर्ष / Assessment Years : 2011-2012)

ACIT, Central Circle-13, Room No.1103, 11 th Floor Old CGO Building (Annex.) M.K.Road, Mumbai-400020	Vs.	M/s 'A' Star Exports, 114/116, Mittal Court, C-Wing, 11 th Floor, Nariman Point, Mumbai-400021
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABFV 4508 K		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

AND

आयकर अपील सं./ITA No.4412/Mum/2014

(निर्धारण वर्ष / Assessment Years : 2011-2012)

ACIT, Central Circle-13, Room No.1103, 11 th Floor Old CGO Building (Annex.) M.K.Road, Mumbai-400020	Vs.	M/s Asian Star Diamonds International Pvt. Ltd., 114, Mittal Court, C-Wing, 11 th Floor, Nariman Point, Mumbai-400021
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACP 4726 H		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

राजस्व की ओर से /Revenue by : Ms. Arju Garodia
निर्धारिती की ओर से /Assessee by : Shri Rakesh Joshi
सुनवाई की तारीख / Date of Hearing : **13/05/2016**
घोषणा की तारीख/Date of Pronouncement **31/05/2016**

आदेश / O R D E R

PER R.C.SHARMA (A.M):

These are the appeals filed by the revenue with respect to two different assesseees belonging to same group, against the order of CIT(A), Mumbai, for the assessment year 2011-2012.

2. As common issues are involved in both the appeals, both the appeals are heard altogether and now disposed off by this consolidated order.

ITA No.4411/Mum/2014 :

3 This is an appeal filed by the revenue against the order of CIT(A) for the assessment year 2011-2012 in the matter of order passed u/s.143(3) r.w.s.153A of the I.T.Act. In this appeal, the revenue is aggrieved for deleting the addition of unexplained stock u/s.69A by allowing set off of such stock against loss incurred on trading activity. Revenue is also aggrieved for deleting the trading addition made by AO after rejecting books of accounts. Precise grounds taken by revenue reads as under :-

(i) Whether on the facts and circumstances of the case and in law, the learned CIT(A) erred in allowing the set off of loss incurred on sale of polished diamond goods against deemed income assessed u/ s. 69A.

(ii) Whether on facts and circumstances of the case and in law, the learned CIT(A) erred in holding that the sales on account of undisclosed stock of diamond goods added u/ s. 69A was business sales.

(iii) Whether on the facts and circumstances of the case and in law, the learned CIT(A) erred in treating the loss on sale of the diamonds as genuine without appreciating the fact that the assessee has sold the stock at much lower rate than that arrived at by the Government Valuer. "

(iv) Whether on the facts and circumstances of the case and in law, the learned CIT(A) was right in deleting the addition of Gross Profit at the rate of 3.30% made by the AO rejecting the books of accounts, relying on the various discrepancies pointed out by the AO in his account."

4. Rival contentions have been heard and record perused. Facts in brief are that a search and seizure action u/s. 132 and survey action u/s. 133A of the I.T.Act was carried out in the case of Asian Star Group on

29/10/2010. The assessee was also covered in the search action. The assessee filed its e-return on 29/09/2011 showing income of Rs.6,88,14,140/-. The assessment was completed u/s.143(3) vide order dated 20-03-2013 and income was assessed at Rs.14,21,06,590/-. In the assessment order the AO made addition by way of disallowance of claim of loss on the subsequent sale of undisclosed and unaccounted diamonds found in the course of search. The AO also added an estimated gross profit on this sale of unaccounted diamonds. By the impugned order addition on account of unexplained stock u/s.69A and gross profit was deleted by CIT(A) after observing as under :-

4.2.1 In the course of search action, three loose papers (page 76,77,&78) were found and seized as part of Annexure-5 to the Panchnama prepared on 29/10/11 at the office premises at 114/116, Mittal Court, C-Wing, 11th floor, Nariman Point, Mumbai-400021. These documents mention the carat value, rate per carat and total value of diamonds. The contents of these papers is as follows :-

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	A'Star Exports		
	Carats	Rate Per Carat	Total Value
	12.05	300,000	3,615,000
	60.70	111,250	6,752,875
	275.50	115,000	31,682,500
	412.70	90,000	37,143,000
	516.30	75,000	38,722,500
Total	1277.25		117,915,875

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	A'Star Exports		
	Carats	Rate Per Carat	Total Value
	115.00	100,000	11,500,000
	306.33	90,000	27,569,700
	237.33	75,000	17,799,750
	386.33	60,000	23,179,800
	390.50	50,000	19,525,000
Total	1435.49		99,574,250

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	A'Star Exports		
	Carats	Rate Per Carat	Total Value
	176.50	92,000	16,238,000
	184.50	75,000	13,837,500
	214.54	68,000	14,588,720
	184.90	56,000	10,354,400

	297.21	50,000	14,860,500
	245.30	42,000	10,302,600
Total	1302.95		80,181,720

4.2.2. These documents were confronted to Shri Vipul Shah, partner of the assessee company, in the course of search proceedings. Sh. Vipul Shah confirmed that these loose papers were containing stock details of M/s. A' Star Exports, M/s. Asian Star Diamond International Pvt. Ltd. and M/s. Rahil Agencies. Shri Vipul P Shah further stated that the stock mentioned in seized papers was procured out of unaccounted income. He gave the details of stock as follows:

Sr.No.	Name of the entity	Amount (Rs.)
1.	M/s Rahil Agencies	8,01,81,720/-
2.	M/s Asian Star Diamonds International Pvt. Ltd.	9,95,74,250/-
3.	M/s A'Star Exports	11,79,15,875/-
	Total	29,76,71,845/-

4.2.3. Further he stated that he did not have any document to prove that they were accounted for in the books of accounts of above entities and made a declaration of Rs.29,76,71,845/- as unaccounted investment in stock, which included Rs.11,79,15,875/- belonging to M/s. A-Star Exports (i.e., the appellant in this case). The stock mentioned in above referred seized papers was stated to be kept in one safe located at the office premises. During the course of the search action a prohibitory order u/s. 132(3) of the Act was placed on the safe as keys of the safe were not traceable at time of search. This prohibitory order was withdrawn and safe operated on 27.12.2010 i.e. after a gap of approximately 2 months. The stock of diamonds found from safe was valued on the same day by the Govt. approved Valuer Shri Dinesh Salvi, as follows:

Sr.No.	Name of the entity	Carats	Amount (Rs.)
1.	M/s Rahil Agencies	1302.95	10,56,66,666/-
2.	M/s Asian Star Diamonds International Pvt. Ltd.	1435.49	10,45,70,210/-
3.	M/s A'Star Exports	1277.25	13,47,63,640/-
	Total	4015.69	34,50,00,516/-

4.2.4. The statement of Shri Vipul P Shah was again recorded on 27/12/2010, wherein he admitted the unaccounted stock of Rs. 34,50,00,516/- which included unaccounted stock of Rs.13,47,63,640/- of M/s. A Star Exports (i.e., the appellant). In the return of income filed for A.Y. 2011-12, the assessee has reported the total income of Rs.6,88,14,140/- which is computed as under:

Income from business or profession	Amount (Rs.)	Amount (Rs.)	Amount (Rs.)
ASTAR EXPORTS (SACHIN SEZ)			

Profit as per P&L account		5185790	
Add: Depreciation Debited in P&L A/c		223778	
Total		5409568	
Less: Depreciation as per chart u/s.32	223778		
Deduction u/s.10AA	5185790	5409568	
			0
ASTAR EXPORT (Mumbai and Surat)			
		(-)65980534	
Add: Depreciation Debited in P&L A/c		251941	
Provision for gratuity		94223	
Income declared u/s. 132(4) of the I.T.Act during the course of search		134763640	
Total		69129270	
Less:			
Interest on Fixed Deposit	2895751		
Depreciation as per chart u/s.32	315127	3210878	
			65918392
Income from other sources			
Fixed deposit interest		2895751	
Gross Total Income			68814143
Total income (rounded off u/s.288A)			68814140

4.3. The AO observed that though the appellant had declared undisclosed income of Rs.13,47,63,640/- in the form of stock of polished diamonds under the head profit and gains of the business, a loss was shown as incurred on the subsequent sales of these diamonds. This loss claimed at Rs. 6,59,80,534/- was adjusted against the undisclosed income of Rs.13,47,63,640/-. It was thus noted by the AO that in effect the appellant whittled down the undisclosed income in the return of income filed. The AO held that the unaccounted undisclosed polished diamonds found was unexplained investment of the appellant which was covered u/s. 69/69A of the IT.Act. Accordingly the AO held that the loss under the head profit and gains of the business cannot be set off against the deemed income u/s. 69/69A of the I.T.Act. AO held that both the sections 70 and 71 as applicable to the facts of the case did not allow the business loss to be adjusted against the deemed income u/s. 69A which is not falling under any of the heads of income. After recording the statement of Shri Vipul P.Shah, Director of the assessee company, the AO concluded that Shri Vipul.P.Shah could not furnish evidence in support of his claim that there was unrecorded trading in diamonds. The AO then

went on to issue show cause notice to the appellant as to why the undisclosed diamonds should not be treated as deemed income u/s. 69/69A of the I.T.Act. The appellant submitted that the polished diamonds found was undisclosed trading stock and not undisclosed investment. Further, if the polished diamonds is not accepted as undisclosed stock and therefore as 'business income' then the same can be assessed under the head 'income from other sources'. It was then argued that any income u/s. 69/69A also has to fall under one of the specified heads of income and that there cannot be any headless income. The AO was not convinced. He held that the unaccounted polished diamonds found could be stock in trade in two situations - one if the assessee is engaged in trading or manufacturing of diamonds duly recorded in the books of account and the stock found is as per books of account, the stock can be held as explained stock in trade. The second situation is one, where the appellant is engaged in carrying out trading and manufacturing activity unrecorded in books of account and stock is found from this unrecorded activity, it could be stock in trade of unrecorded business activity. However, the appellant will have to submit supporting evidences to show that it was carrying out unrecorded activity of trading and manufacturing. He noted that the appellant did not provide any evidence of unrecorded trading activity and therefore concluded that the polished diamonds found falls in the category of investment. The AO also opined. that merely passing a single entry in the books of accounts that the diamonds found are stock in trade does not make it a business income since business income is a result of purchase and sales transaction. He further concluded that the appellant had not produced any evidence to support its claim as to the source of the diamonds found in the course of search. Since the source was not substantially explained, the value of such unrecorded asset becomes deemed income of the appellant. The AO therefore concluded that the provision of section 69/69A is squarely applicable to the case of the appellant and unrecorded investment in diamonds worth Rs.13,47,63,640/- was held to be unexplained investment in terms of sec. 69/69A of the Act. Thereafter the AO also held that the opening words of sec. 14 of the Act -save as otherwise provided by this Act"- clarified that this Act may provide certain situations in which the income (chargeable to tax) may not be classified under any head. He concluded that the deemed income u/s. 68 to 69A may not be classified under any heads of the income but may be charged to tax separately without referring to any head of income. He also noted that the amounts deemed to be income u/s.68/69A can be deemed to be income under certain circumstances. He concluded that there cannot be any source for such deemed income and that such income are often in the nature of application of income. The AO finally

concluded that if the source of investment as explained are known then the income from the said source can be brought to tax under the relevant head and not as deemed income u/s. 68 to 690. He thereafter relied on the Hon'ble Gujarat High Court decision in the case of Fakir Mohamed Hazi Hasan (247 ITR 290). Relying on the paragraph quoted from the decision by the Gujarat High Court, the AO drew support for his contention that the deemed income u/s. 69 to 69A is not income from salary, house property, profit and gains from business or capital gains nor income from other sources. Since the source is not known such deemed income will not fall even under the head 'income from other sources'. The AO held the unexplained investment of Rs. 13,47,63,640/- as a separate item below the total income from all other heads of income in the computation of income.

4.3.1. The AO did not accept the action of the ,appellant of setting off of the loss under the head profit of business against the deemed income. The AO observed that in the normal course the assessee can deal with the unexplained investment u/s. 69/69A or 69B of the Act in two manners. The appellant may either sell the investment as such and declare gains or losses in sale transaction under the head capital gains or the appellant may carry out the business activity out of the investment. The appellant can convert the investment to stock in trade as provided in sec. 45(2) of the Act and, offer the capital gain on conversion, under the head "capital gains" and profit or loss arising from the subsequent sale of stock in trade under the head 'profits and gains of the business. Looking at the facts of the appellant's case, the AO observed that the assessee has actually first converted the unexplained diamonds as stock in trade of the business and subsequently the stock in trade of the business has been sold. The sale of the stock of diamonds is at a price less than the price at which it was converted into stock in trade. This sale has resulted into a business loss. The loss under the head profit and gains of the business has been set off by the assessee against unexplained investment in diamonds. The AO relied upon the decision of Hon'ble ITAT Chandigarh Bench and Hon'ble High Court of Punjab and Haryana for the proposition that in the case of surrendered income, brought forward losses cannot be set off u/s. 70 & 71 of the I.T.Act against the surrendered income. The AO therefore, disallowed the set off of losses claimed by the appellant.

4.3.2. Apart from the above, the AO also questioned the losses claimed to be suffered of Rs.6,59,80,534/- on sale of unaccounted diamonds of Rs. 13,47,63,640/-. He observed that the same stock' of diamonds of 1277.25 carats was valued at Rs.11,79,15,875/- in the loose paper found at the time of search

but was shown to have been finally sold for Rs 6,95,55,842/- only.. The AO noted that the appellant could not furnish evidence to support his claim that "the global prices and the liquidity position forced the appellant to sell the undisclosed diamonds at a loss. The AO observed that the other concerns belonging to same assessee group had shown profit and therefore there was no reason for losses to be incurred on sale of undisclosed polished diamonds found during the search. He also did not accept, for the reasons stated in the order, that the diamonds were sold to meet the tax liability of the appellant. The AO also did not accept the contention of the appellant that the polished diamonds were overvalued by the government valuer at the time of search, on the ground that the appellant had not filed any letter of objection about the alleged over valuation of stock of diamonds during and after the search proceedings. The AO also noted that even in the Page no. 76 of Annex. A-5 the value of diamonds of 1277.25 carats was considered at Rs.11,79,15,875/- and that this valuation is made by the appellant itself. The AO also did not-accept the valuation report obtained by the appellant in January 2011 wherein the same diamonds were valued by the registered valuer viz. Sharad Jhaveri who valued these diamonds at Rs.7,94,58,400/- .The AO doubted the valuation report submitted by the appellant. He found defects in the description of quality of diamonds as per the valuation report of Shri Jhaveri submitted by the appellant as not matching the quality mentioned in the valuation report prepared at the time of search. The AO also observed that though the valuation report obtained by the appellant showed the value at a lower figure of Rs. 7,94,58,400/-, but the appellant did not revise the value in its books of account nor has the auditor made any comment about the revaluation of stock in its audit report. The AO also found fault with the appellant's stock register since it did not contain the details of cut, clarity, colour and .carats in the stock register. He therefore, concluded that quality wise stock register had not been maintained. On the grounds that the proper stock register was not maintained, the AO invoked sec. 145 of the I.T.Act stating that the correctness and completeness of the accounts of the appellant could not be verified and therefore the book results and the book losses claimed by the appellant was rejected. He thereafter estimated the gross profit on sale of polished diamonds at the rate of 3.30% based on gross profit shown by the appellant at the Surat - SEZ unit. He therefore computed the gross profit at Rs. 44,47,200/- as against the loss claimed of Rs.6,59,80,534/- .

4.4. Before me the appellant has vehemently objected to all the actions of the AO. It has been argued that the assessee firm is in the business of import and export of diamonds and

manufacturing of polished diamonds from rough diamonds. In the course of search loose papers were found and seized as part of Annexure-5 of the Panchnama prepared on 29/10/11. Shri Vipul Shah confirmed that these loose papers were containing stock details of M/s. Asian Star Exports, M/s. Asian Star Diamond International Pvt. Ltd. and M/s. Rahil Agency. The details are as follows:

Sr.No.	Name of the entity	Amount (Rs.)
1.	M/s Rahil Agencies	10,56,66,666/-
2.	M/s Asian Star Diamonds International Pvt. Ltd.	10,45,70,210/-
3.	M/s A'Star Exports	13,47,63,640/-
	Total	34,50,00,516/-

The statement of Sh. Vipul Shah was again recorded on 27/10/12 wherein he admitted the unaccounted stock of Rs.34,50,00,516/- including unaccounted stock of Rs.13,47,63,640/- pertaining to the appellant. The appellant had declared undisclosed income of Rs.13,47,63,640/- in form of stock of polished diamonds under the heads profits and gains of business and profession and further the same had been set off u/s.70 of the I.T. Act against losses of Rs.6,59,80,534/- incurred on trading activity during the year. It was argued that the AO was wrong in treating the stock of polished diamond u/s.69/69A of the I.T. Act and also holding that the same was headless deemed income not liable to be adjusted or set off u/s. 70/71 of the I.T. Act. It was claimed that the stock of polished diamond found was declared as stock in trade and this contention of the appellant was accepted by the investigation officer, who therefore did not seize the diamonds. It was submitted that in the statement recorded of Sh. Vipul Shah partner of the firm on 20/11/12, it was stated that this undisclosed income is generated on account of unrecorded trading of diamond. It is argued that since the declaration was related to trading business, the unaccounted polished diamonds found was stock in trade and therefore the same was offered as income of business or profession. It was argued that both the business that was recorded in the books of account and that which was not recorded in the books of account were only on account of business activity. The stock was found at the office premises of the appellant. It was argued that investment in stock of polished diamond was earned only through business income of the appellant' firm. There was no other source of income found during the search and therefore, there was no question of any other source of income. It was argued on without prejudice basis that even if the above undisclosed income i.e. the unexplained investment of the appellant is not considered as business income then the

same shall be assessed under the head income from other sources. It was further argued that appellant was one of the many firms forming part of the huge diamond industry operating in Mumbai. The appellant had incurred a loss of Rs,6,59,80,534/- due to the circumstances faced by the assessee to sell the stock of the business at loss.”

5. The CIT(A) has allowed the set off of loss after observing as under:-

2.3 I have gone through the facts of the case. The AO has accepted the current year business loss. He has not allowed set off of this loss against income disclosed during survey as, relying upon the decision in *Fakir Mohmed Haji Hassan*, he held that income disclosed in survey did not fall under any Head of income .t therefore was not eligible for set off with current year business loss. The decision in the case of *Fakir Mohmed Haji Hassan* has been overturned by the Hon'ble Gujarat High Court itself in their decision in *Radhey Developers Pvt. Ltd.* which held that income that does not fall within the prescribed heads of income could not be taxed. Therefore, for the income declared in survey to be taxed, it has to fall under one of the heads of income. Once a head of income is assigned to the additional income disclosed, whether business or other source, it becomes available for set off against current year business loss as current year business loss is allowed to be set off against Current year income under any other head (Section-71). The assessee was therefore eligible to set off current year business loss with income declared during survey. The A. O. is directed to set off current year business loss against additional income declared during survey. Further AO relied upon the decision in case of *Kim Pharma (P) Ltd vs CIT (ITA No.106 of 2011 (O & M)* is also misplaced. In this case the assessee has adjusted current year undisclosed income with the carried forward business losses and since in current year there is no business income, hence the same has been disallowed. But in case of the appellant the losses claimed for set off pertains to current year which is eligible for set off against any head of income except salary income. Therefore the ratio of above decision is not applicable on the facts of the appellant's case.”

6. An appeal was also filed by the revenue in ITA No.4412/Mum/2014 against the order of CIT(A) for the assessment year 2011-2012, wherein same grounds have been raised as have been raised in ITA No.4411/Mum/2014 in case of *M/s A' Star Exports Ltd., Mumbai*, as discussed above. The CIT(A) has deleted the addition and allowed the set

off of stock against the business loss after having the following observations :-

4.5. I have perused the submission filed and the explanation given in the oral hearings in the appellate proceedings carefully. From the submission of AR , it is seen that it was argued that the investigation team released the unaccounted stock of diamonds after valuation only because the same was stock in trade. Had it been investment the same would have been seized by the investigation team. The appellant quoted the sec.132(1)(8)(iii) to buttress its argument that the investigation team was bound to seize such unaccounted polished diamond found in the course of the search and only such valuable items will not be seized which are stock in trade of the business. It was further argued that requirement of sec.69/69A are not fulfilled because the appellant has offered explanation and has given the nature of source of acquisition as undisclosed stock received from the unaccounted trading of diamonds as source of income. The appellant. argued that as per sec.14 all the income for the purpose of charge of income tax and computation of total income has to be classified under five heads of income only. It was therefore, argued that there cannot be any headless income. It was argued that as per sec.56 of I.T. Act, the income of every kind which is not to be excluded from the total income in the Act shall be chargeable to income tax under the head 'income from other sources'. It was therefore argued that if the unaccounted polished diamonds found was not treated as part of business income, the same should be assessed u/s.56 as income from other sources. The appellant submitted that the ratio of decision of Fakir Mohamed Hazi Hassan are not applicable in its own case since in the case cited by the AO the assessee was found with some gold and currency by the Custom Authorities which confiscated the same. The assessee in that case had offered the said gold as undisclosed stocks and claimed losses on confiscation as business loss. The assessee in that case was engaged in the illegal activity of smuggling of gold and currency and it was held that the gold and currency found from the assessee which was from an illegal activity cannot be part of . the business stock. In contrast, in the case of the appellant, the main object was carrying on the business in diamond which is a legal business. It was further submitted that the decision in the case of Fakir Mohamed Hazi Hassan relied upon by the Ld AO was subsequently considered by the Hon'ble Gujarat High Court in the case of DCIT vs. Radhe Developers India Ltd. (2010) 29 ITR 1 (Guj.) and CIT -11 vs. Shilpa Dyeing & printing Mills Pvt. Ltd. It was argued that the subsequent decision of Gujarat High Court has noted that the earlier decision did not consider the sec.14 and sec. 56 of the on a conjoint basis. It was argued that the Apex Court decision in the case of D.P.Sandhu Brothers Chembur Pvt. Ltd.(2005) 273 ITR 1 supports the view that all income has to fall in one of the heads of the income provided in the income tax act. Some decisions were cited to support the view that the income reflecting the unaccounted stock of diamond during

search cannot be headless income, and it should be considered to be taxable either under the head of income from business or income from other sources. It was then argued that the current year's loss should be set off against the income in terms of sec.70/71 of the I.T.Act. Reliance was placed on the judgment in the case of Chensing Venture Vs. CIT [2007] 163 Taxman 175 (Mad.). In this decision, the case of Fakir Mohamed Hazi Hassan has been considered. It has been noted that the decision in the case of Fakir Mohammed Hazi Hassan was over turned by Hon'ble Gujarat High Court itself in their decision in Radhey Developers Pvt. Ltd. the appellant also submitted that the AO has incorrectly relied upon the decision in the case of Kim Pharma (P) Ltd. Vs. CIT. In that case the assessee had adjusted current year's undisclosed income with the carried forward business loss and since in the current year there was no business carried out and no such source of income, hence the same had been disallowed. However, in the case of the appellant, the loss claimed for set off pertains to the current year which is eligible for set off against any head of income except salary income.

4.6. As regards the rejection of books of account and estimation of gross profit, the appellant submitted that the seized loose paper show asking price of 1277.25 carats of polished diamond at Rs. 11.79 cr. as against the valuation made the departmental valuer at Rs. 13.47 cr which was even higher than the asking price as reflected in the loose paper. The appellant could not sell the diamonds at the valuation given by the departmental valuer and therefore the same was revalued on 14/01/11 by Govt. Registered Valuer Sh. Sharad Jhaveri who valued the same at Rs.7,94,58,4091-. The efforts made in selling these polished diamonds was submitted in the form of copies of correspondence, in which the date of Fax is clear. It was argued that the export of polished diamond is certified by the Custom Authorities and is based on the estimation of Fair Market Value of these diamonds. Payment has been received through proper banking channels. Hence, the AO was incorrect in treating the sales as not genuine. It was argued that the loss incurred in the sales was genuine and all the sales parties are verifiable. The auditors have not qualified the books of the account of the appellant. The quantitative stock register was filed before the AO. It was submitted that the purpose for valuation carried out on 14/01/11 was not to reduce the value of diamonds in its books at Rs. 13.47 crs. but only to highlight the fact that the valuation made by the departmental valuer was on the higher side. The appellant argued that the AO was incorrect in holding that the appellant M/s. A' Star Exports had sold the diamonds to Indigo Trading FZE at a profit in the month .of March where as the appellant had sold goods to the same party at a loss. It was argued that each diamond has a different value based on shape, cut, clarity and colour and therefore no two sale purchase transactions can be considered to be the same. Further, the loss has occurred on account of the cost price considered viz-a-viz the sales price and not on the basis of the party to whom the goods are sold. Sale to the same party where the cost is less results in profit

which is higher than the case where the cost is more. As regards the maintenance of stock register, the appellant has maintained carat wise stock register. Further, details such as cut, clarity, colour is difficult to maintain and is not a practice in the diamond industry. The details as maintained in the stock register of the appellant has been approved by ITAT Mumbai Bench in the case of Dharamchand Paraschand Export vs. ACIT no. 2833/Bom/91 where it has been held that carat wise stock register will be sufficient. Similar observations has been made by the Hon'ble Bombay High Court in the case of CIT -5 vs. M/s. Sundaram Gems Pvt. Ltd. (ITA No.6785 of 2010) In this decision the Bombay High Court did not accept the rejection of books of account by the AO and held that the maintenance of carat wise stock register is a regular practice prevalent in diamond trade. The decision in the case of DCIT vs. Samir Diamond Export was reversed by the Hon'ble ITAT in the case of Dharamchand Paraschand Export mentioned above. The ITAT Mumbai Bench has observed that it is not practically possible to maintain the quality wise stock register because of large variety of diamonds Involved. Several other decisions were cited on the aspect of rejection on books of accounts and it is argued that the AO could not point out any defect I the books of account except that quality wise stock register is not maintained.

4.7. The appellant thereafter argued that there was discount given to the parties to whom the diamonds were finally sold and the observation of the AO that the loss is artificial loss is based on surmises and assumption because the goods were exported through the Indian Custom Department after verification and valuation and the payment thereof is realized through banking channel. It was further argued that, as held by Hon'ble Delhi High Court in the case of CIT vs. Dalmia Cement Ltd. (254 ITR 377)(Del), the revenue cannot put itself in the position of business man to decide what is reasonable expenditure in a particular case. The copies of correspondence with the parties to whom the polished diamonds were sold, was furnished to substantiate the genuineness of the sales. It was pointed out that the AO has not doubted the credentials of the customers/sales party. The AO has not made any efforts to verify the sales transactions from the buyers. It was finally submitted there was no basis for estimating the gross profit and rejecting the loss incurred by the appellant in the facts of the case.

4.8. Nature of stock of diamonds found

4.8.1. One of the main area of dispute is the action of the assessing officer in treating the polished diamonds found as investment, as capital assets and not as stock in trade.

It is a fact that the Asian Star Group is engaged in import of rough diamonds, cutting and polishing and export of polished finished diamonds. It is also engaged in buying and selling polished diamonds. As per the audited accounts of the flagship company of the group viz. Asian Star Co. Ltd., the sales in the current year is

Rs.1455.91 crores on which profit before tax of Rs 37.68 crores is shown. The purchases of finished goods ie polished diamonds are shown at Rs 29.19 crores. The material cost comprising of rough diamonds is shown at Rs.1246.05 crores. The processing expenses are shown at Rs.73.03 crores. As seen from the copies of audited accounts for AY 2001-02 till AY 2001-02 till AY 2011-12, A-star Exports (earlier named as Vipul Trading Company), with its office at 104/116-C, Mittal Court, Nariman Point ,Mumbai, has business activity of Cutting, polishing of rough diamonds and sale of polished diamonds. The business was of import, export & processing of diamonds. In AY 2010-11, a SEZ unit was set up in Surat. As seen from copies of audited accounts for AY 2002-03 to AY 2012-13, Asian Star Diamonds International Pvt Ltd., with its office at 114-C, Mittal Court, Nariman Point, Mumbai , has business of trading in Cut and Polished Diamonds. It was also a partner in Vipul Trading Company, now A-Star Exports. As seen from copies of audited accounts for AY 2000-01 to AY 2011-12, Rahil Agencies, was also having business of trading of export and import of diamonds. The directors/partners of these firms/company such as Vipul Shah, Dharmesh D Shah, Dinesh Shah and Arvind Shah, are all in diamond trade. The diamonds found during search was from the office premises at 114/116, Mittal Court, C-Wing, 11th floor, Nariman Point, Mumbai-400 021. This is also the head office of the flagship company, Asian Star Co Ltd. Diamonds valued at Rs106,73,74,569 were also found at this premises which belonged to Asian Star Co. Ltd. Similar stocks belonging Asian Star Co Ltd. were found at 704, Aman Chambers, 7th Floor, Queens Road, Opera House, Mumbai valued at Rs 92,56,33,242/-, at 1st Floor, Mehta Mahal, Mathew Road, Opera House, Mumbai valued at Rs.7,85,19,165 and at 604, Aman Chambers, 6th Floor, Queens Road, Opera House, Mumbai valued at Rs 2,05,59,790/- and has been assessed in its hands as stock in trade. The diamonds found belonging to the three concerns, subject matter of the present appeal, are not of the nature of ornaments/jewelry. Rather they are similar to other stock in trade found at these office premises and that which are business stock common in diamond trade. In this background, the stock of polished diamonds found can only be in the nature of stock in trade.

4.8.2. The assessing officer has expressed his view that the unaccounted diamonds found can be treated as stock in trade if it is part of accounted business of trading or manufacturing of diamonds and stock is reflected as per books, or if unaccounted business of trading or manufacturing of diamonds is carried out and stock is from this business, but only if such unaccounted business is proved to be carried out. I am unable to appreciate and uphold this view of the assessing officer. Now, when the item of trade is the same as that of regular business carried out, the stock found is logically an excess of the same business. It is not the case that, say, the assessee is carrying out regular business of trading in chemicals as per regular accounted and disclosed books of accounts and stock of diamonds is found, or say jewelry is found. In such a case, diamonds found will be extraneous to the regular business of the

assessee, and a logical doubt can arise that the same is not stock in trade. Such is not the case in this appeal. Even, in such a case, where unaccounted business is carried, often only bank account is found wherein cash deposits and withdrawals are reflected. It may be very difficult to produce evidence that the unaccounted business is carried out, since by the very fact that the transactions are unaccounted and in cash, documentary evidence will not be there.

4.8.3. In the statements recorded at the time of search and post search investigation, these diamonds found were always referred to as stock in trade. The extracts of the statements are reproduced below.

Statement on oath of Shri Vipul Prabodh Shah, aged 43 years, s/o Late Shri Prabodh Shah, recorded on 30-10-2010 u/s. 132(4) of the Income Tax Act, 1961 during the search proceedings u/s. 132 of I.T. Act, 1961, at the office premises of Asian Star Company Ltd at 114, 11th floor, Mittal Court 'C' Wing, Nariman Point, Mumbai 400 021 on 30.10.2010.

Q.6 During the course of search u/s. 132 of the I.T. Act in the premises of M/s. Asian Star Cam. Ltd., it was found that there is stock of diamonds both rough and polished as mentioned in the stock inventory taken by the government approved valuer, valued at Rs.1,06,73,74,569/- as per Annexure 1 to this statement. Please confirm the same and state whether the same is accounted for in your books of accounts.

Ans. Yes, I confirm that the stock inventory taken by the government approved valuer, valued at Rs.,1,06,73,74,569/- as per Annexure 1 to this statement pertains to that of our company, M/s, Asian Star Co. Ltd. There may be difference in the value of stock of diamonds as per books and what is physically found. This is because of the fact, we would have accounted for the value of stock at cost, whereas the government valuer has valued the same at market value as on this day. However, the stock quantity as per books and what is physically found are almost tallying. I am submitting herewith a copy of the stock reconciliation statement. The minor difference may be due to weighing scale difference and that is insignificant compared to the quantum of stock at hand.

Q.8 During the course of search u/s. 132 of the I.T. Act on the premises of M/s. Asian Star Co. Ltd., A loose papers found and seized as page no 76, 77 and 78 in the file seized as Annexure 5. Please confirm the same and explain what do the contents mean?

Ans. Yes I confirm that the loose papers found and seized as page no 76, 77 and 78 in the file seized as Annexure 5 are taken from my office premises at 114, 11th floor, Mittal Court 'C' Wing, Nariman Point, Mumbai- 400 021. The same are nothing but stock details of M/s. A Star exports, M/s. Rahil Agencies and M/s. Asian Star International Pvt. Ltd.

Q.9 Please state as to whether the stock of diamonds mentioned by your as pertaining to M/s. A star exports, M/s. Rahil Agencies and M/s. Asian Star International Pvt. Ltd. are accounted for in the books of accounts of the respective entities?

Q.10 Please state as to where the stock of diamonds mentioned by your as pertaining to M/s. A Star exports, M/s. Rahil Agencies and M/s. Asian Star International Pvt. Ltd are accounted for in the books of accounts of the respective entities?

Ans. Sir, these are stock procured out of manufacture income as given below hereunder

Sr.No.	Name of the entity	Amount (Rs.)
1.	M/s Rahil Agencies	8,01,81,720/-
2.	M/s Asian Star Diamonds International Pvt. Ltd.	9,95,74,250/-
3.	M/s A'Star Exports	11,79,15,875/-
Total		29,76,71,845/-

I do not have any documents in support to state that they are accounted for in the books of accounts of the respective entities. I wish to disclose this unaccounted investment in stock amounting to Rs.29,76,71,845/- as unaccounted income/investment in the respective entities for the current financial year 2010-11 and pay income tax there upon.

Q.10 Please state as to where the stock of diamonds mentioned by your as pertaining to M/s A Star Exports, M/s Rahil Agencies and M/s Asian Star International Pvt. Ltd. and are accounted for in the books of accounts of the respective entities are kept?

Ans. The same are kept in the safe number 2 found in the executive main cabin in this premises. The keys of the same are not available right now. We will produce the same on Tuesday as the same are available with on of our employees who is out of station and is expected to be back in Mumbai on 2/11/2010.

Statement u/s. 132(4) on Oath of Shri. Vipul Probodh Shah, Managing Director of Asian Star Co. Ltd. recorded during the course of search action u/s. 132 of the I.T. 1961 (Operation of P.O) in the case of M/s. Asian Star Co. Ltd. at 114, 11th floor, C wing, Mittal Court, Nariman Point, Mumbai-400 021 on 27.12.2010.

Q.2 Do you aware of the proceedings that today we have come for operation of prohibitory order placed on Safe No. 2 in Strong Room in Executive Main Cabin at 114C, 11th floor, Mittal Court, Nariman Point, Mumbai-400 021?

Ans. Yes. I am aware of the proceedings.

0.3 I am showing your statement recorded on oath u/s. 132(4) on 30.10.2010 to you. While answering to Q. No. 8, 9, 10 % 11, you had stated that there were some unaccounted diamonds worth Rs. 29.76 crores of three entities namely M/s. Rahil Agencies, M/s. Asian Star Diamonds International Pvt. Ltd. and M/s. A' Star Exports. You had further stated that they were kept in safe No.2 for which keys were not available readily on that day. Do you have any other kept inside this safe. Have you got keys for the same, since we have to lift the P.O. today, please explain?

Ans. Yes. I am aware of the proceedings.

Ans. Yes, I have gone through my statement recorded on 30.10.2010 and I confirm it once again. I understand that in the Safe No.2, unaccounted diamonds to the extent of Rs.30 crores, are kept. I also understand that there are certain papers relating to this stock and other matters, which are kept in this safe. On the date of search the keys were not available because the concerned employee was out of station. Today I made available this key to you in front of two witnesses in order to operate the prohibitory order.

0.4 Now, I am showing you the valuation Report prepared by Govt. Registered valuer, Shri Dinesh Salvi, in respect of the Diamonds kept in safe No.2 on which Prohibitory Order was operated today. It shows following summary:

Sr. No	Name of the entity	Diamonds (in Cts.)	Amount (Rs.)
1.	M/s Rahil Agencies	1277.25	10,56,66,666/-
2.	M/s Asian Star Diamonds International Pvt. Ltd.	1302.95	10,45,70,210/-
3.	M/s A'Star Exports	1435.49	13,47,63,640/-
Total		4015.69	34,50,00,516/-

Please confirm the same.

Ans. Yes I confirm the same.

Statement on oath of Shri. Vipul Prabodh Shah aged 45 yrs.old recorded u/s. 131 of the I.T.Act, 1961 on 01.02.2011 at the Office of the Dy.DIT(Inv.), Unit-VII 1(3), Room No.323, 3rd Floor, Scindia House, Ballard Estate, Mumbai-400038 in connection with the search action u/s. 132 of the I.T. Act, 1961 carried out on 29.10.2010 in the case of M/s. Asian Star Co. Ltd. and their related group concerns.

0.16 Please produce the stock reconciliation between opening stock on 01.04.2010 and the physical stock found on 29.10.2010 during the course of search proceedings also work out the yield percentage of diamond process during the above period.

Ans. I am submitting as per the Annexure 7.

0.17 Do you want to say anything else?

Ans. We have fully co-operated during search proceedings and no incriminating material or loose papers were found. We have explained and reconciled all loose papers found. The cash and stock of M/s. Asian Star Co. Ltd. are fully reconciled and excess stock found of three companies namely M/s. Asian Star Diamond International Pvt. Ltd, MI5. Rahil Agencies and M/s. A Star Exports (formerly known as MI5. Vipul Trading - Co.) valued by your valuer at Rs.34,50,00,516/- is declared as additional income for F.Y. 2010-11 and other RS.1 0 crores as additional miscellaneous income in order to take care of any discrepancy if found during the course search proceedings. We shall pay tax there on before 31/10/2011. Since income declared voluntarily u/s. 132(4) we request you not to initiate any penal proceedings against us. In future also we assure you to fully cooperate with the department.

4.8.4 A perusal of the extracts from the above statements show that the appellant had always explained the diamonds found as excess stock in trade. There is nothing to indicate that the appellant was carrying out any other undisclosed activity or had any other undisclosed source of income. There is also merit in the appellant's contention that accepting this explanation of the appellant that the diamonds are stock in trade, the investigation team did not seize the diamonds found in the course of search.

In the above facts and circumstances, I hold that the unaccounted diamonds are stock-in-trade of the appellant.

4.9. Head of Income in respect of unaccounted stock of diamonds

4.9.1. The assessing officer has held that section 69/69A applies to the unaccounted diamonds found belonging to the appellant from its business premises. He has further held that the income to be assessed under these sections are deemed income. He has finally held that such deemed income do not fall under any of the five heads of income enumerated under section 14 of the Act. For this view, the assessing officer has elaborated on the expression "Save as otherwise provided by this Act' under section 14 of the Income Tax Act.

4.9.2. I find that the expression "Save as otherwise provided by this Act' under section 14 is analogous to the phrase under Section 6 under the Income Tax Act, 1922. While interpreting this phrase in the decision in the case of Kevalchand Nemchand Mehta vs CIT reported in (1968) 67 ITR 804(Bom), the jurisdictional Hon'ble Bombay High Court held that the words "Save as otherwise provided by this Act' do not make any exceptions to the provisions of this section, but refer only to the exemptions granted under the Act. The meaning of the opening words of this section, therefore, is clear that, the charge of income tax shall be only on the enumerated heads of income, profits and gains, that is to say, on the heads of income falling under one or more of the heads

mentioned in that section. Therefore, it will not be permissible to hold that there can be some other source of income other than the heads enumerated in this section, such as, income which is statutorily liable to income tax in the hands of assessee. In this case the issue being discussed was the head under which the income of a minor liable to clubbed with the income of assessee, will fall. It was held to be assessable under the head income from other sources'.

4.9.3. As rightly pointed out by the AR,' the case of Fakir Mohammed Haji Hasan relied upon by the assessing officer is distinguishable on facts. The stock of diamonds found in the search is not a contraband item. Trading in diamonds, though unaccounted, is not illegal business. The loss has not been incurred on confiscation. Further, this decision in the case of Fakir Mohammed on this issue has not been accepted in the subsequent decision of the Gujarat High Court in the case of DCIT vs Radhe Developers India Ltd reported in (2010) 329 ITR 1 (Guj) where it is held that the Act does not envisage taxing any income under any head not specified in section 14 of the Act. This view of the Gujarat High Court has been followed in Chensing Venture vs CIT (2007) 163 Taxman 175 (Mad).

4.9.4. The assessing officer has explained that section 68/690 represent deemed income which is distinct from the normal concept of income. The normal concept of income only can be considered under the five heads of income. The deemed income is a headless income. However, deemed income is not a concept found only under section 68-690. Under income from house property, there is concept of deemed to be let out u/s 23(1)(a) of the Act. Similarly section 41 deals with remission of liabilities as deemed income. Section 44AD to 44BBB deal with presumptive income as does section 50C and 50D in the Act. No doubt the decision in the case of Fakir Mohamed Hazi Hasan supports the view of assessing officer, but the same has subsequently been overruled, as already discussed above.

4.9.5. The assessing officer may apply section 69/69A if he is no explanation is offered by the appellant as to source of income reflected in the investment/asset or the explanation is not satisfactory as per assessing officer. If the explanation of the appellant is accepted, the income is business income. The assessing officer has not believed that appellant stating that details of brokers/party from whom purchased and party to whom sold in the unrecorded activity has not been furnished. It is likely that details such as the customers/ sellers will not be available since the transactions are unrecorded/ unaccounted. However, considering that polished which is the same product that is in the regular business activity of the appellant lends credence to the explanation of the appellant that the same is from unrecorded activity trading in diamonds.

4.9.6. Deemed income u/s 69/69A merely represents unaccounted income found to be reflected in the form of and utilized as investment in stock of diamonds. If it is from unrecorded trading in diamonds then that is the source. If it is not believed to be from unrecorded trading in diamonds, then it is an undisclosed source and therefore assessable under the head 'income from 'Other' sources'. I have already held that the unaccounted investment in stock of diamonds in this case is stock-in-trade, and therefore the investment will represent business income and loss on its sale will result in business loss which the appellant is entitled to set off u/s70 of the Act. Even if the income is considered as deemed income, it will have to be assessed under one of the five heads of income enumerated under section 14 of the Act. The heads of income 'Salary', 'Capital gains' and 'House Property' are clearly not applicable in the present case. In my view, the most appropriate head is 'Profits and Gains of business'. In that case the loss can be set off under section 70(1) of the Act. Even if the unaccounted investment is assessed under 'income from other sources' the loss will be set off under section 71 of the Act. Irrespective of whether deemed income reflected in the form of unaccounted diamond stock is treated as Income from business or income from other sources.

4.10. Genuineness of loss

4.10.1. Now I come to the decision of the assessing officer in rejecting the loss on sale of the diamonds and estimating gross profit instead. The loss in the case of appellant has arisen primarily on account of cost considered in respect of the same. Admittedly, there is no proof with regard to the cost of acquisition of the diamonds. The cost has been considered based on the valuation made by the Departmental Valuer at the time of search. This is much higher than the asking price mentioned in the loose paper 76,77 and 78. If the valuation is high, it will result in loss. If the valuation is low, it will result in profit. The appellant has claimed that the valuation at the time of search was on the higher side. It has relied upon a subsequent valuation to show that the valuation was on the higher side. At this stage, on examination of the two valuation reports, it is noted that neither of the reports have indicated the number of pieces of diamonds that were found nor has valuation been made based on distinct categories based on cut, colour, carat and clarity. This lends support to the claim of the appellant that such record keeping in stock register is onerous if not impossible. The number of pieces are indicated in the invoices for sales. Some important conclusions are tabulated below:

below:

	Loose Paper found in search	Valuation on 27/12/2010 at time of search	Valuation on 14/01/2011	Based on sale invoices
Total carats	1435.49	1435.49	1435.49	1435.49
No of categories in which stock is grouped	5	5	10	NA
Maximum rate Rs/ carat	100,000/-	105,000/-	46,000/-	52,325/-
Minimum rate Rs/ carat	50,000/-	52,000/-	32,500/-	24,115/-
Average rate Rs/carat	69,366/-	72,846/-	40,261/-	36,440/-
Total no of pieces	NA	NA	NA	6835
Minimum Carat/piece	NA	NA	NA	0.08327 cts
Maximum Carat/piece	NA	NA	NA	1.02 cts
Average carat/piece	NA	NA	NA	0.21 cts

4.10.2. A look at the above table shows that the categories are not uniform and varies from person to person who assort/values the diamonds. Further the size of diamonds in question also varies considerably (0.08 cts to 1.64 cts) and so does the rate per carat. It is a subjective exercise. Further, the diamonds in question are not very large sized stones with fancy valuation. The average piece is only 0.28 cts.

4.10.3. The assessing officer has not found fault with the sales realization shown by the appellant, nor proved any under invoicing. The exports of diamonds are examined and certified by customs department, and the export realization are seen by RBI. Admittedly, no irregularities have been found by these organizations.

4.10.4 The sales as exports were made to parties which include parties to whom other exports were made. These are tabulated below:

Summary of unaccounted stock diamonds exported by A-star Exports to overseas parties:

S.No.	Party Name	CTS	Amount
1	Creative Design Ltd	383.44	2,65,61,092/-
2	Star Art Co. Ltd	311.76	1,44,48,082/-
3	Indigo Trading FZE	310.40	1,23,17,782/-
4	Star Asia Mfg. Co. Ltd	75.45	54,63,779/-
5	Ultrax Trading FZE	196.20	1,07,65,107/-
Total		1277.25	6,95,55,842/-

Summary of unaccounted stock of diamonds exported by Asian Star Diamond International Pvt Ltd. to overseas parties

S.No.	Party Name	CTS	Amount
1	GAP International FZE	268.17	1,19,46,468/-
2	Ability Trading Co.	499.21	1,79,51,434/-
3	Indigo Trading FZE	587.91	1,92,44,506/-
4	Raghu Enterprises	80.20	31,66,296/-
Total		1435.49	5,23,08,704/-

Summary of unaccounted stock of diamonds exported by Rahil Agencies to overseas parties

S.No.	Party Name	CTS	Amount
1	GAP International FZE	100.87	56,15,752/-
2	Ability Trading Co.	533.28	2,05,10,076/-
3	Indigo Trading FZE	46.53	24,40,216/-
4	Star Asia Mfg. Co. Ltd	61.69	33,77,355/-
5	Ultrax Trading FZE	560.58	2,06,21,003/-
Total		1302.95	5,25,64,402/-

Details of exports other than unaccounted stock to overseas parties

SR.NO	NAME OF THE PARTY	COUNTRY	F.Y. 2007-08		F.Y. 2008-09		F.Y. 2009-10		F.Y. 2010-11	
			Cts	Amt.	Cts	Amt.	Cts	Amt.	Cts	Amt.
1	ABILITY TRADING CO.	HONGKONG	-	-	-	-	-	-	-	-
2	CREATIVE DESIGNS LTD.	HONGKONG	-	-	-	-	-	-	-	-
3	G.A.P. INTERNATIONAL FZE	U.A.E.	-	-	-	-	179.66	50,71,938	13376.56	107099565
4	Indigo Trading FZE	U.A.E.	-	-	-	-	-	-	9609.38	51155143
5	Raghu Enterprise Ltd.	HONGKONG	-	-	-	-	-	-	-	-
6	STAR ART CO.LTD.	HONGKONG	241.43	48,90,377	-	-	-	-	-	-
7	STAR ASIA MFG CO LTD.	HONGKONG	-	-	1,202.21	84,68,673	-	-	-	-
8	ULTRAX TRADING FZE	U.A.E.	-	-	-	-	-	-	-	-
Total			241.43	48,90,377	1,202.21	84,68,673	179.66	50,71,938	22,985.94	1582,54,708

4.10.5. The above table show that some of the export customers for sale of unaccounted diamonds and regular export of diamonds are common such as Indigo Trading FZE, GAP International FZE, STAR ASIA MFG. CO. LTD. and STAR ART CO. LTD. Thus, when other sales are genuine, there is reasonable grounds to hold that the impugned sales are also genuine.

4.10.6. The assessing officer has implicitly alleged that there is under invoicing and this has resulted in loss. But there is nothing brought on record to substantiate the allegations. The assessing officer has questioned the need to sell the stock of diamonds if good prices were not offered. I find the appellant has rightly pointed out that it is not for the revenue to sit on judgment as to the business decision made by the appellant. The assessing officer called upon the appellant to produce the customs officer who has certified the exports, but I find it to be unreasonable to expect compliance to the same. The assessing officer has written to customs authority but has not received any reply. However, this cannot be a basis for questioning the certification of the customs authorities. The assessing officer has recorded statement of Shri Jhaveri in respect of valuation made on 14-1-2011 and has drawn adverse inference from his inability to certify from the invoice that the diamonds exported are the same that he had valued on 14-1-2011. The diamonds valued are a large number of pieces of small carat value. They are not unique or distinguishable for a person to remember after two years. The value of diamonds are best indicated by the price offered by customers. I find that the assessing officer has not commented on the documentation provided by the appellant in respect of price negotiation with the customers.

4.10.7. The negotiations with overseas parties as per contemporaneous records in respect of sale of unaccounted stocks is summarized below.

Asian Star Diamonds Intl. Pvt. Ltd.

Sr. No.	Date	Particulars	Carat	Amount	Correponding Page no. of paper book	Whether submitted before A.O.
1	29.10.2010	Estimated Value as per loose paper found along with the stock placed in the safe located in the office premises	1435.49	9,95,74,250/-	47	Yes
2	27.12.2010	Valuation as per Income Tax Department Valuer Mr. Dinesh Salvi	1435.49	10,45,70,210	44-45	Yes
3	14.01.2011	Valuation as per govt approved valuer Mr. Sharad A. Jhaveri prepared by third party valuer	1435.49	5,77,95,675/-	46	Yes
Correspondence with M/s GAP International FZE (UAE)						
4	06.01.2011	Offer letter sent to M/s GAP International FZE (USD \$ 2304466.50 @ 45.50)	1435.49	10,48,53,225/-	48-49	Yes
5	09.01.2011 (13:30 fax)	M/s GAP International FZE through fax on 13:30 has rejected the offer on the ground that prices are very steep unreasonable and asked for counter offer of appropriate price for 192.41 carat goods			50	Yes
6	17.01.2011	Revised offer was sent to M/s GAP International FZE for 192.41 carat with revised letter with revised price list (US \$ 197220.25 @ 45.50)	192.41	89,73,521/-	51	Yes

4.10.8. *The appellant has submitted credible contemporaneous evidence of price negotiations in respect of sales of unaccounted stock of diamonds. It supports the appellant's claim that the customers did not value the diamonds at the rates considered in the valuation made at the time of search. Some of these parties are regular customers of the appellant group. There is no evidence that the sales are not genuine or under invoiced. The assessing officer has not verified the details from the customers, the details of which have been furnished to him. I hold that the transactions of sale reported are genuine and the losses arising from these transactions are accordingly genuine and allowed.*

4.11. *Rejection of books of accounts and estimation of gross profits*

4.11.1. *The assessing officer has rejected books of accounts u/s 145(3) of the Act and estimated the gross profit. The assessing officer has considered the gross profit based on the SEZ unit of A-Star Exports at Surat. There are two difficulties with the approach of the assessing officer. First, the SEZ unit which operates on fiscal benefits available to SEZ unit and is a manufacturing activity cannot be compared with trading activity. Second, the loss has arisen because of the value considered as its cost. Admittedly, there is no evidence of costs in the books of accounts. The same has been considered as valuation made at the time of search. If the valuation is on the higher side, the sale subsequently will result in loss. The value of stock of diamonds as per valuation made at the time of search has been offered fully as income.*

4.11.2. *The assessing officer has rejected the books of accounts for the following reasons:*

- i) Quality of diamonds exported not matching the diamonds exported.*
- ii) The revaluation has not been given effect to in the books of accounts, nor has the auditors mentioned anything about such revaluation.*
- iii) The stock register is not based on quality and is based only in terms of carats.*

4.11.3. *As indicated in the data tabulated earlier in this order, the valuation made at the time of search is a mere one page summary which gives no description of the diamonds and is merely total value of 5-6 packets. The same is not qualitative. Thus, no meaningful comparison can be made. The valuation of diamonds on 14/01/2011 was not intended for changing the value of stock in the books, and in any case since all stock of diamonds were actually sold prior to 31st March 2011, the question of valuation at year end did not arise. Accordingly, there was no reason for auditors to comment on the same. Lastly, as regards the assessing officer's view that qualitative stock register is not maintained, considering the numerous number of pieces and characteristics on which the pieces can be distinguished,*

the stock is maintained only in terms of carats in the diamond industry. The case laws cited by the appellant support the contention of the appellant. Accordingly, the rejection of books of accounts and estimation of gross profits by the assessing officer is held to be unjustified in the facts of this case.

In the result, grounds of appeal for A.Y.2011-12 are allowed.”

7. Against the above orders of CIT(A), the revenue is in further appeal before us.

8. We have considered rival contentions, carefully gone through the orders of the authorities below and also deliberated on the judicial pronouncements referred by lower authorities in their respective orders as well as cited by Id. DR and AR during the course of hearing before us. From the record we found that the assessee a partnership firm is in the business of trading, import, export, manufacturing, wholesale and retail dealing in diamonds, gems and jewellery. The main object of the assessee firm is to carrying out the business of import, export, manufacturing, wholesale and retail dealing in diamonds, gems and jewellery. The partnership business was of importers, exporters, manufacturers, processors, investors, wholesalers, distributors, retailers, dealers and indenting agent of diamonds, synthetic stones, gems and jewellery, precious and semi precious metals and miners and ornaments and article made thereof including jewellery, decorative and precious objects of arts and crafts and to cut, design polish rough diamond, gems and precious stones and that of investment and lending and to do any other business as may be mutually agreed upon by the partners. In the return of income filed for the year under consideration, the assessee has shown income under the head profit and gains of business and profession and other

sources. In the search action, three loose papers were found and seized as part of Annx - 5 of the panchnama prepared on 29.10.2011 at the office premises of 114/116, Mittal Court, C-Wing, 11th floor, Nariman Point, Mumbai - 400021. These documents mention the carat value, rate per carat and total value of diamonds. In the course of search proceedings Shri Vipul Shah confirmed that these loose papers were containing stock details of M/s A'Star Exports, M/s. Asian Star Diamond International P. Ltd. and M/s. Rahil Agencies. The stock mentioned in the above referred seized papers was stated as placed in one safe located at the office premises. The stock of diamonds found from the safe was valued by the Govt. Approved valuer appointed by the Income Tax Department at the time of prohibitory order execution and was valued as follows:

Sr.No.	Name of the entity	Amount (Rs.)
1.	M/s Rahil Agencies	10,56,66,666/-
2.	M/s Asian Star Diamonds International Pvt. Ltd.	10,45,70,210/-
3.	M/s A'Star Exports	13,47,63,640/-
	Total	34,50,00,516/-

The statement of Shri Vipul Shah was again recorded on 27/12/2010, wherein he admitted the unaccounted stock of Rs.34,50,00,516/- including unaccounted stock of Rs.13,47,63,640/- pertain to the assessee. The computation of the total income of the assessee had declared undisclosed income of Rs.13,47,63,640/- in the form of stock of polished diamonds under the head "profit and gains of the business and profession". In the course of assessment the assessee submitted its explanation on why the undisclosed stock should be treated as a business

income. In this connection it was stated that at the time of search, the investigating officers found unaccounted stock in the business premise of the assessee at 114/116, Mittal Court, 'C' Wing, 11th Floor, Nariman Point, Mumbai - 400021. This stock was valued at Rs.13,47,63,640/- by the income tax valuer. Consequently the assessee declared this amount as stock in trade and this contention of the assessee was accepted by the Investigating officer. Who has released the stock after valuation and not impounded/seized. The statement of Shri Vipul P. Shah Partner of the firm was again recorded on 20.11.2012 wherein in reply to the question no. 22 he has stated that this undisclosed income is generated through unrecorded trading of diamonds.

Q.22 Please explain as to how this undisclosed income is generated?

Ans: it is through unrecorded trading of diamonds. "

It is clear from the above facts that the declaration was related to business stock in trade hence it is evident that the declaration amount is required to be assessed under the head 'Income from Business or profession. Thus, the undisclosed income of Rs.13,47,63,640/- declared voluntarily by the assessee for A.Y. 2011-12, is undisclosed stock held under the customary trading of the business and hence should be treated as the business income of the assessee firm and not as undisclosed investment as held by the AO. If all the three conditions of Section 69 exist together, the unrecorded investment or value of assets can be deemed to be assessee's income of the relevant financial year. In the present case all three conditions as required under section 69 are not fulfilled because the appellant has offered explanation and nature of

source of acquisition as undisclosed stock received from the unaccounted trading of diamond as source of income. The partner of the firm has time and again stated in his statement that diamond found in the premises during the search is out of unrecorded trading of diamonds hence the third part of section 69 is not satisfied hence the said stock is not taxable under section 69 of the Act.

9. Now, we shall deal with the decision relied on by the AO while declining set off of stock offered against business loss. The ratio of decision of Fakir Mohammed Haji Hasan (247 ITR 290) as relied on by the AO are not applicable in the present case because in the above case the assessee was found some gold and currency by the custom authority which was confiscated by the custom department. The assessee has offered the said gold as undisclosed stock and claimed the loss on confiscation of gold as business loss. The assessee was engaged in the illegal activity of smuggling of gold and said gold and currency was found from the assessee which is illegal activity which cannot be part of business stock whereas in the present case the diamond was found from the premises of the assessee and the main object of the firm is to carrying on the business of diamond. This judgment has been considered in later decision of the Hon'ble Gujarat High Court in the case of DCIT Vs. Radhe Developers India Ltd. [2010] 29 ITR 1 and CIT Vs. Shilpa Dyeing & Printing Mills Pvt. Ltd. [Tax Appeal No.290 of 2013. In the case of DCIT Vs. Radhe Developers India Ltd. [2010] 29 ITR 1, the Hon'ble Gujarat High Court held that :-

“26. The decisions of this court in the case of Fakir Mohmed Haji Hasan [2001] 247 ITR 290 (Guj) and Krishna Textiles [2009] 310 ITR 227 (Guj) are neither relevant nor germane to the issue considering the fact that in none of the decisions the legislative scheme emanating from the conjoint reading of the provisions of sections 14 and 56 of the Act have been considered. The apex court in the case of O. P. Sandu Bros. Chembur P. Ltd. [2005] 273 ITR 1 has dealt with this very issue while deciding the treatment to be given to a transaction of surrender of tenancy right. The earlier decisions of the apex court commencing from the case of United Commercial Bank Ltd. v. CIT [1957] 32 ITR 688 (SC) have been considered by the apex court and, hence, it is not necessary to repeat the same. Suffice it to state that the Act does not envisage taxing any income under any head not specified in section 14 of the Act. In the circumstances, there is no question of trying to read any conflict in the two judgments of this court as submitted by the learned counsel for the Revenue.”

The same stand was re-affirmed by the Hon'ble Gujarat High Court in the case of CIT-II Vs. Shilpa Dyeing & Printing Mills Pvt. Ltd. (Tax Appeal No.290 of 2013.

10. In view of the above and relying on the decision of various high court and tribunal as cited by Id. AR it is clear that the stock of diamond declared during the search is taxable under the heads of income as defined in section 14 read with section 56 and not taxable separately. As there cannot be taxable income of income out of the 5 heads of income as specified in section 14 of the Act. Hence the stock of diamond of Rs.13,47,63,640/- is taxable either under Income from Business & Profession or under income from other sources.

11. With regard to AO's action for rejection of books of account u/s.145(3), we found that assessee's books of accounts are consistent with the applicable accounting standard and there are no qualifications by the auditors of the assessee with regards to the method of accounting or accounting policies. Furthermore, the accounts for the above mentioned

assessment year are complete and accurate as it includes the undisclosed stock of 1277.25 carats of polished diamond. From the record we found that all details as and when called for by the Assessing officer during the assessment proceedings had been timely submitted. It is to be noted that the financial statements of the assessee are fully verifiable and as such cannot establish any incompleteness or incorrectness in assessee's books of accounts. One of the reasons stated by the Assessing officer that in spite of revaluation by the assessee, it continue to record the value of diamond in its books at Rs. 13.47 crores. The Ld AO fail to appreciate the fact that appellant has declared income during search operation at Rs.13.47 crores and accordingly recorded the same in its books of accounts. The valuation carried out by another Govt. Approved valuer has nothing to do with the amount declared by the assessee but the same was done to prove on the part of assessee that the value of diamond found during the search was much less therefore the assessee has to sell it at lower value. The AO has wrongly mistaken the purpose of second valuation. Thus the assessee has fully discharged its onus to disclose this stock and offer it as income.

12. With regard to AO's observation assessee maintained carat wise stock register, which is a normal practice prevalent in diamond trade. The Gems and Jewellery Export promotion Council has also recognised such practice. In fact, ACIT 16(3) Mumbai has also confirmed that diamond merchants maintained stock of diamond carat wise and this is a practice followed by diamond merchant in Mumbai as well as whole India. The Hon. Bombay High Court in the unreported judgement in case of CIT - 5

vs. M/s Sundaram Gems Pvt Ltd (ITA No.6785 of 2010) has confirmed that the maintenance of carat wise stock register is regular practice prevalent in diamond trade.

"We are of the view that the books of accounts can not be rejected without pointing out any defects in the same. The A. O. has not pointed out any defects whatsoever in the books of accounts maintained by the assessee. In this regard, the assessee has relied on the several judicial pronouncement before us; but we deem it appropriate to refer to the decision of Hon. Bombay High Court in the case of R.B. Bansil Abirchand Spinning and Weaving Mills. Vs. CIT, 75 ITR 260; Pandit Brothers vs. CIT, 26 ITR 159 (Punjab) and Ashok retractories Co. P Ltd., 279 ITR 457. Considering facts and circumstances prevailing in the present case, we are of the view that learned CIT (A) was right in deleting the addition made by A.O."

13. The CIT(A) has given categorical finding to the effect that the AO has considered gross profit based on SEZ Unit on A' Star Exports at Surat. We found that SEZ Unit operates on fiscal benefits available to SEZ unit and is a manufacturing activity cannot be compared with trading activity. The loss has arisen because of the value considered as its cost. However, there is no evidence of cost in the books of accounts. Further the valuation made at the time of search is a mere one page summary which gives no description of the diamonds and is merely total value of 5-6 packets. Thus, no meaningful comparison can be made. The CIT(A) has categorically dealt with each and every documents and after giving detailed finding in para 4.11, reached to the conclusion that rejection of books of accounts and estimation of gross profit by the AO was not justified on the facts of this case. The findings recorded by CIT(A) are as per material on record and do not require any interference on our part.

14. With regard to set off of losses, once it is decided that the income is taxable under either of the head of income A to F of section 14 of the Act,

then the set off losses is permitted under section 71 of the Act. The income declared at the time of search was in respect of excess stock found which was in nature of business activity therefore part of business income. Even if the said amount was to be taxed than the same should be under the head income from other sources and therefore current year loss of Rs.13,47,63,640/- have to be set off against the income in terms of provision of section 71 of the Act. Reliance can be placed on the judgment of Chensing Venture vs CIT [2007]163 Taxman 175 (Mad).

15. From the record we found that CIT(A) has recorded a categorical finding as per material placed on record and after relying on various judicial pronouncements dealt with the issue in great detail. Accordingly, we do not find any reason to interfere in the order of CIT(A).

16. In the result, appeal of the revenue is dismissed.

17. It was argued by Id. DR that provisions of Section 115BBE is specific provisions of the Act, according to which business loss cannot be set off against income declared during the course of search.

18. On the other hand, it was contended by Id. AR that Section 115BBE was inserted w.e.f.1.4-2013, whereas the assessment year under consideration is 2011-2012, hence this section is not relevant in this case, whereas the contention of Id. DR was that amendment is retrospective in nature and hence, applicable in this year also.

19. We have considered rival contentions and found that by applying provisions of Section 115BBE the AO has declined set off of business loss against income declared during the course of survey/search. The provisions of Section 115BE are applicable on the income taxable under

section 68, 69, 69A, 69B, 69C or 69D of the Act. The income declared by the assessee is unrecorded stock of diamond found during the course of search. The assessee is in the business of diamond trade and such stock was part of the business affair of the company. Therefore since income declared is in the nature of business income, the same is not taxable under any of the section referred above and accordingly section 115BBE has no application in case.

20. Furthermore, the memorandum to the Finance Bill, 2012 read on Section 115BBE reads as under :-

"under the existing provisions of the Income-tax Act, certain unexplained amounts are deemed as income under section 68, section 69, section 69A, section 69B, section 69C and section 69D of the Act and are subject to tax as per the tax rate applicable to the assessee. In case of individuals, HUF, etc., no tax is levied up to the basic exemption limit. Therefore, in these cases, no tax can be levied on these deemed income if the amount of such deemed income is less than the amount of basic exemption limit and even if it is higher, it is levied at the lower slab rate. In order to curb the practice of laundering of unaccounted money by taking advantage of basic exemption limit, it is proposed to tax the unexplained credits, money, investment, expenditure, etc., which has been deemed as income under section 68, section 69, section 69A, section 69B, section 69C or section 69D, at the rate of 30% (plus surcharge and cess as applicable). It is also proposed to provide that no deduction in respect of any expenditure or allowance shall be allowed to the assessee under any provision of the Act in computing deemed income under the said sections.

This amendment will take effect from 1st April, 2013 and will, accordingly, apply in relation to the assessment year 2013-14 and subsequent assessment years. [Clause 45]."

21. Thus, in the Act itself it is clearly mentioned that this section is applicable from 1st day of April, 2013. When the legislature itself provided that the particular provisions are applicable prospectively then submission of Ld D. R. that the section is applicable retrospectively without any basis is not tenable. Further, it is not a matter of insertion of explanation or

clarification to some existing provisions of law. It is a new section inserted barring claim of expenses/ allowance against particular income. Therefore any bar or restrictions of a claim cannot be applied retrospectively. It is well settled rule of interpretation allowed by time and sanctified by judicial decisions that retrospective operation should not be given to a statute so as to effect, alter or destroy an existing right or create a new liability or obligation. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only as per ratio of Hon'ble Supreme Court in the case of Govinddas Vs. ITO, (1976) 103ITR 123 (SC). A statute which deals with matter of substantive law and taxation is matter of substantive law-would not be construed to have retrospective operation unless such a construction appears very clearly in the terms of the Act or arises by necessary implication.

22. As per our considered view, Section 115BBE bar from claiming any expenses or allowance from the income taxable under section 68, 69, 69A, 69B, 69C, or 69D of the Act. In the instant case before us the claim was of set off of business loss against income declared during search. There is vital difference between the loss and expenses/ allowance. Hon'ble Supreme Court in case of CIT Vs. Wallford share & Stock brokers Pvt. Ltd (326 ITR 1) while discussing the issue that losses incurred in mutual fund from which dividend received, can not be considered for the purpose of section 14A of the Act and held that:

"We may reiterate that one must keep in mind the conceptual difference between loss expenditure, cost of acquisition, etc. while interpreting the scheme of the Act."

In view of the decision of Hon'ble Supreme Court, business loss cannot be treated at par with the expenses / allowances and such business loss can be set off against any type of income as section 71 do not debar from setting off such losses

23. We have considered rival contentions in ITA No.4412/Mum/2014 and found that similar issue has been dealt with by us in ITA No.4411/Mum/2014. As the reasoning given by the AO for not allowing set off and reasoning given by the CIT(A) for allowing set off are the same as we have discussed in ITA No.4411/Mum/2014, following the same reasoning given hereinabove, in ITA No.4411/Mum/2014, we do not find any reason to interfere in the findings recorded by CIT(A), which is as per material on record, which had not been controverted by the department by bringing any positive material on record.

24. In view of the above discussion, we do not find any infirmity in the order of CIT(A) for allowing set off of business loss against income declared during the course of survey/search, accordingly, this appeal of the revenue is also dismissed.

25. In the result, both appeals of the revenue are dismissed.

Order pronounced in the open court on this 31/05/2016.

Sd/-

(SANDEEP GOSAIN)

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-

(R.C.SHARMA)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 31/05/2016

प्र.कु.मि/pkm, नि.स/ PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A), Mumbai.

4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार
(Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai