Operation Clean Money Assessments- Postscript

(Perspective on : Its Various aspects e.g infirmities in revenue's approach ; unexplained income charge , section 115BBE applicability , penal provisions of section 270A & 271AAC & its stay of demand etc)

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1. Hindsight (Recall of events)

When demonetization was last announced on 08.11.2016 , SBN's and consequential cash deposits subsequent to that attracted lot of attention as to its tax treatment under the provisions of Income Tax Act,1961 (Act). On social & other platforms it was hot topic in end of calendar year 2016 as to whether said cash deposit would only attract 30% rate as existing prior to amendment in section 115BBE in December 2016 (operative w.e.f AY 2017-2018) and no penalty u/s 270A would be levied on income offered in return filed u/s 139(1) of the Act. Then to penalize errant taxpayers having unsubstantiated or hidden business income in form of cash/asset etc detected by revenue as such, only rate was increased was from 30 to 60% in section 115BBE of the Act keeping its corpus and foundation intact (refer statement of objects and reasons to Taxation Laws (Second Amendment) Bill, 2016 (26/11/2016) (received assent of the President on 15/12/2016)). That is base factor to invoke section 115BBE of the Act, remained unaltered, which requires *primordial* existence of jurisdictional fact of correct and valid invocation of section 68 to section 69D of the Act. Now when provisions of section 68 to section 69D itself remained unchanged pre & post 2016 and only rate of tax in section 115BBE was doubled to 60% in December 2016 , it remained very much important as to whether such increase by 100% in rate was constitutionally valid , remains a unresolved enigma. This is also dealt in succeeding paragraphs. Now when much water has already flown down the river as already ITR's of those period stands filed , scrutinized and assessed in just completed assessments creating colossal and high pitched demands , opening a Pandora box of litigation , would be antithesis to government policy of less litigation (refer Supreme court in 400 ITR 9

highlighting national litigation policy) and would be in oppugnation to sage observations of Apex court in recent ruling in case of Maruti Suzuki case (reported at 416 ITR 613) that *"There is a value which the court must abide by in promoting the interest of certainty in tax litigation. The view which has been taken by this Court in relation to the respondent for AY 2011-12 must, in our view be adopted in respect of the present appeal which relates to AY 2012-13. Not doing so will only result in uncertainty and displacement of settled expectations. There is a significant value which must attach to observing the requirement of consistency and certainty. Individual affairs are conducted and business decisions are made in the expectation of consistency, uniformity and certainty. To detract from those principles is neither expedient nor desirable."* One wonders as to whether these assessments of OCM cases would answer to much desired *expectations of consistency, uniformity and certainty.*

2. Various Shades and Aspects of these assessments

2.1 Scrutiny assessments u/s 143(2)/143(3): It remains a matter of ongoing legal debate when a case is scrutinized in Computer aided scrutiny selection CASS u/s 143(2) of the Act that too without any intimation to taxpayer as to his case is taken for limited or complete scrutiny and its reasons, which are no where displayed when seminal notice of section 143(2) is generated by computer and till assessment completion , thus flouting mandate of CBDT instruction of 19& 20/2015 (dated 29.12.2015) , whether such non communication by itself has any fatal impact on assessment made. In author's opinion, since purpose of said instruction is public welfare and mitigation of harassment, its scrupulous and strict implementation is called for and any deviation therefrom must result in making the assessment as null and void. There have been few instances where case has been picked for limited scrutiny on sole "cash withdrawal" reason and no addition is made for same and addition is made for "cash deposits" which is not reason of limited scrutiny in the case concerned , and case is not converted to complete scrutiny as per applicable CBDT guidelines , so that assessment may not pass legal muster in authors opinion for which reference can be made to

i) Delhi bench ITAT CBS international projects pvt ltd (order dated 28.02.2019)
ii) Jaipur bench ITAT Late Smt Gurbachan Kaur (order dated 05.12.2019)
iii) Jaipur bench ITAT Manju Kaushik (order dated 09.12.2019)
iv) Lucknow bench ITAT Ravi Prakash Khandelwal (order dated 08.11.2019)
v) Mumbai G bench ITAT order in case of Su-Raj Diamod Dealers Pvt Ltd order dated 27.11.2019
vi) Mumbai D bench ITAT order in case of R&H Property Developer Pvt Ltd order dated 30.07.2019

Above litany of orders from various benches of ITAT across country remains ad-idem on impact of infraction of scope of CBDT instructions dealing with scope of limited scrutiny assessments that same would be nullity. Further in a recent case it was practically seen that in limited scrutiny assessment for reason of cash deposit which stood satisfactorily explained from sale consideration of immovable property , without any adverse inference on limited scrutiny reason, apparently exceeding the jurisdictional boundary of limited scrutiny assessment, penalty u/s 269SS is initiated which in authors opinion is prima-facie ultra vires to scope of limited scrutiny assessment and can be challenged on ground of *detournment de puvoir (misuse of power).*Even in a practical case it was observed that when only basis of issue notice u/s 143(2) to a firm was simplicitor PAN No of firm being reflected in concerned bank a/c where cash deposits was made, even when said firm got dissolved long back and said firm was validly converted to proprietary concern where said bank a/c was duly accounted and recorded in its books and said proprietary concern was filing its returns with said bank a/c, without making any independent inquiry etc assessment is made on said non existing firm hitherto dissolved which as per SC recent verdict in Maruti case (supra) is nullity and can't be validated.

2.2 Merits of assessee's explanation versus alleged charge of section 68 etc

Now comes important phase of OCM assessment where merits of assessee's explanation is traversed for its veracity on touchstone of section 68 to section 69d of the Act. When various assessment orders passed are categorized few illustrative cases can be compartmentalized as under:

i) Cases where presumptive scheme of section 44AD is opted by assessee;
ii) Cases where no books are there and no section 44AD is opted and earlier cash withdrawals etc is stated to be source of stated cash deposits;
iii) Cases where assessee is acting as a middlemen like a broker and owner of cash is somebody else and assessee is just acting like a conduit
iv) Cases where full fledged audited & regular books of accounts are maintained to support stated cash deposits in bank a/c (here source of cash deposits can be debtor realization , sales , etc)

One by one we deal with above case. Where presumptive scheme u/s 44AD is opted and there is no doubt on assessee's eligibility for the same , now merely because assessee is not able to satiate the SOP of CBDT which broadly speaking calls for historical analysis of cash deposits in assessee's past years can same without anything more and act as sole basis to implicate the entire cash sales (deposited in bank) already offered for taxation in presumptive scheme u/s 44AD of the Act as unexplained deemed income in section 68 of the Act. The basic edifice of presumptive scheme u/s 44AD is assessee would not be called to maintain books refer section 2(12A) of the Act and get them audited if profit shown by assessee is otherwise in accordance with prescription of section 44AD of the Act. Now subject matter of initiation of inquiry in OCM case here is factum of cash deposit which is further explained to be part of sales offered in presumptive scheme of section 44AD of the Act, same on basis of consistent decisions of various courts cant ipso facto be transformed as unexplained cash credit u/s 68 of the Act for various reasons. Firstly section 68 is a deeming fiction and same needs to interpreted in felicitous words from a ITAT verdict *that deeming fiction relates to that branch of jurisprudence which needs to be narrowly watched , zealously regarded and never to be pressed beyond its true limits.* Secondly section 68 requires existence of books and actual credit therein which are jurisdictional fact and without any books (refer section 2(12A) of the Act for definition of books) and without any credit therein, section 68 can't be pressed in service just because it is seemingly dearer to revenue due to its castigating implications in terms of

exponential tax rate prescribed in section 115BBE of the Act. In other words when a deeming fiction like section 68 here is applied it is not allowable to deem that books are there or credit is there when same is otherwise lacking ex-facie. If deeming within deeming provision is allowed then it may lead to absurdity. (refer Madras high court decision in Karti Chidambram case on jurisdictional fact importance : Held it **has succinctly observed that:**"168.From the above judgments, it could be deduced that existence of jurisdictional fact is a sine qua non for exercise of power. A jurisdictional fact is one on existence or non; existence of which depends jurisdiction on a Court or tribunal or authority, as the case may be. If the jurisdictional fact does not exist, the Court, authority or officer cannot act. If a court or authority has wrongly assumes the existence of such fact, the order can be quashed by a writ of certiorari. 169.If the jurisdictional fact exists, the authority can proceed further and exercise his power and take a decision in accordance with law. No Court or tribunal, statutory authority can assume jurisdiction, in respect of a matter which the statute does not confer on it. Error on jurisdictional fact , renders the order, ultra vires and bad. In the case on hand, as rightly submitted by Mr.Gopal Subramanium, learned Senior Counsel, that in the light of sections 2(11) and 50 of the Black Money Act, 2015, jurisdictional fact to enquire does not exist and that the Principal Director of Income Tax/first respondent herein, has assumed jurisdiction that he can enquire into the matter under Section 55 of the Act, by issuing a show cause notice.") Thirdly even if books are there and actual credit is there which is so contemplated in section 68 of the Act , then also what is of primordial significance is objective and judicious and exclusive *opinion* of assessing officer which can't be substituted by any other authority's dictate or directions as here it is apparent that CBDT SOP has been main focal point of assessing officer's framing of purported opinion u/s 68 etc which in authors view is again acting on directions of other authority (refer Supreme court in Green World corporation case 314 ITR 81 on duty of AO in forming his own opinion) and is legally impermissible. Fourthly it can't be lost sight of that section 68 etc gives *discretion* to assessing officer by use of phrase MAY which discretion has to be on judicious & cumulative consideration of entire facts and not simply adding cash deposits in bank a/c because they are not answering to stipulated enumeration of CBDT SOP. Formation of opinion and usage of discretion in section 68 remains of pivotal importance and same can't be displaced by dictates and directions of other authority. Once anatomy of section 68

stands adumbrated above , it would become clear that an assessee validly opting for section 44AD of the Act can't be subjected to section 68 qua sales (= cash deposits) already offered to tax as it is patently double taxation.

Reference may be made to:

Further, regarding approach to be adopted by revenue authorities u/s 68, it may be useful to make reference to full bench decision of P&H high court reported at **382 ITR 453:** The Hon'ble Punjab & Haryana High Court in a recent judgement in the case of CIT vs Jawaharlal Oswal and Others (I.T.A. No. 49 of 1999, Judgment delivered on 29.01.2016) dismissed the Department's appeal by holding that suspicion and doubt may be the starting point of an investigation but cannot, at the final stage of assessment, take the place of relevant facts, particularly when deeming provision is sought to be invoked. The Hon'ble Court has observed , *"...The principle that governs a deeming provision is that the initial onus lies upon the revenue to raise a prima facie doubt on the basis of credible material. The onus, thereafter, shifts to the assessee to prove that the gift is genuine and if the assessee is unable to proffer a credible explanation, the Assessing Officer may legitimately raise an inference against the assessee. If, however, the assessee furnishes all relevant facts within his knowledge and offers a credible explanation, the onus reverts to the revenue to prove that these facts are not correct. The revenue cannot draw an inference based upon suspicion or doubt or perceptions of culpability or on the quantum of the amount, involved particularly when the question is one of taxation, under a deeming provision. Thus, neither suspicion/doubt, nor the quantum shall determine the exercise of jurisdiction by the Assessing Officer....**Further a deeming provision requires the Assessing Officer to collect relevant facts and then confront the assessee, who is thereafter, required to explain incriminating facts and in case he fails to proffer a credible information, the Assessing Officer may validly raise an inference of deemed income under section 69-A.** As already held, if the assessee proffers an explanation and discloses all relevant facts within his knowledge, the onus reverts to the revenue to adduce evidence and only thereafter, may an inference be raised, based upon relevant facts, by invoking the deeming provisions of Section 69-A of the Act. It is true that inferences and presumptions are integral to an adjudicatory process but cannot by themselves be raised to the status of substantial evidence or evidence sufficient to raise an inference**. A deeming provision, thus, enables the**

revenue to raise an inference against an assessee on the basis of tangible material and not on mere suspicion, conjectures or perceptions"

IN THE SUPREME COURT OF INDIA CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4476 OF 2019 (Arising out of Special Leave Petition (Civil) No. 4210 of 2018)

63 MOONS TECHNOLOGIES LTD April 30, 2019

" WHERE THE CENTRAL GOVERNMENT IS SATISFIED"

37. With regard to similar language that is contained in Section 237(b) of the Companies Act, 1956, this Court, in Barium Chemicals (supra), contained separate opinions as to what the phrase "in the opinion of" contained in Section 237(b) meant. In Rohtas Industries (supra), this Court adopted the test laid down by Hidayatullah, J. (as he then was) and Shelat, J. as follows:

"Before taking action under Section 237(b)(i) and (ii), the Central Government has to form an opinion that there are circumstances suggesting that the business of the company is being conducted with intent to defraud its creditors, members or any other persons, or otherwise for a fraudulent or unlawful purpose or in a manner oppressive to any member or that the company was formed for any fraudulent or unlawful purpose or that the persons concerned in the formation or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards the company or towards any of its members. From the facts placed before us, it is clear that the Government had not bestowed sufficient attention to the material before it before passing the impugned order. It seems to have been oppressed by the opinion that it had formed about Shri S.P. Jain. From the arguments advanced by Mr Attorney, it is clear that but for the association of Mr S.P. Jain with the appellant-company, the investigation in question, in all probabilities would not have been ordered. Hence, it is clear that in making the impugned order irrelevant considerations have played an important part. The power under Sections 235 to 237 has been conferred on the Central Government on the faith that it will be exercised in a reasonable manner. The department of the Central Government which deals with companies is presumed to be an expert body in company law matters. Therefore, the standard that is

prescribed under Section 237(b) is not the standard required of an ordinary citizen but that of an expert. The learned Attorney did not dispute the position that if we come to the conclusion that no reasonable authority would have passed the impugned order on the material before it, then the same is liable to be struck down. This position is also clear from the decision of this Court in Barium Chemicals and Anr. v. Company Law Board and Anr. [(1966) Supp SCR 311]. (at p. 119) xxx xxx xxx The decision of this Court in Barium Chemicals case which considered the scope of Section 237(b) illustrates that difficulty. In that case Hidayatullah, J. (our present Chief Justice) and Shelat, J. came to the conclusion that though the power under Section 237(b) is a discretionary power the first requirement for its exercise is the honest formation of an opinion that the investigation is necessary and the further requirement is that "there are circumstances suggesting" the inference set out in the section; an action not based on circumstances suggesting an inference of the enumerated kind will not be valid; the formation of the opinion is subjective but the existence of the circumstances relevant to the inference as the sine qua non for action must be demonstratable; if their existence is questioned, it has to be proved at least prime facie; it is not sufficient to assert that those circumstances exist and give no clue to what they are, because the circumstances must be such as to lead to conclusions of certain definiteness; the conclusions must relate to an intent to defraud, a fraudulent or unlawful purpose, fraud or misconduct. In other words they held that although the formation of opinion by the Central Government is a purely subjective process and such an opinion cannot be challenged in a court on the ground of propriety, reasonableness or sufficiency, the authority concerned is nevertheless required to arrive at such an opinion from circumstances suggesting the conclusion set out in sub-clauses (i), (ii) and (iii) of Section 237(b) and the expression "circumstances suggesting" cannot support the construction that even the existence of circumstances is a matter of subjective opinion. Shelat, J. further observed that it is hard to contemplate that the Legislature could have left to the subjective process both the formation of opinion and also the existence of circumstances on which it is to be founded; it is also not reasonable to say that the clause permitted the Authority to say that it has formed the opinion on circumstances which in its opinion exist and which in its opinion suggest an intent to defraud or a fraudulent or unlawful purpose. On the other hand Sarkar, C.J. and Mudholkar, J. held that the power conferred on the Central Government under Section 237(b) is a discretionary power and no facet of that power is open to

judicial review. Our Brother Bachawat, J., the other learned Judge in that Bench did not express any opinion on this aspect of the case. Under these circumstances it has become necessary for us to sort out the requirements of Section 237(b) and to see which of the two contradictory conclusions reached in Barium Chemicals case is in our judgment, according to law. But before proceeding to analyse Section 237(b) we should like to refer to certain decisions cited at the bar bearing on the question under consideration. (at pp. 120-121) xxx xxx xxx "Coming back to Section 237(b), in finding out its true scope we have to bear in mind that that section is a part of the scheme referred to earlier and therefore the said provision takes its colour from Sections 235 and 236. In finding out the legislative intent we cannot ignore the requirements of those sections. In interpreting Section 237(b) we cannot ignore the adverse effect of the investigation on the company. Finally we must also remember that the section in question is an inroad on the powers of the company to carry on its trade or business and thereby an infraction of the fundamental right guaranteed to its shareholders under Article 19(1) (g) and its validity cannot be upheld unless it is considered that the power in question is a reasonable restriction in the interest of the general public. In fact the vires of that provision was upheld by majority of the Judges constituting the Bench in Barium Chemicals case principally on the ground that the power conferred on the Central Government is not an arbitrary power and the same has to be exercised in accordance with the restraints imposed by law. For the reasons stated earlier we agree with the conclusion reached by Hidayatullah, J. and Shelat, JJ. in Barium Chemicals case that the existence of circumstances suggesting that the company's business was being conducted as laid down in sub-clause(1) or the persons mentioned in sub-clause (2) were guilty of fraud or misfeasance or other misconduct towards the company or towards any of its members is a condition precedent for the Government to form the required opinion and if the existence of those conditions is challenged, the courts are entitled to examine whether those circumstances were existing when the order was made. In other words, the existence of the circumstances in question are open to judicial review though the opinion formed by the Government is not amenable to review by the courts. As held earlier the required circumstances did not exist in this case." (at pp. 128-129)

38. In Western U.P. Electric Power & Supply Co. Ltd. v. State of U.P. and Anr., (1969) 1 SCC 817, this Court dealt with a situation where the Indian Electricity

Act, 1910 was amended by the U.P. Act 30 of 1961, by which, Section 3(2)(e)(ii) provided that the grant of a licence shall not, in any way, hinder or restrict the supply of energy by the State Government or the State Electricity Board within the same area where the State Government deems such supply "necessary in public interest". In that case, the High Court had observed that the State Government was the sole judge of whether the direct supply of energy was or was not in public interest, the nature of the power being subjective. This Court, in upsetting the High Court's view, held: "11. We are unable to agree with that view. By Section 3(2)(e) as amended by the U.P. Act 30 of 1961, the Government is authorised to supply energy to consumers within the area of the licensee in certain conditions: exercise of the power is conditioned by the Government deeming it necessary in public interest to make such supply. If challenged, the Government must show that exercise of the power was necessary in public interest. The Court is thereby not intended to sit in appeal over the satisfaction of the Government. If there be prima facie evidence on which a reasonable body of persons may hold that it is in the public interest to supply energy directly to the consumers, the requirements of the statute are fulfilled. Normally a licensee of electrical energy, though he has no monopoly, is the person through whom electrical energy would be distributed within the area of supply, since the licensee has to lay down electric supply-lines for transmission of energy and to maintain its establishment. An inroad may be made in hat right in the conditions which are statutorily prescribed. In our judgment, the satisfaction of the Government that the supply is necessary in the public interest is in appropriate cases not excluded from judicial review."

39. Close upon the heels of these judgments, this Court, after considering Barium Chemicals (supra) and Rohtas Industries (supra), restated the test as to judicial review of administrative action in Rampur Distillery Co. Ltd. v. Company Law Board, [1970] 2 SCR 177 as follows: "The scheme of the section implies investigation and a decision on the matters set out therein. Section 326 lays down conditions by sub-section (1)(a) in which the Central Government may override the resolution of the general body of share-holders in certain specified conditions. Upon the Central Government is imposed a duty not to accord approval to the appointment or reappointment of a proposed managing agent in the light of clauses (a), (b) and (c) of sub-section (2). Though the sub-section is enacted in form negative, in substance it confers power upon the Government subject to the

restrictions imposed by clauses (a), (b) and (c), to refuse to accord approval. Sub-section (2) imposes upon the Central Government the duty not to accord approval to appointment or re-appointment of a proposed managing agent unless the Government is satisfied that the managing agent is a fit and proper person to be appointed, that the conditions of the managing agency agreement are fair and reasonable and that the managing agent has fulfilled the conditions which the Central Government required him to fulfil. Thereby the Central Government is not made the final arbiter of the existence of the grounds on which the satisfaction may be founded. The satisfaction of the Government which is determinative is satisfaction as to the existence of certain objective facts. The recital about satisfaction may be displaced by showing that the conditions did not exist, or that no reasonable body of persons properly versed in law could have reached the decision that they did. The Courts, however, are not concerned with the sufficiency of the grounds on which the satisfaction is reached. What is relevant is the satisfaction of the Central Government about the existence of the conditions in clauses (a), (b) and (c) of sub-section (2) of Section 326. The enquiry before the Court, therefore, is whether the Central Government was satisfied as to the existence of the conditions. The existence of the satisfaction cannot be challenged except probably on the ground that the authority acted mala fide. But if in reaching its satisfaction the Central Government misapprehended the nature of the conditions, or proceeded upon irrelevant materials, or ignores relevant materials, the jurisdiction of the Courts to examine the satisfaction is not excluded. ……" (at p. 183)

In M.A. Rasheed and Ors. v. State of Kerala, [1975] 2 SCR 93, after following Rohtas Industries (supra), the test for judicial review of administrative decisions was stated most felicitously by Ray, C.J. thus: "Administrative decisions in exercise of powers even if conferred in subjective terms are to be made in good faith on relevant consideration. The courts inquire whether a reasonable man could have come to the decision in question without misdirecting himself on the law or the facts in a material respect. The standard of reasonableness to which the administrative body is required to conform may range from the courts' own opinion of what is reasonable to the criterion of what a reasonable body might have decided. The courts will find out whether conditions precedent to the formation of the opinion have a factual basis." (at p. 99)

In Khudiram Das v. State of West Bengal, (1975) 2 SCC 81, this Court exhaustively set out parameters for judicial review of the subjective satisfaction of the detaining authority in a preventive detention case. This Court held:

"9. But that does not mean that the subjective satisfaction of the detaining authority is wholly immune from judicial reviewability. The courts have by judicial decisions carved out an area, limited though it be, within which the validity of the subjective satisfaction can yet be subjected to judicial scrutiny. The basic postulate on which the courts have proceeded is that the subjective satisfaction being a condition precedent for the exercise of the power conferred on the Executive, the Court can always examine whether the requisite satisfaction is arrived at by the authority : if it is not, the condition precedent to the exercise of the power would not be fulfilled and the exercise of the power would be bad. There are several grounds evolved by judicial decisions for saying that no subjective satisfaction is arrived at by the authority as required under the statute. The simplest case is whether the authority has not applied its mind at all; in such a case the authority could not possibly be satisfied as regards the fact in respect of which it is required to be satisfied. Emperor v. Shibnath Bannerji [AIR 1943 FC 75 : 1944 FCR 1 : 45 Cri LJ 341] is a case in point. Then there may be a case where the power is exercised dishonestly or for an improper purpose : such a case would also negative the existence of satisfaction on the part of the authority. The existence of "improper purpose", that is, a purpose not contemplated by the statute, has been recognised as an independent ground of control in several decided cases. The satisfaction, moreover, must be a satisfaction of the authority itself, and therefore, if, in exercising the power, the authority has acted under the dictation of another body as the Commissioner of Police did in Commissioner of Police v. Gordhandas Bhanji [AIR 1952 SC 16 : 1952 SCR 135] and the officer of the Ministry of Labour and National Service did in Simms Motor Units Ltd. v. Minister of Labour and National Service [(1946) 2 All ER 201] the exercise of the power would be bad and so also would the exercise of the power be vitiated where the authority has disabled itself from applying its mind to the facts of each individual case by self-created rules of policy or in any other manner. The satisfaction said to have been arrived at by the authority would also be bad where it is based on the application of a wrong test or the misconstruction of a statute. Where this happens, the satisfaction of the authority would not be in respect of the thing in regard to which

it is required to be satisfied. Then again, the satisfaction must be grounded "on materials which are of rationally probative value". Machindar v. King [AIR 1950 FC 129 : 51 Cri LJ 1480 : 1949 FCR 827]. The grounds on which the satisfaction is based must be such as a rational human being can consider connected with the fact in respect of which the satisfaction is to be reached. They must be relevant to the subject-matter of the inquiry and must not be extraneous to the scope and purpose of the statute. If the authority has taken into account, it may even be with the best of intention, as a relevant factor something which it could not properly take into account in deciding whether or not to exercise the power or the manner or extent to which it should be exercised, the exercise of the power would be bad. Pratap Singh v. State of Punjab [AIR 1964 SC 72 : (1964) 4 SCR 733]. If there are to be found in the statute expressly or by implication matters which the authority ought to have regard to, then, in exercising the power, the authority must have regard to those matters. The authority must call its attention to the matters which it is bound to consider."

In Tata Cellular v. Union of India (1994) 6 SCC 651, after an exhaustive review of the latest English judgments, this Court held: "77. The duty of the court is to confine itself to the question of legality. Its concern should be: 1. Whether a decision-making authority exceeded its powers? 2. committed an error of law, 3. committed a breach of the rules of natural justice, 4. reached a decision which no reasonable tribunal would have reached or, 5. abused its powers. Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under: (i) Illegality: This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. (ii) Irrationality, namely, Wednesbury unreasonableness. (iii) Procedural impropriety. The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact, in R. v. Secretary of State for the Home Department, ex Brind [(1991) 1 AC 696], Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all these

cases the test to be adopted is that the court should, "consider whether something has gone wrong of a nature and degree which requires its intervention"."

40. In Bhikhubhai Vithlabhai Patel v. State of Gujarat, (2008) 4 SCC 144, this Court, in an elaborate judgment, referred to and followed several judgments, including Barium Chemicals (supra), in the context of Section 17 of the Gujarat Town Planning and Urban Development Act, 1976, by which, if the State Government is of opinion that substantial modifications in the draft development plan are necessary, it may publish such modifications. This Court held:

"20. The State Government is entitled to publish the modifications provided it is of opinion that substantial modifications in the draft development plan are necessary. The expression "'is of opinion' that substantial modifications in the draft development plan are necessary" is of crucial importance. Is there any material available on record which enabled the State Government to form its opinion that substantial modifications in the draft development plan were necessary? The State Government's jurisdiction to make substantial modifications in the draft development plan is intertwined with the formation of its opinion that such substantial modifications are necessary in the draft development plan. The State Government without forming any such opinion cannot publish the modifications considered necessary along with notice inviting suggestions or objections. We have already noticed that as on the day when the Minister concerned took the decision proposing to designate the land for educational use the material available on record were: (a) the opinion of the Chief Town Planner; (b) note dated 23-4-2004 prepared on the basis of the record providing the entire background of the previous litigation together with the suggestion that the land should no more be reserved for the purpose of South Gujarat University and after releasing the lands from reservation, the same should be placed under the residential zone. 21. It is true that the State Government is not bound by such opinion and is entitled to take its own decision in the matter provided there is material available on record to form opinion that substantial modifications in the draft development plan were necessary. Formation of opinion is a condition precedent for setting the law in motion proposing substantial modifications in the draft development plan. 22. Any opinion of the Government to be formed is not subject to objective test. The language leaves no room for the relevance of a judicial examination as to the sufficiency of the grounds on which the Government acted in forming its opinion.

But there must be material based on which alone the State Government could form its opinion that it has become necessary to make substantial modification in the draft development plan. 23. The power conferred by Section 17(1)(a)(ii) read with proviso is a conditional power. It is not an absolute power to be exercised in the discretion of the State Government. The condition is formation of opinion—subjective, no doubt—that it had become necessary to make substantial modifications in the draft development plan. This opinion may be formed on the basis of material sent along with the draft development plan or on the basis of relevant information that may be available with the State Government. The existence of relevant material is a precondition to the formation of opinion. The use of word "may" indicates not only a discretion but an obligation to consider that a necessity has arisen to make substantial modifications in the draft development plan. It also involves an obligation to consider which of the several steps specified in sub-clauses (i), (ii) and (iii) should be taken. 24. The proviso opens with the words "where the State Government is of opinion that substantial modifications in the draft development plan and regulations are necessary, …". These words are indicative of the satisfaction being subjective one but there must exist circumstances stated in the proviso which are conditions precedent for the formation of the opinion. Opinion to be formed by the State Government cannot be on imaginary grounds, wishful thinking, however laudable that may be. Such a course is impermissible in law. The formation of the opinion, though subjective, must be based on the material disclosing that a necessity had arisen to make substantial modifications in the draft development plan 25. The formation of the opinion by the State Government is with reference to the necessity that may have had arisen to make substantial modifications in the draft development plan. The expression: "as considered necessary" is again of crucial importance. The term "consider" means to think over; it connotes that there should be active application of the mind. In other words, the term "consider" postulates consideration of all the relevant aspects of the matter. A plain reading of the relevant provision suggests that the State Government may publish the modifications only after consideration that such modifications have become necessary. The word "necessary" means indispensable, requisite, indispensably requisite, useful, incidental or conducive, essential, unavoidable, impossible to be otherwise, not to be avoided, inevitable. The word "necessary" must be construed in the connection in which it is used. (See Advanced Law Lexicon, P. Ramanatha Aiyar, 3rd Edn., 2005.) 26. The

formation of the opinion by the State Government should reflect intense application of mind with reference to the material available on record that it had become necessary to propose substantial modifications to the draft development plan."

42. Thus, at the very least, it is clear that the Central Government's satisfaction must be as to the conditions precedent mentioned in the Section as correctly understood in law, and must be based on facts that have been gathered by the Central Government to show that the conditions precedent exist when the order of the Central Government is made. There must be facts on which a reasonable body of persons properly instructed in law may hold that it is essential in public interest to amalgamate two or more companies. The formation of satisfaction cannot be on irrelevant or imaginary grounds, as that would vitiate the exercise of power.

So when we apply above to assessment framed in OCM cases applying section 68 etc requisite opinion on part of assessing officer as required in law and as highlighted in aforesaid inundated jurisprudence is grossly lacking when mere basis to draw adverse inference is alleged and stated statistical non justification as per criteria in CBDT SOP. The Hon'ble Supreme Court in Maneka Gandhi Vs. Union of India reported in 1978 AIR (SC) 597 has laid down the law that a public authority should discharge his duties in a fair, just and reasonable, manner and the principle of due process of law was recognized by the Hon'ble Supreme Court. Therefore the opinion of the Ld. AO has to be in consonance with that of the well settled judicial principles and cannot be arbitrarily made discarding the judicial precedent on the subject.

Even Madras high Court in a recent case of Sri Balamurugan Textile Processing (Tax Case Appeal No. 344 of 2009 order dated 15.07.2019) in context of section 68 of the Act has highlighted that *"15. In our considered view, recording of satisfaction by the Assessing Officer to invoke Section 68 of the Act is primordial and the satisfaction to be recorded should be with the reasons to state as to why the assessee's explanation is not found to be satisfactory. In the absence of any such finding, invoking provision of Section 68 of the Act has to be held to be perverse"* and further it is observed u/s 68 that "17. One more issue, which falls for consideration is whether mere book entries or journal entries by itself can be taken to have resulted in income for the assessee. This issue was explained by the Hon'ble Supreme Court in the case of CIT, Bombay City I Vs. Messrs. Shoorji Vallabhdas And Company [reported in 46 ITR 144] stating that no doubt, the Income-tax Act takes into account two points of time at which the liability to tax is

attracted, viz., the accrual of the income or its receipt; but the substance of the matter is the income. If income does not result at all, there cannot be a tax, even though in book-keeping, an entry is made about a "hypothetical income", which does not materialise. Where income has, in fact, been received and is subsequently given up in such circumstances that it remains the income of the recipient, even though given up, the tax may be payable."

In the case of T. Jayachandran 406 ITR 1 , the Hon'ble Apex Court held that the *revenue has to see what income has really accrued, not by reference to physical receipt of income, but by the receipt of income in reality; that when the assessee had acted only as a broker and not allowing any claim of ownership, the receipt of money was only on behalf of his clients in trust; and that, therefore, such receipt cannot be termed to be the income of the assessee*.

For a similar principle, reliance is placed on the decision of the Hon'ble Supreme Court in the case of Pearless General Finance & Investment Co. Ltd. vs CIT (2019), 416 ITR 1 (SC) wherein the Hon'ble Apex Court held that *it is not a theoretical aspect but the reality of the situation that has to be viewed as a whole*, which may lead to the conclusion that the receipts in question were capital and not income.

Apropos interpretation of taxing statute which principle is apposite in our humble view in present case can be culled out as:

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3327 OF 2007

COMMISSIONER OF CUSTOMS (IMPORT), MUMBAI …APPELLANT(S)

VERSUS

M/S. DILIP KUMAR AND COMPANY & ORS. …RESPONDENT(S)

J UDGMENT

N.V. RAMA NA, J.

12. We may, here itself notice that the distinction in interpreting a taxing provision (charging provision) and in the matter of interpretation of exemption notification is too obvious to require any elaboration. Nonetheless, in a nutshell, we may mention that, as observed in ***Surendra Cotton Oil Mills Case*** (supra), in the matter of interpretation of charging section of a taxation statute, strict rule of interpretation is

mandatory and if there are two views possible in the matter of interpretation of a charging section, the one favourable to the assessee need to be applied. There is, however, confusion in the matter of interpretation of exemption notification published under taxation statutes and in this area also, the decisions are galore
In construing penal statutes and taxation statutes, the Court has to apply strict rule of interpretation. The penal statute which tends to deprive a person of right to life and liberty has to be given strict interpretation or else many innocent might become victims of discretionary decision making. In so far as taxation statutes are concerned, Article 265 of the Constitution3 prohibits the State from extracting tax from the citizens without authority of law. It is axiomatic that taxation statute has to be interpreted strictly because State cannot at their whims and fancies burden the citizens without authority of law. In other words, when competent Legislature mandates taxing certain persons/certain objects in certain circumstances, it cannot be expanded/interpreted to include those, which were not intended by the Legislature.
After thoroughly examining the various precedents some of which were cited before us and after giving our anxious consideration, we would be more than justified to conclude and also compelled to hold that every taxing statue including, charging, computation and exemption clause (at the threshold stage) should be interpreted strictly. Further, in case of ambiguity in a charging provisions, the benefit must necessarily go in favour of subject/assessee, but the same is not true for an exemption notification wherein the benefit of ambiguity must be strictly interpreted in favour of the Revenue/State. There is abundant jurisprudential justification for this. In the governance of rule of law by a written Constitution, there is no implied power of taxation. The tax power must be specifically conferred and it should be strictly in accordance with the power so endowed by the Constitution itself. It is for this reason that the Courts insist upon strict compliance

before a State demands and extracts money from its citizens towards various taxes. Any ambiguity in a taxation provision, therefore, is interpreted in favour of the subject/assessee. The statement of law that ambiguity in a taxation statute should be interpreted strictly and in the event of ambiguity the benefit should go to the subject/assessee may warrant visualizing different situations. For instance, if there is ambiguity in the subject of tax, that is to say, who are the persons or things liable to pay tax, and whether the revenue has established conditions before raising and justifying a demand. Similar is the case in roping all persons within the tax net, in which event the State is to prove the liability of the persons, as may arise within the strict language of the law. There cannot be any implied concept either in identifying the subject of the tax or person liable to pay tax. That is why it is often said that subject is not to be taxed, unless the words of the statute unambiguously impose a tax on him, that one has to look merely at the words clearly stated and that there is no room for any intendment nor presumption as to tax. It is only the letter of the law and not the spirit of the law to guide the interpreter to decide the liability to tax ignoring any amount of hardship and eschewing equity in taxation. *Thus, we may emphatically reiterate that if in the event of ambiguity in a taxation liability statute, the benefit should go to the subject/assessee. But, in a situation where the tax exemption has to be interpreted, the benefit of doubt should go in favour of the revenue, the aforesaid conclusions are expounded only as a prelude to better understand jurisprudential basis for our conclusion. We may now consider the decisions which support our view.*"

If aforesaid observations are tested against facts of this case in hand in our view same should go to benefit the tax payer as there is not only ambiguity in law in applicability of section 68/115BBE but also principle of strictest interpretation would support case set up by assessee as held in aforesaid order in following instructive words "In construing penal statutes and taxation statutes, the Court has

to apply strict rule of interpretation. *The penal statute which tends to deprive a person of right to life and liberty has to be given strict interpretation or else many innocent might become victims of discretionary decision making.* Insofar as taxation statutes are concerned, Article 265 of the Constitution3 prohibits the State from extracting tax from the citizens without authority of law. It is axiomatic that taxation statute has to be interpreted strictly because State cannot at their whims and fancies burden the citizens without authority of law. In other words, when competent Legislature mandates taxing certain persons/certain objects in certain circumstances, it cannot be expanded/interpreted to include those, which were not intended by the Legislature." , these observations in our respectful view are clincher to present issue.

IN THE HIGH COURT OF DELHI AT NEW DELHI in ITA 613/2010
COMMISSIONER OF INCOME TAX ..... Appellant
Through: Ms Suruchi Aggarwal
versus
KAILASH JEWELLERY HOUSE ..... Respondent
Through: None O R D E R
09.04.2010

HELD

The revenue is in appeal against the order passed by the Income-tax Appellate Tribunal dated 08.07.2009 passed in the revenue?s appeal being ITA No.3597/Del/2008 pertaining to the assessment year 2006-07. Before the Tribunal, the revenue had taken the ground that the Commissioner of Income-tax (Appeals) had erred in deleting the addition of an amount of Rs 24,58,400/- in respect of cash received in the bank account on the ground that the assessee had not established the nexus of such deposit to any source of income. 2. On examination of the orders passed by the Assessing Officer, the Commissioner of Income-tax (Appeals) and the impugned order passed by the Tribunal, we find that both the appellate authorities below have disagreed

with the Assessing Officer and have deleted the said addition on the ground that the cash sales were duly recorded in the books and that they had found place in the profit and loss account.

3. The Commissioner of Income-tax (Appeals) had returned a finding that the stock and cash found at the time of search had been examined by the Assessing Officer and was compared with the stock and cash position as per books. The stock and cash position as per the books had been arrived at after the effect of the aforesaid cash sales. The stock position as well as the cash position as per the said books had been accepted by the Assessing Officer. The Commissioner of Income-tax (Appeals) also noted that the appellant had furnished the complete set of books of accounts and the cash books and no discrepancy had been pointed out. The Assessing Officer had doubted the aforesaid sales as bogus and had made the aforesaid addition. However, the Commissioner of Income- tax (Appeals) as well as the Income-tax Appellate Tribunal returned findings of fact to the contrary.

4. The Tribunal also noted that the departmental representative could not challenge the factual finding recorded by the Commissioner of Income-tax (Appeals). Nor could he advance any substantive argument in support of his appeal. The Tribunal also observed that it is not in dispute that the sum of Rs 24,58,400/- was credited in the sale account and had been duly included in the profit disclosed by the assessee in its return. It is in these circumstances that the Tribunal observed that the cash sales could not be treated as undisclosed income and no addition could be made once again in respect of the same.

5. The findings of the Commissioner of Income-tax (Appeals) and the Tribunal, which are purely in the nature of the factual findings, do not require any interference and, in any event, no substantial question of law arises for our consideration. The appeal is dismissed.

Case law	Proposition
M/s Singhal Exim Pvt.Ltd ITA No.6520/Del/2018 Assessment Year : 2014-15 THE INCOME TAX APPELLATE TRIBUNAL DELHI BENCH 'G'	In the first paragraph above, the Assessing Officer mentioned "the amount of Rs.59,11,29,517/- is hereby disallowed u/s 68 of the Act and added back to the total income of the assessee company". It seems that the Assessing Officer has probably not understood the scope of Section 68. Section 68 is not for the purpose of allowability or disallowability of any deduction and moreover, the question of disallowance may arise in respect of any expenditure or allowance claimed by the assessee. In respect of a sale consideration, there cannot be any question of any disallowance. In the second paragraph above, the Assessing Officer has alternatively applied Section 69C. Section 69C is also for unexplained expenditure. Admittedly, there is no question of any unexplained expenditure in the case under appeal before us and therefore, Section 69C is also not applicable. In view of the above, we hold that the Assessing Officer was not right in concluding that the high sea sales are not genuine. *Moreover, Section 68 would also not be applicable in respect of recovery of sales consideration. Once the assessee sold the goods, the buyer of the goods becomes the debtor of the assessee and any receipt of money from him is the realisation of such debt and therefore, we are of the opinion that in respect of recovery of sale consideration, Section 68 cannot be applied. In view of the above, we find no justification for upholding the addition of `59,51,29,517/-. The same is deleted.*
IN THE INCOME TAX APPELLATE TRIBUNAL DELHI BENCH 'D', NEW DELHI **ITA No. 1220/Del/2011 : Asstt. Year : 2006-07** **Kishore Jeram Bhai Khaniya** **Date of Pronouncement : 13.5.2014**	*There is another dimension to this issue. The Assessing Officer made addition of Rs. 22.06 lacs u/s 68 of the Act, which contemplates the making of addition where any sum found credited in the books of the assessee is not proved to the satisfaction of the A.O. It is only when such a sum is not proved that the Assessing Officer proceeds to make addition u/s 68 of the Act. We are dealing with a situation in which the assessee has himself offered the amount of cash sales as his income by duly including it in his total sales.* *Once a particular amount is already offered for taxation, the same cannot be again considered u/s 68 of the Act. In fact, such addition has resulted into double addition.*
CIT vs Goverdhan India	AY 2001-02. The assessee had recorded sale of goods to Ambrose

(P) Ltd., 177 Taxman 29 ,18 August 2008	International Corporation worth Rs.50.36 lakhs. On summons from AO, AIC sent a copy of account showing purchase of Rs.28.19 lakhs only. The difference of Rs.22.17 was added as unexplained cash credit. The assessee's accounts were audited. The copies of the sale bills to AIC were countersigned by AIC. The sales to AIC stood proved . The sales were made to identified person. No addition under s.68 could be merely on copy of account filed by AIC. Further, assessee's request to cross examine AIC was not allowed. The tribunal rightly deleted the addition to income. S.68 of the Income Tax Act 196
Racmann Springs (P) Ltd vs DCIT, 55 ITD 159 ITAT **(Delhi)**	*- Thereare contradictory findings in the assessment order dated 8-10-1984 and 13-1-1992. In the assessment order dated 8-10-1984, that Assessing Officer (Mr. O. S. Bajpai) at page 18 stated that these deposits are the realisation of the sale proceeds against the sales not disclosed in the past years in the books of account". However, in the assessment order dated 13-1-1992 at page 5 the Assessing Officer (Mrs. Gunjan Misra) stated that "drafts deposited in the Bank of Tokyo as per List-I ..... are actually undisclosed sales of the assessee." and "the sales were not being accounted for in the books of the assessee and the same were being directly deposited in various bank accounts". Thus, the successive Assessing Officers are not sure of the stand taken by them. Added to this, no evidence was brought on record by the Assessing Officer to substantiate the allegation that the impugned amount of Rs. 15,59,845 represented undisclosed sales. In the circumstances, benefit of doubt should have been given to the assessee as contended by the assessee's counsel reproduced earlier. The taxation authorities cannot go on changing their mind from time to time and cannot be allowed to create uncertainty in the realm of taxation (6 ELT 756 Guj. (sic)). Departure from earlier conclusion without explanation is vitiated. When the taxing authorities themselves were not sure about the correct factual position, any addition made is not sustainable under the law. It is settled law that benefit of doubt is the right of the assessee. (29 STC 695 (sic)).* - The assessee has filed reconciliation statement of sundry debtors from 1-7-1979 to 30-6-1980 (page 135 of paper book No. 1). In the said statement Rs. 18,00,763 was shown as realisation from the debtors during the year ended 30-6-1980. The Assessing Officer after comparing the figures of realisation from the debtors in the assessment years 1982-83, 1983-84 and 1984-85 concluded that it was unlikely that for the assessment year 1981-82 the assessee suddenly had realisation from sundry debtors of about Rs. 18 lakhs. This is only a suspicion of the Assessing Officer. *Suspicion, however, grave, cannot take the place of proof.* The assessee's plea of realisation of Rs. 18,00,763 from the sundry debtors in the year ended 30-6-1980 cannot be rejected on the ground that realisations in the later assessment years

	were less. Please see the case of New Ambadi Estates Pvt. Ltd.'s case (supra). *- The Assessing officer held in the assessment order dated 13-1-1992 that the drafts deposited in the Bank of Tokyo as per List-I are actually undisclosed sales and treated the same as income of the assessee under section 68 of the Income-tax Act, 1961. This was really strange. Only unsubstantiated cash credits could be added under section 68 of the Income-tax Act, 1961. The said section does not permit the Assessing Officers to add undisclosed sales under that section. Further, the realisations from the sundry debtors cannot be treated as cash credits. Cash credits always appear as a liability in the balance sheet of the assessee. Realisation from the sundry debtors would reduce the sundry debtors appearing on the "assets" side of the balance sheet.*
IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH, AHMEDABAD ITA.No.1652/Ahd/2011 Shri Pavankumar Bhagatram Sharma Date of Pronouncement: 11/04/2016	Since the books of accounts of the appellant are incorrect, and unreliable, the proper course to be adopted by the AO was to reject the books and estimate the income of the appellant on a reasonable basis. It is obvious that the deposits in the bank account are sale proceeds of the appellant. The mere fact that the books of accounts were not correct would not empower the AO to make an addition of the entire deposits in the bank account as unaccounted income of the appellant u/s 68 of the IT Act. - If this finding is weighed in the light of the finding recorded by the ld.AO, then scale would tilt in favour of this finding. The AO has not made detailed analysis of the account as well as other details submitted by the assessee. According to the ld.CIT(A) aggregate cash deposits in the said bank account is only of Rs.21,23,800/-. The AO, on the other hand, observed that the cash deposits was of Rs.50,48,055/-. The ld.CIT(A) thereafter made reference to other materials produced before the AO to point out that this bank account was used for the purpose of business and sale proceeds were deposited in this bank account. On the other hand, the ld.AO did not make any such investigation. He simply treated the deposits made in the bank account as unexplained cash credits. Contrary to this, the Revenue has not brought any evidence on record to demonstrate the fact that opinion formed by the ld.CIT(A) contrary to the details available on record. In words, it has not brought to our notice that inference drawn by the ld.CIT(A) are factually incorrect. The ld.CIT(A) has right observed that total amount appearing as a deposit in the account was not cash credits, rather sale proceeds of the assessee.

	Turnover of the assessee is to be computed on the basis of all these details and at the most, an estimated net profit can be computed as an income of the assessee. Accordingly, the ld.CIT(A) has confirmed an addition of Rs.3,50,208/-. We do not find any error in the detailed reasoning of the ld.CIT(A), and accordingly, the appeal of the Revenue is dismissed. For dismissal of this appeal, we do not require the presence of the assessee.
IN THE INCOME TAX APPELLATE TRIBUNAL HYDERABAD BENCH "A", HYDERABAD **ITA No. 264/Hyd/2011** **Assessment Year : 2006-07** S.B. Steel Industries, Date of pronouncement : 13 - 11-2013	- It is an established fact that only cash credits can only be considered u/s 68, but, not trade receipts. The coordinate bench of ITAT in the case of ITO Vas. Rajendra Kumar Taparia, 106 TTJ 712 (Jodh.) has held that "*cash credits standing in the names trade creditors, all income-tax Assessees, could not be treated as nongenuine when they have confirmed the transactions by filing affidavits and deposing before the AO, and the addition could not be made in respect of cash credits or interest paid thereon*". In the present case, the amounts received by Assessee are not cash credits but the same were recovery of the debtors, which are available in the books of account. Since Assessee furnished details of debtors and also the entries made in the books of account, we are of the opinion that both the AO and the CIT(A) have erred in considering recoveries from deposits as cash credits. the corresponding sales in earlier years have been accepted, as there is no dispute with reference to the entries in the books of account in any of the earlier years. Therefore, we are of the view that the principles laid down for invoking provisions of section 68 cannot be applied to the trade recoveries made by Assessee during the year.
Gujarat high court approving ITAT order in case of VISHAL EXPORTS OVERSEAS LIMITED Date : 03/07/2012 TAX APPEAL No.2471 of 2009	The Tribunal however, upheld the deletion of Rs.70 lakhs under section 68 of the Act observing that when the assessee had already offered sales realisation and such income is accepted by the Assessing Officer to be the income of the assessee, addition of the same amount once again under section 68 of the Act would tantamount to double taxation of the same income.

In view of aforesaid legal position it is not fathomable as to on what basis deeming fiction of section 68 is applied to sales offered to taxation by assessee in its return of income and that to creating egregious tax demands under section 115BBE where till end it is no bodys case that assessee is owner of stated sum of money and same is possessed by assessee in form of hidden/unaccounted investments. Whether any real income in form of said alleged unexplained cash credits is there is something which remains shrouded in mystery.

Now if we turn to other cases where books are maintained and same are not doubted u/s 145 of the Act and stated cash deposits are duly accounted for in books of accounts and are explained to be from justified source (say cash sales), *then without showing it is not possible to compute assessee's income from given books for which burden lies on revenue,* no valid exception can be

made to audited defect free books of accounts. *Evidentiary value of books of accounts maintained in regular course can be traced to section 34 of Indian evidence law.* Even in cases where it is observed that books are rejected u/s 145, appropriate satisfaction on part of assessing officer as required and stipulated in section 145 is lacking as it is not shown that books are incorrect and incomplete etc. So where cash deposits are validly supported by regular & audited books of accounts then same carry huge relevance and cant be brushed aside lightly. Analyzing from different angle at worst if books are treated to be not validly maintained in such cases, can proportionate punishment principle which is ingrained in Indian jurisprudence, allow revenue to tax entire cash sale deposits/gross receipts or it would be just proper to estimate enhanced business profits of assessee on basis of material on record. *Latter idea (to estimate profits as per law) seems to be better/worthy option in reaching to fair tax assessment.*

Now for cases where assessee has filed valid cash flow statement to justify cash deposits say same are sourced from cash withdrawals , can revenue interdict to check as to why assessee withdrew cash and prudence for the same and if same in opinion of revenue is found to be not explained satisfactorily, can additions be made in deeming provisions of section 68/section 69A etc. ? To this it may be worthwhile to quote from a recent **Lucknow bench ITAT verdict in case of Smt. Veena Awasthi order dated 30.11.2018 Held :**

"We have perused the case record and heard the rival contentions. We *find that addition has been made by the Assessing Officer, as is evident from his order, on the ground that he has come to the conclusion that cash deposits were from some other source of income which is not disclosed to the Revenue. Assessing Officer nowhere in his order has brought out any material on record to show that assessee is having any additional source of income other than that disclosed in the return nor Assessing Officer could spell out in his order that cash deposits made by the assessee was from some undisclosed source. All throughout Assessing Officer has raised suspicion on the behavioral pattern of frequent withdrawal and deposits by the assessee. There is no law in the country which prevents citizens to frequently withdraw and deposit his own money.* Documentary evidences furnished before the Revenue clearly clarifies that on each occasion at the time of deposit in her bank account, assessee had sufficient availability of cash which is also not disputed by the Revenue. Entire transaction of withdrawals and deposits are duly reflected in the bank account of the assessee and are verifiable from relevant records. Assessing Officer himself admitted that assessee had sufficient cash balance on each occasion at the time of deposit in her bank account on different dates during the assessment year under consideration. We have also examined the order of ld. CIT(A) and we find that his decision is based on facts on record and is supported by adequate reasoning and, therefore, we do not want to interfere with the order of ld. CIT(A) and accordingly we uphold the findings of the ld. CIT(A) sustaining relief granted to the assessee."

Even Delhi bench of ITAT in recent case of Neeta Breja, ITA No. 524/Del/2017 Date of pronouncement 25/11/2019 has held as under:

"We have carefully considered the rival contention and perused the orders of the lower authorities. In the present case it is not disputed that the amount of cash was explained as available with the assessee in the hands to deposit in the bank. Assessee has substantiated the availability of the cash by producing the cash flow statement, day-to-day cash book, Ledger account of the Bank with narration and the complete bank statement Same were disbelieved by the learned assessing officer for the only reason that there is an inordinate delay in deposit of the cash in the bank account.

Identical issue arose before the honourable Delhi High Court in case of CIT vs Kulwant rai in 291 ITR 36 wherein the honourable Delhi High Court has held as under:-

This cash flow statement furnished by the assessee was rejected by the AO which is on the basis of suspicion that the assessee must have spent the amount for some other purposes. The orders of AO as well as CIT(A) are completely silent as to for what purpose the earlier withdrawals would have been spent. As per the cash book maintained by the assessee, a sum of Rs. 10,000 was being spent for household expenses every month and the assessee has withdrawn from bank a sum of Rs. 2 lacs on 4th Dec., 2000 and there was no material with the Department that this money was not available with the assessee. It has been held by the Tribunal that in the instant case the withdrawals shown by the assessee are far in excess of the cash found during the course of search proceedings. No material has been relied upon by the AO or CIT(A) to support their view that the entire cash withdrawals must have been spent by the assessee and accordingly, the Tribunal rightly held that the assessment of Rs. 2.5 lacs is legally not sustainable under s. 158BC of the Act and the same was rightly ordered to be deleted.""

In the present case also the learned assessing officer or the learned CIT A did not show that above cash was not available in the hands of the assessee or have been spent on any other purposes. Further the coordinate bench in ACIT vs Baldev Raj Charla 121 TTJ 366 (Delhi) also held that merely because there was a time gap between withdrawal of cash and cash deposits explanation of the assessee could not be rejected and addition on account of cash deposit could not be made particularly when there was no finding recorded by the assessing officer or the Commissioner that apart from depositing this cash into bank as explained by the assessee, there was any other purposes it is used by the assessee of these amounts. In view of above facts, the ground number 1 of the appeal of the assessee is allowed and orders of lower authorities are reversed"

The Hon'ble Punjab & Haryana High Court in the case of Shiv Charan Dass Vs CIT 126 ITR 263 considered the facts wherein the amounts kept with the wife of the assessee from 1951 upto her death in 1956 – later deposited in bank in the names of two unmarried daughters of the

assessee after they became major – explanation of the assessee was not accepted and amount deposits were considered from undisclosed sources. Hon'ble High Court held that , "There was nothing on record to show that amount was utilized by the assessee or the HUF in any other manner than the one which was represented by the assessee, the onus lay on the department to show that explanation offered by the assessee should not be accepted".

Same ratio in: Ahmedabad bench of the Tribunal in the case of Anand Autoride Ltd. V/s. JCIT (99TTJ 1250); Kerala High Court in the case of CIT V/s. K.J.Sridharan (201 ITR 1010);

2.3 *When we now turn to section 115BBE , it remains a matter of constitutional debate as to whether doubling of tax rate from 30 to 60 % (penalty and interest separate) can be held to be reasonable and within legislative competence , in authors personal opinion, applying Apex court ruling in case of Nikesh Tarachand Shah vs Union Of India on 23 November, 2017 in context of constitutional validity of Section 45 of the Prevention of Money Laundering Act, 2002 has observed as under:*

In so far as "manifest arbitrariness" is concerned, it is important to advert to the majority judgment of this Court in Shayara Bano v. Union of India and others, (2017) 9 SCC 1. The majority, in an exhaustive review of case law under Article 14, which dealt with legislation being struck down on the ground that it is manifestly arbitrary, has observed: "87. The thread of reasonableness runs through the entire fundamental rights chapter. What is manifestly arbitrary is obviously unreasonable and being contrary to the rule of law, would violate Article 14. Further, there is an apparent contradiction in the three-Judge Bench decision in McDowell [State of A.P. v. McDowell and Co., (1996) 3 SCC 709] when it is said that a constitutional challenge can succeed on the ground that a law is "disproportionate, excessive or unreasonable", yet such challenge would fail on the very ground of the law being "unreasonable, unnecessary or unwarranted". The arbitrariness doctrine when applied to legislation obviously would not involve the latter challenge but would only involve a law being disproportionate, excessive or otherwise being manifestly unreasonable. All the aforesaid grounds, therefore, do not seek to differentiate between State action in its various forms, all of which are interdicted if they fall foul of the fundamental rights guaranteed to persons and citizens in Part III of the Constitution.

It will be noticed that a Constitution Bench of this Court in Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India [Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India, (1985) 1 SCC 641: 1985 SCC (Tax) 121] stated that it was settled law that subordinate legislation can be challenged on any

*of the grounds available for challenge against plenary legislation. This being the case, there is no rational distinction between the two types of legislation when it comes to this ground of challenge under Article 14. The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14." This view of the law by two learned Judges of this Court was concurred with by Kurian, J. in paragraph 5 of his judgment." So on ground of manifest arbitrariness one may attack amendment in section 115BBE in adopting standard rate of 60% when in provisions like section 115BB dealing with immoral income of gambling etc still tax rate prescribed is 30% & for simply unexplained income u/s 68 etc which is nebulous, it is fixed at 60% which seemingly does not satisfy reasonable classification test in article 14 of Indian constitution. Even one may refer to Delhi high court recent decision in case of Sahara reported at **399 ITR 81** where constitutional validity of section 142(2A) in income tax act -amendment was adjudicated:*

"Before dealing with the constitutionality of the aforesaid amendment, it would be fitting to recollect the basic principles that must be kept in mind by the Courts while dealing with the challenge to the constitutionality of a legislative enactment. These principles were succinctly stated by the Supreme Court in Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar, AIR 1958 SC 538:

- *"The principle enunciated above has been consistently adopted and applied in subsequent cases. The decisions of this Court further establish -*

(a) that a law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself;

(b) That there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;

(c) That it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made

manifest by experience and that its discriminations are based on adequate grounds;

(d) That the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest;

(e) That in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and

(f) That while good faith and knowledge of the existing conditions on the part of a legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.

- *The above principles will have to be constantly borne in mind by the court when it is called upon to adjudge the constitutionality of any particular law attacked as discriminatory and violative of the equal protection of the laws."*

- *The above principles have been consistently followed by the courts in India and the law in relation to challenge on the constitutionality of an enactment on the touchstone of Article 14 was reiterated by the Supreme Court in Subramaniam Swamy v. CBI, (2014) 8 SCC 682 in the following terms:*

"Where there is challenge to the constitutional validity of a law enacted by the legislature, the Court must keep in view that there is always a presumption of constitutionality of an enactment, and a clear transgression of constitutional principles must be shown. The fundamental nature and importance of the legislative process needs to be recognised by the Court and due regard and deference must be accorded to the legislative process. Where the legislation is sought to be challenged as being unconstitutional and violative of Article 14 of the Constitution, the Court must remind itself to the principles relating to the applicability of Article 14 in relation to invalidation of legislation. The two dimensions of Article 14 in its application to legislation and rendering legislation

invalid are now well recognised and these are: (i) discrimination, based on an impermissible or invalid classification, and (ii) excessive delegation of powers; conferment of uncanalised and unguided powers on the executive, whether in the form of delegated legislation or by way of conferment of authority to pass administrative orders-if such conferment is without any guidance, control or checks, it is violative of Article 14 of the Constitution. The Court also needs to be mindful that a legislation does not become unconstitutional merely because there is another view or because another method may be considered to be as good or even more effective, like any issue of social, or even economic policy. It is well settled that the courts do not substitute their views on what the policy is."

Even on merits of invocation of section 115BBE one may refer to :

HIGH COURT OF KERALA AT ERNAKULAM
M/S. VIJAYA HOSPITALITY AND RESPORTS LTD THE 07TH DAY OF MARCH 2019 ITA.No.20 OF 2019 HELD:

"As the provisions of law which stood applicable for the relevant year of assessment, there is a specific bar with respect to allowing any deductions from such income, by virtue of Section 115BBE, as it stood unamended. The amendment declining set off was introduced only with effect from 1.4.2017. Therefore, question whether set off permissible under Section 72(2) read with Section 32(2) of the Act would apply with respect to the said income, assumes importance. There again, the crucial aspect relevant for consideration is the nature of the said income. In one of the oldest cases decided by the Honourable Supreme Court, **Govindarajulu Mudaliar v. Commissioner of Income Tax [(1958) 34 ITR 307]** it is held that, "there is ample authority for the position that where an assessee fails to prove satisfactorily the source and nature of certain amounts of cash received during the accounting year, the Income Tax Officer is entitled to draw an inference that the receipts are of an assessable nature". Following the said observations in **Lakhmi Chand Baijnath** (*supra*) the Honourable Supreme Court observes that, "when an amount is credited in the business books, it is not an unreasonable inference to draw that it is a receipt from business". **Even though Standing Counsel contended that the said observations of the apex court cannot be treated as a precedent of binding nature, mainly because it is made with respect to the provisions contained in the**

erstwhile Income Tax Act of 1922, we are not persuaded to accept the same. It is basically on an identical circumstance that the apex court had found that the income credited in the business book with respect to which the assessee fails to prove satisfactorily the source and the nature of receipt of the amount, it shall be deemed to be of receipt from business. The decisions of the High Court of Madras in **Chensing Ventures** (*supra*) as well as the decision of the High Court of Gujarat in **Shilpa Dyeing & Printing Mills** (supra) are to the effect that income of such nature from undisclosed source need to be treated as income from other sources. Therefore, we are of the opinion that the undisclosed income assessed under Section 68 need not be treated as an income falling totally outside the ambit of the classifications contained in Section 14 of the Act."

IN THE INCOME TAX APPELLATE TRIBUNAL JODHPUR BENCH (SMC), JODHPUR

ITA No. 143/Jodh/2018 (ASSESSMENT YEAR-2014-15

Shri Lovish Singhal

Date of Pronouncement 25/05/2018

"I have heard the rival contentions and record perused. I have also carefully gone through the orders of the authorities below. I have also deliberated on the judicial pronouncements referred by the lower authorities in their respective orders as well as cited by the ld AR during the course of hearing before the ITAT in the context of factual matrix of the case. From the record, I find that during the course of survey, income was surrendred by the assessee on account of stock, excess cash found out of sale of stock and also in respect of incriminating documents. As per judicial pronouncements cited by the ld. AR and also the decision of Hon'ble Rajasthan high court in the case of Bajrang Traders in Income Tax Appeal No. 258/2017 dated.12/09/2017 I observe that the Hon'ble High Court in respect of excess stock found during the course of survey and surrender made thereof was found to be taxable under the head 'business and profession'. Similarly

in respect of excess cash found out of sale of goods in which the assessee was dealing was also found to be taxable as business income. Applying the proposition of law laid down in the judicial pronouncements as discussed above, I hold that the lower authorities were not justified in taxing the surrender made on account of excess stock and excess cash found U/s 69 of the Act. Thus, there is no justification for taxing such income U/s 115BBE of the Act." While so holding ITAT took into consideration following (which is apposite in present facts also):

Lakhmichand Baijnath v. CIT [1959] 35 ITR 416, the Supreme Court has observed that when an amount is credited in thebusiness books, it is not an unreasonable inference to draw that it is a receipt from business. It was also observed that as the credits were found in the business accounts of the assessee and the explanation as to how the amounts came to be received was rejected by the Income-tax authorities, the Income-tax authorities were entitled to treat the credits as business receipts chargeable to tax.

Nalinikant Ambalal Mody v S.A.L. Narayan Row, CIT [1966] 61ITR 428, the Supreme Court has held that whether an income falls under one head or another has to be decided according to the common notions of practical man because the Act does not provide any guidance in the matter.

On basis of above, no legal warrant and authorization remains to justify as done in some cases to support straight invocation of draconian and lethal provision of section 115BBE in I.T.N.S sheet computing demand without any whisper in assessment order what to speak of specific show cause notice to assessee in that regard which exposes perfunctory manner of creating stated abnormal and extraordinary tax demand .

When in context of interest levy u/s 234A/B/C etc such has been the position that same must be founded in assessment order can exorbitant demand raised in sec.115BBE be held to be justified when there is no whisper in assessment order what to speak of discernible satisfaction for the same on part of assessing officer and same is raised in demand computation sheet straightway. It is noteworthy that in some cases revenue has applied section 68 to cash deposits and in some cases

section 69A is applied to cash deposits accounted in books so there is no uniformity in revenue's action . Even section 69A cant be applied to cash deposits which are explained from available /accounted source of *cash sales* without bringing something more on record for which burden lies on revenue,which has not been discharged ex-facie.

2.3 Now an attempt is made to deal with penal aspect of additions of cash deposits made u/s 68 or section 69A etc. It is really surprising that for addition made u/s 68 etc penalties in both provisions of section 270A and section 271AAC are initiated where correct legal position in authors opinion is for addition made in section 68 etc specific provision of penalty specified is section 271AAC and section 270A being general provision can't be recourse to. If one refer to section 271AAC(2) it clearly states that " (2) No penalty under the provisions of section 270A shall be imposed upon the assessee in respect of the income referred to in sub-section (1)." So parallel and simultaneous initiation of penalty in section 270A and section 271AAC in assessment order, in authors opinion vitiates the charge of penalty beyond repair as it is held in series of decisions that application of mind is required in initiation of penalty and charge leveled **(refer Delhi high court in Pr. CIT vs. M/s. Sahara India Life Insurance Company Ltd., 2019 (8) TMI 409 (Del.) vide Judgment Dated 02.08.2019).** Even otherwise if penalty is to be levied in section 271AAC then again discretion given to assessing officer by use of phrase MAY in the provision has to be judiciously appreciated specially when underlying additions made are in deeming provisions of section 68 to section 69D of the Act for which reference may be made to : **In the case of Durga Kamal Rice Mills 265 ITR 25,** the Hon'ble High Court of Calcutta has held as under: "When two views are possible and when no clear and definite inference can be drawn, in a penalty proceeding, penalty cannot be imposed….in quantum proceedings, a particular provision might be attracted for addition to the income of the assessee. ***But when it comes to the question of imposition of penalty, then independent of the finding arrived at in the quantum proceedings the authority has to find conclusively that eh assessee owns the concealed amount."*** (**Same is Gujarat High court in National Textile case 249 ITR 125: theory of equal hypothesis that is facts not proved versus facts disproved) .** Apropos cases where only penalty initiated is under section 270A and addition is made u/s 68 , then same would be required to be dropped as per section 271AAC(2) of the Act.

2.4 Last aspect of stay of demand u/s 220(6) of the Act is concerned , tabulation of various notable decisions is made below to highlight as to how discretion on part of assessing officer and CIT-A is to be exercised pending disposal of first appeal:

THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **07.03.2019**

W.P.(MD).No.5328 of 2019

M/s.TVS Charities,

Discussion:

*It is an admitted case that the said tenants were the tenants of the petitioner right from the year 1973, when the petitioner's Trust was approved under Section 12A(a) of the Income Tax Act for exemption. It is only for the first time, during the assessment year 2016-2017, the Income Tax Department has raised an issue with the petitioner that they have to pay the tax as per the market rent payable by their tenants who are their associate companies. The petitioner has already deposited Rs.5,00,000/ before the Assessing Officer, even at the time of filing the appeal before the second respondent as against the assessment order dated 14.12.2018. If 20 % of the tax amount is calculated, as per the first respondent's internal circular in Instruction No.1914 dated 31.07.2017, the amount will come to Rs.16,50,000/-. Therefore, the sum of Rs.5,00,000/- deposited by the petitioner with the assessing officer for obtaining stay will work out to 30% of Rs.16,50,000/- which is the amount to be deposited as per the internal circular. 11. The Commissioner of Income Tax (Appeals) has got inherent powers to grant stay of recovery as per the assessment order pending disposal of the appeal. This Court has already considered the said issue and held in the decision reported in **(2018) 409 ITR 33 (Mad)** referred to supra by the learned counsel for the petitioner that when a prima facie case has been made out, the Commissioner of Income Tax (Appeals) is not bound by the internal circular involving high pitched tax assessment. In the instant case also, it is an high pitched tax assessment as seen from the assessment order, which is subject matter of challenge before the Commissioner of Income Tax (Appeals). 12. This Court is of the considered view that prima facie case has been made out by the petitioner since the Associate Companies who are their tenants from the date when the petitioner obtained exemption from payment of income tax under Section 12A(a) of the Income Tax Act right from the year 1973 onwards. In the instant case, the Income Tax Department has raised the issue only for the Assessment Year 2016-17 even though income tax returns were filed by the petitioner disclosing the tenancy, right from the date when they got exemption from payment of Income tax under Section 12A(a) of the Income Tax Act. The Assessing Officer ought to have considered all these aspects and should have granted stay of the impugned order.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.02.2019

W.P.No.3849 of 2019

Mrs.Kannammal ....Petitioner

"The Circulars and Instructions as extracted above are in the nature of guidelines issued to assist the assessing authorities in the matter of grant of stayand cannot

substitute or override the basic tenets to be followed in the consideration and disposal of stay petitions. The existence of a prima facie case for which some illustrations have been provided in the Circulars http://www.judis.nic.in themselves, the financial stringency faced by an assessee and the balance of convenience in the matter constitute the 'trinity', so to say, and are indispensable in consideration of a stay petition by the authority. The Board has, while stating generally that the assessee shall be called upon to remit 20% of the disputed demand, granted ample discretion to the authority to either increase or decrease the quantum demanded based on the three vital factors to be taken into consideration.

- In the present case, the assessing officer has merely rejected the petition by way of a non-speaking order reading as follows:

'Kindly refer to the above. This is to inform you that mere filing of appeal against the said order is not a ground for stay of the demand. Hence your request for stay of demand is rejected and you are requested to pay the demand immediately. Notice u/s.221(1) of the Income Tax Act, 1961 is enclosed herewith.'

- The disposal of the request for stay by the petitioner leaves much to

be desired. I am of the categoric view that the Assessing Officer ought to have taken note of the conditions precedent for the grant of stay as well as the Circulars issued by the CBDT and passed a speaking order. Of course the petition seeking stay filed by the petitioner is itself cryptic. However, as noted by the Supreme Court in the case of *Commissioner of Income tax vs Mahindra Mills*, ((2008) 296 ITR 85 (Mad)) in the context of grant of depreciation, the Circular of the Central Board of Revenue (No. 14 (SL- 35) of 1955 dated April 11, 1955) requires the officers of the department *'to assist a taxpayer in every reasonable way, particularly in the matter of claiming and securing reliefs. .... Although, therefore, the responsibility for claiming refunds and reliefs rests with the assessees on whom it is imposed by law, officers should draw their attention to any refunds or reliefs to which they appear to be clearly entitled but which they have omitted to claim for some reason or other'.* Thus, notwithstanding that the assessee may not have specifically invoked the three parameters for the grant of stay, it is incumbent upon the assessing officer to examine the existence of a prima facie case as well as call upon the assessee to demonstrate financial stringency, if any and arrive at the balance of convenience in the matter."

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED :16.07.2018

W.P.No.7410 of 2018

Kalaignar TV Private Limited

- So far as the contention of the Revenue that Instruction No.96 dated 21.08.1969 has superseded Instruction No.1914 is concerned, the stand is incorrect in the light of the decision of this Court in the case of ***N.Jegatheesan Vs. Deputy Commissioner of Income-Tax,*** cited supra. Identical plea was raised by the Revenue in the said case and the Court after taking into consideration several decisions, held that Instruction No.96 dated 21.08.1969 issued with the consent of the Informal Consultative Committee continues to hold the field. The relevant portion of the order reads as follows:

It is the contention of the learned counsel for the petitioner that pending the appeal, the petitioner is entitled for stay of recovery of the demand amount, as his case falls within the ambit of Sections 220(3) & 220(6) of the IT Act. In view of the pendency of the appeal, the respondent ought to have passed an order treating him as not being in default in respect of the amount in dispute in the appeal, by placing reliance on CBDT Instruction No.95 dated 21.08.1969. But, according to the respondent, the said CBDT Instruction No.95 was superseded and as such, the respondent has exercised his power under subsequent Instruction No.1914 dated 02.12.1993. But, the learned counsel for the petitioner, by relying upon number of judgments submitted that CBDT Instruction No.95 is still in force.

Therefore, it would be appropriate to refer some of the decisions in this regard. In the case of Taneja Developers & Infrastracture Ltd., Vs. Assistant Commissioner of Income Tax, Delhi & ors in W.P.(C).No.6956 of 2009, dated 24.02.2009, the Division Bench of Delhi High Court has held as follows:-

'Relying upon the said Instruction No.1914 of 1993, Mr.Jolly submitted that all previous instructions stood superseded which included the supersession of said Instruction No.96. He further submitted that paragraph No.2(C), which deals with guidelines for staying demand, specifically requires that a demand be stayed only if there are valid reasons for doing so and that a mere filing of an appeal against the assessment order will not be a sufficient reason for staying recovery of a demand.

Having considered the arguments advanced by the learned counsel for the parties, we are of the view that although Instruction No.1914 of 1993 specifically states that it is in supersession of all earlier instructions, the position obtaining after the decision of this Court in Valvoline Cummins Ltd., (Supra) is not altered at all. This is so because paragraph No.2(A) which speaks of responsibility specifically

indicates that it shall be the responsibility of the Assessing Officer and the TRO to collect every demand that has been raised ?except the following', which includes ?(d) demand stayed in accordance with the paras B and C below?. Para B relates to stay petitions. As extracted above, Sub-clause (iii) of para B clearly indicates that a higher/superior authority could interfere with the decision of the Assessing Officer/TRO only in exceptional circumstances. The exceptional circumstances have been indicated as - where the assessment order appears to be unreasonably high pitched or where genuine hardship is likely to be caused to the assessee.?. The very question as to what would constitute the assessment order as being reasonably high pitched in consideration under the said Instruction No.96 and, there, it has been noted by way of illustration that assessment at twice the amount of the returned income would amount to being substantially higher or high pitched. In the case before this Court in Valvoline Cummins Ltd., (supra) that assessee's income was about eight (8) times the returned income. This Court was of the view that was high pitched. In the present case, the assessed income is approximately 74 times the returned income and obviously, this would fall within the expression unreasonably high pitched?. (Emphasis supplied).'

A reading of the above dictum would show that if assessment order is unreasonably high pitched or genuine hardship is likely to be caused to the assessee, then the assessee is entitled to be treated as not being in default in respect of the amount in dispute in the appeal.

In the case reported in (1997) 223 ITR 192 (Raj) [Maharana Shri Bhagwat Singhji of Mewar Vs. Income-Tax Appellate Tribunal, Jaipur Bench, and others), the Rajasthan High Court has held as follows:-

"accordingly, on the facts, that the factors which are relevant for deciding the stay applications primarily are a prima facie case, balance of convenience, financial status of the petitioner, hardship and also the interest Revenue. In the instant case there was an order of the court restraining the accountable person from alienating/disposing of the properties of the estate. The value of the estate which was determined by the authority was much more than twice the returned value. Hence, the Instruction No.96 of August 21, 1969, was applicable. It was also established that the accountable person had no cash belonging to the estate. A perusal of the order of the Tribunal indicated that the contention raised by the petitioner before the Tribunal for staying the total recovery was not contraverted and no relevant and convincing material regarding the financial status of the petitioner was placed before the Tribunal to establish that the petitioner was in a position to deposit 25 percent of the disputed duty. The recovery of the entire duty had to be stayed till the disposed of the appeal.

In the case in Kec International Ltd Vs. B.R.Balakrishnan and

ors, reported in [2001] 251 ITR 158/1`19 Taxman 974, the Bombay High Court has held as follows:-

'Hence, we intend to lay down certain parameters which are required to be followed by the authorities in cases where a stay application is made by an assessee pending appeal to the first appellate authority.

(a)While considering the stay application, the authority concerned will at least briefly set out the case of the assessee.
(b)In cases where the assessed income under the impugned order far exceeds returned income, the authority will consider whether the assessee has made out a case for unconditional stay. If not, whether looking to the questions involved in appeal, a part of the amount should be ordered to be deposited for which purpose, some short prima facie reasons could be given by the authority in its order.
(c)In cases where the assessee relies upon financial difficulties, the authority concerned can briefly indicate whether the assessee is financially sound and viable to deposit the amount if the authority wants the assessee to so deposit.
(d)The authority concerned will also examine whether the time to prefer an appeal has expired. Generally, coercive measures may not be adopted during the period provided by the statute to go in appeal. However, if the authority concerned comes to the conclusion that the assessee is likely to defeat the demand, it may take recourse to coercive action for which brief reasons may be indicated in the order.
(e)We clarify that if the authority concerned complies with the above parameters while passing orders on the stay application, then the authorities on the administrative side of the Department like respondent No.2 herein need not once again give reasoned order.

In the judgment reported in 346 ITR 375 (M/s.Maheswari Agro Industries Vs. Union of India and others), it has been held by the Rajasthan High Court as follows:-

" The mandate of Parliament in sub-section (6) seems to be that the lower Assessing Officer should abide by and being bound by the decision of the appellate authority, should normally wait for the fate of such appeal filed by the assessee. Therefore, his discretion of not treating the assessee in default, conferred under sub-section (6) should ordinarily be exercised in favour of assessee, unless the overriding and overwhelming reasons are there to reject the application of the

assessee under Section 220(6) of the Act. The application under Section 220(6) of the Act cannot normally be rejected merely describing it to be against the interest of Revenue if recovery is not made, if tax demanded is twice or more of the declared tax liability. The very purpose of filing of appeal, which provides an effective remedy to the assessee is likely to be frustrated, if such a discretion was always to be exercised in favour of revenue rather than assessee.

The tendency of making high pitched assessments by the Assessing Officers is not unknown and it may result in serious prejudice to the assessee and miscarriage of justice & sometimes may even result into insolvency or closure of the business if such power was to be exercised only in a pro revenue manner. It may be like execution of death sentence, whereas the accused may get even acquittal from higher appellate forums or courts. Therefore, this Curt is of the opinion that such powers under sub-section (6) of Section 220 of the Act also have to be exercised in accordance with the letter and spirit of Instruction No.95 dated 21.08.1969, which even now holds the field and its spirit survives in all subsequent CBDT Circulars quoted above, and undoubtedly the same is binding on all the assessing authorities created under the Act."
From the reading of the above cited judgments, it is clear that it is incorrect to state that DBDT Instruction No.1914, dated 02.12.1993 supersedes all previous instructions. Although instruction No.1914 specifically states that it is in supersession of earlier instructions, the position obtaining after the decision of the case in Volvoline Cummins Limited Vs. DCIT (2008) 307 ITR 103 (Del) is not altered at all. This is so, the DBDT Instruction No.95, dated 21.08.1969 was issued with the consent of the informal consultative committee held on 13th May, 1969 formed under the business rules of the Parliament, which even now holds the field.

Hence, I am of the opinion that the tendency of making high pitched assessments by the Assessing Officer is not unknown and it may result in serious prejudice to the assessee and miscarriage of justice & sometimes may even result into insolvency or closure of the business if such power was to be exercised only in a pro-revenue manner. Hence, I am of the opinion that the powers under Sections 220(3) & 220(6) of IT Act have to be exercised in accordance with the letter and spirit of CBDT Instruction No.95 dated 21.08.1969, which is binding on all the assessing authorities created under the Act.

Therefore, the impugned order passed by the respondent without considering CBDT Instruction No.95, dated 21.08.1969 is against the principles laid down in the judgments stated supra."

In the light of the above decision, which has been rendered following the decisions of the other High Courts, it has to be held that Instruction No.1914 does not specifically supersede Instruction No.96 and it binds the Assessing Officers."

HIGH COURT OF CHHATTISGARH, BILASPUR
Writ Petition (T) No.59 of 2018

M/s Aarti Sponge & Power Ltd

"Thus, in the considered opinion of this Court, the assessing officer has to consider the case of the particular assessee on merits and if he comes to the conclusion that the assessee has a case for grant of stay, then subject to deposit of 20% of the disputed demand, the outstanding demand may be stayed and in certain cases where the assessee's case is covered by the decision of the Supreme Court and the deposit of 20% of the disputed demand may be reduced as per the discretion of the assessing officer, but the deposit of 20% of the disputed demand cannot be made condition precedent for hearing the application for stay. The condition of pre-deposit of 20% of the disputed demand is neither contemplated by the said memorandum nor there is legislative sanction mandating such deposit for hearing of an application for stay. Therefore, such a condition of pre-deposit cannot be imposed for hearing an application for stay of the disputed demand.

The High Court of Gujarat in the matter of Jagdish Gandabhai Shah v. Principal Commissioner of Income Tax and others while dealing with the similar issue of pre-deposit of disputed demand qua the said memorandum while considering the application for stay by the said authority, held as under: -
"Therefore, the interpretation by the Assessing Officer that at the time of submitting stay application and/or before stay application is taken up for consideration on merits, the assessee is required to deposit 15% of the disputed demand as pre-deposit is absolutely based on misinterpretation and/or misreading of the modified Instructions dated 29th February 2016. What Clause-4 provides is that the Assessing Officer may/shall grant stay of demand till disposal of first appeal on payment of 15% of the disputed demand, unless the case falls in the category mentioned in para 4 [B] of the modified instructions dated 29th February 2016. Under the circumstances, the impugned decision of the respondent No. 2 in rejecting the stay application and consequently directing the petitioner to deposit 100% of the disputed demand on the ground that the petitioner has not deposited 15% of the disputed demand as a predeposit before his application for stay is considered on merits cannot be sustained and the same deserves to be quashed and

set-aside. The matter is required to be remanded to the Assessing Officer to consider the stay application in accordance with law and on merits, in light of the modified instructions dated 29th February 2016 and observations made by us in the present order.

Under the circumstances, for the reasons stated above, the impugned decision of the respondent No.2- Assessing Officer rejecting the stay application cannot be sustained and the same deserves to be quashed and set-aside. So far as the decision of the respondent No. 1 is concerned, it appears that after the decision rendered by the respondent No. 2, the assessee filed stay application before the respondent No. 1 and the respondent No. 1 has passed the impugned order mainly considering the order of the Assessing Officer. Therefore, first, the Assessing Officer is required to take appropriate decision on the stay application, as per the modified instruction dated 29th February 2016 and unless the case falls within Clause 4 [B](a) & (b), he is required to pass appropriate order on the stay application, granting stay on payment of 15% of the disputed demand. In case, the Assessing Officer is of the opinion that the case falls within Clause 4 [B](a) or (b), in that case, he is required to follow the procedure as observed hereinabove; more particularly, Clause 4 [B] where the Assessing Officer is required to refer the matter to the administrative Principal CIT/CIT and thereafter, the Principal CIT/CIT to take appropriate decision."

I am in respectful agreement with the view expressed by the Gujarat High Court in the above-stated judgment which squarely applies to the facts of the present case.

In my opinion, the said question is no longer res integra and it has been well settled by a decision of the Bombay High Court in the matter of KEC International Ltd. v. B.R. Balakrishnan and others 4 in which S.H. Kapadia, J, as then His Lordship was speaking for the Bombay High Court, while considering the similar issue has laid down the following guidelines: -

"This is the consequence of an order being passed without giving any reasons. Hence, we intend to lay down certain parameters which are required to be followed by the authorities in cases where a stay application is made by an assesee pending appeal to the first appellate authority.

Parameters:

(a) While considering the stay application, the authority concerned will at least briefly set out the case of the assessee.

(b) In cases where the assessed income under the impugned order far exceeds returned income, the authority will consider whether the assessee has made out a case for unconditional stay. If not, whether looking to the questions involved in appeal, a part of the amount should be ordered to be deposited for which purpose, some short prima facie reasons could be given by the authority in its order.

(c) In cases where the assessee relies upon financial difficulties, the authority concerned can briefly indicate whether the assessee is financially sound and viable to deposit the amount if the authority wants the assessee to so deposit.
(d) The authority concerned will also examine whether the time to prefer an appeal has expired. Generally, coercive measures may not be adopted during the period provided by the statute to go in appeal. However, if the authority concerned comes to the conclusion that the assessee is likely to defeat the demand, it may take recourse to coercive action for which brief reasons may be indicated in the order.
(e) We clarify that if the authority concerned complies with the above parameters while passing orders on the stay application, then the authorities on the administrative side of the Department like respondent No.2 herein need not once again give reasoned order."

The aforesaid guidelines have been followed later-on again by the Bombay High Court in the matter of UTI Mutual Fund v. Income Tax Officer 19(3)(2) and others5 in which Dr. D.Y. Chandrachud, J (as then His Lordship was) while following the decision rendered in KEC International Ltd. (supra) again held some more guidelines as under: -
"These are, we may say so with respect, sage observations which must be borne in mind by the assessing authorities. Consistent with the parameters which were laid down by the Division Bench in KEC International and the observations in the judgment in Coca Cola, we direct that the following guidelines should be borne in mind for effecting recovery :

1. No recovery of tax should be made pending
(a) Expiry of the time limit for filing an appeal;
(b) Disposal of a stay application, if any, moved by the assessee and for a reasonable period thereafter to enable the assessee to move a higher forum, if so advised. Coercive steps may, however, be adopted where the authority has reason to believe that the assessee may defeat the demand, in which case brief reasons may be indicated.

2. The stay application, if any, moved by the assessee should be disposed of after hearing the assessee and bearing in mind the guidelines in KEC International;

3. If the Assessing Officer has taken a view contrary to what has been held in the preceding previous years without there being a material change in facts or law, that is a relevant consideration in deciding the application for stay;

4. When a bank account has been attached, before withdrawing the amount, reasonable prior notice should be furnished to the assessee to enable the assessee to make a representation or seek recourse to a remedy in law;

5. In exercising the powers of stay, the Income Tax Officer should not act as a mere tax gatherer but as a quasi judicial authority vested with the public duty of protecting the interest of the Revenue while at the same time balancing the need to mitigate hardship to the assessee. Though the AO has made an assessment, he must objectively decide the application for stay considering that an appeal lies against his order: the matter must be considered from all its facets, balancing the interest of the assessee with the protection of the Revenue."

After having noticed the manner of disposing the appeal as highlighted by the Bombay High Court in the two judgments noticed herein-above and agreeing with the same, it would appear that the competent authority, in the instant case, while considering the application simply held that the appeal proceedings are separate and distinct from recovery proceedings and further proceeded to hold that 20% of the disputed demand has not been deposited in accordance with the guidelines dated 31-7-2017 and passed the order dated 7-3-2018. Thus, it is quite vivid that the application for stay of demand has not been considered in the manner it was required to be considered and dealt with. Deposit of 20% of the disputed demand has been made condition precedent for hearing the application for stay which is not contemplated either under the Act of 1961 or the CBDT guidelines dated 29-2-2016 modified by the office memorandum dated 31-7-2017. It is only when the competent authority is of the opinion that the assessee has made out a case for grant of interim relief, stay can be granted subject to deposit of 20% of the disputed demand. Likewise, there is a further clause in the circular for reduction of 20% deposit if the petitioner makes out a case, it has also not been considered. In straightway, direction of deposit of 20% of the disputed demand has been made which is not the correct way of deciding the application for stay of the disputed demand"

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.09.2019

Tax Case Appeal No.648 of 2019

Intimate Fashions (India) Private Limited,

Three relevant aspects should be always taken into consideration by all the Tribunals or civil Courts, while considering the stay applications, which are

(I) existence of *prima facie* case
(II) Irreparable injury aspect and
(III) Balance of convenience.

These are well settled and statutorily required parameters to be considered by dealing with stay applications.

The learned Tribunals or Civil Courts are bound to give their findings and reasons, even though tentative, with respect to the above three aspects of the matter while dealing with any stay applications before them.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 2271 OF 2019

General Insurance Corporation of India
Petitioner

" So far as Issue No.1 above is concerned, the Petitioner submits that same stands concluded in its favour by virtue of the decision dated 11 October 2017of the Mumbai Bench of the Tribunal in DCIT Circle 3(1)(2) vs. ECGC IT No. 7657/Mum/2014 and the Kolkata Bench of the Tribunal in the case of DCIT v/s. Mutual Insurance Co. Ltd. 2016 (72) Taxmann.Com 116 in favour of the Petitioner. However, the impugned order still directed a deposit of 10% of disputed demand on this Court in view of the decision of Chennai Bench of the Tribunal in the case of United India Insurance v/s. JCIT (2018) 97 Taxmann.com 466. We note that the Chennai Bench decision of the Tribunal has ignored the co-ordinate bench decision of Mumbai and Kolkata benches of the Tribunal. Therefore, prima facie per incurium. In any case the CBDT Circular No. 530 dated 6 March 1989 states that stay of demand be granted where there are conflicting decisions of the High Court. This principle can be extended to the conflicting decisions of the different benches of the Tribunal. Thus, in the above facts the complete stay of the demand on the above head i.e. Item No.1 of the above chart was warranted in the Petitioner's favour."

On basis of above there should remain no iota of doubt that in **high pitched assessments creating sky touching tax demands** on basis of mechanical application of section 115BBE same needs to be stayed u/s 220(6) in favor of assessee as lot of judicial decisions are there which favors **assessee case on merits from various high courts and ITAT benches.**

Conclusion

It may be apt to close by reminding observations of Supreme court in case of Ms Era vs Govt of NCT of delhi where income tax act suddenly came up for *feedback from their lordships of Supreme court:*

- *The Indian Income Tax Act, 1960 has also been the subject matter of judicial criticism. Often, amendment follows upon amendment making the numbering and the meaning of its sections and sub-sections both bizarre and unintelligible. One such criticism by Hegde, J. in Commissioner of Income Tax v. Distributor (Baroda) (P) Ltd., (1972) 4 SCC 353, reads as follows:*

"We have now to see what exactly in the meaning of the expression "in the case of a company whose business consists wholly or mainly in the dealing in or holding of investments" in the main Section 23-A and the expression "in the case of a company whose business consist wholly or mainly in the dealing in or holding of investments" in clause (i) of Explanation 2 to Section 23-A. The Act contains many mind-twisting formulas but Section 23-A along with some other sections takes the place of pride amongst them. Section 109 of the 1961 Income Tax Act which has taken the place of old Section 23-A of the Act is more understandable and less abstruse. But in these appeals we are left with Section 23-A of the Act." (Para 15)

- *All this reminds one of the old British ditty:*

"I'm the Parliament's draftsman, I compose the country's laws, and of half the litigation I'm undoubtedly the cause!"