

Atul Construction Co, Mathura vs Department Of Income Tax on 3 October, 2012

IN THE INCOME TAX APPELLATE TRIBUNAL
AGRA BENCH, AGRA

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER AND
SHRI A.L. GEHLOT, ACCOUNTANT MEMBER

ITA No.266/Agr/2011
Assessment Year: 2004-05

Income Tax Officer - 3(1), Mathura.	vs.	M/s Atul Construction Co., 1980/3/1, Dampier Nagar, Mathura. (PAN: AABFA 8730 E)
(Appellant)		(Respondent)

Appellant by	:	Km. Anuradha, Jr. D.R.
Respondent by	:	Shri M.M. Agarwal, C.A.

Date of Hearing	:	03.10.2012
Date of Pronouncement of order	:	30.11.2012

ORDER

PER A.L. GEHLOT, ACCOUNTANT MEMBER:

This is an appeal filed by the Revenue against the order dated 25.02.2011 passed by the Id. CIT(A)-1, Agra for the Assessment Year 2004-05.

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

"1. That the CIT(Appeals)-1, Agra has erred in directing the AO to apply Net profit of 2% of total turnover as against the rate of 6.5% applied by the Assessing Officer as the assessee has failed to prove satisfactorily the defects and deficiencies in the books of account as mentioned by the AO in the assessment order.

A.Y. 2004-05

2. That while doing so the learned CIT(A) has not properly appreciated the facts of the case brought on record by the AO.

3. That the learned CIT has erred in law and on facts in deleting the addition of Rs.8,50,000/- made by the AO under section 68 without properly appreciating the facts of the case as mentioned by the AO in the assessment order.

4. That the learned CIT(A) has erred in law and on facts in deleting the interest paid to the parties on the above amount of Rs.8,50,000/- without properly appreciating the facts of the case.

5. That the appellant craves leave to add or delete or alter or modify any one or more ground(s) of appeal during the appellate proceedings.

6. That the order of the CIT(Appeals)-1, Agra being erroneous in law and on facts be set aside and that the order of the Assessing Officer be restored."

3. The brief facts of the case are that in this case the assessment has been completed under section 143(3) at an assessed income of Rs.25,67,420/- as against the returned income of Rs.4,84,370/-. This is a case of Construction Company that works for MES (defense establishment). During the course of assessment proceeding, the A.O. after detailed examination of the books of account produced by the assessee observed certain defects and deficiencies in the books of account as discussed from page ano.3 to 6 of the order dated 15.12.2006. In view of these defects and deficiencies in the books of account, the A.O. rejected the books of account of the assessee as per the provisions of section 145 and estimated the profit of the assessee at the rate of 6.5% before allowing deduction u/s 40(b) and thus A.Y. 2004-05 made addition for extra profit of Rs.12,58,049/-. The A.O. has further made addition of Rs.8,25,000/- u/s 68 because certain loans shown to have been taken by the assessee could not be verified to the satisfaction of the A.O. After making these two additions, assessment order has been completed at Rs.25,67,420/-. Despite making above two additions, the A.O. has also discussed disallowance of interest payment of Rs.58,977/- u/s 40A(2)(a), disallowance of Rs.17,961/- out of telephone and mobile expenses, disallowance of Rs.14,703/- out of vehicle expenses, disallowance of Rs.10,650/- out of depreciation on vehicles. He has also discussed for disallowance of interest payment on loan disallowed by him u/s 68. However, no separate addition has been made for these disallowances because it has been held by the A.O. that same will be covered in the hand of the assessee firm within the above made addition by applying the net profit rate of 6.5%.

4. The CIT(A) confirmed the order of the A.O. regarding rejection of books of account as under :- (Paragraph no.5.6) "5.6 Despite the above mentioned two major defects, the AO has also pointed out many other defects on page no.4 of the assessment order which is also discussed in para no.5.1 above. No specific comments have been offered by the appellant for these defects mentioned in the assessment order. As discussed in above mentioned sub-paras and considering all the defects pointed out by the AO in the assessment order, I am of the opinion that the AO has rightly rejected the books of account as per the provisions of section 145 and, therefore, ground no.1 dismissed."

A.Y. 2004-05

5. On merit the CIT(A) called remand report from A.O. and after considering the assessee's submissions directed the A.O. to estimate taxable profit of the assessee at 2% of total turnover of Rs.3,35,51,000/- of which calculation comes to Rs.6,71,020/- against the profit shown by assessee for Rs.4,84,370/-. The addition of Rs.1,86,650/- was sustained and relief of Rs.10,71,399/- out of

total addition made by the A.O. Rs.12,58,049/-. The assessee did not file any appeal against the order of CIT(A) as submitted by the ld. Authorised Representative at the time of hearing before us. However, the Revenue challenged the order of CIT(A) vide ground Nos.1 & 2 against the relief granted to assessee by reducing net profit rate from 6.5% to 2%.

6. As retards disallowance of interest under section 40A(2)(a) Rs.58,977/-, in principle the CIT(A) agreed with the A.O. for disallowance but the CIT(A) held that no separate addition is warranted as addition to the extend of Rs.1,86,650/- has been sustained on account of profit which covers this addition also.

7. As regards adhoc disallowance out of mobile, vehicle expenses and depreciation totaling to Rs.81,352/-, the CIT(A) held as under :- (Paragraph No.8.3 page no.32) A.Y. 2004-05 "I do not agree with the ld. AR because in absence of log book or call register being maintained by the appellant firm and no separate vehicle provided to the partners of the firm for their personal use, it cannot be ruled out that they were using these facilities for their personal use. In view of the personal use of these facilities, the AO has disallowed 20% of these expenses, which in my view appears to be excessive. In my opinion 10% of these expenses would be justified to take care of the personal use of these facilities by the partners. Therefore, I restrict addition out of telephone expenses, vehicle expenses and depreciation at 10% of such expenses debited in P&L A/c as against 20% calculated by the AO. Therefore, total addition of Rs.40,676/-out of these expenses would be disallowed instead of Rs.81,352/- as held by the AO in the assessment order. However, the assessee will not get any relief out of the assessed income on account of reduction of these expenses because no separate addition was made on account of this disallowance in the assessment order as the same was considered to be covered within the addition made after applying the net profit rate. In view of the above discussion, ground no.2 is partly allowed but in computation of income after giving effect to this appeal order, no relief would be provided to the appellant because no separate addition was made in the assessment order on account of disallowance taken in this ground."

8. We have heard the ld. Representatives of the parties and records perused. There is no dispute as regards to rejection of books of account. The Revenue disputed about the relief granted by the CIT(A). The CIT(A) found that the A.O. has not commented on any specific query that for comparing the net profit rate, why for the purpose of comparison the profit should not be taken after allowing deduction of interest and salary to partners and he has also not commented that after rejection of books of account for determining net profit rate, why the past history of the case should not be taken into account. The CIT(A) relied upon a A.Y. 2004-05 judgement of Hon'ble Allahabad High Court, Lucknow Bench in the case of CIT vs. D.M. Brothers, ITA No.27 of 2005. The CIT(A) found that in past years from A.Y. 1998-99 to 2003-04, the assessee never earned net profit more than 4.5%. In last six years the rate of profit ranges from 0.79% to 1.81% except in A.Y. 2001-02 & 2002-03 wherein profit rate was 4.28% & 4.06% respectively. The comparative position noted by the CIT(A) are as under : (Page no.18) Particulars 1998-99 1999-2000 2000-01 2001-02 2002-03 2003-04 Contract 86,51,000 44,42,000 1,06,22,000 43,61,494 17,92,579 1,74,41,000 receipt Net Profit 1,56,882 34,917.95 1,79,048.46 1,86,586.38 72,733.28 2,59,688 NP ratio 1.81% 0.79% 1.69% 4.28% 4.06% 1.49% Returned 1,56,880 34,920 1,79,050 1,86,590 72,730 3,84,520 income Assessed 1,73,028 34,920 1,79,050 1,86,590 72,730 3,84,520 income u/s 143(3) u/s143(1)(a) u/s143(1)(a)

u/s143(1)(a) u/s143(1)(a) u/s143(1)(a)

9. Making comparison of net profit for different year and after discussing various case laws the CIT(A) followed an order of Agra Bench in the case of A.R. Enterprise vs. I.T.O., ITA No.466/Agr/2007, order dated 05.08.2009, in which other considering facts and circumstances held that the rate of 2% would meet the interest of justice and no further deduction in the form of salaries and interest to partner on depreciation would be available to the assessee. Finally, the CIT(A) held as under :- (Page nos.20 & 21) A.Y. 2004-05 "Looking to the past history of the appellant after providing deduction for salary and interest to the partners, net profit has never been more than 2% even after a scrutiny assessment was passed by the department for AY 98-99. For two years i.e. 01-02 & 02-03, though the net profit rate was about 4% but in those years, turnover are very nominal in lakhs only as compared to the turnover in the present year being 3.3 crore and hence result of these two years are not comparable to the year under consideration. In the year just preceding to the year under consideration i.e., AY 2003-04, the turnover is Rs.1.74 crore and net profit shown is Rs.2.59 lac which comes to 1.49%. Considering all these statistical data of past years, in my opinion, following the case law of AR Enterprises vs. ITO (supra), applying a flat rate of 2% in case of the appellant would meet the interest of justice and further no deduction in the form of salary and interest to the partners or depreciation would be available to the assessee as the books of account has been rejected. Therefore, the AO is directed to estimate taxable profit of the appellant at 2% of total turnover of Rs.3,35,51,000/- which comes to Rs.6,71,020/-. Since in the return the income shown is Rs.4,84,370/-, further addition of Rs.1,86,650/- would be made in the income of the appellant instead of Rs.12,58,049/- as made in the assessment order. Therefore, appellant gets relief of Rs.10,71,399/- and hence ground no.3 is partly allowed."

10. We find that the CIT(A) after considering the facts of the case, past history of assessee and after considering various judgements and order of I.T.A.T. found that 2% flat net profit rate is reasonable. The Revenue has failed to point out any contrary material to the finding of CIT(A) nor the same is available on record. The Revenue has failed to point out any material based on which a different estimation of income can be made at this stage. So far the case of the A.O., the CIT(A) considered the remand report and did not find substance in applying 6.5% rate of profit. We find that finding of the CIT(A) supported by past history of the assessee and comparable cases.

A.Y. 2004-05

11. In the light of above discussion, we do not find any infirmity in the order of CIT(A). The order of CIT(A) on the issue is confirmed including the issue related to separate addition on account of interest and disallowance out of other expenses.

12. Ground nos.2 & 3 of the appeal relates to addition of Rs.8,50,000/- under section 68 of the Act.

13. During the assessment proceedings the AO noticed from balance sheet and other papers filed in assessment proceedings that three new loans/deposits were raised by the assessee from outsiders and deposits of family members, namely, Smt. Mama Agrawal, Shri Atul Kumar (HUF), Shri Rajiv Kumar (HUF) and Smt. Suman Agarwal. As per copies of the account of respective depositors, it was

also noticed that there was no sufficient amount in the respective bank accounts of the depositors to meet the cheque amount extended to the assessee-firm, and the amount in cash was also deposited before the withdrawal. The assessee vide note sheet entry dated 02-11-2006 was asked to produce the depositors to examine their creditworthiness and to get at the truth as well because primary onus rests with the assessee itself in this regard. In reply to this, the assessee has stated that the identity, capacity and genuineness of transactions is established by filing their confirmations, copies of bank accounts and acknowledgements of returns filed with the department. The loans have been received through cheques, therefore, the A.Y. 2004-05 same can not be doubted. Some of the case laws were also relied upon and finally, it was stated that if required, the creditors may be summoned u/s 131 for examination. On the request of the assessee, statutory summons u/s 131 dated 15.11.2006 were issued to all the depositors fixing compliance date 22.11.2006 in the cases of Smt. Suman Agrawal, Smt. Mamta Agrawal, Shri Atul Kumar (HUF) and Shri Rajeev Kumar (HUF), and 23.11.2006 in the cases of Shri Narain Das and Sons, Smt. Akansha Gupta and Smt. Priyanka Gupta. It is worth mentioning that all these depositors are resident of Mtr. One more summon dated 15.11.2006 was issued in the case of M/s Ravi Associates, Morar, Gwalior fixing compliance date on 23.11.2006. On the dates fixed for compliance even on subsequent dates nobody attended nor have written explanations been received. With the result, their credit worthiness is doubtful and remains unsubstantiated. This very fact was communicated to the assessee vide note sheet entry dated 24.11.2006, where it was said as to why the deposits/loans be not added as unexplained cash credits in terms of section 68 of the Act because creditworthiness of depositors remained unsubstantiated. Anyhow, reply from the side of M/s Ravi Associates was filed with the written submission dated 24.11.2006 supported with copy of the bank a/c. of the depositor. Further, in written submission dated 01.12.2006, it was also stated that there is no knowledge as to summons issued to the creditors. The said submission of the assessee is not credible or acceptable because of the fact that on one hand reply from one of the depositors M/s Ravi Associates, Morar, Gwalior A.Y. 2004-05 was filed claiming it to be in response to summon u/s 131, where as for other depositors no knowledge of summons having been issued was shown, which is nothing but to avoid their personal presence for cross-examination. Again, vide note sheet entry 01.12.2006, the assessee was called upon to produce the depositors for examination failing which the alleged deposit are liable to be added back in terms of section 68. In reply to this, there remains mere repetition of the fact as said before on the ground of genuineness of transactions, identify and creditworthiness, and it was also stated that if the depositors are not turned up in compliance to summons u/s 131, it is not the default of the assessee and in support of which reliance was also placed on some of the decisions.

14. The A.O. held that it is well settled that where any sum is found credited in the books of account, assessee has to prove three things viz., identity of the creditors, capacity of the creditors, and genuineness of the transactions. Though ample opportunities have been provided to the assessee as stated above in assessment proceedings, yet the creditworthiness of the depositors' stands unproved, and the primary onus/burden rested with the assessee or lay upon it, has not been discharged. The depositors all through failed to attend for examinations while summoned u/s 131 on the request of the assessee. The matrix of the case is that deposits related to family members of the partners are no doubt through cheques but before drawing respective cheques there were no balances to meet the A.Y. 2004-05 cheque amount and the cash was deposited in four to five occasions just before the loans advanced and the deposits in cash were with Oriental Bank of

Commerce at Gwalior, whereas the depositors are resident of Mathura. The amounts deposited in cash prior to issue of cheques for loans were in-total almost the same as that of amount loaned or deposited with the assessee. The entire modus operandi or the device shows that the assessee-firm itself pumped its unaccounted money in the guise of so-called deposits by the family members and the total deposits i.e. Rs.5,75,000/- (Rs.1,00,000/- in the case of Smt. Mamta Agrawal, Rs.2,00,000/- Shri Atul Kumar (HUF), Rs.1,50,000/- Shri Rajeev Kumar (HUF) and Rs.1,25,000/- Smt. Suman Agarwal) are liable to be added back to the assessee's total income as unexplained and undisclosed income by invoking the provisions of section 68 of the Act. It is also stated that initially to make deposits in the bank in cash or otherwise and then to make deposits with the assessee by withdrawing the amount through cheques does not prove the capacity of the depositors unless and until they prove their sources of income and the available funds with them. So far as other depositors namely, Smt. Priyanka Gupta, Smt. Akansha Gupta, and Sh Narain Das & Sons, who deposited Rs.70,000/-, Rs.1,20,000/- and Rs.60,000/- respectively, are concerned, the fact are similar as that of earlier ones except the deposits in bank just before withdrawal of the cheques were in cash as well as through clearing and transfer. Since, these three depositors also did not attend to examination the entire deposits amounting to Rs.2,50,000/- are also liable to be A.Y. 2004-05 added back to the assessee's total income as unexplained and undisclosed income by invoking the provisions of section 68 of the Act on the grounds stated above. Thus, total addition as an unexplained and undisclosed income u/s 68 comes out to Rs.8,25,000/- and the same is added to the income returned. Disallowance of interest payment on the said amount being unexplained or undisclosed in the hands of the assessee-firm, is also called for, however, the same will be covered within the addition made before by applying the net profit rate.

15. The CIT(A), after considering remand report of the A.O. and other considering submissions of assessee, deleted the addition of Rs.8,50,000/-. The CIT(A) deleted the addition on the ground that the A.O. cannot ask about source of source. He relied upon a judgement of Hon'ble Allahabad High Court in the case of CIT vs. Jauharimal Goel, 201 CTR (All) 54. Secondly, the CIT(A) deleted the addition on the ground that after rejection of books of account addition under section 68 can not be made. The CIT(A) relied upon judgement of Hon'ble Allahabad High Court in the case of CIT vs. Raghavendra Pratap Singh in 14 MTC 415 (All) and ACIT vs. D.M. Brothers (supra). Finally, the CIT(A) held as under

:- (Page nos.30 & 31) "However, the AO without taking any action as required by him under the provision of I.T. Act to take the matter to logical conclusion, he simply resorted to making addition u/s 68 which does not appear to be justified in view of decision of Apex Court in the case of CIT vs. Orissa Corporation (P) Ltd. (supra). Therefore, on merit also addition u/s 68 of A.Y. 2004-05 Rs.8,25,000/- cannot be sustained. In view of these facts and circumstances on the merit as well as in law, I delete the addition of Rs.8,25,000/- u/s 68 following the decision of jurisdictional High Court in the case of CIT vs. Raghavendra Pratap Singh (supra) and CIT vs. Jauharimal Goel (supra) ground no.5 is allowed."

16. Ld. Departmental Representative relied upon the order of A.O. and submitted that the CIT(A), without appreciating the facts noted by the A.O. in his order and

remand report, deleted the addition. Ld. Departmental Representative has also relied upon the recent order of I.T.A.T. in the case of Smt. Suman Gupta vs. ITO in ITA No.454/Agr/2009, order dated 16.03.2012. The said order of I.T.A.T. has been confirmed by the Hon'ble High Court in Income Tax Appeal No.680 of 2012 vides judgement dated 07.08.2012.

17. The Ld. Authorised Representative, on the other hand, relied upon the order of CIT(A) and reiterated the submissions made before the CIT(A). The ld.

Authorised Representative pointed out that the assessee has furnished complete details to prove burden under section 68 of the Act. A chart in this regard furnished by the ld. Authorised Representative has been placed on record. 17.1 The ld. Authorised Representative in support of his contention relied upon:

i) CIT vs. Prem Kumar, 161 Taxman 50 (All)

ii) Order dated 17.11.2009 passed by Hon'ble Allahabad High Court (Lucknow Bench) in the case of CIT vs. Shri Raj Kumar Agarwal in Income Tax Appeal No 179 of 2008.

A.Y. 2004-05 17.2 The Ld. Authorised Representative also referred and relied upon various judgements filed in the Paper Book and copies filed which have been placed on record.

18. We have heard the ld. Representatives of the parties and records perused. The issue to be examined in this ground is in respect of cash credit under section 68 of the Act. The disputed cash credits noted from the order of CIT(A) are as under :- (Page no.21) "1. Smt. Mamta Agarwal Rs.1,00,000/-

2. Shri Atul Kumar, HUF Rs.2,00,000/-

3. Shri Rajiv Kumar, HUF Rs.1,50,000/-

4. Smt. Suman Agarwal Rs.1,25,000/-

5. Smt. Priyanka Gupta Rs. 70,000/-

6. Smt. Akansha Gupta Rs.1,20,000/-

7. Shri Narayan Das & Sons Rs. 60,000/-

Total Rs.8,25,000/-"

19. The case of the A.O. is that the creditors were neither produced by the assessee nor appeared inspite of issuance of summons under section 131 of the Act. The A.O. noticed that all the cash creditors' are resident of Mathura and relatives of the assessee. The A.O. examined the Bank

accounts of the creditors and found that cash was deposited in their Bank accounts and cheques were issued in favour of the assessee. The A.O. noticed that inspite of ample opportunities given to the assessee, the assessee failed to establish the creditworthiness of the creditors. The assessee has failed to discharge the primary onus.

A.Y. 2004-05

20. The CIT(A) deleted the additions on following reasons and grounds :-

- i) Addition under section 68 cannot be made after rejecting the books of account.
- ii) The A.O. cannot investigate the source of the source.
- iii) All creditors are assessed to tax.

21. Under the facts and circumstances, to examine the issue, we would like to refer to section 68 of the Act which is reproduced as below:-

"68. Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the [Assessing] Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year :"

22. As regards the issue whether addition under section 68 can be made after rejecting the books of accounts, we would like to refer a judgement of Hon'ble Supreme Court in the case of Commissioner of Income-tax vs. Devi Prasad Vishwanath, 72 ITR 194 (SC). The facts of that case are that during the proceedings for assessment for the assessment year 1946-47 the Income-tax Officer declined to rely upon the books of account of the assessee, and estimated the business profits of the assessee by applying a flat rate of 12½% to the turnover of the business. The Income-tax Officer also found in the books of account an entry dated January 15, 1945, of a deposit of Rs.20,000 in the name of Messrs. Banshidhar Rawatmal of Ratangarh. The Income-tax Officer called upon the A.Y. 2004-05 assessee to prove the nature and source of this deposit and, after considering the evidence produced by the assessee, rejected the plea of the assessee that the amount was deposited by Messrs. Banshidhar Rawatmal. In the view of the Income-tax Officer the amount of Rs.20,000 represented the assessee's income from some undisclosed source.

22.1 The order relating to the addition of Rs.20,000, in addition to the estimated income, was challenged before the Appellate Assistant Commissioner and before the Tribunal, but without success. The Tribunal was of the view that the evidence of Banshidhar of Messrs. Banshidhar Rawatmal that he had Rs.20,000 which he received from his jajman was unreliable, and that the Income-tax Officer was right in estimating the turnover from sales and in applying a rate for determination of the profit. It was not argued before the Tribunal that if the case of the assessee that the amount of Rs. 20,000 was deposited by Messrs. Banshidhar Rawatmal with him (sic) it should

be treated as income which was part of the business of the assessee in handloom cloth and silk fabrics.

22.2 An application filed by the assessee under section 66(1) of the Income-tax Act to submit a statement of case to the High Court of Allahabad was rejected. But the High Court directed the Tribunal to submit a statement of case on the question A.Y. 2004-05 whether there was "any material to hold that the sum of Rs.20,000 was income of the assessee from some other source, and was not income included in the assessed income on the rejection of the books of account". Pursuant to this direction, the Tribunal submitted a statement of the case raising the following question:-

"Whether, on the facts and in the circumstances of the case, there was any material to hold that the sum of Rs.20,000 was income of the assessee from some other source and was not income included in the assessed income on the rejection of the books of account?"

22.3 The Tribunal in making the reference observed that "at no stage of the proceeding did the assessee urge that the sum of Rs.20,000 got merged with the estimate of profit made in the business at the head office"; the only objection raised by the assessee was that the sum should not have been added as income from some undisclosed source.

22.4 The High Court considered the matter in great detail and recorded an answer in favour of the assessee. The Commissioner has appealed against that order with a certificate granted by the High Court.

22.5 On the basis of above facts and circumstances the Apex Court held as under:-

"There is nothing in law which prevents the Income-tax Officer in an appropriate case in taxing both the cash credit, the source and nature of which is not satisfactorily explained, and the business income estimated by A.Y. 2004-05 him under section 13 of the Income-tax Act, after rejecting the books of account of the assessee as unreliable. This was so decided in *Kale Khan Mohammad Hanif v. Commissioner of Income-tax* [1963] 50 ITR 1 (SC). Whether in a given case the Income-tax Officer may tax the cash credit entered in the books of account of the business, and at the same time estimate the profit must, however, depend upon the facts of each case.

It is unnecessary to elaborate this question in this case, because in our view the question on which the High Court directed the Tribunal to state a case and which the High Court answered did not arise out of the order of the Tribunal. As we have already stated, before the Tribunal at the hearing of the appeal under section 33 of the Income-tax Act, only two questions were argued: (1) that the explanation of the assessee about the genuineness of the entry in the name of Banshidhar should be accepted and (2) that the Income-tax Officer erred in discarding the books of account and in determining the profits from the estimated turnover of the business. No other contention was raised before the Tribunal hearing the appeal.

The application filed before the Tribunal under section 66(1) for stating a case is not before the court but in the petition under section 66(2) before the High Court it was claimed that the following three questions arose out of the order of the Tribunal:

"(a) Whether in view of the statement of Banshidhar and other witnesses proving the deposit, it was still open to the department to treat the amount of Rs. 20,000 belonging to Banshidhar as being income from undisclosed source.

(b) Whether there was any further burden of proof to have been discharged by the assessee in respect of the item of Rs. 20,000 in order to be income from being taxed for Rs. 20,000 for a sum not belonging to the applicant.

(c) Whether, it was competent to the department, both to add to the quantity of sales and the rate in the circumstances of the case."

The High Court, in disposing of the application under section 66(2), expressed the view that because the amount of Rs.20,000 was entered in the books of account of the business, there was some material to hold that the amount was income of the assessee from the business and not from some other source. But it was not open to the High Court to direct the Tribunal to A.Y. 2004-05 state a case on a question which was never raised before or decided by the Tribunal at the hearing of the appeal. The question again assumes that it was for the Income-tax Officer to indicate the source of the income before the income could be held taxable and unless he did so, the assessee was entitled to succeed. That is not, in our judgment, the correct legal position. Where there is an explained cash credit, it is open to the Income-tax Officer to hold that it is income of the assessee and no further burden lies on the Income-tax Officer to show that that income is from any particular source. It is for the assessee to prove that even if the cash credit represents income it is income from a source which has already been taxed."

23. The above judgement of the Hon'ble Apex Court in the case of Commissioner of Income-tax vs. Devi Prasad Vishwanath (Supra) has been followed by the Hon'ble Madhya Pradesh High Court in case of CIT vs. Daulatram Pannalal Modi 129 ITR 398 (M.P.). The Court held as under : -

"Having heard learned counsel for the parties, we have come to the conclusion that this reference should be answered in the negative and against the assessee. As held by the Supreme Court in CIT v. Devi Prasad Vishwanath Prasad [1969] 72 ITR 194 , where there is an unexplained cash credit, it is open to the ITO to hold that it is income of the assessee and no further burden lies on the ITO to show that that income is from any particular source. It is for the assessee to prove that even if the cash credit represents income, it is income from a source which has already been taxed. In the instant case, therefore, the assessee had to show, by adducing satisfactory evidence, that the cash credits were referable to the undisclosed income of the very known or disclosed source, namely, the business, whose income had already been estimated. The ITO held that the cash credits represented income from undisclosed sources. This finding was not set aside either by the AAC or by the

Tribunal. The Tribunal seems to assume that once the business income is estimated, the unexplained cash credits would be covered by the income so estimated. This assumption is not warranted by law. Without setting aside the finding of the ITO that the cash credits represented income from undisclosed sources, the Tribunal was not justified in holding that the amount of Rs. 15,300, which was added as income from A.Y. 2004-05 undisclosed sources, was covered by the intangible additions made to the income of the assessee."

24. In the light of above judgements of the Hon'ble Apex Court and judgement of Hon'ble Jurisdictional High Court of Madhya Pradesh, we are of the view that the judgments cited by the Id. Authorised Representative and relied upon by the CIT(A) cannot be given preference. We, therefore, do not find substance on the ground and reasons on which the CIT(A) has deleted the addition that when the books of accounts has been rejected the addition under section 68 of the Act cannot be made. The order of the CIT(A) on the issue is set aside.

25. As regards other reasons that the A.O. cannot examine the source of the source and the assessee are assessed to tax also do not help to the assessee. In the case under consideration, it is admitted facts that in case of Smt. Mamta Agarwal, Shri Autal Kumar (HUF), Shri Rajiv Kumar Agarwal(HUF) and Smt. Suman Agarwal cash have been deposited in Bank account of respective creditors before issuing the cheques to the assessee. Under this circumstances, the I.T.A.T., Agra Bench in the case of Smt. Suman Gupta vs. ITO in ITA No.454/Agr/2009, order dated 16.03.2012, 138 ITD 153 (Agra) which has been confirmed by the Hon'ble High Court in Income Tax Appeal No.680 of 2012, judgement dated 07.08.2012, held that under these circumstances there are no sufficient evidence before the authorities below to prove the creditworthiness of the creditors and genuineness of A.Y. 2004-05 the transactions in the matter.. The relevant findings of I.T.A.T are reproduced as below (138 ITD 160 to 164):-

"9. We have considered the rival submissions and th (Agra)e material available on record. It is not in dispute that there were cash deposits of the equivalent amounts in the bank accounts of the creditors just before advancing loan to the assessee or on the date of issuing cheques to the assessee. In the case of the creditor, Shri Rampal Singh, his bank statement is filed at page 45 of the paper book, in which Rs.2,50,000/- has been deposited, but neither it is mentioned that it was cash nor it is mentioned how the amount similar to the credit was credited in his bank account. No explanation is given before the authorities below and even during the course of arguments before us. Nothing is clarified as to how equivalent amount of cash credit was deposited in his bank account. In the case of remaining creditors, it is not a denying fact that equivalent amounts of cash credit was deposited in their bank accounts in cash for issuing cheques in favour of the assessee. This created serious doubt in the explanation of the assessee regarding genuineness of the transaction in the matter. The AO asked the assessee to produce all the creditors for examination on oath in order to find out truth in the matter. The assessee produced one of the creditors before the AO for examination, but showed his inability to produce other creditors, which is also clear from the order sheet dated 18.12.2007 (PB-126). Prior to

that, the assessee sought time from the AO to produce remaining creditors for examination, but later on did not produce them. The ld. counsel for the assessee explained that due to one or other problem of the remaining creditors on account of medical advice, the depositors have shown their inability to appear before the AO for examination, but it is admitted fact that the assessee did not make any request before the AO for examination of the remaining creditors through the commission and no willingness was shown before the CIT(A) for production of the remaining creditors for examination even at the remand stage in the appellate proceedings. Even during the course of arguments before the Tribunal, the ld. counsel for the assessee did not show his willingness to produce remaining creditors for examination before the AO. It is, therefore, clear that the assessee has failed to produce the remaining creditors for examination by the Revenue Department in order to find out truth in the matter.

9.1 The AO discussed each and every creditor in the assessment order and the crux of the findings of the AO had been that there were very small bank balances in the bank accounts of the creditors and they were having A.Y. 2004-05 meager income and as such, they were not men of means to advance any loan to the assessee. In the case of Abhay Maheshwari, there was very small balance of Rs.3528/- in his bank account. He was examined on oath and he was not able to give source of cash deposit to the satisfaction of the AO. He was earning hardly one lac rupees and spent 40,000/- to 50,000/- for household purposes. During his examination on oath, he was not able to satisfactorily explain the availability of funds with him for giving loan to the assessee. In his case, he has filed return of income for the assessment year under appeal at Rs.1,02,850/- (PB-60). In the case of Shri Amit Maheshwari, he was also having small bank balance of Rs.2429/- before issue of cheque to the assessee and equal amount of the cash credit was deposited in the bank account. He has filed return of income for the assessment year under appeal at Rs.44972/- (PB-71). In the case of Smt. Keerti Maheshwari, in her bank account, there was balance of Rs.4688/- only prior to issue of cheque to the assessee and equivalent amount of cash credit was deposited for the purpose of issue of cheque in favour of the assessee. For the assessment year under appeal, she has filed return of income at Rs.1,01,000/- only. In the case of Smt. Mithlesh Maheshwari, the bank balance before issue of cheque was Rs.10,794/- and equivalent amount of cash credit was deposited in her bank account for issue of cheque in favour of assessee. For assessment year under appeal, she filed return of income at Rs.1,02,476/- only. In the case of Sh. Rampal Sing, it is already noted above that the deposit entry in his case is not explained and prior to issue of cheque, there was bank balance of Rs.3708/- only. He has filed the return of income for the assessment year under appeal at loss with agricultural income (PB-102). In the case of Shri Shariq Ali Khan, the bank balance in his account was Rs.1055/- prior to issue of cheque and equivalent cash amount was deposited for issuing cheque in favour of the assessee. He has filed return of income at Rs.70,373/- plus agricultural income (PB-116). These details noted in the assessment order and the details verified from the paper book would clearly support the findings of the AO that none of the creditors were persons of sufficient means to advance any loan to the

assessee. Filing of balance sheets, cash flow statements, cash books etc. have no evidentiary value because according to the remand report filed by the AO, those documents were not filed with the return of income. Moreover, no regular books of account have been maintained by any of the creditors and majority of them have shown estimated income in their returns of income. Therefore, such balance sheet, cash flow statements etc. would not support the contention of the assessee that genuine credits have been received. The order sheet noted by the AO would also show that the assessee has made no efforts to produce the remaining creditors before the AO. Even A.Y. 2004-05 in the statement of one of the creditors recorded by the AO, Shri Ambhay Maheshwari, he was not able to explain his source of deposit or advancing loan to the assessee through genuine source. It is well settled law that burden is upon the assessee to prove ingredients of section 68 of the Act by proving identity and creditworthiness of the creditors and genuineness of the transactions. The assessee has, however, failed to prove the creditworthiness of the creditors who were having only meager income. No details of their savings have been filed. The assessee has never shown his willingness to produce the remaining creditors for examination before the AO. Therefore, the genuineness of the transaction could not have been examined by the AO. The smallness of the bank balance in the bank accounts of the creditors prior to issue of cheques would clearly reveal that they were not having any source and it was the money of the assessee which was routed through the bank accounts of the creditors for the purpose of giving credits to the assessee. These were, therefore, accommodation entries only and as such, could not be considered as genuine transactions. Merely because the loans have been received through banking channel, is not sacrosanct to make a non-genuine transaction as genuine transaction.

10. Hon'ble Calcutta High Court in the case of Bharati Pvt. Ltd. vs. CIT, 111 ITR 951 held as under :

"In the course of assessment proceedings, the Income-tax Officer found that the assessee had shown Rs.20,000 as loan in its books taken from two parties. The assessee produced the alleged confirmatory letters from those parties before the Income-tax Officer in support of the two loans. The Income-tax Officer served notices under section 131 of the Income -tax Act, 1961, on the alleged creditors and since those notices came back unserved, the Income-tax Officer treated the loan as assessee's income from undisclosed sources. The Appellate Assistant Commissioner dismissed the assessee's appeal on the ground that the assessee could not even establish the identity of the parties. On further appeal by the assessee, the Appellate Tribunal held that mere filing of confirmatory letters did not discharge the onus that lay on the assessee and there was no material on the record to establish the identity of the creditors:

Held, that the Tribunal had taken all the relevant facts into consideration and the conclusion arrived at by the Tribunal that the loans represented the assessee's

income from undisclosed sources was not perverse or unreasonable."

A.Y. 2004-05 10.1 The Hon'ble Calcutta High Court in the case of CIT Vs United Commercial and Industrial Co. (P) Ltd., 187 ITR 596 held as under:

"The primary onus lies on the assessee to prove the nature and source of credits in its account. It is necessary for the assessee to prove prima facie the identity of his creditors, the capacity of such creditors to advance the money and lastly the genuineness of the transactions. Only when these things are proved by the assessee prima facie and only after the assessee has adduced evidence to establish the aforesaid facts does the onus shift on to the Department. It is not enough to establish the identity of the creditors. Mere production of the confirmation letters before the Income-tax Officer would not by itself prove that the loans have been obtained from those loan creditors or that they have credit-worthiness.

Held, that, in the instant case, the Tribunal misdirected itself in holding that the transactions were genuine simply because some of the transactions were made by cheques. The assessee had failed to prove the credit-worthiness of the alleged lenders. A number of other assesseees had also admitted that loans obtained from these bankers against hundis were not genuine and such hundi loans really represented their own concealed income. The assessee had not discharged its burden of proving that the loans in question were genuine."

10.2 Hon'ble Calcutta High Court in the case of M/s. Precision Finance Pvt. Ltd., 208 ITR 465 held that ""even the loan through bank cannot be accepted as genuine unless the identity and creditworthiness of the creditors are proved. Mere payment of account payee cheque is not sacrosanct nor can it make a non-genuine transaction genuine."

10.3 The Hon'ble Supreme Court in the case of Durga Prasad More, 82 ITR 540 and Sumati Dayal, 214 ITR 801 held that "the Courts and Tribunal have to judge the evidences before them by applying the test of human probabilities after considering the surrounding circumstances."

11. On consideration of the facts of the case in the light of above discussion and decision, we do not find any justification to interfere with the A.Y. 2004-05 order of the Id. CIT(A). The assessee has failed to prove the creditworthiness of all the creditors and no source of their income has been filed. At the best the assessee is able to prove identity of the creditors, but the assessee failed to prove the genuine credit in the matter. All the creditors have been rightly found to be men of meager means and no source of income have been filed to prove that they were having sufficient funds or savings in order to give loans to the assessee. On verification of the bank account of the depositors, it was specifically found that there were no sufficient funds available in their bank account and they were having only small bank balance, which was even not sufficient to meet out their household expenses or day-to-day requirements. Therefore, it is unbelievable to accept the contention of the assessee that said persons were having creditworthiness to advance any loan to the assessee. The documents produced by the Id. counsel for the assessee in the paper book merely prove the case of assessee

superficially, which is far from reality or truth. When the test of human probabilities after considering the surrounding circumstances as is propounded by Hon'ble Supreme Court in the case of Durga Prasad More (supra) and Sumati Dayal vs. CIT (supra), is applied to the facts of the case, it is clear that the Id. CIT(A) was justified in confirming the addition u/s. 68 of the IT Act. In the present case, the assessee has not adduced any sufficient evidence before the authorities below to prove the creditworthiness of the creditors and genuineness of the transactions in the matter. Therefore, the assessee has not satisfied the essential ingredients of section 68 of the IT Act.

12. In the case of Rohini Builders and U.M. Shah (supra), the departmental appeal was dismissed finding no substantial question of law because the findings of the Tribunal were based on appreciation of evidence. 12.1 In the case of CIT vs. Orissa Corporation P. Ltd (supra), it was also held that the Revenue did not examine source of income of the said alleged creditors when they were assessed to tax to find out whether they were creditworthy. However, in the present case, the authorities below have specifically found that all the creditors were not men of means and as such, their creditworthiness was not proved at all. Therefore, the decision cited by the Id. counsel for the assessee would not support the case of the assessee.

13. Considering the facts and circumstances of the case in the light of findings of the authorities below, we do not find any irregularity or illegality in the orders of the authorities below. We confirm their findings and dismiss the appeal of the assessee on this ground. Concise grounds Nos. 1 & 2 are, accordingly, dismissed.

A.Y. 2004-05

26. The relevant facts, question before High Court and finding thereon in case of suman Gupta ; Income Tax Appeal No.680 of 2012, judgement dated 07.08.2012 by the Hon'ble High Court of Allahabad are reproduced as below :-

"3. The appeal has been preferred on the following substantial questions of law, as follows :-

"(i) Whether the ITAT, was correct to confirm the addition of Rs.11 lacs under Section 68 of the Act, which was taken as loan from 5 lenders without summoning the lenders under Section 131 of the Act or 133(6) of the Act despite requested in writing before A.O. on 26.11.2007, 18.12.2007 and 24.12.2007 ?

(ii) Whether the ITAT was right in confirming the addition of Rs.2 lacs given by Abhay Maheshwari who personally appeared before the A.O. and examined on oath and have accepted having given the loan to the appellant by account payee cheque ?

(iii) Whether the ITAT was correct to confirm the addition of cash credit under Section 68 of the Act when the appellant has discharged the primary burden by furnishing the confirmatory letters, copy of the bank pass book returns of past 3 years, balance sheet, cash fallow statements and PAN numbers, affidavits of all the

creditors proving the identity, capacity of the genuineness of the transaction, the burden shifted of the revenue, which the revenue failed to rebut ?

(iv) Whether the ITAT was correct to hold that the appellant failed to prove the source of source of the creditors once the appellant has given the names and address of the creditors of AO and all the creditors were income tax assessee and having paid loan by giving account payee cheques and the interest was paid to the creditors by making TDS on the interest amount, but the revenue did not examine the creditors ?

(v) Whether the order of the ITAT confirming the addition of Rs.11,00,000/- and Rs.2,00,000/- was perverse having regard to the evidence and material on record.?

A.Y. 2004-05

4. It is submitted by learned counsel appearing for the appellant, relying upon CIT v. Orissa Cement (P) Corporation (1986) 159 ITR 78 (SC); DCIT v. Rohini Builders (2002) 256 ITR 360 (Guj); Nemi Chand Kothari v. CIT (2003) 264 ITR 254 (Guh); CIT v. Divine Leasing and Finance Ltd (2008) 299 ITR 268 (Del); CIT v. Dwarikadish Investment (P) Ltd. (2011) 330 ITR 298 (Del) and CIT v. Oasis Hospitalities (P) Ltd (2011) 333 ITR 199 (Del), that the appellant-assessee discharged its burden under Section 68 of the Income Tax Act by giving the names, PAN numbers, and producing the assessment orders and accounts books of the unsecured creditors. The loans were taken by the banking channels. It is submitted that once the burden was discharged by the assessee, it was open to the Assessing Officer to have called the creditors by issuing notices under Section 131 of the Act to examine their creditworthiness and the genuineness of transactions. It was not open to the AO to examine the assessment orders and pass books and draw conclusions on the creditworthiness of the creditors, to add back at the entire loan amount to assessee's income.

5. We have considered the submissions, and have gone through the judgments cited by the appellant. In all these judgements, it has been reiterated that after the assessee has led the evidence of identifying the persons, with names, PAN numbers, bank account numbers and assessment orders, the burden under section 68 of the Act shifts upon the department to disprove the genuineness of the transactions. The AO could not make detailed enquiries into the sources of source, or doubt the genuineness and creditworthiness of the creditors on arbitrary reasoning or mere ipse dixit. His enquiry should be bonafide and concerned with the genuineness of the transactions. In case of share application money, it was held in CIT v. Lovely Exports P. Ltd. (2009) 319 ITR (st) 5 (SC), that the genuineness of the transaction is to be demonstrated by showing that the assessee had, in fact, received money from the said shareholder and it came from the coffers of that very shareholder. It was further held as follows :-

"As far as creditworthiness or financial strength of the creditor/subscriber is concerned, that can be proved by producing the bank statement of the creditor/subscriber showing that it had sufficient balance in its accounts to enable it to subscribe to the share capital. This judgement further holds that once these documents are produced, the assessee would have satisfactorily discharged the onus

cast upon him. Thereafter, it is for the Assessing Officer to scrutinize the same and in case he nurtures any doubt about the veracity of these documents to probe the matter further. However, to discredit the A.Y. 2004-05 documents produced by the assessee on the aforesaid aspects, there have to be some cogent reasons and materials for the Assessing Officer and he cannot go into the realm of suspicion."

6. In the present case, we find that after the initial burden was discharged by the appellant-assessee, the AO did not accept the application to summon the creditors and proceeded to examine the records namely the bank accounts to find out whether the unsecured loan transactions were genuine. He considered each and every loan transaction and found that none of the individual unsecured creditors could be said to be creditworthy to advance loans for such amounts. The observations made by the AO discussed by the ITAT are re-produced as follows :-

9.1 The AO discussed each and every creditor in the assessment order and the crux of the findings of the AO had been that there were very small bank balances in the bank accounts of the creditors and they were having meager income and as such, they were not men of means to advance any loan to the assessee. In the case of Abhay Maheshwari, there was very small balance of Rs.3528/- in his bank account. He was examined on oath and he was not able to give source of cash deposit to the satisfaction of the AO. He was earning hardly one lac rupees and spent 40,000/- to 50,000/- for household purposes. During his examination on oath, he was not able to satisfactorily explain the availability of funds with him for giving loan to the assessee. In his case, he has filed return of income for the assessment year under appeal at Rs.1,02,850/-

(PB-60). In the case of Shri Amit Maheshwari, he was also having small bank balance of Rs.2429/- before issue of cheque to the assessee and equal amount of the cash credit was deposited in the bank account. He has filed return of income for the assessment year under appeal at Rs.44972/- (PB-71). In the case of Smt. Keerti Maheshwari, in her bank account, there was balance of Rs.4688/- only prior to issue of cheque to the assessee and equivalent amount of cash credit was deposited for the purpose of issue of cheque in favour of the assessee. For the assessment year under appeal, she has filed return of income at Rs.1,01,000/- only. In the case of Smt. Mithlesh Maheshwari, the bank balance before issue of cheque was Rs.10,794/- and equivalent amount of cash credit was deposited A.Y. 2004-05 in her bank account for issue of cheque in favour of assessee. For assessment year under appeal, she filed return of income at Rs.1,02,476/- only. In the case of Sh. Rampal Sing, it is already noted above that the deposit entry in his case is not explained and prior to issue of cheque, there was bank balance of Rs.3708/- only. He has filed the return of income for the assessment year under appeal at loss with agricultural income (PB-102). In the case of Shri Shariq Ali Khan, the bank balance in his account was Rs.1055/- prior to issue of cheque and equivalent cash amount was deposited for issuing cheque in favour of the assessee. He has filed return of income at Rs.70,373/- plus agricultural income (PB-116). These details noted in the assessment order and the details verified from the paper book would clearly support the findings of the AO that none of the creditors were persons of sufficient means to advance any loan to the assessee. Filing of balance sheets, cash flow statements, cash books etc. have no evidentiary value because according to the remand report

filed by the AO, those documents were not filed with the return of income. Moreover, no regular books of account have been maintained by any of the creditors and majority of them have shown estimated income in their returns of income. Therefore, such balance sheet, cash flow statements etc. would not support the contention of the assessee that genuine credits have been received. The order sheet noted by the AO would also show that the assessee has made no efforts to produce the remaining creditors before the AO. Even in the statement of one of the creditors recorded by the AO, Shri Ambhay Maheshwari, he was not able to explain his source of deposit or advancing loan to the assessee through genuine source. It is well settled law that burden is upon the assessee to prove ingredients of section 68 of the Act by proving identity and creditworthiness of the creditors and genuineness of the transactions. The assessee has, however, failed to prove the creditworthiness of the creditors who were having only meager income. No details of their savings have been filed. The assessee has never shown his willingness to produce the remaining creditors for examination before the AO. Therefore, the genuineness of the transaction could not have been examined by the AO. The smallness of the bank balance in the bank accounts of the creditors prior to issue of cheques would clearly reveal that they were not having any source and it was A.Y. 2004-05 the money of the assessee which was routed through the bank accounts of the creditors for the purpose of giving credits to the assessee. These were, therefore, accommodation entries only and as such, could not be considered as genuine transactions. Merely because the loans have been received through banking channel, is not sacrosanct to make a non-genuine transaction as genuine transaction.

7. We do not find that the AO failed to exercise his jurisdiction in refusing to summon the file of unsecured creditors other than Shri Abhay Maheshwari, who had appeared and was examined. We also do not find that the AO has committed any error in examining the account books. None of the creditors under examination could prove their creditworthiness. Each one of them had a very small bank balance of a few thousand rupees only and that in all the cases the entire sum given as unsecured loan was deposited on the same day, when it was advanced to the assessee-appellant.

8. We do not find that any of the substantial questions of law framed by the appellant arises for consideration of the Court. The findings recorded by the AO about the creditworthiness of the unsecured loans of Rs.13,00,000/- as against the total unsecured loans of Rs.78,75,249/-, does not suffer from any error of law."

27. To maintain consistency, we follow the above order of I.T.A.T in the case of Smt. Suman Gupta vs. ITO in ITA No.454/Agr/2009, order dated 16.03.2012, 138 ITD 153 (Agra), where in the ratios of judgments relied upon by the assessee and contention of the assessee have been considered. In the light of that, the addition to the extent of Rs.5,75,000/- on account of Smt. Mamta Agarwal Rs.1,00,000/-, Shri Atul Kumar (HUF) Rs.2,00,000/-, Shri Rajiv Kumar (HUF) Rs.1,50,000/- and Smt. Suman Agarwal Rs.1,25,000/- are required to be confirmed. Because the assessee has filed to produce sufficient evidence in support of credit worthiness of A.Y. 2004-05 creditors. We, therefore, set aside the order of CIT(A) and restore the order of A.O in respect of additions in respect of these creditors. In the light of the fact, addition to the extent of Rs.5,75,000/- is confirmed. However, the addition to the extent of Rs.2,50,000/- on account of Smt. Priyanka Gupta Rs.70,000/-, Smt. Akansha Gupta Rs.1,20,000/- and Shri Narayan Das & Sons Rs.60,000/- have been rightly deleted by the CIT(A) as there sufficient funds were available in bank accounts before issuing cheques to the

assessee. Therefore, order of the CIT(A) regarding deletion of addition of Rs.2,50,000/- is upheld.

28. In the result, appeal of the Revenue is partly allowed.

(Order pronounced in the open Court)

Sd/-
(BHAVNESH SAINI)
Judicial Member
PBN/*

Sd/-
(A.L. GEHLOT)
Accountant Member

Copy of the order forwarded to:

1. Appellant
2. Respondent
3. CIT (Appeals) concerned
4. CIT concerned
5. D.R., ITAT, Agra Bench, Agra
6. Guard File.

By Order
Sr. Private Secretary
Income-tax Appellate Tribunal, Agra
True Copy