CHARTERED ACCOUNTANTS **VIMAL PUNMIYA & CO.**
MR. VIMAL C. PUNMIYA CHARTERED ACCOUNTANTS
B.Com., LL.B(Gen.) F.C.A. 501, NIRANJAN, 99, MARINE DRIVE, MUMBAI 400 002
MRS. DIMPLE N. PUNMIYA PHONES : 2281 0635, 22813415
B.Com., A.C.A. FAX : 2281 8267, CELL 98219 36314
MR. HIMANSHU GANDHI Email:vimalpunmiya@gmail.com/nirajvp@rediffmail.com
B.Com., A.C.A.
ADVOCATES
MR. NIRAJ V. PUNMIYA
B. Com., LL.B
MISS. AARTI V. PUNMIYA
B. Com., LL.B

ORGANISED BY: J. B. NAGAR CPE STUDY CIRCLE
***SUBJECT*: "Assessment Procedure and Appeal Procedures with specific reference to Scrutiny Assessment"**

DATE: 15th November, 2015
TIME: 8.45 A.M. TO 10.30 A.M.
***VENUE*:. Hotel Kohinoor, Andheri Kurla Road, J B Nagar, Andheri (E), Mumbai - 59**

BY CA VIMAL PUNMIYA

A) ASSESSMENTS.

1. Type of Assessment:

(i) Regular Assessment
(ii)Best Judgment Assessment

2. ASSESSMENTS :

2.1)Introduction:

- *Means determination of income-tax liability.*
- *S. 2(8) assessment includes reassessment.*
- *S. 147 – 148 – reassessment of escaped income.*
- *S. 142 – 143 – 144 Normal assessment of total income.*
- *S. 142 Inquiry before assessment.*
- *S. 143 (1) Summary assessment – assessment based on return.*
- *S. 143 (3) Scrutiny assessment – assessment based on evidence.*
- *S. 144- Best judgment assessment*
- *S. 2(40), regular assessment, means the assessment made u/s 143(3) or u/s 144.*

We are mainly concerned with assessment u/s 143 & u/s 144.

2.2)Summary Assessment :

S. 143 (1) w.e.f. 1/4/2008 where return has been made u/s 139 or pursuant to notice u/s 142 (1) determine

(i) Tax/interest due
(ii) Refund due

On the basis of the return subject to following adjustment:-

a) Any arithmetical error in the return of income.

b) An incorrect claim apparent from any information in the return.

Send intimation to assessee, raising demand or granting of refund or loss adjusted. Intimation deemed to be notice of demand.

Proviso 1. Even no interest, no refund due but loss is adjusted than also intimation will be sent.

Proviso 2. No. intimation to be sent after expiry of one year from the end of the financial year in which the return is furnished.

If there is no demand no refund the acknowledgement of filing the return shall be deemed to be intimation.

143(1A),(1B),(1C) introduce for centralised processing. Accordingly, implement through CPE, Bangloure.

143(1D) w.e.f. 01/07/2012 -Notice U/s 143(2) issued than processing u/s 143(1) is not necessary.

2.3) Assessment u/s 143 (3) and S. 144 :

S. 143 (3) – Scrutiny assessment – regular assessment –co-operative assessee.

S. 144- Best judgment assessment –Non-co-operative assessee.

S.142 – Inquiry before assessment.

2.3.1) Time limit for completion of assessment :

S.153 (1) – Asst. u/s 143 (3) or u/s 144 shall be made within 2 years from the end of the A.Y.

S.153 (2) – Asst. u/s 147 shall be made within one year from the end of the F.Y. in which notice u/s 148 was served.

Ex. If the notice was served between 1/4/14 to 31/3/2015 then the time for completing the assessment will upto 31/3/2016.

2.3.2) Preliminaries for assessment under these two sections commences with inquiry before assessment u/s 142. Assessment u/s 144 would be made whether a return of income is filed or not. Assessment u/s 143 is made only where a return of income is filed u/s 139 or in response to notice u/s 142 (1).

Return of income represents self assessment of tax and corresponding liability.

2.3.3) Time for filing return of income:-

I) S. 139 (1) :

30st Sept. : Company : irrespective of income

Others : requiring audit and working partners of firms requiring Audit, where there is tax liability.

30th Nov. : : Any Assessee who required to furnish a report u/s 92E (Transfer Pricing Rules)

31st July : : Remaining cases where there is tax liability.

II) S. 139 (1A) : Filing of Bulk Returns. Employee at his option files return through his employer.

III) S. 139(1B): Filing of electronic Return

IV) **S.139(1C):** Special power of central Govt. to exempt any class of person from requirement of furnishing a return of income.

Govt. notified that if following conditions are satisfied, the assessee shall have option to submit his return or not to submit his return of income.

- **a)** The Assessee is an individual (may be resident or non-resident)
- **b)** His total income should consist only of salary and/ or saving bank interest
- **c)** His total income should not exceed Rs. 5,00,000/- and saving bank interest should not exceed RS.10,000/-.
- **d)** He should receive salary from only one employer.
- **e)** The assessee should have reported his PAN to his employer
- **f)** The assessee must have reported his interest income from saving bank account to his employer for the purpose of TDS u/s 192
- **g)** The Assessee must have received a TDS certificate in form No.16 from his employer and such TDS certificate must include his PAN, Details of income, tax deducted by the employer and deposited to govt. A/c
- **h)** The assessee should not have any claim of refund.

Exemption shall not be allowed if a notice U/s 142(1), 148, 153A or 153C is issued by the department.

V) a)S. 139 (3) Return of Loss
b)S. 139(4) Belated Return
c)S. 139 (4A) Charitable Trust exempt u/s 11 & 12.
d)S. 139 (4B) Political Parties.
e)S. 139(4C) Return in some cases where income is exempted u/s 10
f)S. 139(4D) Return by university, collage etc. covered u/s 35
g)S. 139(4E)Return by Business Trust
h) S. 139(5) Revise Return

IV) **S. 139 (4) Extended Period** : One year from end of A.Y. or before the completion of assessment.

V) **S.142 (1):** Where no return filed u/s 139 (1) and time has expired A.O. can issue notice requiring the assessee to file return within the time prescribed in the notice.

VI) **S.139 (5): Revise return:** Where return is filed u/s 139 (1) or u/s 142 (1): revise return to be filed within one year from the end of the A.Y. or before completion of assessment whichever is earlier.

* Belated Return U/s 139(4) and return U/s 148 cannot be revised.

Kumar Jagdish Chandra Sinha V/s CIT (1996) 220 ITR 67 (SC)

V) **S. 148:** Within the time prescribed in the notice – requires the assessee to furnish return of his income – however the assessing officer before issuing any notice should record his reasons for doing so. But, the Assessment will be final u/s 143(3) or 144.

But, the Reopening u/s 148 can be challenged on the Following Grounds:

A. **Issue is subject matter of appeal, therefore out of the scope of section 148**.

Appeal pending from original assessment order. Reassessment cannot be done as the order merged with order of higher authorities. *Proviso to section 147 has been inserted by Finance Act, 2008, w.e.f. 2008.* *Notes on clauses.(2008) 298 ITR 163 (st),* *Memorandum explaining the provision.(2008) 298 ITR St. 222 to 224* *Metro Auto Corporation vs. ITO (2006) 286 ITR 618 (Bom)* *Vodafone Essar Gujarat Ltd. Vs. ACIT (2010) 37 DTR 259 (Guj.)*	
Appeal was pending before ITAT and the matter was subject matter of appeal before CIT(A). No Reassessment, once an issue is subject matter of appeal before Tribunal, issuance of Notice of reassessment on said ground has to be considered bad-in-law.	*Chika Overseas (P) Ltd. V/s ITO (2011) 131 ITD 471 (Mum.)(Trib).*

B. Proceeding u/s 148 cannot be initiate on audit objection:

Adani Exports vs. DCIT (1999) 240 ITR 224 (Guj)

Reassessment was not valid as the AO held no belief on his own at any point of time that income of assessee had escaped assessment on account of erroneous computation of benefit u/s 80HHC and was constrained to issue notice only on the basis of audit object.

C. Proceeding u/s 148 cannot be initiate to review the earlier opinion:

The power to reopen an assessment is conditional on the formation of a reason to believe that income chargeable to tax has escaped assessment. The power is not akin to a review. The existence of tangible material is necessary to ensure against an arbitrary exercise of power.	*Aventis Pharma Ltd. vs. ACIT (2010) 323 ITR 570 (Bom)*
AO having allowed assessee's claim depreciation in the regular assessment and reopened the assessment pursuant to audit objection, it cannot be said that he had formed his own opinion that the income had escaped assessment, and the reopening being based on mere change of opinion, same was not valid.	*IL & FS Investment Managers Ltd. vs. ITO & Ors. (2008) 298 ITR 32 (Bom)*
The assessing officer has been given power to reassess under section 147 upon certain conditions being satisfied, and the assessing officer does not have power to review. If such a change of opinion were to be permitted as a ground of reassessment then it would amount to granting a license to the assessing officer to review his decision, which he does not have under the provision of section 147.	*D. T. & T. D. C. Ltd. vs. CIT (2010) 324 ITR 234 (Del.)*
Issue regarding addition of amount of deferred taxation for computingbook profits u/s115JB having been raised by the AO at the time of original assessment u/s. 143(3) and no addition having been made by AO on the account on being satisfied with the explanation of the assessee reopening of assessment on the very same issue suffered from change of opinion in the absence of any fresh material hence invalid.	*M.J. Pharmaceuticals Ltd vs. CIT (2008) 297 ITR 119 (Bom)*
In determining whether commencement of reassessment proceedings was valid it has only to be seen whether there was prima facie some material on the basis of which the department could reopen the case. The sufficiency or correctness of the material is not a thing to be considered at this stage.	*Raymond Woollen Mills Ltd. Vs. ITO (1999) 236 ITR 34 (S.C.)*
No new material brought on records – Reassessment on change ofopinion of officer not valid	*Asteroids Trading & Investment P.*

	Ltd. vs DCIT (2009) 308 ITR 1 90 (Bom) (193)
Reopening of assessment on the same ground in the absence of any tangible material was based on mere change of opinion and therefore is not sustainable.	*ICICI Prudential Life Insurance Co Ltd. (2010) 325 I TR 471 (Bom)*
AO has no power to reopen case on change of opinion. *CIT vs. Kelvinator of India Ltd (2010) 320 ITR 561 (SC)* *Asian Paints Ltd. vs. DCIT (2008) 308 ITR 195 (Bom) (198)* *Bhavesh Developers vs. A.O. (2010) 224 CTR 160 (Bom)* *International Global Networks BV v. DDIT (IT) (2012) 50 SOT 433 (Mum) (Trib.),* *General Insurance Corporation of India v. Dy .CIT (2012) Vol.114 (1) Bom. L.R. 024 (High Court):*	

D. <u>NO REASSESSMENT JUST TO MAKE AN ENQUIRY OR VARIFICATION:</u>

No reopening to make fishing inquiries.

1. *Bhor Industries Ltd. v/s. ACIT – [(2004) 267 ITR 161 (Bom)]*
2. *Hindutan Lever Ltd. v/s. R. B. Wadkar, ACIT [(2004) 268 ITR 332 (Bom)]*
3. *Bhogwati Sahakari Sakhar Karkhana Ltd.v/s.DCIT (2004) 269 ITR 186 (Bom)*
4. *Ajanta Pharma Ltd. v/s. ACIT – [(2004) 267 ITR 200 (Bom)]*
5. *Grindwell Norton v/s. ACIT (2004) 267 ITR 673 (Bom)]*

E. <u>NO REOPENING IF ASSESSEE DISCLOSED ALL THE FACTS FULLY & TRULY AT THE TIME OF ORIGINAL ASSESMENT.</u>

2.3.4) <u>Assessment u/s 143 (3) : Scrutiny Assessment : regular assessment :</u>

<u>2.3.4.1) Commences with notice u/s 143 (2):-</u>

Where return is filed u/s 139 or 142 (1), and where A.O. considers it necessary or expedient to ascertain the correctness of the return.

The notice is issued for giving an opportunity to substantiate, by leading evidence if necessary to prove the correctness of the return.

The notice u/s 143 (2) should be served on the assessee within 6 months from the end of the financial year in which the return is furnished.

A notice u/s 143 (2) served beyond the prescribed time is without jurisdiction and is held as invalid and hence the consequent. Assessment Order u/s 143(3) will also be invalid as held in the cases:-

i) C.I.T. v/s D. S. Screens P. Ltd. (2000) 164 CTR (Bom) 62

ii) Arasina Hotels Ltd. V/s D.C.I.T. (1997) 60 ITD 667 (Bang)

Illegality of notice cannot be waived.

iii) C.I.T. v/s Ram such Motilal 27 ITR 54 (Bom).

2.3.4.2) <u>Procedure of assessment u/s 143 (3) (r.w.s.142):</u>

i) A.O. shall hear the assessee on the evidence produced by the assessee on the day specified in the notice u/s 143 (2).

ii) A.O. can adjourn the hearing and hear the evidence on adjourned day or days.

iii) A.O. may require the assessee to produce further evidence on specified points on the adjourned day or days.

iv) A.O. can take into account all relevant material which he has gathered, after affording a reasonable opportunity of being heard to the assessee in that regard.

v) A.O. to assess total income/loss and pass assessment order on the last day of hearing or soon afterwards as may be.

Some Points:

1) The Assessment u/s 143 (3) must be based on the i) the return of income filed by the assessee, ii) the evidence i.e.(the documents/material/information) produced by the assessee and/or gathered by the A.O. on his independent enquiry.

2) Note on Section 292BB: **Notice deemed to be in certain circumstances:**

"292BB. *Where an assessee has appeared in any proceeding or co-operated in any inquiry relating to an assessment or reassessment, it shall be deemed that any notice under any provision of this Act, which is required to be served upon him, has been duly served upon him in time in accordance with the provisions of this Act and such assessee shall be precluded from taking any objection in any proceeding or inquiry under this Act that the notice was—*

(a) not served upon him; or

(b) not served upon him in time; or

(c) served upon him in an improper manner:

Provided that nothing contained in this section shall apply where the assessee has raised such objection before the completion of such assessment or reassessment.]"

This section is inserted by Finance Act, 2008 which has no retrospective effect.

Whether in order to complete reassessment, notice under section 148 has to be mandatorily served upon assessee in accordance with section 282 (1), read with Order V, Rule 12 CPC and Order III Rule 6 CPC - Held, yes - Whether mere fact that an assessee or some other person on his behalf not duly authorised has participated in reassessment proceedings after coming to know of it, will not constitute a waiver of requirement of effecting proper service of notice on assessee under section 148 - Held, yes *Section 292BB, read with section 148, of the Income-tax Act, 1961 - Notice deemed to be valid in certain circumstances - Whether where prior to completion of reassessment, assessee raised an objection that he had not been duly served in accordance with section 148, proviso to section 292BB was attracted and revenue could not take advantage of main portion of section 292BB - Held, yes*	CIT V/s Chetan Gupta [2015] 62 taxmann. com 249 (Delhi)
Pursuant to action taken under section 143(2), Assessing Officer completed assessment under section 153A - In appellate proceedings, assessee challenged validity of assessment order on ground that no notice was issued to him under section 143(2) - Commissioner (Appeals) noted that impugned notice did not bear PAN or address of assessee and its service was also highly doubtful - However, Commissioner (Appeals) finding that assessee had participated in assessment proceedings, concluded that assessment proceedings were valid in terms of section 292BB - Whether provisions of section 292BB do not cure virus	Rajib Saikia V/s ACIT [2015] 59 taxmann. com 171 (Guwahati - Trib.)

of non-issuance of notice under section 143(2) - Held, yes - Whether, therefore, in absence of any proof of service of notice, impugned assessment order was to be set aside - Held, yes	

3) <u>Admission by assessee/his legal representative :</u>

What is shown/claim in the return is admitted by the assessee.

- What is admitted by a party to be true must be presumed to be true unless the contrary is proved (Nathulal v/s Durga Prasad, AIR 1954 S.C. 355, 358.)

- An admission is the best evidence that an opposition party can rely upon, and though not conclusive, is decisive of the matter, unless successfully withdrawn or proved erroneous.

- Thus an admission is not conclusive proof of the matter admitted, though it may, in certain circumstances, operate as estoppels.
(K.S. Srinivasan v/s U.O.I. AIR 1958 S.C. 419, 427. Basant Singh v/s Janaki Singh, AIR 1967 S.C. 341, 343.)

- An admission would bind the person making it only in so far as facts are concerned but not in so far as it relates to a question of law.
(Banarasi Das v/s Kanshi Ram AIR 1963 S.C. 1165, 1169)

- It is open to the assessee who made the admission to show that it is incorrect and the assessee should be given a proper opportunity to prove that what is correct
  - *i) Pullangode Rubber Roduce Co. Ltd. v/s State of Kerala (1973) 91ITR18 (SC)*
  - *ii) Kishori Lal v/s Mt. Chaltibai AIR 1959 S.C. 504, 511.*
  - *iii) Federal Bank Ltd. v/s State of Kerala AIR 1955 Ker 62, 65 (1995) 127 Taxation 273, 279-80 (Ker).*

- Admission can be retracted if it could be shown that it was made under an erroneous impression of law.
(G. Murugeshan & Bros v/s C.I.T. (1973) 88 ITR 432, 438 (S.C.)

- Any admission made in ignorance of legal rights or under duress cannot bind the maker of the admission. *(Shri. Krishan v/sKurukshetra University AIR 1976 S.C. 376, 382.)*

- C.I.T. v/s Dayaram Vasudev (1992) 193 ITR 602, 605 (Bom):Tribunal justified in deleting addition, which was made on the basis of an admission made by the assessee's C.A., after accepting an affidavit of the C.A. showing that the admission was made under an erroneous impression.

- No appeal lies against agreed assessment.
  - *i) Sterling Machine Tools v/s C.I.T. 123 ITR 181 (AII)*
  - *ii) Ramanlal Kamdar v/s C.I.T. 108 ITR 73 (Mad).*
  - iii) *Rameshchandra & Co. v/s C.I.T. 168 ITR 375 (Bom) :* Where an assessee has made a statement of facts, he can have no grievance if the taxing authority taxes him in accordance with that statement. If he has any grievance on law then he can file.

Therefore, it is imperative, if the assessees case is that his statement has been wrongly recorded or that he made, it under mistake of belief of fact or law, that he should make an application for rectification to the authority which passed the order based upon that statement. Until rectification is made, an appeal is not competent.

- Basic principle is that appeal against agreed addition is not maintainable

  Exceptions:

  i) No estoppels against law. *I.T.O. v/s G.E. Hawn (1987) 21 ITD 553 (All)*

  ii) Appeal against addition agreed to under misapprehension is maintainable.

  a) Dina Nath Prem Kumar v/s I.T.O. (1982) 13 TTJ (Del) 442.

  b) R. T. Balasebramaniam v/s I.T.O (1994) 50 ITD 513 (Mad) (SMC).

3) **Revised Return: Section 139 (5):**

An assessment u/s 143(3) is based on a return or a revise return which replaces the original return.

* Belated return cannot be revised u/s 139 (5). *Kumar Jagdish Chandra Sinha v/s C.I.T. 220 67 (S.C).*

Revision of claim without revising return:

i) Gopaldas Purshottamdas v/s C.I.T. 9 ITR 130 (All)

ii) Dharmpur Sugar Mills Ltd. v/s C.I.T. 90 ITR 236 (All)

iii) C.I.T. v/s Prabhu Steel Industries P. Ltd. (1988) 171 17R 530 (Bom)

iv) Gujarat Gas Co. Ltd vs. C.I.T. 245 ITR 84 (Guj) See 9 below.

Claim directly before AO/CIT/ITAT during course of Asst/Appeal if information available on record –Yes possible in respect of legal issues.

i) National Thermal Power Corporation v/s C.I.T. 229 ITR 33 (S.C.)

ii) Jute Corporate of India Ltd. v/s C.I.T. 187 ITR 688 (S.C.).

iii) C.I.T. v/s Western Rolling Mills (P) Ltd. (1985) 156 ITR 54 (Bom)

Circular No. 14 (XL-35) of 1955 C. No. 13 (207) –IT/50, dated 11/4/1955.

4) Strict rules of evidence are not applicable

5) Evidence obtained in the course of illegal search can be relied upon by the A.O.

Dr. Pratap Singh v/s Director of Enforcement (1985) 155 ITR 166, 175 (S.C).

6) Return filed in pursuance of an invalid notice may still be taken as material for making the assessment such a return is a valid material on record and the A.O. can look into it as a piece of evidence to come to the conclusion as to the assessable income.

Commercial Art Press v/s. C.I.R. (1978) 115 ITR 876 (All)

7) Statements recorded u/s 131 cannot be used without giving opportunity of rebuttal to the assessee.

8) Finding, on material partly relevant and partly irrelevant is bad in law.

i) Dhirajlal Girdharilal v/s C.I.T. (1954) 26 ITR 736 (S.C.)

ii) Lalchand Bhagat Ambika Ram v/s C.I.T. (1959) 37 ITR 288 (S.C.)

iii) C.I.T. v/s Daulatram Rawatmal (1973) 87 ITR 349 (S.C.).
iv) C.I.T. v/s S.P. Jin (1973) 87 ITR (S.C.)
v) Dhirajlal Girdharilal v/s C.I.T. (1970) 78 ITR 657 (Bom).

9) Gujarat Gas Co. Ltd. V/s C.I.T. (2000) 161 CTR (Guj) 246/245 ITR 54 (Guj) :
A.O. was not bound by Circular No. 549 dated 31/10/1989, and was not justified in refusing refund to the assessee when its assessed income was less than returned income. A.O was directed to modify the assessment ignoring the Circular.

10) Cross-examination: If A.O. is relying on the testimony of a witness; the assessee is to be afforded an opportunity to cross examine him.
C.I.T. v/s Eastern Commercial Enterprises (1994) 210 ITR 103, 111 (Cal).

11) Assessment u/s 143 (3) on the basis of an invalid or honest return is ab-initio void.
Maya Debi Bansal v/s C.I.T. (1979) 117 ITR 125 (Cal). *Such an assessment cannot also be treated or sustained as one made u/s 144.*
C.I.T. v/s Smt. Minabati Agarwalla 79 ITR 278 (Cal).
C.I.T. v/s Bissessar Lal Gupta 105 ITR 684 (Cal.).
Cf. CED v/s Bhola Dut (1981) 130 ITR 468 (All).

2.3.5) ***Best Judgment Assessment u/s.144 can be done if there are four fatal defaults namely,***

1) Failure to make return required u/s 139 (1), (4) & (5)
2) Failure to comply with all terms of notice u/s 142 (1)
3) Failure to comply with direction u/s 142 (2A)
4) Failure to comply with all terms of notice u/s 143 (2)
5) Method of accounting as prescribed in sec.145 is not followed.
6) Accounting standards notified by central govt. u/s 145 are not complied.
7) Assessing officer not satisfied about correctness of the accounts.
8) Assessing officer not satisfied about completeness of the accounts.

After giving opportunity to the assessee the assessing officer can make best judgment assessment determining the sum payable by the assessee.

- On committing one of the defaults the A.O. is bound to assess u/s 144 to the best of his judgment on the basis of the material on record and the material gathered by him.

2.3.6) ***Best Judgment Assessment: How to be made?***

(i) It must be honest, rational, fair and reasonable – say estimate guided by justice, equity and good conscience (i.e principles of natural justice).
(ii) Should not be arbitrary.
(iii) Should not be made capriciously in utter disregard to the material on record.
(iv) It is not by way of penalty for non-compliance.
(v) The estimates must be based on adequate and relevant material.
(vi) The estimate must be based on legal and not on mere hearsay evidence, not on mere conjecture or suspicion or surmises.

2.3.7) ***Protective Assessment :v/s Regular/ Substantive Assessment*** *:*

- Where there is doubt or ambiguity about the real entity in whose hands a particular income is to be assessed the A.O. is entitled to have recourse to make protective assessment in the case of one and regular assessment in the case of the other.

- There is no statutory mandate to make protective assessment. It is the settled law that where there is doubt or ambiguity about the real entity in whose hands a particular income is not be assessed the A.O. is entitled to have recourse to making protective assessment.
  (Banyan & Berry v/s C.I.T. (1996) 222 ITR 831 (Guj).
  I.T.O. v/s Bachu Lal Kapoor (1966) 60 ITR (S.C.).

- There can be protective assessment under Chapter XIVB. *(Unique Hotel v/s Asst. C.I.T. (2000) 108 Taxman 254 (Chd) (Mag).*

- Where an assessment is intended to be protective, it must be expressly mention in the order. *CIT v/s Khalid Mehdi (1987) 165 ITR 685 (AP)*

- Protective assessment is permissible but protective recovery is not.
  i) Jagannath Bawri v/s C.I.T. (1998) 234 ITR 464, 471 (Gauh)
  ii) Sunil Kumar v/s C.I.T. (1983) 139 ITR 880 (Bom).
  iii) C.I.T. v/s Cochin Co. P. Ltd. (1976) 104 ITR 655 (Ker).
  iv) P. K. Trading Co. v/s I.T.O. (1970) 78 ITR 427 (Cal).

- There cannot be protective order of penalty, as held in the following judicial pronouncement
  i) C.I.T. v/s Behari Lal Pyare Lal (1983) 141 ITR 32 (Punj)
  ii) C.I.T. v/s Super Steel Sales Co. (1989) 178 ITR 451, 452 (Cal).
  iii) Metal Stores v/s C.I.T. (1990) 186 ITR 612, 614, 615 (Gauh).

u/s 167B: Association of persons or Body of individuals, tax shall be charged on the total income of the association or the body at the maximum marginal rate, provided where the total income of any member of such association or body is chargeable to a tax at a rate which is higher than the maximum marginal rate, tax shall be charged on the total income of the association or body at such higher rate.

B) RECTIFICATION AND REVISION UNDER INCOME TAX ACT

I. Rectification Sec.154

Section 154 provides for rectification of mistakes.

a) Any order passed by an income tax authority can be rectified under this section.

b) Intimation or demand intimation u/s143(1) can also be rectified under this section.

c) Rectification is possible only if there is a **"MISTAKE APPARENT FROM THE RECORD".** In other word, the mistake must be a prima facie/apparent mistake from record.

d) Mistake can be classified under two categories- (i) Apparent from record, and (ii) arguable/ disputable/ debatable mistake.

e) The scope of section 154 is limited to the rectification of mistake apparent from record, not extended to arguable/ disputable/ debatable mistake.

However, the parliament has not prescribed any guidance in income tax act related to classification of mistake. But based on court decisions, followings are some of the examples of apparent mistake-

- Arithmetical mistake
- Mistakes in application of any limit/amount/percentage prescribed in the law
- A view taken against the decision of jurisdictional high court or Supreme Court.

i. ***Honda Siel Power Products Limited Vs.Dy CIT and Anr***

The Assessing Officer could not have resorted to Section 154 proceedings to disallow expenditure under Section 14A of the Act. This was not possible in 154 proceedings as it was not an error or mistake apparent from the record.

ii. ***T. S. Balaram, Income-tax Officer v. Volkart Brothers****,*

wherein the Supreme Court held that a mistake apparent on the record must be an obvious and patent mistake and not something which could be established by a long drawn process of reasoning on points on which there may be conceivably two opinions.

iii. ***Arvind N. Mafatlal v. T. A. Balakrishnan, Deputy Controller of Estate Duty and Burmah-Shell Refineries Ltd. v. G. B. Chand***

A decision on a debatable point of law is not a mistake apparent from the record

iv. ***Tata Iron & Steel Co. Ltd. v. N. C. Upadhyaya & Anr. (1974) 96 ITR 1 (Bom.)***

Issue involve is disputable, therefore provision of sec.154 not applied.

v. ***Dy CIT v. Waman Hari Pethe Sons (2011)138 TTJ (Mumbai) 451***

The AO has in detail tried to justify the addition to be made u/s. 68 and accordingly, has passed the detailed order giving the elaborate reasons. Now the law is well-settled in respect of the limitation of the AO to rectify any order u/s. 15

f) Rectification can be done only by an income-tax authority covered by section116. Hence ITAT, High court or Supreme Court etc cannot make a rectification u/s 154 as they are not income tax authorities within the meaning of section 116.

g) Rectification is done by the same authority i.e. the authority who passed the order sought to be rectified.

h) Where the relevant order(i.e. the order sought to be rectified) is subject matter of any appeal/ revision/, rectification is possible in relation to any such matter as is not considered and decided in appeal/revision (Doctrine of partial merger)

i) Rectification can be done-

i. On own motive by the concerned authority, or
ii. On an application by the assessee, or
iii. On an application by the assessing officer(if the authority taking action u/s 154 is CIT[A]

j) If the result of the rectification is likely to be against assessee i.e. the result shall be increase in tax liability or reduction in refund, an opportunity of being heard shall be given the assessee before passing an order under this section.

k) Rectification can be done within 4 years from end of the financial year in which the order sought to be rectified is passed.

l) Where the assessee files application for rectification, the order of rectification shall be passed within 6 month from end of the month in which such application is received by the department. However, the law does not provide as to what will happen if the department does not pass order within 6 month.

CIRCULAR No.73 dated 07.01.1972:

Where a valid application u/s 154 has been filed by the assessee within the statutory time limit but it was not disposed by the concerned authority within the time limit of 4 years. It can still be disposed by the authority.

CIRCULAR No.669 dated 25/10/1993

Where the amount of tax, duty etc. as specified in section 43B had been paid within the prescribed time but evidence of payment has not been furnished with the return, the assessee can submit an application u/s 154.

Hind Wire Industries Ltd. V/s CIT (1995) 212 ITR 639 (SC)

Order sought to be rectified does not necessarily mean the original order. It could be any order including the amended or rectified order itself. Thus if the order of reassessment is sought to be rectified, the time limit of 4 years shall be computed from end of the financial year in which the order of reassessment was passed.

II. Revision u/s 263/264

Section 263 Revision of Order Prejudicial To the Interest Of Revenue

- The provision deals with the revisionary powers of the Commissioner of Income Tax (CIT) which are supervisory in nature. The CIT can call for and examine the **record of any proceedings** under the act and if he considers that any order passed by **the assessing officer** is **erroneous in so far as it is prejudicial to the interest of revenue,** he can take action under this section.
- The CIT can exercise revision only if the following circumstances exist:
  i) The order of the Assessing Officer is erroneous. **and**
  ii) The order of the Assessing Officer is prejudicial to the interest of the Revenue.
- 'Record' shall include all records relating to any proceedings of the Act available at the time of examination by the CIT.
- The words "Any Proceedings" would mean proceedings of any kind such as assessment, penalty, interest, rectification etc. **CIT V/s Christian Mic Industries Ltd. (1979) 120 ITR 627 (Cal)**

- However, the CIT has to given an opportunity of being heard before any order is passed under this section.
- **Power of CIT**

  The CIT can pass such order as the circumstances may justify including followings types of orders—

  a) Order enhancing assessment,
  b) Order modifying assessment
  c) Order cancelling assessment
  d) Order directing fresh assessment

  This implies that the CIT is empowered to modify the assessment order passed by the Assessing Officer, if the order is found to be erroneous and prejudicial to the interest of the Revenue. If the order of the Income Tax Officer is erroneous but not prejudicial to the interest of the Revenue or if the order of the ITO is prejudicial to the interest of the Revenue and not erroneous, recourse to Section 263(1) cannot be taken by the CIT. **[CIT Vs. Smt. Minalben S. Parikh [1995] 215 ITR 81 (Guj.)]** It can never be implied that every order that is erroneous is also prejudicial to the interest of the Revenue.

- If the order passed by the Assessing Officer has been subject matter of appeal, the power of the CIT shall extend to such matters as had not been considered and decided in such appeal. However, he will not have revisionary powers on matters which have been decided in the appeal. In such a situation, the appellate order stands merged with the order of the Assessing Officer.
- Provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer. **[Malabar Industrial Co. Ltd. Vs. CIT [2000] 243 ITR 83 (SC).**

Time Limit

- The act prescribed two time-limits, viz (i) two years time limit, and (ii) indefinite time-limit

  Two year Time limit: Normally, order u/s 263 can be passed within a period of 2 years from end of financial year in which order sought to be revised was passed by the Assessing Officer.

  In computing the period of 2 years, following periods shall be excluded----

  a) Period taken in giving an opportunity of re-hearing u/s 129

  b) Period during which proceeding u/s 263 are stayed by an order/ injunction of any court.

Indefinite time limit:

An order passed in consequence of, or to give effect to, any finding or direction contained in an order of the ITAT, high Court or Supreme Court, can be revised at any time.

Doctrine of Partial Merger

Where an order passed by the assessing officer has been subject matter of any appeal, the CIT can revise that part of the order which has not been considered and decided in appeal.

The orders which can be revised u/s 263 :

Apart from the order passed by the Assessing Officer [including order u/s 143(1)], the following orders can also be revised by the CIT:

i) An order of assessment made by Assistant Commissioner of Income Tax (ACIT) or
ii) Deputy Commissioner of Income Tax Officer (DCIT) or Income Tax Officer on the basis of direction from Joint Commissioner of Income Tax (JCIT) u/s 144A.
iii) An order made by the JCIT conferred on him under the order issued by the Board or CCIT or DG u/s 120.

Meaning of the word 'erroneous' and 'prejudicial to the interest of the revenue'

1. CIT Vs. Shri Ashish Rajpal, High Court of Delhi (16.11.2007)

"An order is erroneous when it is contrary to the law or proceeds on an incorrect assumption of facts or in breach of principles of natural justice or is passed without application of mind, that is stereo-typed, in as much as, the Assessing Officer, accepts what is stated in the return of the assessee without making any enquiry called for in the circumstances of the case, that is proceeds with undue haste. The expression 'prejudicial to the interest of the Revenue' while not to be confused with the loss of tax will certainly include an erroneous order which results in a person not paying tax which is lawfully payable to the Revenue."

Both conditions need to be satisfied in order to exercise powers u/s 263.

1. Malabar Industrial Co. Ltd. [2000]243 ITR 83

Held that pre-requisite for exercise of suo motu revisional jurisdiction by the Commissioner under Section 263 of the Income Tax Act is that, the order of the Income Tax Officer is erroneous in so far as it is pre-judicial to the interest of the Revenue and if the twin conditions, namely, (1) the order of the Assessing Officer sought to be revised is erroneous, and (2) it is prejudicial to the interests of the Revenue, the exercise of suo motu revisional power under Section 263(1) of the Act would be justified.

Revisional powers cannot be exercised on the ground that the AO should have gone deeper into the matter or should have made a more elaborate discussion.

1. CIT vs. Leisure W ear Exports Ltd. [2010] 46 DTR (Del) 97

"Where the assessment order has been passed by the AO after taking into account assessee's submissions and documents furnished by him, and no material is brought on record by the CIT which shows that there was any discrepancy or falsity in the evidence furnished by the assessee, the order of the AO cannot be set aside for making deep enquiry only on the presumption that something new may come out."

2. CIT v. Development Credit Bank Ltd., (323 ITR 206) (Bom.);
3. CIT v. Hindustan Marketing and Advertising Co. Ltd.,(341 ITR 180) (Del.);
4. CIT v. Ganpati Ram Bishnoi, (296 ITR 292) (Raj.);
5. CIT v. Unique Autofelts (P) Ltd., (30 DTR 231) (P&H);
6. Hari Iron Trading Co. v. CIT, (263 ITR 437) (P&H); and
7. CIT v. Goyal Private Family Specific Trust, (171 ITR 698) (All.).

Powers u/s 263 cannot be invoked when assessment order is subject to appeal effect because appellate order stands merged with the Assessment Order (provided the issues raised in the order u/s 263 deal with the issues subject to appeal effect).

1. Fortaleza Developers Vs. Assessee (ITA NO. 2648/MUM/2012)

Once the deduction u/s 80 IB (10) was a subject matter of appeals , the entire issue of 80 IB(10) was open in appeal and according to the followings decisions, so far as it relates the deductions u/s 80IB (10), the assessment order has merged with the appellate order passed by the CIT(A)

2. **Marico Industries Ltd. Vs Assisstant Commissioner of Income Tax (312 ITR 259)**
   It was held that since deduction u/s 80IB(10) was the subject matter of appeal before CIT(A), the order of Assessing officer got merged with the order of CIT(A).

3. **Ranka Jewellers Vs Additional Commissioner of Income Tax (328 ITR 148)**
   Once the issue was considered and decided by the CIT(A) , the remedy of the revenue cannot lie in the invocation of the jurisdiction under Section 263.

4. **Commissioner of Income Tax Vs. Farida Prime Tannery (259 ITR 342)**
   Held, it was clear from the express language of Section 263 of the Income Tax Act, 1961 that issues on which the Appellate Authority had already deliberated, the matter could not be reopened by way of revision- Answered the question against the Revenue and in favour of the Assessee.
5. *M/s Keshvi Developers Vs. ITO (ITA NO. 3832/MUM/2011)*
6. *Commissioner of Income Tax Vs. Mehsana District Co-operative Milk Producers Union Ltd. (263 ITR 645)*
7. *Commissioner of Income Tax Vs. Nirma Chemicals Works P. Ltd. (309 ITR 67)*
8. *Sonal Garments Vs. Joint Commissioner of Income Tax (95 ITD 363)*
9. *ITO Vs. Ch. Atchaiah (218 ITR 239)*

Where two views are possible and the AO adopts one view with which the CIT does not agree, the order cannot deemed to be erroneous or prejudicial to the interest of the Revenue even if there is a loss of the revenue.

1. **CIT Vs. Honda Siel Power Products Ltd. [(2010) 6 TAXMANN 15]**
   In cases where the Assessing Officer adopts one of the courses permissible in law or where two views are possible and the Income-tax Officer has taken one view, the Commissioner of Income-tax cannot exercise his powers under Section 263 to differ with the view of the Assessing Officer even if there has been a loss of revenue. Of course, if the Assessing Officer takes a view which is patently unsustainable in law, the Commissioner of Income-tax can exercise his powers under Section 263 where a loss of revenue results as a consequence of the view adopted by the Assessing Officer.
2. CIT Vs Max India Ltd [2007] 295 ITR 282 (SC) : 213 CTR 266 (SC)
3. Jamnadas T. Mehta Vs. ITO [2002] 257 ITR (AT) 90 (Pune) (TM)
4. Patel Cotton Co.Ltd. Vs ACIT [1998] 64 ITD 273 (Mum)
5. Sobha Developers Ltd. Vs. Commissioner of Income Tax (ITA No. 339/Bang/2011)
6. Malabar Indusrtial Co. Ltd. Vs Commissioner of Income Tax (2000)

Powers u/s 263 cannot be invoked merely because the CIT had a different opinion on the matter.

1. **Ramakant Singh Vs CIT [2011] 8 ITR (Trib) 403 (Pat)**

It was held, that the questionnaire issued by the Assessing Officer covered all the points raised by the Commissioner in his show-cause notice and in the order passed under section 263 and on all these points, reply along with necessary details and evidence was furnished by the assessee before the Assessing Officer in the course of assessment proceedings and hence, it had to be accepted that the Assessing Officer had applied his mind on all these issues and even if such enquiry was inadequate in the opinion of the Commissioner, this did not give power to the Commissioner to pass order under section 263 merely because he had a different opinion on the matter. The order of the Commissioner under section 263 was not sustainable.

There is a difference between 'lack of enquiry' and 'inadequate inquiry'.

1. **ITO Vs. D G Housing Project Ltd. (343 ITR 329),**
2. **CIT Vs Hero Auto Ltd. (343 ITR 342)**

If there was inquiry, even inadequate, that would not by itself give occasion to the Comm0issioner to pass order under section 263 of the Act merely because he has a difference of opinion in the matter. It is only the cases of 'lack of inquiry' that such a course of action would be open.

The order of the AO cannot be branded as erroneous merely because, according to the Commissioner, the order should have been written more elaborately.

1. **CIT v. Gabriel India Ltd.,203 ITR 108 (1993)**

The Court observed that the Commissioner cannot initiate proceedings with a view to starting fishing and roving enquiries in the matters or orders which are already concluded. The power u/s.263 can be exercised only when the order is erroneous and due to this, prejudice has been caused to the interests of the Revenue. The order cannot be branded as erroneous by the Commissioner because according to him the order should have been written more elaborately.

Remedy Against order

If the order passed by CIT u/s 263 is not acceptable, the assessee can avail following remedies—

a) If the order suffers from prima facie mistake, an application u/s 154 for rectification can be filed to the CIT, or
b) If the order suffers from a **disputable mistake,** an appeal u/s 253 can be filed to the ITAT.

Section 264 Revision of Orders Prejudicial To The Interest Of Assessee.

- An assessee can file appeal against an order passed by the Assessing Officer to the CIT(A) or He can prefer an appeal to the CIT for revising the order passed by the AO.

Revision of Which Order?

The CIT can revise any order (other than to which section 263 applies) passed by a subordinate authority. The revision under this section can be done---

a) Either on own motion of CIT, or
b) On an application by the assessee

Time Limit for Submission of Application:

The Assessee can submit application for revision u/s 264 within 1 year from the date on which the order was communicated to him or the date, on which he otherwise came to know of it, whichever is earlier. However CIT can admit belated application.

Time Limit For Submission of Application:

a) **Where the CIT takes action on his own motion—**

1 year from the date of the order sought to be revised.

b) **Where the assessee submits application for revision—**

1 year from the end of the financial year in which such application is submitted by the assessee. While computing this period of limitation following periods shall be excluded-

i) Period taken in giving an opportunity of re-hearing u/s 129

ii) Period during which proceeding u/s 263 are stayed by an order/ injunction of any court.

However, an order passed u/s 264 can be passed at any time in consequence of, or to give effect to, any finding or direction contained in an order of the ITAT, high Court or Supreme Court.

Powers of CIT:

The CIT can pass such order as he thinks fit, subject to the restriction that the order passed by him cannot be prejudicial to the interest of assessee-

- An order passed by CIT declining to interfere,
- An order in which neither favour nor unfavour is done by the CIT,
- An order in which both favour and unfavour are done by the CIT but the net result is favourable to the assessee or NIL.

Payment of Fee:

A fee of Rs. 500/- is to be paid.

No Revision in Some Cases:

CIT can't revise following orders u/s 264-

a) An order which is appealable to CIT(A)/ITAT cannot be revised so long the time within which appeal may be made, expires. However, the CIT can make revision if the assessee waives his right of appeal.

b) If the order has been made subject matter of appeal before CIT(A)/ ITAT, revisional powers of CIT come to an end. Thus CIT cannot make revision during the pendency or even after the disposal of appeal.

Remedy Against Orders U/s 264:

Since the order u/s 264 cannot be prejudicial to the interest of assessee, normally there is no need of filling further appeal etc. however, if the order is not acceptable, the assessee can avail following remedies—

a) If the order suffers from a **prima facie mistake**, an application u/s 154 for rectification can be filed to the CIT or

b) If the order suffers from a disputable mistake, the assessee can file a writ petition under article 226 of the constitution of India as decided by the supreme court in case of **Dwarka Nath V/s ITO 1965 57 ITR 349**.

Some Relevant Point

- Those cases which are not appealable before the CIT (A) can be referred by the assessee to the CIT for revision or modification.
- Even those orders which are not appealable before the Dy.CIT(A) or CIT(A), may be referred by the assessee to the CIT for seeking revision or modification. **[Dwarka Nath Vs ITO 57 ITR 349 (SC)].**
- A remedy u/s 264 is contemplated by the Legislature only to meet a situation faced by an aggrieved assessee who is unable to approach the appellate authorities for relief and has no other alternative remedy under the Act.
- The revisional powers conferred by Section 264 on the CIT are very wide. It is open to the CIT to entertain even a new ground, not urged before the lower authorities, while exercising revisional powers. -- **C. Parikh & Co Vs CIT 138 ITR p.689 (All).**
- Hindustan Aeronautics Ltd. Vs. CIT (2000) 243 ITR 808 (SC)-The CIT does not have power to revise an order u/s 264 if the same order has been made subject-matter of appeal to the ITAT, even though the relief claimed in appeal is different from the relife claimed in revision and irrespective of fact whether the appeal is filed by the assessee or by the revenue.
- CIT can interfere both on question of fact and law as his power is co-extensive with that of the original and the first appellate authority.
- Second time revision by CIT is not possible.
- The assessee should be given an opportunity of being heard by fixing a date of hearing even where a written submission is there.
- CIT's power u/s 264 is discretionary. CIT may even refuse to interfere in a case where, for reasons to be stated, the assessee has disentitled himself to get the relief at the revisional stage by his own conduct.

An order u/s 264 cannot be prejudicial to the interest of the assessee.

ACIT Vs M.V.Kenlucky, 60 ITD 492 (Pune - Trib)

In this case, on a petition U/s 264 by the assessee the CIT set aside the assessment, with a direction to make a fresh assessment. The AO completed the fresh assessment without any change in total income and tax originally assessed. The AO also initiated penalty proceedings U/s 271(1)(c), though no such penalty proceedings were initiated in the original order of the AO. The Hon. Tribunal held that order U/s 264 of the CIT, had indirectly resulted in the levy of penalty U/s 271(1)(c) and as such was prejudicial to the interest of the assessee. The cancellation of order U/s 271(1)(c) was accordingly held to be justified.

A new claim for deduction made by the assessee in revision petition is to be examined on merits

Rashtriya Vikas Ltd Vs CIT 99 CTR 68.

The CIT has the power U/s 264, to issue directions to the AO.

Mohammadi Begum Vs CIT 158 ITR 622 (AP)

The assessee can file a revision petition against an addition erroneously accepted by him.

The CIT cannot reject a petition for revision on the ground that the assessee itself had returned income which it claims in the revision petition as not its income. In such a situation the CIT is bound to apply his mind to the question whether the assessee is liable to be taxed in respect of that income. **[Pt. Sheonath Prasad Sharma Vs CIT 66 ITR p.647 (All)].**

Even an order passed in violation of the principles of natural justice can be corrected U/s 264.

Mohammadi Begum Vs CIT 158 ITR p.622 (AP)

Even an order wherein the principles of natural justice have been ignored, can be corrected in exercise of revisional powers U/s 264.

C) APPEAL :

Coverage:-

1. **Drafting of Appeals**
2. **Filing of Appeal**
3. **Precautions to be taken.**
4. **Various Appellate authorities.**
5. **Procedure**
6. **Preparation & Appearance.**

3. APPEALS :

The term "Appeal" is not defined in the act. It means a complaint to higher authority against the order passed by lower authority in order to get justice and relief.

-Redressal of grievances by way of appeal is not an inherent or constitutional right but a statutory right and hence is subject to the provisions of the statute and the restrictions prescribed therein.

C.I.T. v/s S.C. Shah (1982) 137 ITR 287, 294 (Bom)

CIT V/s Ashoka Engineering Co. (1992) 194 ITR 645 (SC)

3.1 Appeal to C.I.T. (A) :

The First appeal is to the C.I.T. (A).

Exception: S. 253 (1):

a) Orders u/s 154, 271, 271A & 272A passed by C.I.T. (A).
b) A.O. u/s 158BC in case of search action after 30.6.95 but before 1.1.97.
c) Order of C.I.T. u/s.12 AA , 263,271, 272A, 154 order passed by C.C.I.T. Director General or Director u/s 272A.
d) An Order passed by an assessing officer u/s. 115(1) VZC.

Second appeal lies to the Tribunal.

3.1.1) Appealable Orders:

- Section 246A (1) enlists orders against which appeal lies before C.I.T. (A).
- This section provides the specific orders, which are appealable.
- However, in Sec. 246A (1) (a) there is a general clause covering "an order against the assessee where the assessee denies his liability to be assessed under this Act."

- The scope of this clause has been considered by the courts.

a) C.I.T. v/s Kanpur Coal syndicate 53 ITR 225 (S.C.)
Denial of liability will embrace denial of liability to tax under particular circumstances.

b) Central Provinces Manganese One Co. Ltd. V/s C.I.T. 160 ITR 961 (S.C.).
1. C.I.T. v/s Mustakhuse in Gulamhuse Ghia 143 ITR 95 (Bom).
2. C.I.T. v/s Gannon Dunkerley & Co. Ltd. 119 ITR 595 (Bom)
Owner levying interest is appealable when assessee denies total) liability to pay interest.

c) C.I.T. v/s Prakash Cotton Mills P. Ltd. 188 ITR 713 (Bom).
Appeal does not lie against quantum of penal interest.

d) C.I.T. v/s B. V. Subnani 177 ITR 56 (Bom).
Where liability to be assessed to tax including interest u/s 139 (1) was to some extent disputed an appeal against levy of interest would be competent.

e) C.I.T. v/s Devichand Panmal 160 ITR 545 (Raji).
If an appeal against assessment, it is open to the assessee to attack levy of penal interest u/s 215 also and such appeal is maintainable.

3.1.2. <u>Section 248:</u>

- Person having deducted and paid tax can file appeal under this section (if he denies his liability to make such deduction) or declaration that he is not liable to make such deduction.

S.M.M v/s C.I.T. 33 ITR 529 (Bom).

- An employer who has not deducted or paid tax cannot file appeal u/s 248.
- Therefore a person, denying his liability to deduct and pay tax may file appeal u/s 246A(1)(a).

3.1.3 Who can file appeal : Any assessee aggrieved?

- Revenue has no right of appeal. before 1st Appellate authority. Remedy for revenue is S. 154, S. 148, S. 263.
- S.2 (7) 'Assessee' means a person by whom any tax or any other sum of money is payable under the Act and includes a person who is deemed to be an assessee or deemed to be an assessee in default.

  - Assessee
  - Legal heir of assessee – on death of assessee
  - Successor –after dissolution etc.
  - Assessee in default – a person who is made to pay tax etc.

- A member of HUF in case of HUF.
- Amalgamated company on amalgamation.
- Representative assessee- assessee and the beneficiary-
- S. 166 tax can be recovered from beneficiary.
- Firm and Partners.

- Benoy Kurian v/s Agr. I.T.O. (1998) 234 ITR 617, 623-24 (Ker). Kerala Agr. I.T. Act, I.T.Act, 1991. Recovery of tax dues of B.D. by sale of property purchased by petitioner from B.D. Petitioner aggrieved entitled to file appeal.

- Om Prakash v/s State of Haryana (1996) 100 STC 41, 47-48 (Punj). Haryana General Sales Tax Act, 1973. Recovery proceedings initiated against surety. Surety held entitled to prefer appeal.

- Agreed Assessment: - Basic principle is that appeal against agreed addition is not maintainable.
    i) Sterling machine Tools v/s C.I.T. 123 ITR 181 (All).
    ii) Ramanlal Kamdar v/s C.I.T. 108 ITR 73 (Mad).
    iii) Remeshchandra & Co. v/s C.I.T. 168 ITR 375 (Bom).

- **Exceptions:**
    i) No estoppel against law I.T.O. v/s G.E.Hawn (1987) 21 ITD 553 (All).
    ii) Appeal against addition agreed to under misapprehension is maintainable.
        a) Dina Nath Prem Kumar v/s I.T.O. (1982) 13 TTJ (Del) 442.
        b) R.T. Balaschramaniam v/s I.TO. (1994) 50 ITD 513 (Mad) (SMC).

3.1.4) Time Limit for filing appeal : Section 249 (2) – 30 days time:

a) S.248, from date of payment.
b) A.O. & penalty : from date of service of notice of demand.
c) Other case : from date of intimation of order.

S.249 (3) - Condonation of delay for sufficient cause.

3.1.5) Payment of agreed tax 249 (4):

a) Tax due as per return.
b) Where no return filed : advance tax as per assessed income must be paid before filing appeal.
Otherwise appeal will not be admitted.

Provision : Power to exempt payment for good and sufficient reasons in case of (b) only.

- Prior to 1/4/1989 power was in both the cases.
- Consider case where appeal filed without payment of tax in clause. (a)
- Subsequent payment of tax.
- Condonation of delay

3.1.6) <u>Fees : Section 249(1) :</u>

i)	Total income upto Rs. 1,00,000	-	Rs. 250/-
ii)	Total income upto Rs. 2,00,000	-	Rs. 500/-
iii)	Total income above Rs. 2,00,000	-	Rs. 1,000/-
iv)	Where subject matter of appeal is not covered under clauses (i), (ii) & (iii) – Rs. 250/-		

Fair interpretation: in case of an appeal against the assessment order (i), (ii) & (iii) will apply. In all other cases (iv) Rs. 250/- will apply. Which include in case loss return filed.

<u>Memorandum explaining proposed amendments:</u>

Appeals are also filed on issues such as TDS defaults, non-filing of returns, etc., which may not have any nexus with the assessed income. It is therefore, proposed to provide a fee of Rs. 250/- for appeals before the Commissioner (Appeals) and Rs. 500/- for appeals before the Income Tax Appellate Tribunal for the residuary group of appeals which cannot be linked with assessed income or assessed net wealth.

3.1.7) <u>Form of Appeal – Grounds of Appeal – S. 249 (1):</u>

- In Form No. 35-Rule 45(1).
- Statement of Facts & Grounds of Appeal.
- Verify facts on record not considered by A.O.
- Considered facts not on record – for additional evidence.
- Considered – Claims made and not allowed/ not considered by A.O.
- Find out claims not made and not considered.
- Make such claims in appeal.
- Find out grounds for claims considered/not considered.
- Raise such grounds not raised and not considered.
- All relevant grounds must be taken.
- Grounds must be precise and clear and complete.
- Challan of fees paid for filing appeal before CIT (A).
- Grounds must not be in the form of arguments (long) but must communicate the issue and points to be considered by the Authority – This helps at the time of hearing.
- The grounds on similar issues, additions and points may be clubbed.

e.g. - a particular addition.
- rejection of books of accounts.
- validity of reopening
- Technical grounds.

3.1.8) <u>Powers of C.I.T. (A)- Powers enjoined with duty to be fair, just and to do justice</u> :

3.1.8.1) <u>Power to admit additional evidence(Rule 46A):</u>

S. 250 (4) : Commissioner may make such further enquiry as he thinks fit or may direct the A.O. to make further enquiry and report the result of the same to him by way of Remand report .

This includes suo moto admission of additional evidence.

Rule 46A : Production of additional evidence before CIT(A)

1) Production of additional evidence (by right). Assessee entitled to produce additional evidence. Only
   a) Where A.O. refused to admit evidence.
   b) A.O. called upon to produce evidence - Assessee could not produce evidence before assessing officer for sufficient cause.
   c) Assessee could not produce evidence for sufficient opportunity.
   d) A.O. passed order without giving sufficient opportunity.

2) Order of admission must be in writing and for reasons.
3) Assessing Officer must be given reasonable opportunity.
4) This is without prejudice to the suo moto power of the Commissioner.

- *Smt. Prabhavati S. Shah v/s C.I.T. 231 ITR 1(Bom).*
- Powers u/s 250 being quasi judicial, it is incumbent in him to exercise the same, if the facts and circumstances justify. These powers are not restricted by Rule 46A.
- Thus an additional evidence, which
- Was not in existence.
- Was not available
- Not produced for sufficient reasons.
- Needs to be admitted in first appeal.
- If it is relevant necessary for just decision in the case.

3.1.8.2)Additional Grounds of Appeal : S. 250 (5) (Fresh/Additional Ground):

Allow additional ground of appeal at the time of hearing if he is satisfied that the omission was not willful or not unreasonable.

i) When the relevant material is on record the additional ground can be entertained by the Tribunal.*National Thermal Power Co. Ltd. V/s C.I.T. 229 ITR 383 (SC).*

ii) *C.I.T. v/s Western Rolling Mill Pvt. Ltd. 156 ITR 54 (Bom).*Additional claim by way of additional ground before AAC is allowable when material is on record.

iii) Powers of C.I.T. (A) are to terminus with the powers of the A.O. *Investors Industrial Corporation Ltd. 194 ITR 548 (Bom).*

3.1.8.3) Sec. 251(1)(a) : In case of appeal against A.O. Power of CIT(A) on different ground such as:

a) Reduce
b) Enhance
c) Annual
d) Confirm

Sec.: 251 (1)(b): in case of order of penalty.

Power to confirm, Or cancel, Or vary either to enhance or reduce penalty

No power to set aside or remand

Regular commance has got a right to waive interest so levied u/s 234A, 234B & 234C

Sec. 251 (1) (C) in any other case as it thinks fit.

3.1.8.3) **Power of Enhancement :** Prior notice necessary.

i) C.I.T. v/s Rai Bahaddur Hardutraj Motilal Chamaria 77 ITR 443 (S.C.)
Power restricted to sources of income which have been subject matter of consideration by I.T.O.

ii) C.I.T. v/s Shapoorji Pallonji Mistry 44 ITR 891 (S.C.) Restricted to income mentioned in return and considered by I.T.O. in assessment order.

iii) Lokenath Tolaram v/s C.I.T. 161 ITR 82 (Bom).

iv) In CIT v/s Assam Travels Shipping Services 199 ITR 1 (S.C)
A.O. levied less than minimum penalty. A.A.C. cancelled penalty. Tribunal held that it had no alternative but to uphold the order. High Court upheld the order of the Tribunal. S.C. held that the A.A.C. should have enhanced.

3.1.8.5)Power to levy penalty:

S.271(1), Various Penalty

S. 271A- Provides power to levy penalty Rs. 25,000/- .

S. 271AA – Penalty for failure to keep & maintain information & documents in respect of International Transaction which will be a sum equivalent to 2% value of each such international transaction.

3.1.8. 6) Power to stay recovery: Section 226.

During pendency of appeal the C.I.T. (A) has inherent power to stay recovery of demand.

i) Paulsons Litho Works v/s I.T.O. 208 ITR 676 (Mad).
ii) Prem Prakash Tripathi v/s C.I.T. 208 ITR 461 (All).
iii) Tin Manufacturing Co. of India v/s C.I.T. 212 ITR 451 (All).
iv) Kesav Cashew Co. v/s C.I.T. 210 ITR 1014 (Ker).
v) Pradeep Ratanshi v/s A.C.I.T. 221 ITR 502 (Ker).

C.I.T. has no power, only C.I.T. (A) has power to stay recovery proceedings so initiated

3.1.8.7) **Time for disposal: Section 250 (6A):**

Where it is possible, to decide within one year from the end of the financial year in which appeal is filed under sub section (1) of section 246A.

3.1.8.8)Important Point

- The CIT(Appeal) shall not enhance an assessment/penalty unless a reasonable opportunity of hearing is given to assessee.
- In addition to specified powers u/s 251, the CIT(A) is also having general power relating to enquiry and production of evidence etc. u/s 131.

- The Hon'ble Supreme court has decided CIT Vs. Kanpur Coal Syndicate (1964) 53 ITR 225 and Jute Corporation of India V/s CIT (1991) 187 ITR 688 Wherein it was held that the powers of the CIT(A) are conterminous with the powers of the assessing officer. The CIT(A) can do what the assessing officer can do and also what the assessing officer has failed to do. Thus, the CIT(A) has very wide powers. However, it has been held that the CIT(A) cannot search for and assessee a source of income which neither the assessee has included in the return not the AO has dealt with in the assessment order.
- Normally, the CIT(A) annulles an assessment or penalty order in following situations and that too, only if the mistake committed by the assessing officer is incurable:
  (i) The Assessing officer has completed assessment/penalty without issue/service of notice,
  (ii) The assessing officer has acted without authority of law or beyond such authority/jurisdiction, or
  (iii) The assessing officer has not complied with time-limitation requirement.

3.2) Proceedings before Tribunal :

3.2.1) Appealable orders : Sec 253(1):

a) Order of C.I.T. (A) u/s 250, 154,271, 271A,272A

b) A.O. u/s 158BC in respect of search between 1/7/1995 and 31/12/1996

c) Order passed by Commissioner u/s 263,271, 154, 272A 154 , by Chief Commissioner, Director or General Director u/s 272A. Commissioner's order u/s 12AA.

3.2.2) Who can file appeal : Assessee against all order u/s 250, 263

S.253 (2): A.O. against orders u/s 250 & 154, 271, 271Aor sec . 272A of C.I.T. (A).

3.2.3) Time limit : 253 (3), (4) & (5) :

Within 60 days of communication of the order appealed against.

30 days in case of 253 (1) (b) – order u/s 158BC.

3.2.4) Cross Objection : S. 253 (4) :

A.O. and assessee is entitled to file cross objection within 30 days of receipt of notice of appeal.

Meaning of cross objection. (What to contain- grounds not decided or decided against the assessee)

3.2.5) Power to condone delay : S. 253 (5) :

Empowers the Tribunal to condone delay for sufficient cause.

3.2.6.) Form of appeal:

_ Appeal From No.36. Rule 47(1)

- Cross Objection Form 36A Rule 47(2).
- Ground of Appeal

Statements of facts, CIT (A) order, Grounds of Appeal & Statement of Facts filed before CIT (A), Assessment order and challan.

3.2.7) Fees :

i) S. 253 (6): On appeal by assesses:

a) Total income upto Rs. 1,00,000/- - Rs. 500/-

b) Total income upto Rs. 2,00,000/- - Rs. 1,500/-

c) Total income above Rs. 2,00,000/ -1 percent of assessed income with the maximum limit of Rs. 10,000/-

d) Where subject matter of appeal is not covered under (a) (b) or (c) -Rs. 500/-

ii) 253 (6) Proviso: No fees:
In appeal by revenue or on cross objections by revenue.

iii) 253 (7) : Application for stay of demand – Rs. 500/- for each assessment year.

3.2.8) Power of Tribunal: 254 (1) to pass an order as it thinks fit. See Para No.3.2.8.3 below.

3.2.8.1) Power to allow additional grounds:

National Thermal Power Co. Ltd. 229 ITR 383 (S.C.) No reason why a question of law should not be allowed to be raised when it is necessary to consider that question in –Question on the basis of facts on record.

3.2.8.2) Additional evidence:

Rule 29-30, & 31 of I.T.A.T. Rules
Production of additional evidence
Examination of witness
Filing of affidavit
Either before the Tribunal
Or before such Income-tax Authority as the Tribunal may direct.
Rule 29-Production of additional evidence before Tribunal
Rule 30-Mode of taking additional evidence
Rule 31-Additonal evidence to be submitted to the Tribunal.

3.2.8.3) Pass such order as it thinks fit :

In the interest of justice.
Includes to confirm, reduce, cancel, set-aside, remand- for fresh disposal or for remand report.

3.2.8.4) has no power to enhance :

Meaning of :

In department appeal, restoration is possible, but further enhancement will not be permissible.

3.2.8.5)<u>Power to grant stay :</u> Fees Rs. 500, Rule 35A Inherent power : I.T.O. v/s M.K. Mohammed Kunhi 71 ITR (SC)

a) Merits of the case must be the first criteria for granting stay. Many a times this criteria is ignored.

b) The financial hardship to the assessee is the second criteria which is mainly looked at by the member.

c) Security for the future recovery in case of decision going against the assessee is another criteria – which is important.

In this respect production of balance sheet, bank statement any other, supporting proving financial hardships is a material factors.

It will disclose availability of liquid funds and the assets position.

<u>Rule 35A (2) (V) provides :</u> Whether any application for stay was made to the revenue authorities concerned, and if so the result thereof (copies of correspondence if any, with the revenue authorities to be attached) – as a requirement of application.

3.2.9)<u>Rectification :</u> Section 254 (2) Fees Rs.50, Suo moto rectification can be done within 4 years of the date of the order. Application to be made within four years from date of receipt of the orders.

<u>Mistake apparent from record : Includes</u>

1) Restoration of exparte order.
2) Grounds raised, not considered.
3) Submissions made not considered.
4) Inherent contradictions.
5) Incomplete orders/ Not Speaking order.

Note: Before 7.2.2012 application can be made u/s 254(2) only one time against the original order passed by Tribunal. However, if still after passing order on Miscellaneous Application some mistake remains in the original order cannot be rectified by making another application. But after amendment in Rule 34A(2) vide IT(Appellate Tribunal Amendment) Rule 2012, w.e.f. 7-2-2012. Another Application can be filed for rectification is main order which is not rectified while First Application. However, Miscellaneous Application cannot be filed on order passed on Miscellaneous Application

3.2.10) <u>Paper book :</u>

I. Papers on record

II. Additional evidence.

Service to Respondent at least a week before.

Filing at least a week before the date of hearing for Department Representative

3.2.12) <u>to award cost :</u>

Section 254 (2B) : The cost of any appeal to the Appellate Tribunal shall be at the discretion of that Tribunal.

<u>Memo Explains Provisions :</u>

To discourage filing of frivolous appeals it is also proposed to empower the Appellate Tribunal to award cost.

3.3) Appeal to High Court : S. 260A & B

Appeal shall lie to High Court if the case involves substantial question of law.

3.4) Appeal to Supreme Court : S-261

Appeal shall lie to Supreme Court only it the case involves substantial question of law, provided High Court, Certifies the case to be fit before Supreme Court or Assessee can file the case before Supreme Court u/s136 special leave petitions.

3.5) Monetary Limit for Filling Appeal By Department:

To reduce the litigation and burden of appellant authority ***CBDT vide INSTRUCTION NO. 5/2014 [F. NO. 279/MISC. 142/2007-ITJ (PT.)], DATED 10-7-2014*** enhance the monetary limit of filling appeal by department so the valuable time of judiciary system will not be waste for small matter. Revised monetary limits are as follows:

S. No.	*Appeals in Income-tax matters*	*Monetary Limit (in Rs.)*
1.	Before Appellate Tribunal	4,00,000/-
2.	U/s 260A before High Court	10,00,000/-
3.	Before Supreme Court	25,00,000/-

D) ISSUES ARISING OUT OF INCOME TAX NOTICES RECEIVED ON ACCOUNT OF HAWALA TRANSACTION IN MVAT

Currently the sales tax department notified various parties as Hawala Operator. List of those parties is also available on MVAT site. Due to this racket Income tax department re-open the cases of those parties who have transaction with these parties. Because hawala operators, open concerns in name of uneducated poor people. These operators received commission of .01 % to 5% depend upon sector to sector. Therefore, beneficiary should be careful because department made addition/disallowance on account of transaction with hawala parties on following grounds that –

- assessee transaction are bogus.
- Assessee books of account are not correct,
- Assessee take accommodation entries to adjust his profit
- Assessee take Bill to adjust his stock quantity

Particulars	**Transaction is 100% genuine**	**Purchase from "A" and Bill of "B"**	**100% Bogus**	**Combination of these 3**
Loss	NOT	Loss due to adjustment in G.P.	% of transaction as	Some loss

			commission will be added. Because sale cannot be made without purchase	
Reason of Loss	All Evidences are available therefore no addition will be made.	Purchases are genuine but parties are not genuine. In this case inference was drawn that assessee take bill of "B" to reduce G.P.	Whole business is bogus. Main business is only for commission.	In this case some evidences are available. So, whole purchases cannot be denied. But some amount may be disallowed
Power to Assessing officer	Rectification U/s 154, Re-assessment U/s 148, Revision of order u/s 263 and survey or search action.			
Evidence in support of claim:-	Purchase Bill, Purchase Order, Freight Receipt, Weigh bridge, Stock registerInward register, Outward register, Consumption registered, consumption certificate from appropriate person, Vat payment by purchaser Confirmation, and Bank Statement.			
Remedy to assessee	File objection against the Notice u/s 148 and proceeding u/s 154 and 263, Petition to CIT 273Afor reduce or waive penalty, Appeal for waiver of interest may be filed before the CIT(A) and Tribunal, file appeal against the proceeding u/s 148,154 and 263 against appellant authority.			
Objection of rectification of mistake u/s 154 and revision of order u/s 263.	Already explain in Head "B. REVISION AND RECTIFICATION"			
Procedure for challenging notice u/s 148.	File return of income in response to notice and demanded "Copy of reason recorded for reopening of case". **Specimen copy of letter to AO** Date:- To, ……, …… …… REG:-Assessee Name PAN:-…… SUB: - REPLY TO NOTICE U\S 148 OF INCOME TAX ACT 1961 FOR A.Y. ……			

	Respected sir, In connection with the aforesaid subject matter and under instruction from our aforesaid client. We would like to state that— The Assessee has filed the return of income for the Assessment Year ..... dated ..... The Original return filed on ..... should be considered as return U\s 148. We request your good self to kindly <u>provide us the reasons recorded for re-opening</u> the assessment. Which would enable us to file proper objection/ details. Thanking You For .....
Basis of Objection	1. Sales Tax Department called them as'Suspicious' Dealers and not 'confirmed hawala dealers' .i.e. It is possibility that dealers **may be** hawala dealers. Addition cannot be made on presumption basis.
	2. Reopening on the basis of information provided by other person or other officer is bad-in-law. **CIT v. Smt. Laxmi Mehrotra [2014] 41 taxmann.com 427 (All. HC)** Assessing Officer initiated reassessment proceedings on basis of information supplied by Investigation wing that assessee had made certain investment in purchase of plot and carrying out construction on it - Commissioner (Appeals) as well as Tribunal set aside reassessment proceedings taking a view that said proceedings were initiated mechanically on basis of information supplied by Investigation Wing and without ascertaining as to whether assessee had disclosed factum of purchase of plot and cost of construction in original return - Whether since revenue authorities could not controvert finding recorded by authorities below, impugned order passed by them was to be upheld - Held, yes **In the case of Madanlal Jindal Vs. ITO (92 ITR 546):** The Court observed that there is no indication in the reasons as to the source of material for the formation of belief. It was held that the Income-tax Officer has merely acted on the strength of the letter forwarded to him by another Income-tax Officer. The Court observed that although the letter of another Income-tax Officer could be a source of information upon which the Assessing Officer could form his independent belief, but in the present case, it is not clear as to whether the Assessing Officer made any efforts to form any independent belief or he has acted merely on the suggestion of another Income-tax Officer. Accordingly the notice u/s.148 of the Act was quashed by the Court.

3. The name of the selling dealer is placed on the MAHAVAT list only as a 'suspicious' dealer i.e. a person who is suspected for issuing fake bills without selling the goods. The law on reassessment is clear to the effect that an assessment can be opened only if the Assessing Officer has reasons to believe that income of the assessee has escaped assessment. The formation of this belief is a jurisdictional condition and its absence can vitiate the re-assessment proceedings. The Court would be entitled to quash the reassessment proceedings if the reasons to believe are non-existent. The reasons must be genuine and not a pretence. An assessment cannot be re-opened on mere suspicion. After all, 'reason to believe' is not the same thing as 'reason to suspect'.

   SheoNath Singh v. AAC (1971) 82 ITR 147 (SC) is a good authority for the proposition that an assessment cannot be re-opened on the basis of mere suspicion.

4. A general confession by a person that all his transactions are bogus or that he has indulged only in bogus transactions cannot be basis for re-opening the assessment of an assessee who has transactions with this person. This is more particularly so when the assessee has not been specifically named in the confession.

   ITO v. LakhmaniMewal Das (1976) 101 ITR 427 (SC)

   the assessee had obtained a loan from a lender. The lender had given a confessional statement subsequently to the Income-tax department that he had 'only' indulged in name lending transactions 'only'. The assessment of the assessee was proposed to be re-opened on the basis of this statement. The Apex Court held that reassessment proceedings must be constituted by 'reasons to believe' based on relevant material on hand. There must be a live connection between the materials and the belief. If the materials itself were vague, then the belief founded on the same would be as good as non-existent.

   S. P. Agarwalla v. ITO (1983) 140 ITR 1010 (Cal.), the assessment of the assessee was proposed to be re-opened on the ground that the lender had given a confessional statement that 'all' his loan transactions were bogus. The assessee's loan transaction was not specifically referred as bogus.

5. Assessee disclosed **fully and truly all material facts** necessary for his assessment, and all the facts readly available to assessing officer at the time of original assessment, therefore re-opening of assessment is bad-in law.

   Judicial Pronouncement

Tribunal having concluded that all the material facts were fully and truly disclosed by the assessee at the time of original assessment, invoking the provisions of	Jashan Textiles Mills P. Ltgd. Vs. DCIT (2006) 284

S. 147 after the expiry of four years from the end of the relevant asst. year was not valid.	ITR 542 (Bom):
Full and true disclosures of all material facts: Re-opening is invalid *a)* Bhagwati Shankari Karkhana (2004) 269 ITR 186 (Bom) *b)* Western Outdoor Interactive (2006) 286 ITR 620 (Bom) *c)* Hindustan Lever Ltd. (2004) 267 ITR 161 (Bom) *d)* Prashant Project Ltd. vs. Asst. CIT (2011) 333 ITR 368 (Bom) *e)* Hindustan Petroleum Corporation Ltd. vs. Dy. CIT (2010) 328 ITR 534 (Bom) *f)* Nihilent Technologies (P) Ltd v Dy CIT (2011) 59 DTR 281 (Bom) *g)* Shriram Foundry Ltd v. Dy.CIT (2012) 250 CTR 116 (Bom.) *h)* Monitor India (P) Ltd v. UOI (2012) 68 DTR 313 (Bom) *i)* HCL Corporation Ltd. v. ACIT (2012) 66 DTR 473 (Delhi)(High Court) *j)* Kimplas Trenton Fittings Ltd. v.ACIT (2012) 340 ITR 299 (Bom.)	
Division Bench of this Court observed that the assessment cannot be reopened to verify whether any income chargeable to tax has escaped assessment and further that reopening of assessment cannot be permitted on vague and nonexistent reasons for a mere fishing inquiry.	Bakulbhai Ramanlal Patel v. Income Tax Officer
It is necessary for the AO to first state that there is a failure to disclose fully and truly all material facts. If he does not record such a failure he would not be entitled to proceed u/s 147.There is a well-known difference between a wrong claim made by an assessee after disclosing all the true and material facts and a wrong claim made by the assessee by withholding the material facts.	Titanor Components Limited vs ACIT (2011) 60 DTR 273 (Bom.) (High Court) Hindustan Lever (2004) 268 ITR 332 (Bom) followed).
The assessing officer is not entitled to make a pure guess and make an assessment without reference of any evidence or materials at all.	Dhakeshwari Cotton Mills V, CIT 26 ITR 775,782- SC

5. Basis of argument at the time of re-assessment proceeding.

I) TRANSACTIONS ARE GENIUNENESS

Addition cannot be disallowed on the basis of some discrepancies notice in books of seller.	*CIT V/s Basant Investmen Corporation (1999) 238 ITR 680 (Cal).*
Legitimacy or necessity for expenditure cannot be probed into - Once the conditions laid down in section 37(1) are found satisfied.	*Hemraj Nebhomal Sons v. CIT [2005] 146 Taxman 345/278 ITR 345 (MP)*
Expenditure incurred wholly and exclusively for the purpose of business is allowable	*CIT v. Indian Molasses Co. (P.) Ltd. [1970] 78 ITR 474 (SC),*

expenditure.	*J.K. Cotton Mfrs. Ltd. v. CIT [1975] 101 ITR 221 (SC)* *Sassoon J. David & Co. (P.) Ltd v. CIT [1979] 118 ITR 261 (SC)*
The genuineness of transaction was doubted by the AO. The assessee furnished the name of the company, number of share purchased, date of sale amount of purchase and sale money etc. The assessee had discharged its initial burden. The claim of the assessee could not be denied merely because the broker, through whom the shares were purchased and sold, failed to produce his books. That does not mean that the transaction was not genuine	*CIT V. Korlay Trading Co. Ltd. [1998] 232 ITR 820 (CAL)*
Where purchases were supported by bills, entries were made in books of account and payment was made by cheque, said purchases could not be held as bogus purchases.	*CIT-I v. Nangalia Fabrics (P.) Ltd. [2013] 40 taxmann.com 206 (Gujarat)*

II) AO MADE ADDITION WITHOUT INQUIRY. THEREFORE, THE ADDITION MADE BY AO IS BAD-IN-LAW.

We find that AO had made the addition as one of the supplier was declared a hawala dealer by the VAT Department. *We agree that it was a good starting point for making further investigation and take it to logical end. But, he left the job at initial point itself. Suspicion of highest degree cannot take place of evidence. He could have called for the details of the bank accounts of the suppliers to find out as whether there was any immediate cash withdrawal from their account. We find that no such exercise was done. Transportation of good to the site is one of the deciding factor to be considered for resolving the issue. The FAA has given a finding of fact that part of the goods received by the assessee was forming part of closing stock. As far as the case of Western Extrusion Industries.(supra)is concerned, we find that in that matter cash was immediately withdrawn by the supplier and there was no evidence of movement of goods. But, in the case before us, there is nothing, in the order of the AO, about the cash traial. Secondly, proof of movement of goods is not in doubt.* *Thererfore, considering the peculiar facts and circumstances of the case under appeal, we are of the opinion that the order of the FAA does not suffer from any legal infirmity and there are not sufficient evidence on file to endorse the view taken by the AO. So, confirming the order of the FAA, we decide ground no.1 against the AO.*	**DCIT V. Shri Rajeev G. Kalathil , ITA No.6727/Mum/2012**
(i) A perusal of the orders passed by the tax authorities would show that they have suspected the genuineness of the purchases only for the reason that the above said five parties were not available in the given addresses. It is pertinent to note that the AO himself, during the course of remand proceedings, have obtained the bank statements of the above said five parties. It is in the common knowledge of everybody that the bank account, now a days, could be opened only on submission of proper documents. Further the assessee has furnished the Sales tax documents of the above said five parties and also their income tax details to prove their existence. Thus, it is seen that the assessee has furnished many documents to prove the existence of the parties and they have not been controverted by the assessing officer. *(ii) Be that as it may, another important factor the bank account copies collected by the assessing officer shows that the assessee had made the payments to the above said parties by way of account payee cheques. Thus, it is seen that the transactions have been routed through the bank accounts. Further, it is not the case of the assessing officer that the assessee has indulged in accounting of bogus purchases.* *When the assessee submitted that he could not have effected the sales without making corresponding purchases, the AO has taken the view that the assessee could have effected purchases in the grey market, which conclusion is, in fact, not supported by any material. Under this impression only, the AO has further*	**Shri Ganpatraj A Sanghavi v/s ACIT ITA No. 2826/Mum/2013**

expressed the view that the assessee would have purchased the materials by paying cash thus violating the provisions of sec. 40A(3) of the Act, which is again based on only surmises. In the absence of any material to support the said view, we are unable to agree with the view taken by the tax authorities that the purchases amount is liable to be disallowed u/s 40A(3) of the Act. On the same impression only, the AO has expressed the view in the remand report that the purchases amount is also liable to assessed u/s 69C of the Act as the source of purchases were not proved. Again the said conclusion is based upon only surmises, which could not be sustained. Thus, it is seen that the assessing officer has accepted the fact that the quantity details of purchases and sales have been reconciled by the assessee. Further, various case law relied upon by the assessee also supports his case. Under these set of facts, we are of the view that the Ld CIT(A) was not justified in confirming the disallowance of purchases. Accordingly, we set aside the order of Ld CIT(A) on this issue and direct the AO to delete the disallowance of purchases.	
Further, it has to be appreciated that (i)Payments were through banking channel and by Cheque,(ii) Notices coming back, does not mean , those Parties are bogus, they are just denying their business to avoid sales tax/VAT etc, (iii)Statement by thirdpar ties cannot be concluded adversely in isolation and without corroborating evidences against appellant ,(iv) No cross examination has been offered by AO to the appellant to cross examine the relevant parties (who are deemed to be witness or approver being used by AO against the appellant) whose name appear in the website www.mahavat.gov. in and (v)Failure to produce parties cannot be treated adversely against appellant. *In view of the facts discussed above as well as binding judicial pronouncements of the jurisdictional ITAT Mumbai Bench as well as Hon'ble Mumbai High Court and other legal precedents, the addition made by the AO amounting to Rs.28,08,071/- cannot be sustained. Accordingly, the addition of Rs.28,08,071/- is deleted."*	*Shri* ***RamilaPravin Shah*** *VS. ACIT I.T.A. No.5246/Mum/2013*
We find that in similar circumstances the Tribunal had deleted the addition made by the AO in the cases relied upon by the AR of the assessee. In the case of Rajiv G Kalathil (supra),to which one of us was party identical issue has been decided and Respectfully following the above and considering the facts and circumstances effective GOA is decided against the AO.	*Shri* ***Paresh Arvind Gandhi*** *vs. ITO ITA No.5706/Mum/2013*

III) **No addition will be made without any evidence**.

Income assessed by revenue without supporting material is not justified.
CIT V. BHUVANENDRA 303 ITR 235 (MAD.) *VINOD SOLANKI VS. UOI (233) ELT 157 (S.C.)* *CIT V. KASHIRAM TEXTILE MILLS (P) LTD [2006]284 ITR 61 (GUJ)-* *SARASWATHI OIL TRADERS V. CIT [2000] 254 ITR 259 (SC)*

IV) **Quantitative tally then no addition will made**

It is well settled law that when, a quantitative tally is furnished, and even if purchasers are not available, no addition is called for.
a) Balaji Textile Industries (P) Ltd v. ITO(1994) 49 ITD 177(Bom) *b) DCIT v. Adinath Industires (2001) : 252 ITR 476 (Guj)* *c) CIT v. M K Brothers (1987) : 163 ITR 249 (Guj)* *d) DCIT v. Adinath Industries (2001) : 247 ITR 35* *e) DY.CIT V. BRAHMAPUTRA STEELS (P) LTD. [2002] 122 TAXMAN 32 (IATA – GAUHATI)]- Assessee had maintained daily stock register in respect of purchase of raw materials and production of finished goods as required by the Central Excise Act and also furnished weekly, fortnightly and quarterly returns before authorities, factum of purchase of raw materials could not be disputed. Therefore, transactions of purchase of raw materials were genuine and accepted.* *f) ITO VS. SURANA TRADERS C/O S.G. SALECHA AND CO.* *No mistake was pointed out by the AO in the stock register and quantities tally furnished by the assessee and genuineness of the transactions was verified from the books of account*

V) ***Income cannot be assessed on mere statement basis. For assessment there has to be some evidence.***

Income cannot be assessed on mere retracted statement If not material to prove
Meghraj Jain V. UOI (Bombay High Court)

Kailashben Manharlal Chokshi v. CIT [2008] 174 Taxman 466 (Guj.)
M. Narayanan & Bros. v. Asstt. CIT [2011] 201 Taxman 207 (Mag.)
Bansal High Carbons (P)Ltd. 2009) 223 CTR 179 (Del).
Sanjeev Kumar Jain (2009) 310 ITR 178 (P&H)
CIT vs. K. Bhuvanendra and others (2008) 303 ITR 235 (Mad.)
Abid Malik Vs UOI, (2009TIOL272HC Del-FEMA)
CIT vs. Uttamchand Jain 320 ITR 554 (Bom),
Srinivas Naik (2009)117 ITD 201 (Bang)

VI) Estimation should have some basis of evidence

i) GANGA RAM BALMOKAND v CIT (1937) 5 ITR 65 (LAHORE)

When the A.O rejects the accounts and estimates the income, the A.O must base some estimates on evidence and not on conjectures.

ii) MYSORE FERTILIZER CO v CIT (1966) 59 ITR 268 (MAD)

The law provides that the A.O shall make the assessment to the best of his judgment. This means that he must make the assessment according to the rules of reason and justice. He cannot estimate the profit according to private opinion, humour and the estimate must not be arbitrary vague or fanciful.

There must be some material on record as evidence for addition. Addition made on the basis of presumption cannot be sustained in law.

a) CIT v. Roman & Co., (1968) : 67 ITR 11 (SC)

b) CIT v. Calcutta Discount Co. Ltd. (1973) 91 ITR 8 (SC)

c) Omar Salay Mohamed Sait V/s CIT 1959 37 ITR 151 (SC)

d) Dhirajlal Girdharilal V/s CIT (26 ITR 734) (SC)

e) *Dr. Anita Sahai V/s DIT (266 ITR 597) (All)*

f) MODI Creations Pvt. Ltd. V/s ITO [2011] 13 taxmann.com 114 (Delhi)-It will have to be kept in mind that section 68 only sets up a presumption against the assessee whenever unexplained credits are found in the books of account of the assessee. It cannot but be gainsaid that the presumption is rebuttable. In refuting the presumption raised, the initial burden is on the assessee. This burden, which is placed on the assessee, shifts as soon as the assessee establishes the authenticity of transactions as executed between the assessee and its creditors.

g) **CIT- IV *v.* Shree Rama Multi Tech Ltd [2013] 34 taxmann.com 32 (Gujarat)**:- Expenditure cannot be disallowed on account of 'bogus purchase' only on basis of assumption and presumption

h) View taken in Modi creation Pvt. Ltd. Is also taken in following decision.

CIT v/s Divine Leasing & Finance Ltd. 158 Taxmann 440 (Delhi) (2007).

Nemichand Kothari V/s CIT (136 Taxman 216) (Gau.) (2004).

CIT V/s Value Capital Services ?(P) Ltd. 307 ITR 334 (Delhi)(2008).

VII) ***Only one side cannot be treated as bogus. If sales are genuine then purchases were also genuine***.

Department cannot presume that only sale or purchase is bogus. Sale cannot be happen without purchase and vice-versa.

Shyam Telelink Ltd. now Sistema Shyam Teleservices Ltd V/s UOI (2010)10SCC165

VIII) <u>Assessment made without disclosing to the assessee the information is violation of fundamental rules of justice</u>

Assessment made without disclosing to the assessee the information supplied by the department and without giving any opportunity to the assessee to rebate the information is violation of fundamental rules of justice.	*Lalchand Bhagat Ambica Dav V/s CIT (37 ITR 28)(SC)*
While conducting survey u/s 133A the department had no power to examine any person on oath. Consequently, such a statement has no evidentiary value and no addition can be made solely on the basis of such statement.	*DCIT v. M/S. PREMSONS (ITAT MUMBAI) [2009]* *CIT v/s S. Khader Khan Son [2012] 25 taxmann.com 413 (SC)*
An assessment so made without disclosing to the assessee the information supplied by the departmental representative and without giving any opportunity to the assessee to rebut the information so supplied and declining to take into consideration all materials which the assessee wanted to produce in support of case constituted a violation of the fundamental rules of justice and called for interference on our part.	*DHAKESWARI COTTON MILLS LTD. v. CIT [1954] 26 ITR 777*
The Tribunal violated certain fundamental rules of justice in reaching its conclusions. Firstly, it did not disclose to the assessee what information had been supplied to it by the departmental representative. Next, it did not give any opportunity to the assessee to rebut the material furnished to it by him, and lastly, it declined to take all the material that the assessee wanted to produce in support of its case. The result was that the assessee had not had a fair hearing. The estimate of the gross rate of profit on sales, both by the ITO and the Tribunal, was based on surmises, suspicions and conjectures.	*SETH GURUMUKH SINGH v. CIT [1944] 12 ITR 393*
It is a fundamental principle of natural justice that no material should be relied upon against a party without giving him an opportunity of explaining the same	*Jai Karan Sharma v/s DCIT [2012] 23 taxmann.com 300 (Delhi)*
<u>Whether since statements recorded from three parties on which Assessing Officer relied for purpose of assessment, had not been provided to assessee, order of Assessing Officer was bad in law to that extent - Held, yes</u>	*Hamish EngineeringIndustries (P.) Ltd. V/s DCIT [2009] 120 ITD 166 (MUM. Trib.)-*
ITO, on the basis of letters from bank manager, not shown to assessee, treated amount so remitted as income from undisclosed sources—Tribunal, relying on letters of bank manager, upheld ITO's action—Whether tribunal justified—Held, on facts, no.	*Kishinchand Chellaram v/s CIT [1980] 4 Taxman 29 (SC)-*

IX) *<u>Non-production of parties cannot be basis for addition:</u>*

S.N	***Observation***	***Citation***
1	*Non-production of creditor cannot be a reason for making addition under section 68*	*ANIL KUMAR MIDHA (HUF) V/s ITO [2006] 153 TAXMAN 65 (JODH.) (MAG.)*
2	*Assessing Officer harbours doubts of legitimacy of any subscription he is empowered, nay duty- bound, to carry out thorough investigations, but if Assessing Officer fails to unearth any wrong or illegal dealings, he cannot obdurately adhere to his suspicions and treat subscribed capital as undisclosed income of assessee.*	*CIT V/s Divine Leasing etc 299 ITR 268 (Del HC) SLP was also dismissed by Hon'ble Supreme Court.*
3	*The assessee discharged its primary onus and established the identities of the said two commission agents and no evidence had been brought on record by the revenue to rebut the case of the assessee. Hence, the Tribunal was not justified in holding that the payments to the said two commission agents were not genuine.*	*Mather & Platt (India) Ltd. V/s CIT (1987) 168 ITR 493 (Cal HC)*
4	*Merely because summons issued to some of creditors could not be served or they failed to appear before Assessing*	*Dy CIT V/s Rohini Builders [2002] 256 ITR 360 (GUJ). SLP*

	Officer, could not be ground to treat those credits as non-genuine	*was also dismissed by the Hon'ble Supreme Court.*
5	*Assessing Officer issued summons to ten traders under section 131(1) - In response to same, five traders appeared and gave evidence in favour of assessee that transactions with them were conducted by assessee on commission basis - However, remaining five traders did not appear because they could not be served with summons as they were residing outside State-Consequently, Assessing Officer assessed total income treating transaction with absentee traders as having been done by assessee in capacity of 'trader' and not as 'commission agent' - Whether Assessing Officer was justified - Held, no*	*Anis Ahmed V/s CIT (2008) 297 ITR 441 (SC)*
6	*Certain loan transactions found in assessee's accounts, in was explained that these were genuine transactions of borrowings on hundis from various parties about whom complete details were furnished. The ITO summoned all the bankers. However, they did not personally appear before him but instead each one of them sent a letter confirming the loan advanced by them to the assessee. The ITO was not satisfied and held that he was only obliging the assessee by issuing summons to the third party concerned, while in case of the partly not turning up, it was for the assessee to produce the party so that he could examine and satisfy himself that the partly was in a position to give the loans taken from him.On appeal, the AAC while appreciating the assessee's submission that for enforcing the attendance of the hundi workers the assessee had no powers; on the contrary, the ITO had the necessary powers, held that the ITO had not made proper enquiries. High Held that loans were genuine transactions and could not be added back to assessee's income*	*CIT V/s U K Shah (1973) 90 ITR 396 (Bom. HC)*
7	*assessee having filed confirmatory letter showing address and gir no of creditor, had properly discharged primary onus that was on it and that onus had thereafter shifted to the department*	*Add. CIT V/s Hanuman Agarwal (1984) 151 ITR 150 (Patna HC)*
8	*Non-production of the creditor cannot be a reason for making addition.*	*Jhaver Bhai Bihari Lal& Co. v. CIT [1985] 154 ITR 591/ 21 Taxman 238*
9	*Without making inquiry, the ITO disbelieved the evidences of the assessee. HC held that Tribunal was justified in deleting the addition.*	*CIT vs. Sahibganj Electric Cables (P) Ltd. [1978 115 ITR 408]*

X) Other Relevant Judgement

a) The jodhpur bench of the Ho'ble ITAT held in the case of ITO v/s Permanand [2008 25 SOT 11}-No addition can be made in the hands of the assessee on the basis of observations made by a third party. In this case, the addition rests mainly only on the observations of the Sales-tax department. The assessee was never associated with the enquiries made by the Sales-tax department to that extent. The satisfaction of the assessing officer himself is of the prime importance while making assessment of an income and these duties cannot be performed by substituting the satisfaction of someone else. The assessee did pay for the purchases he made from the above two parties through cheque as is evident from the above chart. The statements or even the affidavits of the sellers named above cannot be utilized against the assessee in view of the decision of the Hon'ble Supreme Court given in the case of Kishan Chand Chella Ram v. CIT . Their Lordships of the Hon'ble Supreme Court in the above case (and in so many other cases) has given a ruling that a statement made by a third party cannot be relied in the case of the assessee unless an opportunity is given to him to confront the said statement by way

of cross-examination, etc. Admittedly, no such opportunity was given to this assessee to confront the above sellers in the given case. In our considered opinion, the assessee has discharged the primary onus cast on him by Section 69 of the Act by showing the purchases, their entries in the books of accounts, payments by way of account payee cheque, producing the vouchers of sales of the goods. The assessing officer has miserably failed to bring on record any clinching evidence to prove that these alleged purchases were verily bogus and not genuine. The assessing officer has not arrived at a judicious conclusion after applying his own mind. Strangely enough, the assessing officer has half-heartedly accepted certain quantum of purchases because out of total purchases aggregating Rs. 9,93,442, he has disallowed only a peak of Rs. 3,36,852. This finding of the assessing officer is paradoxical.

b) **Marneedi Satyam V/s MasimukkulaVenkataswami (AIR 1949 Mad 689)-**An affidavit cannot be used as evidence against the person without giving an opportunity of cross examination of the vendor which violates the principle of natural justice.

c) **Shanti Kumar Chordia V/s ACIT (128 TTJ 708)-** where assessee had declared doubtful purchases and purchases of diamond from unregistered dealers for which no verification was got done by the assessee, in absence of any verification of purchases from unregistered dealers and verification of purchases from certain other parties, application of section 145(3) was justified (partly in favour of assessee)".
Where the assessee had declared doubtful purchases and the purchases of diamond from unregistered dealers for which no verification of purchases from the unregistered dealers and verification of the purchases from certain other parties, application of section 145(3) was justified; however, there was no justification for application of 25% G.P. rate as done by the assessing officer as profits margin in such cases was low."

d) **The Hon'ble Calcutta High Court in the case of Diagnostics V/s CIT reported at 334 ITR 111 has held that**-"However, as regards the payments made to M/s. SelvasPhotographics are concerned amounting to Rs. 3,12,302/-, we find that those have been made by account payee cheques and those have been encashed through the bankers of M/s. SelvasPhotographics. It appears that according to the Appellant, at the time of assessment, the Appellant had no business transaction with M/s. SelvasPhotographics and consequently, the said party did not co-operate with the Assessing Officer. However, the transaction having taken place through account payee cheques, we are unable to accept the contention of Mr. Agarwal, the learned advocate appearing for the Revenue that the transaction was a non-existent one. If an Assessee took care to purchase materials for his business by way of account payee cheques from a third party and subsequently, three years after the purchase, the said third party does not appear before the Assessing Officer pursuant to the notice or even has stopped business, the claim of the Assessee on that account cannot be discarded as non-existent. In the case before us, the Revenue has not put forward any other ground, such as, it was not a genuine transaction for other reasons but has simply rejected the claim on the ground as if there was no such transaction.

The transaction having taken place through payment by account payee cheques, such plea is not tenable and in such circumstances, the Tribunal below erred in law in reversing the finding arrived at by the Commissioner of Income-tax (Appeal) accepting the said transaction as a genuine transaction.

e) **ITAT Delhi In case of YFC Project Pvt. Ltd. V/s DCIT 134 TTJ 167 (delhi) has held that-"**The assessee has achieved a turnover of Rs. 884.81 lakhs. It has shown net profit of Rs. 79.11 lakhs. Its net profit in terms of percentage is almost double than the previous year. Assessing Officer was unable to point out a single defect in its books of account. Merely non-filing of confirmation from two suppliers, it cannot be held that assessee has not received the goods from these persons and the credit balance in the shape of sundry credit appearing in the books of account is unaccounted money of the assessee. The assessee has filed certificate from the bank indicating the facts that cheque issued by it were cleared. Assessing Officer is harping upon only one aspect that notice issued to Shri Subhash Chand returned back with a remark "not known", thereafter he did not take any steps to procure the presence of this person. According to the assessee, notice did not contain the father's name of Shri SubhashChand, that may be the reason for return of the notice otherwise on the bills raised by Shri Subhash Chand, his Mobile Number is available. He could have been contacted on his mobile number.

In view of the above discussion, in our opinion, Assessing Officer is not justified in making the disallowance of purchases made by the assessee. We allow this ground of appeal also and delete the addition of Rs. 6,64,521 and Rs. 4,04,012.

f) **ITAT Mumbai Bench In case of Free India Assurance Services Ltd. V/s DCIT (2012) 147TTJ 423-"** Ground No. 4 is against the sustenance of disallowance of 20% ` 6,16,346/- out of cash purchases of `30,80,730/- Under Section 40A(3) and ground No. 1(ii) in Revenue's appeal in ITA No. 3661/Mum/07 for A.Y. 2002-03 is against the relief allowed by the ld. CIT (A) of ` 24,65,384/-out of total disallowance of bogus purchases ` 30,80,730/-.

The facts of the above issue are that the A.O. found from page No. 140 of the seized documents of Annexure A-6 seized from Prime Plaza that the Assessee had made purchases amounting to ` 30,80,730/- from Shri Deepak for which the Assessee had issued a cheque of ` 30,80,730/- and in lieu thereof he received cash from Shri Deepak. Therefore, the A.O. issued show cause notice as to why the purchases of ` 30,80,730/- should not be disallowed. The Assessee replied vide letter dated 8.3.2000 as under (Para 8 at page 12 of the assessment order):

"In para 10, reference is made for page No. 140 of Annexure A-6 seized from Prime Plaza. The amount mentioned is ` 30,80,730/-. In the show cause notice, your honour have mentioned that these entries pertains to Deepak but these entries pertain to M/s Hira Cloth Agency and M/s Shreeram Sales & Synthetics which is already explained in the explanation to seized materials. Purchase bills were taken from these parties to cover up the purchase actually made in the grey markets. The cheques were issued to them against which cash was received and this very cash was in turn utilised for the payment

of purchases made of fabrics from grey market. This fabric was purchased in the year 2001-02 (AY 2002-03) and was lying in stock as on 31.3.2002. the closing stock as on 31.3.2002 includes this fabric purchased and the amount of closing stock was shown in the trading account on the credit side and against which the expenses under the head purchases were shown on the debit side of the trading account. By showing the closing stock on the credit side and the expense i.e. purchases on the debit side of the trading there remains no effect on the profit of the year under consideration. It goes without saying that there cannot be a closing stock without its corresponding purchases. The effect of both these items considered collectively results into no effect on the taxable income. As such no disallowance is warranted on this count.

However, the A.O. did not accept the Assessee's explanation. According to the A.O. Shri Ashish Mehta himself accepted in the statement recorded Under Section 132(4) on 26.06.2003 that the Assessee made certain cheque payments and received the cash back and since Assessee had clarified that the purchases were not made from Deepak Enterprises but from the Grey market it was established that the Assessee did not purchase material from M/s Hira Cloth Agencies and M/s Shreeram Sales & Synthetics. Hence the A.O. concluded that Assessee admitted bogus purchases amounting to ` 30,80,730/- from M/s Hira Cloth Agencies and M/s Shreeram Sales & Synthetics and accordingly added the same to the income of the Assessee.

15. On appeal, the ld. CIT (A) while observing that as long as the stock is reflected in the books of account, to that extent of fabrics purchased by this firm, credit has to be given to the purchases made by the Assessee and since it is an admitted fact that the Assessee had made the purchases by way of cash from the Grey market held that the provisions of Section 40A(3) are attracted and hence he disallowed ` 6,16,346/-being 20% of purchase of ` 30,80,730/- and thus allowed relief of ` 24,65,384/-.

16. At the time of hearing, the ld. Counsel for the Assessee while reiterating the same submissions as submitted before the A.O. and ld. CIT (A) refers to page No. 145 to 152 of the Assessee's paper book to show that cheques amounting to ` 15,50,730/- and ` 15,30,000/- aggregating to ` 30,80,730/- were issued to two parties M/s Hira Cloth Agencies and M/s Shreeram Sales & Synthetics respectively against the purchases of fabrics. He further submits that against the said cheques payments, the Assessee received back the amount in cash from the said two parties and purchased the cloth of the same amount from Grey market. He further submits that the said cloth amounting to ` 30,80,730/- is lying in the closing stock as on 31.3.2002 onwards which may be verified from the details of closing stock as on 31.3.2003 appearing at page No. 147 of the Assessee's paper book. In the light of the above, he submits that the A.O. was not justified in treating the above purchases as bogus purchases without verifying the fact that the Assessee has shown the above purchases in the regular books of account and also shown the same in the closing stock in the regular return filed by the Assessee. With regard to the disallowance made by the ld. CIT (A) Under Section 40A(3), the ld. Counsel for the Assessee submits that during the course of search, no such material was found to show that the Assessee has made cash payments more than` 20,000/- or the Assessee has violated the provisions of Section 40A(3), therefore, the ld. CIT (A) was not justified in invoking the provisions of Section

40A(3) and in making the disallowance of ` 6,16,346/- being 20; of the above purchases of ` 30,80,730/-. In support the reliance was also placed on the following decisions:

1) RajmalLakhichand v. ACIT (2001) 79 ITD 84 (Pune)

2) Western India Bakers (P) Ltd. V. DCIT (2003) 87 ITD 607 (Mum)

3) Sharma Associates v. ACIT : (1996) 217 ITR 1

He, therefore, submits that the addition made by the A.O. and sustained by the ld. CIT (A) be deleted.

On the other hand, the ld. D.R. while relying on the order of the A.O. submits that the Assessee has placed no material on record to show that the Assessee has not made bogus purchases of ` 30,80,730/- and has made cash payments against the said purchases less than ` 20,000/-. He, therefore, submits that the A.O. was justified in treating the said purchases of ` 30,80,730/- as bogus purchases and the ld. CIT (A) was not justified in applying the provisions of Section 40A(3) in sustaining the addition of ` 6,16,346/-. He, therefore, submits that the addition made by the A.O. be restored.

Having carefully heard the submissions of the rival parties and perusing the material available on record, we find that there is no dispute that the Assessee has made payments of ` 30,80,730/- by cheques to M/s Hira Cloth Agencies and M/s Shreeram Sales & Synthetics. During the course of search, the statement was also recorded of Shri Ashish Mehta on 20.6.2003 wherein he has stated that against the cheque transactions, cash has been received which is found recorded at page No. 152 of the Assessee's paper book. During the course of assessment proceeding, it was stated by the Assessee that the said cash, against cheque payments was utilised to purchase cloth from the Grey market and in support, the Assessee has also filed details of closing stock as on 31.3.03 appearing at page 143 of the Assessee's paper book wherein fabric cloth totalling to ` 30,80,730/- is appearing as closing stock. In the absence of any material to show that no such cheque payments were made by the Assessee or cash amount received by the Assessee against the cheque payments was utilised by the Assessee other than purchases or the entry recorded in the closing stock amounting to ` 30,80,730/- is found to be fictitious or false or no such closing stock was found during the course of search, we are of the view that the Assessee has made cash purchases of ` 30,80,730/- which undisputedly found recorded in the inventory of closing stock, therefore, the A.O. was not justified in treating the said purchases of ` 30,80,730/- as bogus purchases.

As regards the application of provisions of Section 40A(3) of the Act, we find that during the course of search, no such material was found to show that the Assessee has made cash payments in violation of provisions of Section 40A(3) of the Act. Disallowance cannot be made merely on presumption basis that the Assessee had made the purchases by way of cash from the Grey market in violation of the provisions of Section 40A(3) of the Act.

In the case of RajmalLakhichand v. ACIT (2001) 79 ITD 84 (Pune), it has been held (Head note - page 86):

The provision of Section 40A(3) is to be invoked when the department has evidence with itself that the Assessee has made payments in cash exceeding the prescribed limits. Disallowance cannot be made merely on a presumption that the Assessee must have made payments in cash and that too exceeding the prescribed limits. Hence, the impugned addition made by the Assessing Officer and sustained by the Commissioner (Appeals) was to be deleted.

In the case of Western India Bakers (P.) Ltd. V. DCIT (2003) 87 ITD 607 (Mum) it has been held (Head note page No. 609):

When a provision of law is to be applied, it is to be seen that all the circumstances alliunde to the application of such provision did exist. If it is not possible to find out how the violation of the provision was done, addition cannot be made on the basis of inference and surmises. In the instant case, it was not known at what point of time and how Assessee violated the provisions of Section 40A(3). As such, no addition on that count was warranted. (para 29).

In the absence of any distinguishing feature brought on record by the Revenue, we respectfully following the aforesaid decisions and for the reasons as discussed above hold that the ld. CIT (A) was not justified in sustaining the addition of ` 6,16,346/- being 20% of total purchase of ` 30,80,730/- and accordingly we delete the entire addition of ` 30,80,730/-. The ground taken by the Assessee is therefore allowed and the ground taken by the Revenue is dismissed.

g) The Hon'ble ITAT, Jaipur Bench in case of ITO V/s Kanchanwala Gems Reported in (2009) 122 TTJ 854 has held under-

The Assessee had furnished all necessary information supported with documents like bills issued against the purchases by the above named four parties bearing details of the goods supplied including rates, RST/CST numbers, their PAN and that the payments have been made through account payee cheques, the assessee had discharged its initial onus to establish the genuineness of the transaction. Besides, the assessee had also furnished confirmations from the above named four parties confirming the purchases claimed to have been made by the assessee from them. During the course of assessment proceedings the assessee has also furnished bank account, wherein the amount has been debited to the account of the assessee and credited to the accounts of the sellers. Confirmations of accounts as obtained from the concerned parties were also submitted before the assessing officer and the very important aspect of the matter is that entire purchases made from the abovementioned four parties have been exported in the same shape, size and weight duly verified by the customs authorities. Payments towards such exports have also come through proper banking channel. Copies of these documents have been placed at page Nos. 21 to 51 of the paper book. The assessee had furnished all the necessary information including name, address and telephone number of the supplier, as discussed above supported with documents which is expected from a prudent purchaser to establish the genuineness of the claimed transaction besides the payments have been made through account payee cheques and goods purchased from the above named four parties have been exported by the assessee. Under these

circumstances, we are of the view that the assessing officer was not justified in doubting the genuineness of the claimed purchases made by the assessee from the said four suppliers merely on the basis that on subsequent occasion the parties were not found on the given addresses or in some other cases some connected person to the supplier had stated that they were only issuing bills without supplying the goods or that the money paid by the assessee against the purchases was withdrawn by those parties. Undisputedly. after completion of transaction a purchaser cannot have any control over the suppliers and suppliers are always at liberty to use the money paid to them against the goods sold by them. We are thus of the view that in absence of any positive evidence that the goods were not purchased from the above named parties but from some named person or that the money paid by the assessee against the goods was ultimately returned to the assessee by the suppliers, there was no occasion before the assessing officer to deny the claimed purchases especially when the genuineness of the export of those goods by the assessee has been accepted by the assessing officer. The learned Commissioner (Appeals) has thus rightly deleted the addition.

h) R.K. Synthetics V/s ITO 2003 81 TTJ 909

It was an undeniable fact that the addition in question under Section 69 has been made on the sole basis of the statement of the partner Shri Kabra recorded by the Central excise authorities which fact has been incorporated by the learned CIT(A) in his order as we have mentioned above. This is also an undeniable fact that the learned AO never recorded any further statements of Shri Kabra or anybody else. A copy of the statements recorded by the Central excise authorities was never provided to the assessee. No independent investigation was carried by the learned AO even though he proposed to make an addition under Section 69 of the Act in the hands of the assessee. There is no evidence of suppressed sales as the sales declared by the assessee have been accepted fully by the AO and no action has been taken by the ST Department despite there being information regarding the fact that the statement made by Shri Kabra has been retracted in the very next opportunity immediately after making of the statement. The assessee has been maintaining complete financial and quantitative records at all stages of production and no specific defects have been pointed out by the authorities below. The learned CIT(A) has categorically mentioned at various places at paras 5.2 at p. 5 of its order that the learned AO has not pointed out any defects in the books of accounts nor brought on record and that the AO was not justified in rejecting the books of accounts which the Department has not come in second appeal. In these circumstances, we are of the opinion that the totality of the facts and circumstances before us do not justify additions under Section 69 merely on the basis of the statement of the partner Shri Kabra without any further supporting evidence being on record.(para 10)

In the result, the appeal was allowed.(para 12)

i) Babulal C Borana V ITO (282 ITR 251)

Held That- where identity of person from whom goods had been purchased and source of investment in such goods had been explained by the assessee, and it was established that amounts paid by the assessee by cheque for those goods had been received, and further, books maintained by assessee had not been rejected by the Ao and in fact

addition was based on entries made in those books it could be said that transaction was genuine.

j) ITO V/s Arora Alloys Ltd. (2012) [12 ITR (trib)263]-addition made of unexplained expenses on sole basis of information received from central excise department was held not be justified.

k) The Hon'ble Bombay High Court in case of CIT V/s M/s NikunjEximp Enterprises Pvt. Ltd. 2013 TIOL-04-HC-MUM-IT dated 17/12/2012.

Whether disallowance regarding purchases made, can be made merely on the basis that the suppliers and other relating evidences are not produced before the assessing authority or before the first appellate authority.

Assessee company had filed its ROI for the AY 2001-02 declaring a total income of Rs.42.08 lacs. During assessment, the AO disallowed an expenditure on account of non-genuine purchases alongwith other disallowances. On appeal, CIT(A) upheld the order of the AO. On further appeal, Tribunal observed that the respondent-assessee had filed letters of confirmation of suppliers, copies of bank statement showing entries of payment through Account Payee cheques to the suppliers, copies of invoices for purchases and stock statement. This reconciliation statement gave complete details with regard to opening stock, purchases, sales and closing stock and no fault with regard to it was found. Besides, substantial amount of sales made by the assessee was to Government Department and such sales could not be bogus. Also the books of account of the assessee had not been rejected. Thus, Tribunal deleted the disallowance of Rs.1.33 crores by holding that the purchases were not bogus.

In this case, the following question of law has been formulated for consideration of the Bombay HC.

"whether on the facts and in the circumstances of the case and in law the tribunal was right in deleting the addition made by the assessing officer of Rs.1,33,41,917/- towards bogus purchases even though the suppliers were nonexistent dealings with the assessee company?"

In this case, the Hon'ble Bombay HC held as under-

++ from the order of the Tribunal, we find that the Tribunal has deleted the additions on account of bogus purchases not only on the basis of stock statement i.e. reconciliation statement, but also in view of the other facts. The Tribunal records that the Books of Accounts of the assessee have not been rejected. Similarly, the sales have not been doubted and it is an admitted position that substantial amount of sales have been made to the Government Department. Further, there were confirmation letters filed by the suppliers, copies of invoices for purchases as well as copies of bank statement all of which would indicate that the purchases were infact made. In our view, merely because the suppliers have not appeared before the AO or the CIT(A), one cannot conclude that the purchases were not made by the assessee. The AO as well as CIT(A) have disallowed the deduction on account of purchases merely on the basis of suspicion because the sellers and the canvassing agents have not been produced before them. We find that the order of the

Tribunal is well a reasoned order taking into account all the facts before concluding that the purchase was not bogus. No fault can be found with the order of the Tribunal. In view of the above, we find that question as formulated is not a substantial question of law.

l) <u>ACIT vs. KisanLal Jewels (P) Ltd 147 TTJ 308(Del)</u>

The assessee was engaged in the business of certain goods .In assessment Ld. A.O. held held that the assessee had made the purchases of goods from the disclosed parties and assume that the assessee would have made the purchases of goods from the disclosed parties and assume that the assessee would have made the purchase from the parties not recorded at in the books of accounts, accordingly made addition U/S89c in respect of purchases made from undisclosed source.

Assessee had admittedly exported goods involving several channels of custom department and bank accounts thus admittedly goods were purchased by assessee for said export. assessee while furnishing necessary information regarding transaction and aforesaid parties like purchase bills issued against goods purchased, sales –tax registration of parties ,PANs ,their confirmations and bank statement showing debit of amount paid through account payee cheques to them in account of assessee and credited in bank account of seller , had discharged its primary onus lower authorities were not justified in making and sustaining a huge addition on account of bogus purchase U/S 69c on the basis of some probabilities that assessee might not have purchased goods exported from above parties.

Assessee has duly explained purchases made particular part and Ao has no creditable evidence to support his case that purchases in question were not made from aforesaid parties and the same were not made from aforesaid parties and same were made from some were else .therefore addition in question is deleted CIT(A), has correctly appreciated full factual as well as legal matrix , as discussed and there is no error in finding of CIT(A) in this regard and same is confirmed".

m) CIT vs. Leaders Valves (p) Ltd [285 ITR 435 (P&H – High Court)

The assessee is engaged in the manufacture of valves, cocks, boiler fittings, etc. the AS.O observed that assessee has made purchase gun metal scrap in collution with certain suppliers and there after invoking sec 145 made addition of bogus purchase.

The Ld. CIT (A) deleted the entire disallowance of purchase. The Hon'ble ITAT upheld the order of Ld. CIT (A) on holding that addition is not sustainable.

The Hon'ble High court dismissed Revenue's appeal and decided that the addition on account of bogus purchases cannot be sustained for reasons that:-

(a) In case the purchase of goods is treated as bogus, then it is impossible to manufacture the goods as shown to have been manufactured by it out of purchases.

(b) Further, the supplier of the assessee is in existing business and has vast financial resources of their disposal;

n) <u>Milk Foods Ltd vs. DCIT 65 TTJ 848(Del)</u>

The assessee is engaged in running the milk plant wherein it used coal and rice husk for use in the boiler for generation of required steam. A search action was carried on at the

premises of the assessee. During search action, it was revealed that the assessee has made bogus purchase of rice husk. However, the supplier during assessment proceedings confirmed the supply of goods. The Ld. A.O. observed that against cheques issued by the assessee, the cash was withdrawn and ultimately the bank account was closed and further held that the supplier has no capacity to supply the goods and thus made addition of bogus purchase. The Ld. CIT(A) confirmed the disallowance of purchase.

The Hon'ble ITAT, Deleted the disallowance of purchases on the reasons that:-

(a) The assessee had regularly maintained ad tax audited its books of accounts and no irregularities is pointed in assessment, thus rejection of the books U/S 145 is erroneous;

(b) No material evidence was found nor seized during search action;

© The consumption of rice husk in milk processing is established by the assessee and consumption ratio is proved.

Ultimately the Hon'ble ITAT deleted the major addition made on account and bogus purchase.

o) <u>M/s. J.R. Solvent industries PVT Ltd Vs. ACIT68 ITD 65(Chd) (TM decision is equivalent to special bench</u>)

The assessee was engaged in the manufacture of rice burn oil. The A.O. Held the purchase of raw material viz. Rice bran as bogus for the reason that the supplier is not traceable and that supplier's telephone number , sales tax number, transport vehicle number are all bogus and that the supplier had withdrawn the amount immediately against assessee'scheque payment. The Ld. A.O. rejected assessee's books of accounts u/s 145(2) and made addition of entire purchases. The LD. CIT(A) observed that assessee had maintained production records and yieldd shown was reasonable, accordingly deleted major disallowance and restricted additions to the extent of inflation of purchase price and wastage. The Hon'ble ITAT bench comprising of 3 members against revenue's appeal and assessee's cross objection, decided that-

(a) The raw material purchased from whatsoever source had went into production as established by day to day records kept by the assessee and no discrepancies were pointed in assessment;

(b) The yield shown by the assessee is reasonable and thus if product stood accepted, the quantity of purchases would also stand accepted;

In the end, Hon'ble ITAT Dismissed the revenue's appeal and deleted the additional on account of bogus purchase.

p) <u>Kasat paper and pulp ltd Vs ACIT 74 ITD 455(PUNE).</u>

The assessee was engaged in manufacturing activity .a search and seizure action was conducted at the premise of the assessee . In search assessment, Ld. A.O. held that the purchase of steel from a supplier- M is bogus.

In appeal, the Hon'ble ITAT held that the purchase of steel from supplier –M and usage in construction of building could be held as in genuine under following reasons-

(a) The managing director had started that the steel has been purchased from supplier-M

(b) The A.O. has not brought any positive material on record to prove the falsity of the entries in the books of accounts and that the books of accounts cannot be rejected in the light hearted manner on mere suspicion and surmises however grave;
(c) The assessee had produced chartered engineer's report to establish the use of steel;

q) CIT vs. Faqirchhandchamanlal 262 ITR 295 (P&H)

Revenue's appeal also dismissed by hon,ble supreme court in 268 ITR 215(St)
"It is also a well settled preposition that the presumption that howsoever strong cannot substitute evidence and if there is no direct nexus on the point , no addition in block assessment can be made. In the instant case also, there was no evidence with the A.O. in support of his contension that the assessee, in fact, earned the income by way of interest"

r) ACIT vs. Nem Prakash Khandaka Jain 35 TTJ 382(JP).

"However, we have come to the conclusion that all the arguments advanced by the departments against the assessee can at better arouse a suspicion that it might have been the assessee's own investment but it is a well know principle of law that suspicion however strong cannot take the place of proof . In the Instant case also as against the suspicion aroused by the circumstances so also the statement of shri M. there is ample evidence to prove that the allegations of the department cannot be accepted"

s) CIT vs. BalchandAjitkumar 135 Taxman 180 (High Court- MP)

"Total Sale Cannot be regarded as the profit of the assessee. The net profit rate has to be adopted and once a net profit is adopted, it cannot be said that there is perversity of approach. Whether the rate is low or high, it would depend upon the facts of each case. In the present case net profit rate 5% has been applied. It is not appropriate that the same requires to be enhanced. It is high. In any case, it cannot be said that there has been perversity of approach."

t) CIT vs. President Industries 258 ITR 654 (Guj - High Court)

"It cannot be a matter of an argument that the amount of sales by itself cannot represent the income of the assessee who has not disclosed the sales. The sales only represented the price received by the seller of the goods for the acquisition of which it has already incurred that only forms part of the profit included in the consideration of sales"

u) Man Mohan Sadani vs. CIT 304 ITR 52 (MP – High Court)

"Entries sale proceeds of the assessee cannot be added to his income for assessing income from undisclosed sales; net profit rate has to be applied"

v) ITO vs. Gurubachansingh J. Juneja 55 ITD 75 (TM)

"Addition of entires unaccounted sale cannot be made as sales is not income and only by application of G. p. rate can be added; however, unaccounted sales were computed at a particular figure, CIT (A)was not justified in directing addition by applying G.P. rate to a lower figure agreed by assesseee"

w) V.R. Textiles vs. JCIT(2011) 11 ITR 476 (Ahd) (trib)

"The CIT (A) wasa, therefore, justified in applying gross profit rate against unaccounted sales for the purpose of making the addition on account of undisclosed income of the assessee. Similarly, CIT (A) was justified in considering the issue of deployment of minimum capital investment for the purpose of making and rotating the sales outside the books of account. These facts are sufficient to hold that the books results of the assessee were not reliable and have rightly been rejected by the authorities below. Rejection of book results is also not disputed by the assessee. The counsel for the asseesee has not pointed our any error in the finding of the CIT(A) to that extant. Considering the facts and circumstances noted above. We are of the view that the CIT (A) was justified in applying gross profit rate as against undisclosed sales made by the assessee for the purpose of making the addition against the assessee. To that extant the findings of the CIT (A) are maintained"

x) R.R. carrying corporation vs. ACIT (2009) 126 TTJ 240(Cuttack)

" After Going through the rival submissions and materials on records, we find that the Hon'bleGujraty High Court in the case of president Industries (supra) has held that the entire addition of undisclosed sales cannot be added . Only the profit embedded in the sale proceeds can be taxed. Similar view has been taken in the case of BalchandAjit Kumar (Supra) and following the similar reasoning, Cuttack Bench of the Tribunal in the case of Balasore Synthetic (P) Ltd. (Supra) has decided the similar issue in favour of assessee wherein AO was directed to adopt GP rate declared by the assessee for the year under consideration. The facts being same, so following the same reasoning, we are of the considered view that in case of the difference between the assessee's books and as per TDS certificate, then on the said difference, the only embedded portion of the profit is to be taken into consideration. Therefore, we set aside the order of revenue authorities on the issue and direct the AO to adopt the GP rate declared by the assessee for the assessment year under consideration and compute addition in question accordingly."

y) ACI vs. Aggarwal Sanitary & Hardware Co. 82 TTJ (CHD) 501

"Addition made on account of unrecorded purchases and undisclosed commission –AS regards unaccounted purchases, only the resultant profit was to be added and not the entire amount"

z) K.C.K.A. Gupta vs. ACIT 90 TTJ (Hyd) 555

"In All the cases, there were unaccounted sales. The AO has taken a View in the matter and accepted the contention of the assessee that a percentage of the sales should be considered as undisclosed income. The ADI as well as the Addl. CIT approved of this view. The view taken by the AO that only a percentage of undisclosed sale is to be considered as undisclosed income is a view taken by some of the courts and Tribunals of this country and hence it is a permissible view and cannot be termed as unsustainable in law. On this ground, the revisionary orders under s.263 have to fail as the AO ha taken one of the permissible views in law."

aa) Abhishek Corporation vs. DCIT 63 TTJ (Ahd) 651

"Even though it is established from seized documents that asessee was receiving premium/ 'on money' on booking of flats belonging to third parties, **entire receipts of 'on money/premium cannot be treated as undisclosed income of assessee; only net profit rate can be applied on unaccounted sales/receipts for making addition.**

Kachwala Gems vs. JCIT 288 ITR 10 (SC)

"It is well settled that in a best judgment assessment there is always a certain degree of guesswork. No doubt the authorities concerned should try to make an honest and fair estimate of the income even in a best judgment assessment, and should not act totally arbitrarily"

bb) ITO vs. Girish M. Mehta 105 ITD 585 (Rajkot)

"Best judgment assessment is not a provision to penalize the assessee, but is a machinery provision to enable the Revenue to assess a person when situation warrants an assessment. The order under Sec. 144 is to be made to the best of the judgment of the AO which means, the order has to be rational and is to be best on ab honest guesswork for which some valid basis is available to the AO. While estimating the GP the AO Should be fair and reasonable and should keep into account the turnover and the GP of earlier years along with all the facts and circumstances of the case. By rejecting book result, the AO does not get absolute and unbridled powers to estimate whatever profit he wants, as per his sweet-will"

cc) DCIT vs. Adinath Industries 252 ITR 476 (GUJ 0 High Court)

"The assessee was engaged in manufacturing activity. **On the basis of information received from sales Tax Departments,** the Ld AO held that the assessee's**supplier M/s Geeta Industriesis a mere billing agent and is not a genuine seller.** Accordingly**,** an **Addition on account of boguspurchase** was made in assessment.

The Ld. CIT(A) and Hon'ble deleted the addition .

The Hon'ble High Court upheld the order of ITAT on deleting the addition of bogus purchase on ground that :-

a) The requisite details of purchase are furnished.
b) The relevant materials showing details of purchase of material and its use in production filed.
c) The other documents being receipt note, entries in Excise register, production registers maintained under Excise laws are furnished.

In end, hon'ble high Court dismissed the revenue appeal.

dd) CIT vs. M.K. Brothers 163 ITR 249 (Guj –High Court)

The assessee was engaged in manufacturing of spindles and machinery parts. The Ld. A.O. observed that assessee had made bogus purchase of pig iron, scrab and spindle steel from 4 suppliers . The Ld. A.O. also learnt that the sales 4 suppliers. The Ld. A.O. learnt that the sales Tax Authorities had carried on investigations which revealed that such suppliers were involved in a racket of issuing bogus bills. The confessional statements admitting the ingenuine transaction were recorded of such suppliers. Accordingly, Ld. A.O. held entire purchase made from such suppliers as bogus. The 1st Appellate authority sustained the additions.

In 2nd Appeal, Hon'ble ITAT deleted the addition of bogus purchase under the reason that :

A) There is no evidence that any part of the fund given by the assessee to these suppliers came back to the assessee in any form;

B) The 2 statements of suppliers do not implication the transaction with the assessee;

C) The evidence gathered during investigation can create doubtful features, but such evidence is not adequate to conclude that purchase made by the assessee from these parties were bogus;

ee) Jagdamba Trading Company vs. ITO 107 TTJ 398 (Jd)

The assessee was engaged in purchase and sales of agriculture produce. The Ld. A.O. Received an information from sales Tax Departments that the purchase made by assessee from certain suppliers are ingenuine. The Ld. AO Relied on the affidavits filed by such suppliers before sales Tax authorities admitting that no sales are made by them to the assessee. In assessment, Ld. A. O. made addition on account of bogus purchase. In 1st Appeal Ld. CIT (A) partly deleted the additions.

In 2nd appeal Hon'ble ITAT deleted the entire additions on holding that :-

a) There is no proof that the amount has been received back by the assessee from suppliers;

b) The suppliers statements and their affidavits does not have any evidentiary value when an opportunity of cross examination was not given to assessee;

c) The ld. A.O. had heavily relied on the affidavits of the suppliers ;

d) There are 101 reasons for the seller to tell untrue facts and unless the seller is confronted with by the assessee, the alleged statements do not have any useful meaning.

ff) CIT vs. Shri Sindhuja Foods PvtKtd 16 DTR 278 (Raj - High Court)

In scrutiny assessment, Ld. A.O. had a made bogus purchase of goods, accordingly, rejected the books of accounts and disallowed the purchase.

"At this point, it is significant to note, that the gross sales figure for the relevant year is not in controversy, in the sense, that whatever bogus sales have been found by the AO, If they were to be considered literally, that would have reduced the figure of sale, and there is no material of finding , or any indication, to show that the assessee at any deflated figure. **In that view of the matter for making best judgment assessment the only relevant thing required to be considered was, application of particular GP rate,** which has been applied by the Tribunal and the CIT (A), on relevant consideration, being the GP rate applied in the last year. Thus it cannot be said that any material evidence has not been considered, or an irrelevant consideration has been taken in account by the Tribunal."

6. <u>Apply to reduce or waive penalty u/s 273A</u>

273A(1) The CIT can reduce/waive the amount of penalty u/s 271(1)(c) if three conditions are satisfied.

(vii) Full and true disclosure

(viii) Payment of tax and interest

(ix) Co-operation by the assessee.

273A(4) The CITcan reduce/waive the amount of any penalty if two conditions are satisfied-

a) To do otherwise shall cause genuine harship
b) Co-operation by the assessee

7. ***Appeal for waiver of interest may be filed before the CIT(A) and Tribunal***

An appeal for the waiver of interest levied under sections 234B, etc. is maintainable, as per the judgement in the case of *Tirath Ram (HUF) Vs Assessing Officer [2004] 87 TTJ 832 (Asr)*

Under certain circumstances, interest levied under sections 234B, etc. may be waived by the appellate authorities, on merits of the case.

In this regard, reliance may be placed on the following legal precedents.

i. ***CIT Vs Rainbow Industries Pvt. Ltd. [2005] 277 ITR 507 : 196 CTR 180 (Guj)*** In this case, addition to income was made on account of undervaluation of closing stock and accordingly, interest under section 215 of the Act was charged. The assessee was following a consistent method of valuation of stock and the assessee could not anticipate any addition of this nature and magnitude at the time of filing of estimate of advance tax.

It was held by the Tribunal that an addition of the aforesaid nature and magnitude could not have been anticipated by the assessee at the time when it filed its estimate of advance tax payable by it. The Tribunal, therefore, deleted the interest levied under section 215 of the Act.

On further appeal to the High Court, it was held that Tribunal was justified in deleting the interest levied under section 215, even though the addition made by the AO was confirmed by the Tribunal and the advance tax paid by the assessee was less than 75% of the assessed tax.

ii. ***CITVs Reading and Bates Exploration Co. [2005] 278 ITR 47 : 198 CTR 670 (Uttar)*** It was held in this case that when the income was subject to TDS and there were conflicting decisions of the Tribunal and a *bona fide* dispute was pending. Therefore, imposition of interest under section 234B was not justified.

iii. Deversons P. Ltd. Vs Chairman, CBDT [2005] 273 ITR 414 : [2004] 192 CTR 400 (Guj) It was held in this case that since the petitioner's tax liability *vis-à-vis* export cash assistance arose after the filing of the return and after the expiry of the relevant AY, on account of retrospective amendment of law, levy of interest under section 234B was required to be dealt with as a fit case of reduction or waiver of interest as per Notification issued by the CBDT.

iv. CIT VsSedco Forex International Drilling Co. Ltd. [2003] 264 ITR 320 (Uttar) It was, *inter alia*, held in this case that at the relevant time there were conflicting decisions of the Tribunal regarding the interpretation of contracts relating to *on-period* and *off-period* salary. A *bona fide* dispute was pending. Therefore, imposition of interest under section 234B was not justified.

v. Emami Ltd. Vs CIT [2011] 337 ITR 470 (Cal)

In this case, liability to pay MAT arose on account of subsequent amendment of the provision, with retrospective effect.

It was held that the last day of the relevant FY was 31.3.2001 and on that day, admittedly, the assessee had no liability to pay any amount in advance in accordance with the law then prevailing. The amended provisions of section 115JB having come into force from 1.4.2001, the assessee could not be held to be a defaulter with respect to payment of advance MAT. Therefore, interest could not be levied under sections 234B and 234C of the Act.

8. Penalty U/s 271(1)(c) on hawalatransaction can be argued on following basis.

SN	Observation:	Judgments:
1.	When income declared in survey on advice of survey officers that no penalty would be levied, - No case for penalty.	• 68 ITD 550 (Pune) Silver Palace • 94 TTJ 156 (Jd) – Narendra Kumar
2.	No presumption of concealment - No penalty u/s. 271(1)(c) for declaration in survey proceedings	• 49 ITD 606 (Dli) - Amirchand
3.	Revised return filed after Survey – ITAT Held no concealment	• 250 ITR 852 (Karn) – V Narashima Prasad • 250 ITR 528 (Bom) Sudhir Kumar Chottubhai
4.	Declaration in survey is not a case of penalty as no concealment is detected and adv. Tax is paid as per return filed.	• 2996/M/01 Sushil H Gupta "A' 23-12-2004
5.	Penalty u/s 271(1)(c) cannot be imposed in case where purchases are treated as bogus since assessee has failed to produce the parties before Assessing Officer for examination.	• Chempurv/s ITO I.T.A.No.451 /M/2006
6.	All the transactions were entered into between the parties through account payee cheque makes the question of identity of creditors fall into oblivion and it becomes absolutely irrelevant. Therefore, in assessee's case no question of concealment arises especially when all transactions were through account payee cheque.	• Addl CIT vs. Bahri Bros. P.Ltd.,(154 ITR 244) Patna HC
7.	Section 271(1)(c) penalty not valid if "satisfaction" not recorded in the assessment order.	• Madhu Shree Gupta, 317 ITR 107 (Del HC)
8.	Assessee agreed for an addition of the undisclosed income, but does not agree for addition on the basis that the undisclosed income is his concealed income. Department has not brought any other materials to show that the assessee had concealed the income or furnished inaccurate particulars so as to warrant penalty under S. 271(1)(c) of the Act. No penalty can be imposed.	• CIT V/s C.J. Rathnaswamy 1997 223 ITR 5 (Mad HC)
9.	A mere making of the claim, which is not sustainable in the law, by itself will not amount to furnishing inaccurate particulars of income of the assessee./ Mere erroneous claim, in the absence of concealment or inaccurate particulars of income cannot be a ground for levying penalty.	• CIT V. Reliance Petro products (P) Ltd. 189 TAXMAN 322/230 CTR 320/322 ITR 158 (SC) • CIT V. SSP LTD. TAXMAN 282/328 ITR 643
10.	A legal claim per se, right or wrong, cannot amount to furnishing of inaccurate	• Industrial Development Bank of India Ltd. Vs. Dy. CIT 42 SOT

	particulars of income.	325
11.	Mere addition to income does not mean there is concealment of income	• CIT V. IndenBislers 240 ITR 943, 158CTR 323, 118 Taxmann 766
12.	Unless the filing of return is accompanied by a guilty mind, penalty u/s 271(1)(c) cannot be levied.	• Cement Marketing Co. of India Ltd. v. Asst. CST(1980) 124 ITR 15 (SC) • CIT v. Ahmed Tea Co.(P) Ltd.(1978) 113 ITR 74 (Gau) • Addl. CIT v. Sawan Motor Stores 109 ITR 660 (AP)
13.	Where additions was on estimation and was reduced by appellate authority, in light of above, there was no justification in imposing penalty especially when necessary information / particulars were furnished by assessee.	• DabawaliTransaport Co. Asst. CIT (2010) 3 ITR (TRIB.) 785 CHD.)
14.	Concealment is attributable to an intention on part of the assessee to hide or conceal the income to avoid imposition of tax/ Case of conscious concealment was not visible.	• K.C. Builders Vs. ACIT 265 ITR 562 • India Cine Agencies Vs DCIT 275 ITR 430 • CIT v. Sureshchandra Gupta 226 ITR 613 (MP) • CIT v. GurbaxLal& Co. 176 CTR 82 (P & H)
15.	Where assessee has furnished all particulars of income, imposition of penalty is not automatic in nature.	• Dilip N. Shroff V/S. Jt. CIT 291 ITR PG. 519 • Twin Star Jupiter Co-op Hsg Ltd. V. ITO 31 SOT 474 • ACIT Vs. Enpakc Motors Pvt. Ltd ITA NO. 914/MUM/2008.
16.	Where the addition is made on the basis of difference of opinion between the AO and the assessee, penalty u/s 271(1)(c) cannot be levied. • ITO Vs. Oasis Securities Ltd. (2010) 37 SOT 63 • CIT(Central) Ludhiana V. Sanitary Improvement & Tiles Mfg. Co.133 ITR 334. • CIT V.Prem Das(NO.1) 248 ITR 234 2001(P & H) • ACIT v. Firmenich Aromatics (India) Pvt. Ltd. [ITA No. 4654/Mum/2009] • Sarnath Infrastructure (P) Ltd. V. Asst. CIT (2009) 120 TTJ (LUCKNOW) 216. • CIT VsCaplin Point Laboratories Ltd. (Mad) 293 ITR 524 Madras	
17.	Where the assessee makes a bonafide claim and no malafide can be attributed, then penalty cannot be levied./ Certain amounts claimed by assessee and disallowed does not mean that the assessee is guilty of fraud or willful neglect. • CIT V. Aretic Investment (P) Ltd. (2010) 190 TAXMAN 157 • Yogesh R. Desai V. Asst. CIT (2010) 2 ITR 267 • CIT V/S. Phi Seeds India Ltd. 301 ITR 13 Delhi • CWT v. HasmukhlalGandalal (2003) 264 ITR 42 (Guj) • CIT V. IndenBislers(1999) 240 ITR 943(Mad) • Karan Raghav exports (P) Ltd. V. CIT (2012) 21 Taxman 8 (Del.) • CIT Vs. Zoom Communication P. Ltd. : [2010] 327 ITR 510 (Del) • CIT VS. Shri Pawan Kumar Dalmia 168 ITR 379	
18.	It is well settled law that findings in the assessment proceedings are relevant but not conclusive in penalty proceedings because the considerations that arise in penalty proceedings are different from those that arise in the assessment proceedings. [Assessee disclosed all material facts-although expenditure was disallowed- penalty u/s 271(1)(c) cannot be initiated. • Ashok GrihUdyog Kendra (P) Ltd. Vs. ACIT [(2009) 120 ITD 151]	
19.	Assessing officer must have some definite evidence to refuse assessee's claim or evidence or explanation/ On account of non – acceptance of evidence furnished by assessee, addition can be made, but penalty under section 271 (1) (c) cannot be levied. • ITO Vs. Raj Rajeshwari Enterprises [(2009) 30 SOT 521 (MUM) • Mangilal G Biyani Vs. Asst. CIT [(2007) 158 TAXMAN 31 MUM] • CIT Vs. SardarmalShivdayal [(1996) 220 ITR 431]	

E) ISSUES RELATED TO SECURITY PREMIUM

Recently one more burning issue arises related to addition of security premium received by company as bogus scrutiny premises. But it has to be consider that amount of share application money received by a Company from alleged bogus shareholders cannot be regarded as undisclosed income because company had source of receipt i.e. Shareholder. Thus, addition cannot be made in hand of company.

Observation	***Judgment***
The amount of share application money received by a Company from alleged bogus shareholders cannot be regarded as undisclosed income under S. 68 of I. T. Act for the simple reason that if the names of the alleged bogus shareholders are given to the AO, then the Department is free to proceed to re-open their individual assessments in accordance with law.	1. CIT vs. Divine Leasing & Finance (Supreme Court) 299 ITR 268 [ITA No. 53/2005] 2. CIT vs. Lovely Exports (P) Ltd. (Supreme Court) (2008) 216 CTR 195 (SC) [ITA No. 953/2006]
Share Application Money taken from private companies does not attract sec-68 if sufficient proofs such as share allotment register, bank account copies, PAN cards of applicants, Income tax return of applicants are made available	3. CIT Vs Victor Electodes Ltd (Delhi High Court) [ITA No. 586/2010]
Remedy with the Department lies in reopening the case of these investors and the addition cannot be made in the hands of assessee	4. Oasis Hospitalities (Pvt.) Ltd. Vs. CIT (Delhi High Court) (2011) 333 ITR 119 (Del) [ITA No. 2093 of 2010]
We find no merit in this Special Leave Petition for the simple reason that if the share application money is received by the assessee company from alleged bogus shareholders, whose names are given to the AO, then the Department is free to proceed to reopen their individual assessments in accordance with law. Hence, we find no infirmity with the impugned judgment	5. CIT Vs. Ultratech Finance & Investment Ltd. (Delhi High Court) [ITA No. 1122/2010] 6. CIT Vs. HLT Finance (P) Ltd. (Delhi High Court) [ITA No. 1133/2010]
Considering the totality the facts and circumstances and the principles laid down by the various courts including Hon'ble Supreme Court and Jurisdictional Delhi High Court, I have come to the conclusion that the appellant company has been able to prove the identity of the share applicants and therefore, no addition can be made in hand of the appellant company even if the share applicant is having no means or creditworthiness	7. CIT Vs. J. J. Jindal Infin Pvt. Ltd. (Delhi High Court) [ITA No. 1507/2010]
If the share application money is received by the assessee company from alleged bogus shareholders, whose names are given to the Assessing Officer, then the Department is free to proceed to reopen their individual assessments in accordance with law, but it cannot be regarded as undisclosed income of the assessee. Thus, in a case where identity of persons is established, in our considered opinion, no addition is justified in the hands of the assessee. If the Assessing Officer was not satisfied with regard to creditworthiness of the depositors the action could have been taken in their hands	8. CIT V/s Derby Overseas P. Ltd. (Delhi High Court) [ITA No. 1497/2010]
This Court has carefully considered the submissions. The previous	9. CIT Vs. Expo Globe

discussion, particularly the order of the CIT (A), would reveal that even though the Assessing Officer had initially concluded on the basis of the materials made available at that stage that service of the entry providers had been utilized to bring in capital, after remand the CIT (A) elaborately took into account considerable material furnished by the assessee. These included income tax returns, balance sheets, ROC particulars and bank account statements. On the basis of these, the CIT (A) held that the share application money or the source of the share application money had been satisfactorily explained.	India Ltd. (Delhi High Court) [ITA No. 1257/2011
Even if it be assumed that the subscribers to the increased share capital were not genuine, nevertheless, under no circumstances, can the amount of share capital be regarded as undisclosed income of the assessed. It may be that there are some bogus shareholders in whose names shares had been issued and the money may have been provided by some other persons. If the assessment of the persons who are alleged to have really advanced the money is sought to be reopened, that would have made some sense but we fail to understand as to how this amount of increased share capital can be assessed in the hands of the company itself	10. CIT vs. Achal Investment Ltd. (Delhi High Court) (2004) 268 ITR 211
Even if it be assumed that the subscribers to the increased share capital were not genuine, under no circumstances the amount of share capital could be regarded as undisclosed income of the company	11. CIT Vs. Gobi Textiles Limited (Madras HC) (2007) 294 ITR 663 12. CIT Vs. M/s Aks Alloys (P) Ltd (Madras HC) [ITA No. 495 of 2011]
Under no circumstances, can the amount of share capital be regarded as the undisclosed income of the assessee	13. Hindustan Inks & Resins Ltd. vs. DCIT (Gujarat High Court) (2011) 60 DTR 18
Assessing Officer made addition under section 68 on account of share application money received by assessee company even though assessee had filed all documentary evidence, like share application form, copies of bank statement, income-tax return, balance sheet, share allotment certificates of board resolution of share applicants, PAN card, register certificate of Registrar - Moreover, applicant companies also confirmed investment made by them and submitted all relevant documents - Whether since assessee had discharged onus establishing identity and creditworthiness of applicant companies and genuineness of transaction, addition made by Assessing Officer under section 68 was to be deleted - Held, yes	14. CIT V/s Vacmet Packaging (India) (P.) Ltd [2014] 45 taxmann.com 204 (Allahabad HC) Order dated: 11/02/2014
Assessee received share application money and share premium money from four parties - Assessing Officer treated said money as unexplained credit under section 68 - However all four parties were limited companies and enquiries were made and received from four companies and all companies accepted their investment - Whether where assessee had categorically established nature and source of said sum, addition of such subscription as unexplained credit under section 68 was unwarranted - Held, yes	15. CIT V/s Pranav Foundations Ltd [2014] 51 taxmann.com 198 (Madras)
Assessing Officer made addition under section 68 on account of amount received for share capital, its premium and amount paid as commission for arranging it on basis of statement made by third parties who were related to purchasing companies stating that these companies were engaged in providing accommodation entries in lieu of commission - However, said third party statement was made behind back of assessee and no opportunity of being heard or cross-examining third parties was provided to assessee - Assessing Officer could not bring any material to disapprove genuineness of confirmation and affidavits filed by assessee - Further, all	16. CIT V/s Supertech Diamond Tools (P.) Ltd. [2014] 44 taxmann.com 460 (Rajasthan HC)

transaction were through account payee cheques, all these companies had PAN numbers and were regularly assessed to tax - Investor companies were registered under Companies Act and Form No. 2 for allotment was also filed - Whether appellate authorities could not be said to have erred in deleting addition - Held, yes	
11. We further note that the assessee produced the balance sheet, profit and loss account, income tax return, PAN and confirmation from these parties, which clearly discharge the assessee from its onus to prove its claim. When the assessee has brought on record the relevant evidence including the balance sheet and profit & loss account and return of income of these parties, then in the absence of proving contrary by the AO these material evidence cannot be brushed aside merely on the basis of suspicious. Even otherwise, when the assessee has produced the share application form, allotment letter, share certificate as well as bank account, then the genuineness of the transaction cannot be doubted in the absence of any contrary finding. The evidence produced by the assessee is even otherwise cannot be doubted when the return of income is already by the parties are on the record of the department. Thus, we find that the disallowance of the claim of the assessee and addition made by the AO under Section 68 is purely based on assumption, guess work without substantiated by any evidence or material. This is not a case of bogus shareholders as all these parties are the company, which are in existence and subjected to Income Tax as the assessee has produced the relevant evidence. Therefore, when the assessee has produced all the relevant evidences, and if the department has doubted the source of the share application money, then it is free to take necessary action in respect of these parties. The Hon'ble Supreme Court in the case of CIT Vs. Lovely Exports Pvt. Ltd. (supra), has held that if the share application moneyis received by the assessee company from alleged bogus shareholders whose names are given to the AO then the department is free to proceed to reopen their individual assessment in accordance with law but it cannot be regarded as undisclosed income of the assessee company. There is nothing on record to show that these transactions of allotment of share is a sham transaction, then the department cannot treat the said share capital money as undisclosed income of the assessee. 12. In view of the above discussion as well as facts and circumstances of the case, we are of the considered opinion that the addition made by the AO under Section 68 of the Act is not justified and the same is hereby deleted.	*17.* M/s Orchid Industries Pvt. Ltd., V/s DCIT ITA No. 1867/Mum/2012 dated 07/02/2014
6. We have heard the rival contentions and perused the record. From the observations made by the tax authorities, I notice that the assessee has furnished details to prove the identity of the share applicant company, its credit worthiness and genuineness of the transactions. As stated earlier, the AO made the addition on the basis of a statement alleged to have been given by the director of the share applicant company and the same was found to be not available. Hence, the very basis on which the impugned addition was made was proved to be wrong. Hence the Ld CIT(A) proceeded to examine the documents himself. However, he has looked into the copy of income tax return filed by the Share applicant company, instead of financial statements. He has also examined the bank account of the share applicant company and found that there were deposits on daily basis. Accordingly he drew adverse conclusions. In my view, the documents examined by the Ld CIT(A) were not sufficient to support the conclusions reached by Ld CIT(A). 7. From the paper book furnished by the assessee, I notice that the share applicant company has furnished following details before the assessing officer on 09-12-2007, i.e., before the completion of	18. Kainya and Associates Pvt.Ltd., V/s DCIT ITA No.6299/Mum/2014 order dated 10.08.2015

assessment:- (a) Bank statement (b) Memorandum and Articles of association of company (c) Audited Balance sheet for FY 2005-06. (d) Copy of Board resolution (e) Copy of income tax return. Thereafter, the share applicant company has also filed another letter on 21-11-2008 before the Ld CIT(A), wherein it has confirmed the investment made in the assessee company. 8. The audited Balance Sheet filed for FY 2005-06 also contains the details relating to FY 2004-05. A perusal of the same would show that the share application money is shown under the head "Loans and Advances". Further the share applicant company is possessing own funds to the tune of Rs.8.89 crores. The above said documents and confirmation letter filed by the share applicant company would show that the identity and credit worthiness of the transactions stand proved. Since the impugned sum of Rs.10.00 lakhs was received through banking channels, the genuineness of the transactions also stand proved. Thus I notice that the assessee has discharged the initial burden of proof placed upon it. 9. As noticed earlier, the Ld CIT(A) has examined the copy of income tax returns, which may not throw light about the credit worthiness. Further the copy of bank statement also shows that there are continuous transactions of deposits and withdrawals. Hence, in my view, the observations made by the Ld CIT(A) that there were heavy deposits before issuing the cheque of Rs.10.00 lakhs to the assessee company also appear to be misplaced one. Hence, in my view, the Ld CIT(A) has confirmed the impugned addition without properly appreciating facts. 10. Hence, I am unable to agree with the conclusions reached by Ld CIT(A) in view of the foregoing discussions. Accordingly, I set aside the order of Ld CIT(A) on the issue of Rs.10.00 lakhs and direct the assessing officer to delete the same. Consequently, the addition of Rs.10,000/- relating to estimated commission income is also directed to be deleted.	
4.1. It is the contention of the ld.counsel for the assessee that the assessee had furnished PANs, addresses, etc. to prove the identity, genuineness of the transaction and creditworthiness of the depositors. We find that the assessee has filed PANs, addresses, etc. for demonstrating that the depositors were assessed to tax. In view of the case-laws as relied upon by the ld.counsel for the assessee more particularly judgement of Hon'ble Jurisdictional High Court in the case of CIT vs. Dharamdev Finance (P.) Ltd. reported at (2014) 51 taxmann.com 205 (Guj.):: (2014) 227 Taxman 219. Therefore, we direct the AO to delete the addition. Thus, ground of assessee's appeal is allowed.	19. Mahalaxmi Housing & Finstock Pvt. Ltd. V/s ACIT ITA No. 19/Ahd/2011

*********THANKING YOU********