Shri Puneet Jain, Meerut vs Ito, Meerut on 27 September, 2019

IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'F' BENCH,
NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
MS. SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No. 1569/DEL/2012 [A.Y 2008-09]

Shri Puneet Jain S/o Shri Praveen Kumar Jain Prop. M/s Paras Paper Center 517/2, Mahavirji Nagar, Meerut	Vs.	The Income tax Officer Ward 2(1) Meerut
PAN: AANPJ 4604 J		
(Applicant)		(Respondent)

Assessee By : Shri K. Sampat, Adv
Shri V. Raja Kumar, Adv

Department By : Smt. Suleka Verma, CIT-DR

Date of Hearing : 19.09.2019
Date of Pronouncement : 27 .09.2019

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

With this appeal, the assessee has challenged the correctness of the order of the CIT(A), Meerut dated 24.01.2012 pertaining to A.Y 2008-09.

2. The grievances raised by the assessee read as under:

> "1. That the assessment completed U/s 143(3) of the l.T. Act 1961 is arbitrary, unjust and illegal because notice U/s 143(2), 142(1) and 131 were not properly served upon the assessee and order passed on 04-07-2010 is against the principle of natural justice and confirmation of order passed by A.O. by Ld. C1T(A) is erroneous and bad in law.
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> 2. That the A.O. is not justified in disallowing the sundry creditors of Rs. 17,31,25,389/- and added in the total income of the assessee and confirmation of

order passed by A.O. by C1T(A) is erroneous and bad in law.

3. That the A.O. is not justifying in disallowing the sundry debtors of Rs. 8,58,44,005/- and added in the total income of the assessee and confirmation of the order passed by A.O. by Ld. CIT(A) s erroneous and bad in law.

4. That the total assessment made by Ld. A.O. of Rs. 25,94,15,964/- is arbitrary, unjust and illegal on the various legal facts and circumstances and action of Ld. A.O. cannot be said justified and he has not reject the books of account, which was duly audited as required U/s 44AB. Ld. CIT(A) ignored the fact that trading result are accepted by the trade tax authority and Police authority however, he took action against Radhey Shyam Mittal therefore, the assessment framed by Ld. A.O. and confirmed by CIT(A) is erroneous and against the facts and law.

5. That without prejudice to ground no. 1, 2, 3 & 4 the assessment completed u/s 143(3) for the A.Y. 2009-10 on the similar facts and circumstances @ 1% so called bogus receipt of Sh. Radhey Shyam Mittal. AO assessed income @ 1% and Ld. CIT(A) totally ignored this fact hence order passed by Ld. CIT(A) without considering the assessment for the A.Y. 2009-10 is bad in law.

6. That the penalty proceeding initiated U/s 271(1)(c) and interest charged U/s 234A, 234B & 234C is not according to law."

3. Briefly stated, the facts of the case are that the appellant is proprietor of M/s Paras Paper Center and filed his return of income on 30.09.2008 returning income of Rs. 44,65,570/-. The return was selected for scrutiny assessment and, accordingly, statutory notices were issued and served upon the assessee.

4. During the course of scrutiny assessment proceedings, and on perusal of the documents furnished by the assessee, the Assessing Officer asked the assessee to furnish details of sundry creditors and sundry debtors. On perusal of the details furnished by the assessee, the Assessing Officer issued notice u/s 133(6) of the Income-tax Act, 1961 [hereinafter referred to as 'The Act'] to one of the creditors M/s Mittal Paper Mart as he was not convinced with the authenticity of the confirmation filed by the assessee. Summons u/s 131 of the Act was also issued to Shri Radhey Shyam Mittal of M/s Mittal Paper Mart. But the summons was returned with the remarks "Addressee was not available on the given address".

5. Subsequently, another summon was issued to the appellant asking him to attend the proceedings alongwith cash book/ledger/bills/vouchers and bank statements. No compliance was made by Shri Puneet Jain.

6. During the course of proceedings, Shri Radhey Shyam Mittal P/o Mittal Paper Mart appeared before the Assessing Officer along with his son on 16.04.2010. Statement of Shri Radhey Shyam Mittal was recorded by the Assessing Officer and the same reads as under:

7. Pursuant to the statements and affidavit of Shri Radhey Shyam Mittal, summons u/s 131 of the Act alongwith notice u/s 142(1) of the Act was issued and served upon the assessee giving him an opportunity to explain his case in light of the statement of Shri Radhey Shyam Mittal. The assessee neither responded to the summons nor to the notice.

8. The Assessing Officer was of the firm belief that the appellant does not want to say anything on this matter and is simply relying upon the confirmation of Mittal Paper Mart. The Assessing Officer found that the signature on the confirmation does not match with the signature of Shri Radhey Shyam Mittal as given in his statement before the Assessing Officer. The Assessing Officer was convinced that the credit entries appearing in the name of Mittal Paper Mart amounting to Rs. 1,73,12,52,389/- is bogus and, accordingly, made addition of Rs. 17.31 crores as unexplained credit.

9. While making the addition, the Assessing Officer drew support from:

10. Proceeding further, the Assessing Officer noticed that the assessee has shown total sundry debtors of Rs. 17,41,65,793/-. Notices u/s 133(6) were issued to the debtors and the status of the notices is as under:

1. M/s Arshia Enterprises.

514, Kamla nagar, Meeru Rs. 7,91,545 Not known 6.5.10

2. M/s Gyan Industries T.P. Nagar, Meerut Rs. 70,000 Not known 6.5.10

3. M/s Shree Adinath Enterprises Mahaveer Ji Nagar, Baghpat Road, Meerut Rs. 2,65,000 5.5.10

4. M/s AARU Enterprises Bhopa Road, Muzaflar Nagar Rs. 28,54,908 5.5.10

5. M/s Adinath Enterpeises 16, Dwarikapuri, MZF Rs. 5,84,900 5.5.10

6. M/s S.S. Marketing Nandan Garden W.K. Road, Meerut Rs. 73,02.781 5.5.10

7. M/s Gokul Enterprises 160/51 Mark Ganj, Lucknow Rs. 6,95,87,579 5.5.10

8. M/s Sincere Marketing Co.

	Sect. 8, Noida	Rs. 5,55,580	5 .5.10
9.	Corrupack India C -97, A, Horiary Complex Ph - II, Noida	Rs. 19,85,663	10.5.10
10.	Aryan Print & Pack C -74, Sector - 63, Noida	Rs. 18,46,049	10.05.10

11. The Assessing Officer was of the opinion that the debtors amounting to Rs. 8,58,44,005/- are not genuine as the addressees were not found on the given addresses. The Assessing Officer, accordingly, added Rs. 8,58,44,005/- to the returned income of the assessee.

12. The assessee assailed the assessment before the ld. CIT(A) and vehemently contended that no proper notice u/s 143(2) of the Act was served upon the assessee and proper opportunity of being heard was not given by the Assessing Officer.

13. The ld. CIT(A) called for remand report from the Assessing Officer in respect of the objections raised by the assessee. The Assessing Officer submitted remand report which is as under:

> From The Income Tax Officer, Ward-2(1).
>
> Meerut To The Commissioner of Income Tax (Appeals), Meerut.
>
> F.No.Scy./ITOAV-2(l)/MRT/2011-12 Dated: 28.12.2011 Sir, Sub: Shri Puneet Jain S/o Shri Praveen Kumar Jain, Prop. M/s Paras Paper Centre, Meerut - A.Y. 2008-09 -
>
> Kindly refer to your letter F.No.125/10-11/165 dated 17.10.2011 on the subject noted above.
>
> 2. After making necessary enquiries and verifications, I am submitting my remand report as under:
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> Assessment in this case was made on total income of Rs.25,94,15,964/- under section 143(3) of the Income Tax Act, 1961 vide order dated 04.06.2010 as against returned income of Rs. 4,46,570/-. The additions made were as under:

Bogus sundry creditors.	Rs.	17,31,25,389
Undisclosed income/ sundry debtors.	Rs.	8,58.44.005
	Rs.	25,89,69,394

> During the course of assessment proceedings, the assessee filed the confirmation from sundry creditor M/s Mittal Paper Mart on 26.02.2010. As the confirmation filed by the assessee was doubtful, the A.O. issued summons to Sh.
>
> Radhey Shyam Mittal, Prop, of M/s Mittal Paper Mart fixing the date for compliance for requiring him to produce copy of bank account, and all the books of accounts

relating to A.V. 2008-09. The summons were received back in this office on with the remarks of postal authorities " The tenant told that the recipient is outside for his treated and not know when he will be back". After it summons were ssued to Sh. Puneet Jain on 19.03.2010 requiring to furnish cash book, ledger and all the bills and vouchers/copy of bank account in this office on 25.03.2010. No compliance was made of this summon and again summon u/s 131 was issued and served upon Sh. Puneet Jain to furnish all the details as asked in earlier summons. But the assessee did not comply to these summons also.

However, During the course of hearing, in response to summons u/s 131, the sundry creditor Sh. Radhy Shyam Mittal Prop. M/s Mittal Paper Mart attended on along with his son Sh. Rajnish Mittal and got his statement on oath recorded. Statement on oath and affidavit of Sh. Radhey Shyam Mittal is part of assessment order. On the basis of statement given, the Assessing Officer treated the sundry creditor of Rs. 17,31,25,389/- as bogus. The Trade Tax Department and Police Department have confirmed that the purchases made by Shri Radhey Shyam Mittal M/s Mittal Paper Mart from M/s Saifali Paper Mart were bogus as the said company had closed and stopped manufacturing and from 1999-2000 is not manufacturing, purchasing and sales, which stands confirmed also by Trade Tax Authorities.

As the addition was made on the basis of statement of Shri Radehy Shyam Mittal and Sh. Radehy Shyam Mittal was not got cross examined, during the course of remand proceedings, to verify the statement of Shri Radhey Shyam Mittal (Answer to Q.No.7), that the cash withdrawals were made by Sh. Puneet Jain and his father, vide this office notice dated 08.11.2011 the assessee was required to attend this office along with his father on 16.11.2011 and to furnish other relevant details (Copy enclosed). However, on 18.11.2011, the counsel of the assessee filed a written reply enclosing therewith copy of R. of Transport, Truck Nos. Bilty No., tax challan of entry tax, copy of assessment order of trade tax, copy of account of unloading and loading expenses, list of salary paid with name and address, copy of credit note. In this reply, the assessee again stated that he has not made withdrawals/deposit any amount in the bank account of Radhey Shyam Mittal and assessee did not deposit any cheque by filling the deposit slip in the bank account of Shri Radhey Shyam Mittal. Sh. Puneet Jain and Shri Praveen Kumar Jain, his father were not produced for examination. Though in the reply it was mentioned that all the books of accounts are produced, but the same were not produced.

To verify the contention of the assessee, the Branch Manager, Punjab National Bank, Baghpat Road, Meerut was required to furnish this office the name of the person who had actually presented the bearer cheque to your branch and made the withdrawals. He was also required to furnish the photocopy of such cheques both side and documentary evidence with regard to identity of the person who withdrew the cash. The branch manger supplied some photocopies of the bearer cheques through which the cash withdrawals were made from the bank account of Shri Radhey Shyam Mittal, Prop. M/s Mittal Paper Mart.

5. In between letter dated 14.12.2011 was again issued to Shri Puneet Jain with regard to furnish certain information (Copy of letter enclosed). Vide this letter, the assessee was informed that he has

only filed the G.R.of Transports, Truck Nos. Bilty Not. Etc. which relate to purchases made from the parties other than M/s Mittal Paper Mart. He was also required to furnish reply to para-3 of notice dated 08.11.2011 to explain as to whether the goods were sold by you on FOR basis or the purchaser had made its own arrangement for carrying the goods. He was again required to produce the sale bills in original and evidence of transportation of the goods from his premises to the parties to whom goods were sold. He was again reminded that you and your father have not attended in person for examination. He was also informed that in the month of December on 21.12.2007, you have purchased goods 42 times in a day, on 24.12.2007- 22 times, on 25.12.2007- 44 times, on 26.12.2007- 42 times, on 27.12.2007 -13 times, on 28.12.2007 - 15 times and on 29.12.2007- 14 times and after that no purchases were made. He was required to furnish the name and complete addresses of the parties to whom corresponding sales were made by him on these dates. The counsel of the assessee vide letter dated 09.12.2011 received in this office on 16.12.2011 stated that Punit Jain was seriously injured in an accident between car and tractor-trolly on 02.12.2011 at Nawab Ganj Disttl. Gaunda, Faizabad and he has multiple fractures in his both arms and have an injury in his head. He is on complete rest. So he is unable to attend the office. As regards the purchases made from M/s Mittal Paper Mart, the counsel stated that the purchases were made on FOR basis so he could not produce transport documents because that record would be kept by M/s Mittal Paper Mart for claiming the expenses in his books of accounts. On 16.12.2001 also the assessee did not furnish the name and complete address of the parties to whom corresponding sales were made. As his father, Shri Praveen Kumar Jain attended the office, his statement on oath was records, the copy of which is being enclosed herewith.

6. In reply to question No.6, Sh. Praveen Kumar Jain stated that he was dealing with the work of supervision only and no writing work was done by him. He also stated that in M/s Paras Paper Centre 10-12 employees were working and some of the name told by him were Tarun, Bijender, Schin, Rahul, Deepak, Balbir etc. In reply to a specific question No.8, he reverted from his answer given in question No.6 and stated that sometimes he used to deposit the cheques by filling his own hand writing relating to M/s Paras Paper Centre. In a specific question No. 12, he was asked as to whether cheque book signed by Sh. Radhey Shyuam Mittal was ever remained with you and after filing the cheque you used to make withdrawals from his account, Shri Praveen Kumar Jain stated that it is not in his knowledge that any such cheque book was there. I had never withdrawn any amount by filling the cheque. In Q..No. 13, he was apprised of the fact that the withdrawals were made by your employees from the account of Sh. Radhey Shyam Mittal and how it was possible that the cheques of Shri Radhey Shyam Mittal were being withdrawn by your employees. He stated that this is not in his knowledge. In the last question No. 14, he was asked to write down five words/sentences for matching his hand writing. The word written by him match with the words written on the self cheques, the self withdrawals through which were made from the account of Shri Radhey Shyam Mittal. He was shown Cheque No.943305 dated 08.08.2007 for Rs. 4,00,000/- and was mad6 aware that the hand writing on this cheque matches with his handwriting whereas in his reply to a question mentioned above, he had stated that no such cheque books was in his knowledge. He was asked to explain as to how he filled up this cheque. He stated that this cheque is not in his handwriting.

7. In order to verify the correctness and matching of his handwriting, copy of 54 such cheques was given to Hand Writing Expert. Sh. Sanjeev Tomar, 77-Old Prempuri, Railway Road, Meerut who confirmed that these cheques have been written in the handwriting of Shri Praveen Kumar Jain. A copy of hand writing expert's report is being enclosed herewith. The handwriting of Shri Praveen Kumar Jain, father of the assessee on the available 54 bearer cheques of Shri Radhey Shyam Mittal from which the cash withdrawals were made, confirms the statement of Shri Radhey Shyam Mittal bank account was got opened and introduced by the assessee and cash withdrawals from his bank account were made by Sh. Puneet Jain and his father Shri Praveen Kumar Jain. Handwriting of Shri Puneet Jain could not be verified as he has not been produced for examination. The handwriting on the sale bills of M/s Mittal Paper Mart issued to M/s Paras Paper Centre could not be verified in absence of the examination of Shri Praveen Kumar, Prop. M/s Paras Paper Centre.

Further, as regards addition of Rs. 8,58,55,005/- on account of unexplained debtors, vide letter dated 08.11.2011, the assessee was required as under:

> "In the written submission before the CIT(Appeals) you have taken a ground that you were not provided proper and reasonable opportunity. The A.O. while making the assessment had made an addition of Rs. 8,58,55,005/- towards sundry debtors being unexplained as the letter issued to them were returned back. Since, the debtors were not available on the given address, you are required to explain the genuineness of these debtors and produce them for examination. Also furnish copy of their accounts as on 31.03.2009 and 31.03.2010."

But, till date neither the assessee has furnished the copy of such sundry debtors nor produced them for examination. Therefore, the debtors could not be verified.

8. The FIR lodged with the Police Authorities against M/s Mittal Paper Mart and M/s Paras Paper Centre by Sh. Sharad Kumar Shukla S/o Shri Radhey Shyam Shuykla, R/o 4/160, Rakshapuram, Mawan Road, Meerut, Asstt. Commissioner of Trade Tax Khand-10 makes it clear that M/s Mittal Paper Mart and M/s Paras Paper Centre together have cause revenue loss to the State Government. The assessee has also filed a copy of final report of Police Department in which they have confirmed that Shri Radhey Shyam Mittal has committed a crime of fake purchases from M/s Saifali Paper Pvt. Ltd., Saharanpur and M/s Paras Paper Centre has not been found involved in this action and no evidences are their against it. The final report from Police Department does not exonerate Shri Puneet Jain for his involvement in fake/bogus purchase and sales in view of above mentioned discussions.

9. A copy of tax audit report of Sh. Radhey Shyam Mittal, Prop. M/s Mittal paper Mart was obtained from the ITO, Ward-2(2), Meerut which reveals that M/s Mittal Paper Mart had not shown any debit balance of Rs. 17,31,25,389/- in his books, though during the course of assessment proceedings for the A.Y. 2009-10 of M/s Paras Paper Centre it is noticed that payment through cheques of Rs.9,80,80,000/- have been issued by M/s Paras Paper Centre to M/s Mittal paper Mart during the period 1.4.08 to 31.3.2009 whereas M/s Mittal Paper Mart had not shown any creditor in his balance sheet for the A.Y. 2008-09 and has also not made any sales during the period 1.4.08 to

31.3.09. It is also noticed that during the financial year 2008-09, M/s Paras Paper Centre has debited the account of M/s Mittal Paper amount for Rs. 8,97,000/- and credited the amount of M/s Aryan Print and Pack and further debited the account of M/s Mittal Paper Mart by Rs. 15,87,579/- and credited the account of M/s Gokul Enterprises by transfer entries.

In support of its contention, in the paper book filed by Sh. Puneet Jain Prop. M/s Paras Paper Centre has taken the following grounds:

> a) The he is registered under both UP. VAT Act as well as Central Sales Tax Act and M/s Mittal Paper Mart is duly registered under UPTT-MF0055531 dated 01.10.2005 CST No. MF 5044141 dated 28.10.2006 from whom he has made purchases of Rs.41,76,22,254/-
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> b) That because of the reason that FIR was made by Commercial Tax Department, the assessee suffered shock and mental agony and he was unable to give any reply to the notices, issued by the A.O.
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> c) That the statement of Sh. Radhey Shyam Mittal and affidavit is contradictory to the fact that the return filed by him after auditing his books of accounts by a C.A. voluntary and if any wrong committed by Radhey Shyam Mittal then he should be punished if his statement is found true but assessee cannot be penalized until the assessee cross examine the witness.
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> d) That the assessee was not allowed sufficient opportunity even the request of the assesss's counsel was turndown in which he wanted to inspect the record and required the certified copies to proceed the case but the A.O. refused to receive the letter and the person on the Dak Counter also refused to receive it which shows that the A.O. was prejudiced against the assessee to complete the assessment u/s 143(3) and not under section
>
> 144.

e) That the assessment order was framed treating the sundry creditors of Rs. 17,54,46,941/- as bogus however the total sales and closing stock was Rs. 45,05,86,546/- was confirmed. The how the total creditors of Rs. 17,54,46,941/- became bogus when proprietor's capital and secured loan are genuine.

f) That the A.O. had not rejected the books of accounts which was duly audited by the auditor u/s 44AB.

Para No. 10(a) to 10(c) are covered by my comments given above.

In para-10(d), the assessee has stated that he was not allowed sufficient opportunities to explain its case which is not correct as letter dated 26.05.2010 of the assessee forming part of the paper books

itself reflects that due to abnormal conditions, he failed to furnished the details before the A.O. It has also been mentioned in that letter that the assessee came to know that the A.O. has been transferred to other place and to keep the assessment pending for another Assessing Officer so that the assessee could collect all the details.

A perusal of assessee's letter reveals that the assessee had changed his counsel and new engaged wanted which was not allowed. The assessee in his letter dated 26.05.2010 which not alleged received at Dak Counter itself proves that the assessee was allowed sufficient opportunities and the assessee himself wanted to escape from the assessment proceedings before the then A.O. but from the another A.O. for the reasons best known to him. First notice u/s 143(2) dated 18.09.2009 was served upon the assessee on 22.02.2009 and during the period of almost 9 months, the assessee did not change his counsel and furnished the details from time to time and on one ground or other lingered the assessment, hence the A.O. completed the assessment.

Para-10(e) is also covered with the comments given above. Since, the party who had made purchases only through fake bills from M/s Saifali Paper Ltd. how could it make the sales to the assessee.

Para-10(e) is concerned with rejection of books of accounts as the creditor was not found genuine. Since, the creditor had not shown debit balance of the assessee in its books of account, the credit balance remained unverifiable and the A.O. made the addition accordingly.

The assessee has challenged the service of notice under section 143(2) which was made on the mother of the assessee as the assessee in the records had given his residential address. But, since the assessee had complied the said notice, it cannot be challenged at this stage and the service of this notice is held to be proper service. In view of the above facts and circumstances, it is proved that fake/bogus purchases and sales through fake bills were made by M/s Mittal Paper Mart and M/s Paras Paper centre in connivance with each other through the firm M/s Mittal Paper Mart.

In view of my above comments, the appeal proceedings may kindly be decided on merits."

14. After considering the facts and remand report of the Assessing Officer, the ld. CIT(A) confirmed the additions made by the Assessing Officer.

15. Before us, the ld. counsel for the assessee reiterated what has been stated before the lower authorities. It is the say of the ld. counsel for the assessee that by not allowing any opportunity to cross examine Shri Radhey Shyam Mittal, the lower authorities have violated the principles of natural justice, which is against the ratio laid down by the Hon'ble Supreme Court in the case of Andaman Timber Industries Vs. CIT Civil Appeal No. 4228 OF 2006.

16. The ld. counsel for the assessee once again stated that there was no proper service of notice u/s 143(2) of the Act. The ld. counsel for the assessee heavily relied upon the decision of the co-ordinate benches for Assessment Years 2009-10 and 2010-11 in ITA No. 4922/DEL/2014 and 4152/DEL/2015. It is the say of the ld. counsel for the assessee that on similar facts in Assessment Year 2009-10, the Tribunal has held that the additions based on the statements of Shri Radhey

Shyam Mittal made by the Assessing Officer are not sustainable. Similar view was taken in Assessment Year 2010-11.

17. The ld. counsel for the assessee further pointed out that in Assessment Year 2009-10, the Assessing Officer had made addition by estimating the profit being addition on account of commission on fake/bogus bills. The ld. counsel for the assessee further drew our attention to the decision of the Additional Commissioner Grade - 2, [Appeal - 2] Commercial Taxes, Meerut and pointed out that the Commercial Taxes Department has accepted the trading results of the appellant.

18. Per contra, the ld. DR strongly supported the findings of the lower authorities. It is the say of the ld. DR that in respect of service of notice u/s 143(2) of the Act, the ld. CIT(A) has categorically mentioned that the ld. counsel for the assessee during the appellate proceedings has made no submissions in this regard and thereafter, dismissed this grievance of the assessee.

19. The ld. DR vehemently stated that there should be no grievance caused to the assessee once the matter is not pressed before the ld. CIT(A). On merits of the additions, the ld. DR drew our attention to the relevant observations made by the Assessing Officer in the assessment order and the ld. CIT(A) in his appellate order, and stated that the Assessing Officer has demonstrated by bringing clinching evidences in support of his additions and has not simply made the additions based upon the statements of Shri Radhey Shyam Mittal.

20. Rebutting to the opportunity of cross examination, the ld. DR stated that technical rules of evidence do not apply to the Income tax proceedings and Income tax authorities are not bound by technical rules of evidence though the general principles of Evidence Act do apply.

21. The ld. DR referred to various judicial decisions in support of her submissions in her written submissions and for the sake of convenience, the same is extracted hereunder:

> "Hon'ble Supreme Court in the case of Indian & Eastern Newspaper Society v. CIT 119 ITR 996 has held that the proceedings for assessment before the Assessing Officer have been described as quasi-judicial in character. The Hon'ble Supreme Court in S.S. Gadgil v. Lal & Co. 53 ITR 231 has held that a proceeding for assessment is not a suit for adjudication of a civil dispute. That an income-tax proceeding is in the nature of a judicial proceeding between contesting parties, is a matter which is not capable of even a plausible argument. The income-tax authorities who have power to assess and recover tax are not acting as judges deciding a litigation between the citizen and the State: they are administrative authorities whose proceedings are regulated by statute, but whose function is to estimate the income of the taxpayer and to assess him to tax on the basis of that estimate. Tax legislation necessitates the setting up of machinery to ascertain the taxable income, and to assess tax on the income, but that does not impress the proceeding with the character of an action between the citizen and the State.

Dhakeswari Cotton Mills Ltd. v. CIT 26 ITR 775 (SC) - As regards the second contention, although ITO is not fettered by technical rules of evidence and pleadings, and that he is entitled to act on material which may not be accepted as evidence in a court of law, but there the agreement ends; because it is equally clear that in making the assessment under section 23(3) he is not entitled to make a pure guess and make an assessment without reference to any evidence or any material at all and there must be something more than bare suspicion to support the assessment under section 23(3).... In this case we are of the opinion that 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 company 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 is that the assessee had not had a fair hearing.

CIT v. East Coast Commercial Co. Ltd. 63 ITR 449 - We may observe that the High Court appears to have felt some doubt as to the admissibility of the Report of the Income-tax Investigation Commission. But the income-tax authorities are not strictly bound by the rules of evidence, and the mere fact that certain provisions of the Taxation of Income (Investigation Commission) Act relating to the inquiries to be held were declared to be ultra vires by this court did not render the Commission an unlawful body ; and in any event the admissions which are recorded by the Commission, as having been made before them, cannot be ignored. The report had evidentiary value and could be taken into account. Undoubtedly the Report had to be brought to the notice of the company, and the company had to be given an opportunity to make its representation against the report and to tender evidence against the truth of the recitals contained therein. The Hon'ble Supreme Court in the case of Chuharmal v. CIT [1988] 172 ITR 250 has held that What is meant by saying that the Evidence Act does not apply to proceedings under the Income-tax Act is that the rigor of the rules of evidence contained in the Evidence Act are not applicable, but that does not mean that when the taxing authorities are desirous of invoking the principles of the Act in proceedings before them, they are prevented from doing so. All that is required is that if they want to use any material collected by them which is adverse to the assessee, then the assessee must be given a chance to make his submissions thereon. The principles of natural justice are violated if an adverse order is made on an assessee on the basis of the material not brought to his notice.

Surrounding circumstances must be considered while scrutinizing the documents - as Hon'ble Supreme Court has said in the case of Durga Prasad and that the taxing authorities are not required to put on blinkers while looking at the documents produced before them. They are entitled to look into the surrounding circumstances to find out the reality of the recitals made in those documents.

Powers of AO under Income Tax Act - under the Income Tax Act the Assessing Officer are empowered to give notice to the assessee to substantiate its Return of Income by producing the necessary materials as under section 143(2) the claims made in the return has to be justified by the assessee. If the Assessing Officer wants to make addition on any new fact outside the record, then in such cases AO must bring these facts to the knowledge of the assessee for rebuttal. In order to assess the correct income, the AO may make necessary enquiries u/s 142(2) of the Act and gather evidences to make an assessment by adding the income not disclosed by the assessee in the Return of Income. However, these evidences must be placed before the assessee but the AO is not required under Income Tax Law to give the assessee the right to cross examine the parties from whom the evidence was gathered due to confidentiality of the matter under which the names of the parties may not be disclosed. However, the assessee must be confronted with the evidences gathered from any confidential source and the opportunity to the assessee must be offered. Hon'ble Allahabad High Court in the case of Motilal Padampat Udyog Ltd. vs CIT 293 ITR 565 after considering the judgment of Hon'ble Supreme Court in the case of Krishna Chand Chela Ram vs. CIT has held that right of cross examination from whom the AO has collected the evidence is not required under the income tax law and such assessment was valid under the Act. In the instant case, the copies of the rough cash books and the statements of the partners of V' which were recorded, had been provided to the assessee and, in fact, the assessee had also submitted its reply. In the letter an opportunity to cross-examine was asked for only in case the statements had not been recorded. As, in the instant case, the assessee had proper opportunity to controvert the material gathered by the assessing authority and used against it, there had been compliance of the principle of natural justice.

In the case of CIT v. Jay Engineering Works Ltd. 113 ITR 389 Hon'ble Delhi High Court has held that the ITO and certain other authority functioning under the Act have a dual character. They are both agencies of investigation made into the incomes of assessees and they are also quasi-judicial authorities assessing the liabilities of the assessees to payment of income-tax. Under section 142(2), the ITO may make such enquiry as he considers necessary for the purpose of obtaining full information in respect of the income or loss of an assessee. Under section 143(3), the ITO does not only hear such evidence as the assessee may produce or as he may require to be produced, but also takes into consideration "all relevant material which he has gathered" for the purpose of making an assessment. While the word "evidence" may recall the oral and documentary evidence as may be admissible under the Indian Evidence Act, the use of the word "material"

shows that the ITO not being a court can rely upon material which may not be strictly evidence admissible under the Indian Evidence Act for the purpose of making an order of assessment. The courts often take judicial notice of certain facts which need not be proved, while administrative and quasi-judicial authorities can take "official notice" of wider varieties of facts which need not be proved before them. Thus, not only in respect of the relevancy but also in respect of proof the

material which can be taken into consideration by the ITO and other authorities under the Act is far wider than the evidence which is strictly relevant and admissible under the Evidence Act.

In the case of Hersh Win Chadha Vs DCIT 135 TTJ 513 Hon'ble ITAT Delhi has analysed the Nature of income-tax proceedings and powers of Assessing Officer and held that the dispute concerned the determination of the income-tax liability of the assessee rather than fixing any criminal liability or accountability of the assessee for any other law or obligation. The admissibility of documents, evidence or material differs greatly in income-tax proceedings and criminal proceedings respectively. In criminal proceedings, the charge is to be proved by the State against the accused, establishing it beyond doubt, whereas as per the settled proposition of law, the income-tax liability is ascertained on the basis of the material available on record, the surrounding circumstances, human conduct and preponderance of probabilities. [Para 6.1] Rules of evidence do not govern the income-tax proceedings, as the proceedings under the Income-tax Act are not judicial proceedings in the sense in which the phrase judicial proceedings' is ordinarily used. The Assessing Officer is not fettered or bound by technical rules about evidence contained in the Indian Evidence Act, and he is entitled to act on material which may not be accepted as evidence in a Court of law. [Para 6.3] In the case of CIT v. Metal Products of India 150 ITR 714 Hon'ble Punjab & Haryana High Court has held that the word 'evidence' as a term of law is not an arrested one. In the context of the Indian Evidence Act, 'evidence' means and includes all statements made before the Court which are called 'oral evidence' and all documents produced before it for inspection which are called 'documentary evidence'. That is a controlled meaning of the word for that Act. Yet, in certain circumstances, evidence in the form of affidavits, declarations and other means of the same kind are allowed to be adduced. But all such exercise is made before a Court or a quasi-judicial Tribunal to make things obvious or manifest. In other words, the effort is to make things plainly visible or conspicuous. The object can also be achieved by a positive suggestion indicating an inference which adds to the plain visibility or manifestation. The Court or the Tribunal must have before it, in all events, the correct perspective of things and what is helpful or valuable in that direction is 'evidence' in the larger context or in the generic sense. As is well known, strict rules of evidence, as are known to the Indian Evidence Act, are not applicable to income-tax proceedings and thus the word 'evidence' in the income-tax proceedings has to be understood in the generic sense.

In the case of Nokia India (P.) Ltd. v. DDIT 59 taxmann.com 212 Hon'ble ITAT DELHI BENCH has relied upon the decision of Hon'ble Calcutta High Court in the case of Kisanlal Agarwalla v. Collector of Land Customs AIR 1967 & Cal. 80 where the Hon'ble Court has held the following in para 28 -

> "28. There is a good deal of misconception on this question of the right of cross-examination as part of natural justice Natural justice is fast becoming the most unnatural and artificial justice and for that confusion the Courts are no less responsible than the litigants. Ordinarily the principle of natural justice is that no man shall be a judge in his own cause and that no man should be condemned unheard. This latter doctrine is known as audi alteram parlem. It is on this principle that natural justice ensures that both sides should be heard fairly and reasonably. A part of this principle is that if any reliance is plated on evidence or record against a person then that evidence or record must be placed before him for his information,

> comment and criticism. That is all that is meant by the doctrine of audi alteram partem, that no party should be condemned unheard. No natural justice requires that there should be a kind of a formal cross-examination. Formal cross- examination is procedural justice. It is governed by rules of evidence. It is the creation of Courts and not a part of natural justice but of legal and statutory justice. Natural justice certainly includes that any statement of a person before it is accepted against somebody else, that somebody else should have an opportunity of meeting it whether it (sic), by way of interrogation or by way of comment does not matter So long as the party charged has a fair and reasonable opportunity to see. comment am criticise the evidence, statement or record on which the charge is being made against him the demands and the test of natural justice are satisfied. Cross-examination in that sense is not the technical cross-examination in a Court of law in the witness-box."

In the case of CIT v. Kuwer Fibers (P.) Ltd. 77 taxmann.com 345 Hon'ble High Court of Delhi has held that "The statements-recorded on 20-3-1996 were corroborated by the materials. As far as the question relating to cross examination is concerned, the court notices that though the documents were furnished to the assessee, it had not sought opportunity of cross examination; this was made at the fag end, in March, 1997. This court finds no justification to reject the statements, which merely explain the documents seized; the assessee could well have given a full explanation instead of seeking rejection of the documents. "

> In the case of GTC Industries Ltd. vs. ACIT 65 ITD 380 Hon'ble ITAT Bombay has held that "As regards the dictum 'Audi Alteram Partem' the assessee's basic contention was that the statements of witnesses and materials which were relied upon by the Assessing Officer in the assessment order to reach the conclusions and findings which were adverse to the assessee should have been disclosed to the assessee and the witnesses should have been offered for cross- examination. The right to cross-examine the witness who made adverse report is not an invariable attribute of the requirement of the said dictum. The principles of natural justice do not require formal cross- examination. Formal cross-examination is a part of procedural justice. It is governed by the rules of evidence, and is the creation of Court. It is part of legal and statutory justice, and not a part of natural justice, therefore, it cannot be laid down as a general proposition of law that the revenue could not rely on any evidence which had not been subjected to cross- examination. However, if a witness has given directly incriminating statement and the addition in the assessment is based solely or mainly on such statement, in that eventuality it is incumbent on the Assessing Officer to allow cross- examination. Adverse evidence and material, relied upon in the order, to reach the finality, should be disclosed to the assessee. But this rule is not applicable where the material or evidence used is of collateral nature. "

In the case of Smt. Kusum Lata Thakral v. CIT 150 ITR 714 Hon'ble Punjab & Haryana High Court has held that it was clear from the findings recorded by the Tribunal that there was no relationship between the donors and the assessee and there was no natural love and affection. The Tribunal had followed the judgment of the jurisdictional High Court in Shri Tirath Ram Gupta v. CIT [20081 304

ITR 145/[20091 177 Taxman 294 (Punj. & Har), laying down that in the absence of natural love and affection, the gift could not be accepted as genuine. [Para 6] The question whether denial of opportunity of cross- examination results in violation of natural justice depends upon facts of each case. The object of cross-examination is to test the veracity of the version given in examination in chief. In the instant case, even if cross-examination was allowed and the donors who had disowned the making of gifts, were confronted and shown to be factually wrong, the same would have made no difference, as there was no natural love and affection and in its absence, the gifts were not genuine. [Para 11] Therefore, no substantial question of law arose. The appeal was to be dismissed. [Para 12] In the case of Hindustan Tabacco Company v. CIT 27 taxmann.com 155 Hon'ble Calcutta High Court has held that If the assessee feels that cross-examining of any person is necessary for establishing its case it is incumbent upon assessee to make such prayer before Assessing officer during the assessment proceeding and if a party fails to avail of opportunity to cross-examine a person at appropriate stage in proceeding, the said party would be precluded from raising such issue at a later stage of proceeding. Therefore, the belated claim of assessee at appellate stage that it is denied the opportunity of cross-examining witnesses in assessment proceeding is wholly untenable in law. [Para 34] Plea of violation of natural justice taken at the appellate stage appears to be belated and clearly an afterthought. It appears that no prejudice had been suffered by the appellant assessee in the manner the proceeding was conducted by the Assessing Officer and the assessee was not aggrieved at that stage. Only when the assessment order went against it, the assessee conveniently raised such belated plea of denial of opportunity of fair hearing and breach of principles of natural justice. [Para 35] In the case of T. Deasahaya Nadar v. CIT 51 ITR 20 Hon'ble Madras High Court has held that It cannot be said as a general proposition of law that any evidence upon which the department might rely should have been subjected to cross- examination. The procedure for assessment is indicated in section 23(3) of the Act. The ITO is not a Court. Having regard to the nature of the proceedings, he occupies the position of a quasi-judicial Tribunal. He is not bound by the rules of evidence in the Indian Evidence Act. The limit of the enquiry and the kind of materials or evidence which he can act upon cannot be specified and the statute has not attempted it. Wide though his powers be, he must act in consonance with rules of natural justice. One such rule is that he shall not use any material against the assessee without giving him an opportunity to meet it.

In the case of ITO v. M. Pirai Choodi 334 ITR 261 Hon'ble Supreme Court of India has held that in this case, the High Court has set aside the order of assessment on the ground that no opportunity to cross-examine was granted, as sought by the assessee. We are of the view that the High Court should not have set aside the entire assessment order. At the highest, the High Court should have directed the Assessing Officer to grant an opportunity to the assessee to cross- examine the concerned witness. Be that as it may, we are of the view that, even on this particular aspect, the assessee could have gone in appeal to the Commissioner of Income-tax (Appeals). The assessee has failed to avail of the statutory remedy. In the circumstances, we are of the view that the High Court should not have quashed the assessment proceedings vide the impugned order.

In the case of Dr. Gauri Shankar Prasad v. ITO 393 ITR 635 Hon'ble High Court of Patna has held that the assessee had been given sufficient opportunity in the matter and at no point of time did he raise the plea that copies of the statements of persons relied upon or such evidence ought to be supplied to him or that he intended to cross-examine them. Therefore, it was not open to him to

turn around and claim that he had been denied the opportunity of cross- examination and the statements in question could not be used against him. Considering the entirety of the evidence and materials which had come up against the assessee, including the huge amount of assets both movable and immovable, investments made by the assessee, it could not be said that the said statements, which had been concurrently accepted as relevant or corroborative evidence or material used for the purpose of addition, could not have been taken into consideration.

Why the decision of Hon'ble Supreme Court in the case of Andaman Timber of Central Excise is not applicable on the facts and circumstances of the case of the appellant under Income Tax proceedings-

Reliance has been placed by the appellant on the judgement of Hon'ble Supreme Court in the case of Andaman timber of Central Excise which is not applicable in the matter of income tax as in the Adjudicating Manual of Customs and Central Excise there is a provision of Cross Examination and there is no parallel provision in the Income tax Act for giving the opportunity of cross examination while giving the opportunity of hearing. This is a thumb rule that decisions/judgment of any court is given in the light of the Rules/Acts/Manuals which is legislated with respect to the specific authorities and cannot be imported to any authority who are not covered under that legislation.

Further the facts of the case of Andaman Timber is entirely different where Hon'ble Supreme Court has considered that there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses who were unknown to the appellant was the only basis of issuing the Show Cause Notice. Hence, this judgment will not apply where there is sufficient material on record of the Revenue against the appellant apart from the statement of the witnesses.

Further this case will also not apply where the appellant is asking to cross examine its/his own witnesses who are known to them and not regarded as third party as under rule of evidence the right to cross examine is given for the witness of the opposite party. For example, if the assessee makes a claim of purchase/investment/transaction in the return of income and filed the necessary details of the parties in support of the claim as witness and if the Revenue has collected the material to rebut such claim which may be in the form of the statement recorded, the appellant has to discharge the onus which was casted upon him and in such condition cannot take the plea of cross examination of his own witnesses unless he claims / proves in the proceedings that the witnesses on which he relied upon turned hostile. Further, this case was earlier set aside to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions of the appellant for giving the opportunity of cross examination and in the second round also the Tribunal has stated that cross- examination of the said dealers could not have brought out any material which was taken by Hon'ble Supreme Court adversely. Relevant observation of Hon'ble Supreme Court is as under:

> "According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it

amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them. As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17.03.2005 was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions. We are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the Show Cause Notice. "

22. Replying to the written submissions of the ld. DR, the ld. counsel for the assessee in his rejoinder has stated as under:

"Summons u/s 131 of the Act were not served on Sri R.S. Mittal. This is acknowledged by the Assessing Officer in the assessment order itself;

2. Suddenly Sri R.S. Miftal is stated to have appeared before the Assessing Officer without any notice or appointment and tendered a statement whose spontaneity and veracity is highly doubtful. Besides collusion cannot be ruled out;

3. The Assessing Officer has framed the assessment without neither confronting the statement nor the affidavit of Sri R.S. Mittal to the Appellant for comments. Evidence

as used for making the additions was clearly inadmissible in law.

To verify the averments of the Appellant's father forensic help was sought by the Assessing Officer. No opportunity is given to the Appellant to verify or comment about the correctness of the forensic report; The difficulties in the Appellant's case erupted as a direct consequence of the Sales-tax disputes of Sri R.S. Mittal. All those with whom Sri R.S. Mittal had transactions were made a part of those proceedings. After protracted consideration at different hierarchical levels the appellant was completely exonerated by the Department in terms of their order dated 30.07.2016. The entry tax paid on purchases by the Appellant was directed to be retained by the Addl. Commissioner of Sales-tax and the returns filed were held as correct and valid. The allegations of the Appellant having not made any purchases from Sri R.S. Mittal were fully rejected. That order of the Sales-tax Appellant Authority has become final with no appeal being filed against that order by the S.T. Department;

6. In sum, therefore, the unverified, uncorroborated and untested statement of Sri R.S. Mittal was set to a naught by the aforesaid sales-tax appellate authority's order. Thus the only evidence which thereafter remained is the one in support of authenticity of transactions of the purchases of the Appellant. All payments were made by account payee cheques with there being absolutely no evidence of teaming and lading or any other form of abstraction;

7. In the note of the Ld. CIT(DR) several averments with selective quotations from authorities, are made with regard to the role of evidence in tax proceedings. Appellant suffices by stating that though the technical rules of evidence are not applicable to tax proceedings yet the fundamental principle is that the Assessing Officer must confront the assessee with materials relied upon by him for assessment. This sacrosanct principle has stood over the years. The authorities postulating the dictum are -

8.

a) C. Vasant Lai & Co., Vs. CIT (1962) 45 ITR 206 (SC)

b) Kishan Chand Cheiia Ram vs. CIT (1980) 125 ITR 713 (SC)

c) Chuharmal vs. CIT (1988) 172 ITR 250

d) CIT vs. SMC Share Brokers Ltd. (2007) 288 ITR 345

e) CIT vs. Sunil Aggarwai (2015) 379 ITR 367 (Del)

f) CIT vs. Ansal Properties & Industries (order annexed)

g) CIT vs. Trans Asia Securities Pvt. Ltd. (order annexed)

h) CIT vs. Andaman Timber Inds Ltd. (2015) 281 CTR 241 (SC) Relevant portions in the cited judgement are highlighted and submitted.

9. The Ld. CIT(DR) submitted that Sri R.S. Mittal was not the department's witness and that, therefore, Department was not under any obligation to produce him for the Appellant for cross examining him. This averment is blatantly wrong. It is the statement of Sri R.S. Mittal and his affidavit which have been relied upon entirely by the Assessing Officer to propose the addition in the Appellant's case. Having relied upon such material which emanated from Sri R.S. Mittal and utilized as evidence against the Appellant by the Department, it cannot now be pleaded by the Department that Sri R.S. Mittal was not its witness. Sri R.S. Mittal in a way was the person on whose accusations and allegations the adverse action against the Appellant has originated and culminated in the impugned additions. It is, therefore, inconceivable for Sri R.S. Mittal to be designated as the Appellant's witness. The CIT(DR)'s plea is totally fallacious on this point.

10. The proceedings for assessment under the Income-tax Act and the Customs & Excise Act are based on the same foundations as to the applicability of the Evidence Act. It was wrongly suggested on behalf of the Department that the law differ in application to the two Acts and so a decision rendered under the Customs & Excise Act will not apply to a case under the Income Tax Act. A shinning illustration of this principle is decision on concealment penalty in UOI vs. Dharmendra Textile Processors (2008) 306 ITR 277(SC).

On identical facts the Income-tax Appellate Tribunal has deleted the additions for AY 2009-10 and AY 2010-11. Copies of the Tribunal orders have been placed on the records.

As to the note dated 26.03.2019:-

11. Submissions made under Para (A) regarding Ground No.l are wrong and misconceived. The factum of the assessee agitating this ground is clearly mentioned in the Written Submission filed by the assessee before the CIT(A). (Please see Page-3 of the Paper Book). In fact the CIT(DR), despite denying the fact that no submissions were made on this ground, has unwittingly produced the relevant submissions in the later Para of his impugned order on Pages 8 and 32. The averments made by the Ld. CIT(A)-DR citing several case laws including Section 292B of the Act on this ground as contained in pages 2-7 of the note are all extraneous and superfluous and being devoid of merit deserve to be completely ignored.

12. Submissions made on Ground No. 2 on Page 7 regarding fundamental principle governing cash credits has been postulated way back by the Calcutta High Court in Shankar Industries (1978) 114 ITR 689. The principle is that the onus is primo facie on the assessee to show the identity, credit-

worthiness and genuineness of the transaction. Once that is discharged, the assessee has proved the needful unless it is reverted back to the assessee with material by the Assessing Officer. That position remains unaltered notwithstanding the later observations contextually different in CIT vs. Durga Prasad More (1971) 82 ITR 540 (SC), Sumati Dayal vs. CIT (1995) 214 ITR 801 (SC), Me Dowell & Co. Ltd (1985) 154 ITR 148 (SC). In the given case the Assessing Officer has himself identified the party. All payments were admittedly through account payee cheques. There is no evidence of any abstraction or repayment of those in cheques, in cash or otherwise by the assessee. In such circumstances the invocation of Section 68 of the Act is ab initio fallacious and untenable. None of the cases as cited by the Ld. CIT(DR) are relevant to the issue in hand. In particular Para of the judgement and order of the Delhi High Court in Nova Promoters (2012) 342 ITR 169 (Del) case is of cardinal importance and only goes to endorse the assessee's plea regarding shifting or onus u/s 68 of the Act.

13. On the aspect of natural justice and cross examination cases cited as Nokia India Pvt. Ltd. vs. DDIT (2015) 59 Taxman.com 212 (Delhi.Trib), CIT vs. Kuber Fibers Pvt. Ltd. (2017) 77 Taxman.com 345 (Delhi) and GTC Industries Ltd. vs. ACIT (1998) 65 ITD 380 (Bom) are all decided on the basis of the facts appertaining to those cases. Even while doing so, the factum of the cross examination being part of the inalienable norm of natural justice, has been asserted. Being so, the judgements as cited are all distinguishable and inapplicable and need not be elaborately committed upon.

As to note dated 19.09.2019 :

14.1 The cases cited by the Id. CIT(DR) are all distinguishable for the reasons as indicated against each of them.

14.2 Indian & Eastern Newspaper Society Vs. CIT fl 979) 119 ITR 996 (SC):

> It is an accepted proposition, endorsed by different courts at all times, that the proceedings for assessment before the Assessing Officer are quasi-judicial in character. All proceedings, whether judicial or quasi-judicial are to be based on evidence. Being so the cited authority only endorses the Appellant's contention for the order to be passed on valid and admissible evidence. evidence of any abstraction or repayment of those in cheques, in cash or otherwise by the assessee. In such circumstances the invocation of Section 68 of the Act is ab initio fallacious and untenable. None of the cases as cited by the Ld. CIT(DR) are relevant to the issue in hand. In particular Para of the judgement and order of the Delhi High Court in Nova Promoters (2012) 342 ITR 169 (Del) case is of cardinal importance and only goes to endorse the assessee's plea regarding shifting or onus u/s 68 of the Act.
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(2017) 77 Taxman.com 345 (Delhi) and GTC Industries Ltd. vs. ACIT (1998) 65 ITD 380 (Bom) are all decided on the basis of the facts appertaining to those cases. Even while doing so, the factum of the cross examination being part of the inalienable norm of natural justice, has been asserted. Being so, the judgements as cited are all distinguishable and inapplicable and need not be elaborately committed upon.

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It is an accepted proposition, endorsed by different courts at all times, that the proceedings for assessment before the Assessing Officer are quasi-judicial in character. All proceedings, whether judicial or quasi-judicial are to be based on evidence. Being so the cited authority only endorses the Appellant's contention for the order to be oocceci QKV MCATA. cisxck .

14.3 S. S. Gadqil Vs. Lai & Co. (19641 53 ITR 231 (SC):

As stated by the apex court in the cited judgement, the assessment proceedings are not in the nature of a les between the parties; yet they are in the nature of judicial proceedings. Being judicial proceedings any finding or inference is essentially to be based on cogent evidence. The contest in the case at hand of the Appellant is that the evidence as used in assessment is untested and unverified. The cited judgement fortifies the assessee's stance. That principles of natural justice are contravened if evidence used by the Assessing Officer is not confronted to the assessee for rebuttal. This citation as pressed by the Id. CIT(DR) only goes to fortify assessee's submissions.

14.4 Dhakeswari Cotton Mills Ltd. Vs. Vs. CIT (1954) 26 ITR 775 (SC):

This decision as cited by the Id. CIT(DR) is clearly in favour of the assessee's contention that the evidence as utilized in assessment is required to be tested both for its authenticity and its relevance before any such use. The citation supports the contentions of the assessee and is of no help to the Department.

14.5 CIT Vs. East Coast Commercial Co. Ltd. (1967) 63 ITR 449:

In this decision too the principle that Income Tax proceedings are not strictly bound by the technical rules of evidence is stated. That, however, does not mean that the rules of evidence are not applicable to the proceedings at all. This proposition has been explained in greater detail by the apex court in the later decision in Chuharmal

Vs. CIT (1988) 172 ITR 250 (SC) which the Id. CIT(DR) has quoted immediately after citing this judgement. The quotation as extracted by the Id. CIT(DR) is self-explanatory and going as it does the support the assessee's contention needs no further elucidation.

14.6 On surrounding circumstances as dilated in the note -

The factum of surrounding circumstances and also the other point as to human behavior are factors which can be made applicable to substantive provisions. Ideally they are in-applicable to deeming provisions for the deeming provisions themselves are based on assumptions and presumptions. Legally no addition can be made to the assumptions and presumptions incorporated through law by the Legislature. Still however, any act of the authority, has to be strictly evidence based. Both for surrounding circumstances or human behavior, there must be proper evidence. Assumptions and presumptions are inadmissible as valid material for any act. 14.7 Motilal Padampat Udyoa Ltd. Vs. CIT (2007) 293 ITR 565 (All.):

The citation as extracted is done contextually. The principle of law as stated in Kishnachand Chelaram Vs. CIT (1980) 125 ITR 713 (SC) has been referred to by the High Court and reference answered accordingly. Hon'ble Supreme Court finally had ruled that sincethe assessee had been given an opportunity to rebut the evidence gathered by the revenue the principles of natural justice had in a way, been complied with. In effect the judgement reiterates the principle that evidence relied upon by the Department must be confronted to the assessee. In the factual setting of the case, in view of the other material on record, the failure gave opportunity to cross- examine was held not to be fatal.

14.8 CIT Vs. Jay Engineering Works Ltd. (1978) 113 ITR 389 (Del.):

This judgement is mitigative in character, in as much as, in a case where the books of accounts by the assessee had been destroyed by fire the Assessing Officer was directed to compute the income in terms of the audited account and audit report. In the cited case, the court attempted to define what is 'material'? This citation, therefore, cannot be an authority for the proposition erroneously advanced by the Id. CIT(DR) that the cross examination of Shri R. K. Mittal was in-essential in the facts and circumstances of the case in appeal.

14.9 Hersh Win Chadha vs. DCIT (2011) 135 TTJ 513: (sic) GTC Industries Ltd. Vs. ACIT (1998) 65 ITD 380: & Nokia India (P.) Ltd. Vs. DDIT 59 taxmann.com 212:

The principle of law as propounded by the Hon'ble High Courts and the apex court have been adopted by the Hon'ble Tribunal in the cited orders. Being so, they do not require any separate comment.

15.1 CIT Vs. Metal Products of India (1984) 150 ITR 714 (P &H):

The High Court has only gone by the principle. The Id. CIT(DR) has missed to notice and quote the more relevant part of the judgement which reads on page 717 of the Report as under:

"Now the word "evidence" as a term of law is not an arrested one. In the context of the Indian Evidence Act, "evidence"

means and includes all statements made before the court which are called "oral evidence" and all documents produced before it for inspection which are called "documentary evidence". That is a controlled meaning of the word for that Act. Yet, in certain proceedings, evidence in the form of affidavits, declarations and other means of the same kind is allowed to be adduced. But all such exercise is made before a court or a quasi-judicial Tribunal to make things obvious or manifest. In other words, the effort is to make things plainly visible or conspicuous. The object can also be achieved by a positive suggestion indicating an inference which adds to the plain visibility or manifestation. For the cause before it, the court or the Tribunal must have before it, in all events, the correct perspective of things, and what is helpful or valuable in that direction is "evidence" in the larger context or in the generic sense. As is well known, strict rules of evidence, as are known to the Indian Evidence Act, are not applicable to income-tax proceedings, and thus the word "evidence" in the question under reference has fo be understood in the generic sense, and not in the arrested sense so as to be either oral or documentary evidence, or both."

These observations are in direct contradiction to the Department's contention of the Evidence Act being not applicable in the facts of the Appellant's case.

15.2 CIT Vs. Kuwer Fibers (P.) Ltd. (2017) 77 taxmann.com 345 (Del.):

In the cited case cross-examination was sought by that assessee at the fag end of the proceedings, it also appeared to the court that in view of the other corroborative material made available to the assessee during the proceedings a cross-examination was not indispensable in the facts of fhe case. The ratio would have to be strictly read in the context of the conspectus of facts appertaining to that case.

15.3 Smt. Kusum Lata thakral Vs. CIT 150 ITR 714:

The citation is erroneous because the Id. CIT(DR) at 150 ITR 714 in the written submissions has herself cited CIT Vs. Metal Products of India at that reference.

15.4 Hindusthan Tabacco Company Vs. CIT 27 taxmann.com 155 (Cal.):

In this case what the court has advised is that cross-examination should be sought at an appropriate time and not belatedly. Obviously the ratio is based on its own facts and would have no relevance or application to the Appellant's case at hand where the cross- examination was sought at an appropriate time. 15.5 T. Deasahaya Nadar Vs. CIT 51 ITR 20 (Mad.):

After the later decisions of the apex court as cited supra (Chuharmal Vs. CIT) this old decision of the Madras High Court loses its significance and authority.

16. ITO Vs. M. Pirai Choodi (2011) 334 ITR 261 (SC):

The correct citation is 334 ITR 262. This order emanates out of a writ filed before the High Court against the assessment order. It is in that context that the quoted advise has been tendered by the apex court to the High Court. It is a well established principle of law that a decision in a writ does not create a precedent. Dr. Gauri Shankar Prasad Vs. iTQ f2017) 393 ITR 635 (Pat.):

In the cited case request for cross-examine was never expressed by the litigant. In the subject case cross-examination has been sought at the first available opportunity during assessment. Facts being different and distinguishable the cited ratio has no application.

18. Andaman Timber Industries Vs. CCE (2015) 281 CTR 241 (SC):

The observations of the apex court as extracted in the department's written submissions have not been followed in the narrative of the Id. CIT (DR) in the earlier part of the submissions. Being so, the observations as made are erroneous and so do not merit any consideration."

23. We have given thoughtful consideration to the rival submissions and have carefully perused the orders of the authorities below as well as the written submissions by the respective representatives. On perusal of the facts on record, we can safely conclude that it is not a case of non issue of notice u/s 143(2) of the Act. The Assessing Officer did issue notice u/s 143(2) which was served at the residence of the assessee. As mentioned elsewhere, this issue was not seriously contested before the ld. CIT(A). Even before us, the ld. counsel for the assessee did mention a passing reference to improper service of notice. But thereafter, he did not make any submissions and was emphatically relying upon the decisions of the co-ordinate benches in Assessment Year 2009-10 and 2010-11. Therefore, this grievance is dismissed as it was not seriously contested.

24. As mentioned hereinabove, the ld. counsel for the assessee has placed heavy reliance on the decision of the co-ordinate benches in Assessment Years 2009-10 and 2010-11. In A.Y 2009-10, the Assessing Officer himself has treated the business of the assessee as fake business and estimated the commission income on sale @ 1%. The Assessing Officer did not even bother to look into the assessment records for the Assessment Year 2008-09.

25. The co-ordinate bench in ITA No. 4922/DEL/2014, in its wisdom and without looking into the assessment history of Assessment Year 2008-09, allowed the appeal

of the assessee by relying upon the decision in the case of Andaman Timber Industries [supra]. The co-

ordinate bench did not look into the fact that in Assessment Year 2008- 09, opportunities were given to the assessee for cross examination but he chose to remain absent from the proceedings. In Assessment Year 2010-11, the co-ordinate bench has simply followed the decision of the bench given in Assessment Year 2009-10. In our considered opinion, these decisions of the co-ordinate benches would not apply on the plethora of facts considered in the year under consideration which remain unrebutted by the assessee.

26. The statement of Shri Radhey Shyam Mittal has been exhibited elsewhere. A perusal of the same reveals that the bank account of M/s Mittal Paper Mart was, in fact, operated by Shri Puneet Jain. Shri Radhey Shyam Mittal has categorically stated that it was Shri Puneet Jain who was depositing the money in the account of Mittal Paper Mart and was withdrawing the money from the same account as the cheque book of Shri Radhey Shyam Mittal was already with him or with Shri Praveen Kumar Jain, father of Shri Puneet Jain, bearing the signatures of Shri Radhey Shyam Mittal.

27. Another glaring fact coming out of the statement of Shri Radhey Shyam Mittal is that even the pay-in slips of the bank were prepared by Shri Puneet Jain or Shri Praveen Kumar Jain.

28. The Bank Manager, where Mittal Paper Mart had its bank account, was summoned by the Assessing Officer alongwith the pay in slips prepared by Shri Puneet Jain/Shri Praveen Kumar Jain. Those pay in slips were referred to a forensic expert, report is exhibited at pages 58 to 63 of the paper book, in which the forensic expert has categorically given his conclusion that in all the cheques, hand writing matches with that of Shri Praveen Kumar Jain. The claim of the ld. counsel for the assessee that no opportunity to cross examine Shri Radhey Shyam Mittal was given does not hold any water as we find that several opportunities were given to the assessee but for reasons best known to him, he kept himself absent from the proceedings and did not avail any opportunity to cross examine Shri Radhey Shyam Mittal.

29. Moreover, as Shri Radhey Shyam Mittal was drawing salary of Rs. 25,000/- from the assessee himself, it cannot be said that he was a stranger to the assessee. The report of the forensic expert clearly establishes the fact that the bank account of Mittal Paper Mart was operated by Shri Puneet Jain and all the deposits and withdrawals were made in his own handwriting or handwriting of his father Shri Praveen Kumar Jain. Question Nos. 7 and 8 of the Statement of Shri Radhey Shyam Mittal clearly establish these facts.

30. Considering the report of the forensic expert, it can be safely concluded that the additions are not solely based upon the statement of Shri Radhey Shyam Mittal but on facts and evidences unearthed during the assessment proceedings.

31. The forensic expert's report remains unchallenged even before us because the ld. counsel for the assessee has never pointed out any defect in the said report and moreover, the said forensic report is part of the paper book submitted by the assessee himself. Moreover, we find that the assessee never

sought any opportunity to cross examine the forensic expert nor he has pointed out any defect in the report of the forensic expert.

32. The evidences on record clearly show that the purchases made from Mittal Paper Mart are total bogus purchases as Mittal Paper Mart itself was a bogus firm. Even in the statement of accounts of Mittal Paper Mart, there is no receivables from the assessee. Reliance on the order of the Additional Commissioner Grade - 2 (Appeal 2) Commercial Tax Department will also do not good to the assessee as we cannot question the wisdom of the Additional Commissioner [Appeal], Commercial Taxes Department. The documentary evidences brought on record emanating from the assessment proceedings supported by the remand report establishes only one fact that the credit entries in the name of Mittal Paper Mart P/o Shri Radhey Shyam Mittal amounting to Rs. 17,31,25,389/- is unexplained credit which is supported by evidences on record. On this count, reliance placed on the decision of the Hon'ble High Court of Calcutta in the case of Shankar Industries 114 ITR 689 is misplaced in as much as the assessee has failed to establish the genuineness of the transaction. Merely because the transactions have been done by account payee cheques would not suffice when the forensic expert's report clearly proves that the account was operated in the handwriting of Shri Puneet Jain, and all deposits and withdrawals were made in the handwriting of Shri Puneet Jain.

33. Reliance placed on the decision of the Hon'ble Supreme Court in the case of Andaman Timber Industries [supra] is clearly distinguishable on facts as it cannot be stated that no opportunity of cross examination was given. From the assessment order itself, it can be seen that several notices were served upon the assessee during the assessment proceedings itself but the assessee chose not to respond and capture the opportunity to cross examine Shri Radhey Shyam Mittal.

34. Moreover, the statement of Shri Radhey Shyam Mittal did not surprise the assessee as the facts mentioned therein in relation to operation of bank account of Mittal Paper Mart by Shri Puneet Jain/Shri Praveen Jain were known to the assessee. Further, Mittal Paper Mart was shown as a creditor in the books of account of the assessee. Therefore, the onus was upon the assessee to explain the genuineness of the credit entries and since Mittal Paper Mart was creditor of the assessee, Shri Radhey Shyam Mittal appeared before the Assessing Officer in response to the summons issued u/s 131 of the Act for and behalf of the assessee. Therefore, technically, Shri Radhey Shyam Mittal was assessee's own witness.

35. In our understanding of the law, all that is meant by the principle 'Audi Alteram Partem' is that no party should be condemned unheard. Once the evidences are collected by the Assessing Officer have been placed before the assessee for his information, comment and criticism, it meets all the requirements of principles of natural justice. Natural justice certainly includes that any statement of a person before it is accepted against somebody else, that somebody else should have an opportunity of meeting it by way of interrogation or by way of comment does not matter so long as the party charged has a fair and reasonable opportunity to see, comment or criticise the evidences.

36. As mentioned elsewhere, the statement of Shri Radhey Shyam Mittal prompted the Assessing Officer to make further enquiry from the bank and the evidences collected from bank were referred to forensic expert for verification of handwriting and report of the forensic expert was made

available to the assessee on which the assessee did not even care to make any comment.

37. Considering the facts of the case in totality, we do not find any merits in the submissions of the ld. counsel for the assessee. Addition of Rs. 17,31,25,389/- is sustained.

38. Coming to the next addition of Rs. 8,58,44,005/-, being unverified sundry debtors, we are of the considered view that such debit entries cannot become income of the assessee. The assessee was showing bogus sales out of bogus purchases and we have confirmed the addition on account of bogus purchases to the extent of Rs. 17.31 crores. Any addition out of the sales made out of the aforesaid purchases would result into double addition. We, therefore, do not find any merit in this addition of debit entry and the same is directed to be deleted.

39. In the result, the appeal of the assessee in ITA No. 1569/DEL/2013 is partly allowed The order is pronounced in the open court on 27.09.2019.

Sd/-	Sd/-
[SUCHITRA KAMBLE]	[N.K. BILLAIYA]
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated: 27th September, 2019

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation

Date on which the typed draft is placed before the dictating Member Date on which the typed draft is placed before the Other Member Date on which the approved draft comes to the Sr.PS/PS Date on which the fair order is placed before the Dictating Member for pronouncement Date on which the fair order comes back to the Sr.PS/PS Date on which the final order is uploaded on the website of ITAT Date on which the file goes to the Bench Clerk Date on which the file goes to the Head Clerk The date on which the file goes to the Assistant Registrar for signature on the order Date of dispatch

of the Order