

आयकर अपीलीय अधिकरण “C” न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH, MUMBAI

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No. 1295/Mum/2014

(निर्धारण वर्ष / Assessment Year : 2006-07)

Shri Champalal S. Shah, A-8, Maulana Shaukat Ali Road, Grant Road (East), Mumbai – 400007.	बनाम/ v.	Income Tax Officer – 16(2)(3), Pratyakshakar Bhavan, Matru Mandir, Mumbai 400 007.
स्थायी लेखा सं./ PAN : AAHPS4629Q		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

आयकर अपील सं./I.T.A. No. 2415/Mum/2014

(निर्धारण वर्ष / Assessment Year : 2006-07)

Income Tax Officer – 16(2)(3), Pratyakshakar Bhavan, 2 nd floor, Matru Mandir, Tardeo Road, Mumbai 400 007.	बनाम/ v.	Shri Champalal S. Shah, B-33, Pannalal Terrace, 2 nd floor, Grant Road (E), Mumbai 400 007.
स्थायी लेखा सं./ PAN : AAHPS4629Q		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by	Shri Rushabh Mehta
Revenue by :	Shri P.R. Ghosh, CIT D.R.

सुनवाई की तारीख / **Date of Hearing** : 11.07.2017

घोषणा की तारीख / **Date of Pronouncement** : 03.10.2017

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member

These are cross appeals filed by the assessee and the Revenue with the Income-tax Appellate Tribunal, Mumbai (Hereinafter called "the tribunal"). These cross appeals are heard together and are disposed of by this common order for the sake of convenience and brevity. These appeals are directed against the appellate order dated 10.01.2014 passed by learned Commissioner of Income Tax (Appeals)- 28, Mumbai (hereinafter called "the CIT(A)"), for the assessment year 2006-07, the appellate proceedings before the learned CIT(A) arising from the assessment order dated 29.12.2008 passed by learned Assessing Officer (hereinafter called "the AO") u/s 143(3) of the Income-tax Act, 1961 (Hereinafter called "the Act").

2. The grounds of appeal raised by the assessee (ITA No. 1295/Mum/2014, A.Y. 2006-07) in the memo of appeal filed with the tribunal read as under:-

"I. The learned Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] erred in estimating higher Gross Profit @ 5 % on sales shown in the books without appreciating the submissions made by the assessee and ignoring the facts of the case. [hereinafter referred to as the "Act"]

II. The learned CIT (A)] erred in enhancing the income by way of addition of Rs.1,35,516/- being the difference in Closing capital balance of M/s. Meenakshi Enterprise as un-explained income of the assessee.

3. The following grounds of appeal are raised by the Revenue in ITA No. 2415/Mum/2014 for the assessment year 2006-07 in the memo of appeal filed with tribunal which reads as under:-

"1. Whether on the facts and circumstances and in law, the Ld CIT(A) has erred in deleting undisclosed income which was added to the total income of assessee as the assessee could not produce any evidences of purchase and sale transactions?

2. Whether on the facts and circumstances and in law, the Ld CIT(A) has erred in not taking cognizance of Hon. Supreme Court in

case of Sumati Dayal v/s CIT;214 ITR 801 (1995) wherein the Hon'ble Court has agreed that the question of source of money had to be considered in the light of human probabilities, as in the case under consideration, the assessee used colorable device to prove purchase and sale transactions as genuine ones by submitting the facts that the purchasers used to deposit money in the form of cash in his (assessee's) bank account and after that he used to place purchase orders of gold bars and there after sold these gold bars to such parties (purchasers) which he finally failed to prove as genuine ones."

4. The issue involved in these appeals is in the narrow compass wherein addition of Rs. 49,17,69,925/- has been made by the A.O. of the undisclosed income of the assessee with respect to the entire cash sale shown by the assessee, which additions has been upheld by the Id. CIT(A) by estimating GP ratio of 5% on sales as against GP ratio of 0.17% declared by the assessee. The assessee is aggrieved with the decision of learned CIT(A) upholding of GP ratio of 5% on sales, while on the other hand the Revenue is aggrieved by the decision of learned CIT(A) in deletion of the entire addition of Rs. 49,17,69,925/- as undisclosed income of the assessee with respect to the cash sales which was deposited in the bank as held by the AO and instead upholding of additions by learned CIT(A) by estimating GP ratio of 5% on sales declared by the assessee.

The Brief facts of the case are that assessee is an individual running a proprietary concern under the name and style of 'Shankheshwar Bullion', stated to be engaged in the business of purchase and sale of gold bars/bullions. The said proprietary concern was started by the assessee in the month of March 2005 only. The A.O. observed that the magnitude of the business in the month of April, 2005 shows that the assessee had made huge purchase to the tune of Rs. 48.78 crores and sales of Rs. 49.17 crores, which stood credited to P&L account. The A.O. observed that the assessee did not have any antecedents in dealing in gold bars/bullion whereby the AO sought details of party-wise sales and purchases of each and every transaction from

the assessee in assessment proceedings u/s 143(3) r.w.s. 143(2) of the 1961 Act. In response, the assessee submitted the following details of purchases from two parties situated at Ahmedabad, Gujarat as under:-

S No.	Name of purchase party	Date of purchase	Quantity	Amount (Rs)	Mode of payment
1	M/s Padmavati Bullion, Ahmedabad	1.4.2005	45 kg	2,75,62,185	By cheque
2	-do-	4.4.2005	56 kg	3,36,30,190	-do-
3	-do-	6.4.2005	100 kg	6,09,03,300	-do-
4	-do-	7.4.2005	20 kg	1,22,16,168	-do-
5	-do-	8.4.2005	120 kg	7,34,25,360	-do-
6	-do-	11.4.2005	40 kg	2,43,06,720	-do-
7	-do-	12.4.2005	45 kg	2,63,60,677	-do-
8	-do-	14.4.2005	125 kg	7,60,21,300	-do-
9	-do-	18.4.2005	60 kg	3,65,61,000	-do-
10	-do-	20.4.2005	20 kg	1,21,70,300	-do-
11	-do-	22.4.2005	25 kg	1,54,52,125	-do-
12	-do-	25.4.2005	10 kg	61,96,200	-do-
13	-do-	27.4.2005	75 kg	4,64,68,125	-do-
14	-do-	28.4.2005	55 kg	3,46,89,200	-do-
15	M/s Kuber Bullion, Ahmedabad	21.7.2005	3 kg	18,47,940	-do-

The A.O. observed that these alleged purchases have been covered in fifteen transactions mainly in a single month i.e. April, 2005 and the payments were stated to be made by cheque. The A.O. issued notices u/s 133(6) of the Act to the above said parties but these notices were returned back by the postal authorities with the remark 'left'. The A.O. vide powers conferred upon him u/s 131(1)(d) of the Act appointed commission wherein the AO required ADIT(Inv.) to conduct enquiry of the said party and the ADI(Inv.) , Ahmedabad also confirmed the non-existence of the party at the given address. The assessee was also given an opportunity by the AO to produce the party for verification, however, the assessee did not produce the said party. As per the information received from the ADI (Inv.) Ahmedabad, the following two partners of the Ahmedabad based firm, M/s. Padmavati Bullion, from whom

the assessee claimed to have made purchases of gold were summoned by the AO by issue of summons u/s. 131 of the Act.

- (1) Shri Rajesh Kumar Khimchand Bafna,
C/2, 703- Ganjawala Building,
Near Shag un Hotel, Dr. D. B. Marg,
Bombay Central, Mumbai 400 008.
- 2) Shri Champalal Bhhormalji Sanghavi,
Flat No.104, 10th floor, Sumer Tower. A-Wing,
Seth Motisha Lane, Byculla, Mumbai 400 010.

But, both the above partners of Padmavati Bullion did not comply with the summons u/s 131 of the Act issued by the AO. Thus, the A.O. arrived at the conclusion that these parties are non-existent parties and there were no genuine purchases made by the assessee from the said party by the assessee as the worthiness of the said party is not proved and even the existence of gold of this quantity was not substantiated. Thus, the A.O. observed that the purchases were nothing but an eye wash and the assessee arranged fabricated transactions.

The assessee during the course of assessment proceedings submitted the sales bills, the details of which are as under:-

S No.	Bill/Invoice No.	Date	Name of the party	Quantity	Amount	Mode of receipt
1	1	1.4.2005	Cash	5 kg	30,95,000	Cash
2	2	-do-	-do-	45 kg	2,76,05,250	-do-
3	3	4.4.2005	-do-	56 kg	3,36,60,000	-do-
4	4	6.4.2005	-do-	100 kg	6,10,90,000	-do-
5	5	7.4.2005	-do-	20 kg	1,22,40,000	-do-
6	6	8.4.2005	-do-	120 kg	7,35,24,000	-do-
7	7	11.4.2005	-do-	40 kg	2,43,48,000	-do-
8	8	12.4.2005	-do-	45 kg	2,64,45,000	-do-
9	9	14.4.2005	-do-	125 kg	7,61,11,200	-do-
10	10	18.4.2005	-do-	60 kg	3,66,12,000	-do-

11	11	20.4.2005	-do-	20 kg	1,22,19,000	-do-
12	12	22.4.2005	-do-	25 kg	1,54,75,000	-do-
13	13	25.4.2005	-do-	10 kg	62,20,035	-do-
14	14	27.4.2005	-do-	75 kg	4,65,00,000	-do-
15	15	28.4.2005	-do-	55 kg	3,47,76,000	-do-
16	16	22.7.2005	-do-	3 kg	18,49,440/-	-do-

The assessee although was based at Mumbai but has shown the following address in the sales bills raised by it:

“Flat No. 3, 1st floor, Aakash Ganga Flats,
Aakash Seth Kuvani Pole,
Madan Gopal Haveli, Manek Chowk,
Ahmedabad – 380 001.

A perusal of the assessee’s sale bills reflected that no sale bill bears the name of so called purchaser and all the sales were made in cash. The assessee was asked to disclose the identity of the purchaser, however, the assessee expressed his inability under the pretext that the entire transactions were conducted telephonically only against cash which is collected in short span of time and delivery of gold effected after collection of cash from the buyer. The assessee submitted that the sale transactions are genuine . The assessee submitted that in the statement recorded of the assessee u/s 131 of the Act on 05-11-2008, the assessee had stated that the sale in this business of gold was done on cash and carry basis wherein the customer either deposits the cash directly into bank or pay cash to the dealer against the delivery of gold and the delivery was effected only after the full payment for the gold was received and this was the general prevailing practice of the business.

The A.O. inferred that there was no genuine sales made by the assessee. The AO also observed several irregularities in the bank account wherein the AO observed that the assessee had deposited cash in bank account as per his whims and to cover such cash deposits, the sales bills for making cash sales

are prepared by the assessee with no details of purchaser available . The AO observed that cash deposits on a particular day were made on three to four occasions in respect of a single sale bill and the reasons for depositing the cash in installments were unknown. Further, on examination of assessee's bank accounts and sales bills, the AO observed that cash sales to the tune of Rs.49 crores(approx) has been made till 28-04-2005 while the cash to the tune of Rs. 27.54 crores has been deposited after 28-04-2005 , which were later transferred to 'Padmavati Bullion, Ahmedabad' through cheque. Thus, it was observed by the AO that the assessee was keeping such huge cash with him in the intervening period which was also not invested elsewhere by the assessee which is strange and unbelievable behavior and is not possible from the prudent businessman like assessee.

Thus, the A.O. inferred that the assessee was having huge cash in his possession and under the garb of sale of gold he was introducing it into the bank. The identity of parties buying gold from the assessee is not revealed by the assessee and sales bills were issued by the assessee for which there is no control of any body and also no sales tax is paid by the assessee. Thus, the A.O. concluded that the assessee had manufactured and fabricated the story of trading in gold to suit his behavior which cannot be accepted. The AO concluded that this was done by the assessee to introduce his undisclosed income and accumulated cash in the business. Thus, the A.O. brought to tax in the assessee's hands as 'undisclosed income' without giving any deduction on account of purchases amounting to Rs. 49,17,69,925/- , vide assessment order dated 29-12-2008 passed by the AO u/s 143(3) of the 1961 Act.

5. Aggrieved by the assessment order dated 29-12-2008 passed by the A.O. u/s 143(3) of the 1961 Act, the assessee carried the matter in appeal before the ld. CIT(A).

6. Before the Id. CIT(A), the assessee had submitted that the assessee was denied reasonable opportunity and evidence placed on record has not been considered. It was submitted that the AO had issued notice u/s.133(6) of the Act to verify the purchases made from M/s. Padmavati Bullion. Since the supplier was out of town, the assessee obtained from the said suppliers purchase bills, bank statement, delivery challans and confirmation duly signed by the suppliers with PAN, however, the AO did not accept these evidences on the ground that the supplier should personally come and file the details , which has led to the denial of natural justice to the assessee. It was submitted that the said evidences were not considered by the AO while the same were sent by speed post after the AO refused to accept the same from the assessee. The assessee submitted before learned CIT(A) that the Maharashtra VAT is applicable on Bullion transaction , while in Gujarat there is no VAT on bullion. It was submitted by assessee that the profits are negligible in this trade of gold bullion by reasons of publication of daily rates and due to VAT in Maharashtra it deters persons from doing business in Maharashtra. It was submitted by the assessee before learned CIT(A) that after cash is deposited in the bank account by the buyers which in some instances is deposited in installments , the assessee issues instructions to the supplier to deliver the gold . The assessee submitted that then the assessee issues account payee cheque in favour of supplier of the assessee which is reflected in the assessee's bank account as well bank account of the suppliers. The assessee submitted that 'Padmavti Bullion' from whom the gold was purchased informed the assessee that it has purchased entire gold sold to the assessee from banks and entire payment received from the assessee is passed on to banks. It was submitted that the A.O. had made the entire addition on the sale value deposited in the bank without considering the payments made by the assessee for purchasing gold . It was submitted that all the documents were submitted by the assessee before the A.O. like confirmation from the supplier etc. which were not considered by the A.O. . It

was submitted by the assessee before learned CIT(A) that Investigation report of ADI(Ahmedabad) was not made available to the assessee and the assessee is not in a position to make any comment on the same in the absence of report being furnished to the assessee. The assessee submitted that the AO summoned the parties and these parties did not comply with the summons but later the AO did not exercise his powers to enforce the attendance of the parties. The confirmations from parties were submitted by sending through speed post but the same were not considered by the AO. In nutshell, the assessee submitted that these are genuine transactions of purchases.

The assessee also explained before learned CIT(A) that the sales are genuine and when the purchaser is not a regular dealer whose financial status is not known, it is the practice of the assessee to accept only cash, against the gold. The existence of such practice though obvious and patent was not accepted by the AO without assigning any valid reason on tenable ground. The assessee submitted that sometime buyers do not have ready cash and payments are deposited in bank in installments but the supplies of the gold are made only after realizing entire sale proceed in cash. The assessee submitted that there are several purchasers who want to buy gold without revealing identity. The assessee submitted that there is no rule or law which stipulate that the identity of the purchaser should be established by the seller on cash memos and sales are genuine and the assessee as prudent business man wanted to make maximum profits and hence sold gold against cash. The assessee submitted before learned CIT(A) that the assessee has maintained regular books of accounts which are subjected to audit. It was submitted that the transaction has taken place at Ahmedabad because there is no VAT on gold bars in Gujarat and in view of this the purchaser's cost would be less, hence, all bulk transactions had taken place in Ahmedabad to save the cost. The assessee submitted that it had 5 kg of gold in opening stock and he purchased 799 kgs of gold and the entire quantity of 804 kgs of

gold was sold in financial year 2005-06 (AY 2006-07). It was submitted that the Revenue has accepted assessee purchases from Padmavati Bullion in financial year 2004-05 (AY 2005-06). It was submitted that the A.O. had made high-pitch assessment as the assessee capital is merely Rs.87,114/- while additions have been made to the tune of Rs. 49,17,69,925/- as black money component available with the assessee. It was submitted that the assessee did not have any asset, investment or bank balances which could reflect that the assessee earned income to that magnitude of Rs. Forty nine crores while the capital is less than Rs. One lakh.

The ld. CIT(A) called for remand report from A.O. and the matter was referred to the A.O. for verification. The AO in his first remand report on 25th January, 2010 stated that one of the partner of M/s Padmavati Bullion, Ahmadabad Shri Champalal Bhurmalji Sanghavi was produced by the assessee and his statement was recorded on oath u/s.131 of the Act whereby it was stated that the assessee was one of his client and the assessee made purchases from them. In support said Sh. Champalal Bhurmalji Sanghavi produced copies of account of the assessee in books of accounts of Padmavati Bullions. However, no books of accounts of Padmavati Bullions were produced by the said Sh. Champalal Bhurmalji Sanghavi and it was accepted that they did not maintain any record in respect of delivery of goods. The A.O. also raised doubts on the genuineness of the transactions as the identity of the person to whom the sales were made were not provided and no documentary evidences in support of the delivery of goods to the assessee were produced. The A.O. doubted the genuineness of the transactions.

Second remand report was also called by learned CIT(A) vide letter dated 17-12-2010 from the AO, whereby the ld. CIT(A) directed the A.O. to make detailed enquiry and submit his comments on specific question raised in the

said letter. The A.O. in response, had submitted a detailed remand report which is reproduced here under:

"2. With a view to gather information on the assessee claims and as directed by Id CIT(Appeals) in the letter dated 17.12.2010, summons u/s 131 were issued by the undersigned on 01.02.2013 to Shri Champaklal Sanghvi, partner of M/s Padmavathii Bullion and the assessee fixing the case to 12.2.2013 for recording of statement. On the appointed day, Shri Champaklal Sanghvi did not attend. Instead, a letter was received from the representative to adjourn the case by 8 to 10 days and the case was fixed for hearing on 12.2.2013 at 11.30 AM. On that day, there was no compliance.

The assessee also did not attend on 12.2.2013. There was a request to adjourn and refix the case by 8 to 10 days. The case was later reaffixed to 25.2.2013. On that day, Shri Manjunath Gowda, CA representative of the assessee and the assessee attended before me at 3.30 P.M. As the recording of statement was about to begin, the assessee's behavior was such that he became indisposed, all of a sudden. He told me that he is a B.P. patient and that he forgot to have his medicine on that day. After seeing the plight of the assessee, the representative told me that the assessee will have to be taken to a hospital. The representative explained that the assessee after recovery of health will make himself available in next few days. In these circumstances they were allowed to leave the office. Later, I briefed the Addl.CIT about the developments, who instructed me to issue a letter to the assessee if he failed to turn up within couple of days. However, the representative, Shri Manjunath Gowda CA attended before me 27.2.2013 and filed details vide letter dated 25.2.2013 as asked for in the annexure enclosed with the summons issued to the assessee. On 4.3.2013 I was telephonically informed by the representative of the assessee that the assessee will attend on that day in the next half an hour.

4. The assessee attended before me at 12-15.PM on 4.3.2013. Once again, he expressed that he was unwell and that he would not be in a position to have his statement recorded on oath. Further, he also told me that his earlier statement on record should be taken as a complete statement. After some time, his daughter came in, with some tablets. He submitted a letter dated

4.3.2013 (Annexure-I) stating that he is not in position to record a statement and his earlier statement dated 5.11.2008 may be taken on record. (Annexure-2). In the circumstances, after apprising the ITO (HQ) of the situation, I allowed him to leave the office.

It is pertinent to mention here that as per your goodself letter dated 17-12-2010 (in the copy endorsed to the assessee), the assessee has been asked by your goodself to cooperate with the AO as and when called for, in preparation of various workings/comparative results from the books and to furnish any other relevant data within his knowledge. Yet, as narrated above both the assessee and partner of M/s Padmavathi Bullion were dragging their feet in the matter nor were they ready for recording statements. Under these circumstances, this report is submitted on the basis of material on record.

M/s Shankeshwar Bullion:-

The assessee was proprietor of this concern which is said to have commenced business of trading in gold bars in March, 2005 as stated by the assessee in his sworn statement on 5.11.2008. The address of the business premises was Akash Ganga, Flat No-3, Madan Gopal Haveli, Manek Chowk, Ahmedabad, while the address for the purpose of filing of Returns of income was given as: A/8 Bharat Nagar, Grant Road, Mumbai 400 007. The assessee has stated that from 2002 to February, 2005 he carried on business of trading in bright bars in Mumbai whereas in March, 2005 has started business of trading in gold bullion at Ahmedabad.

Regarding modus operandi of business, the assessee in answer to Q.No. 5 of the statement recorded on 05.11.2008 stated as follows:

"I used to get enquiry about the availability of gold bars, quantity and rates, after that I used to confirm the availability from the purchaser. After getting confirmation from the purchaser the same was conveyed to the buyer. Subsequently the buyer was asked to deposit cash in my bank account at Mumbai/Ahmedabad wherever convenient. After confirming the cash deposit I used to issue cheque to purchaser mainly Padmavati Bullion, Ahmedabad. On submission of the cheque, I

used to take delivery of gold bar from Padmavati jewellers and delivered the same to the buyer at my bussiness address at Ahmedabad "

However, the facts on record do not support this. For example; the sales by M/s Padmavati Bullion to the assessee up-to 18.04.2005 were to the tune of (37,09,86,902) whereas the assessee made the payments of Rs. 13,89,04,600/- (Annexure 3) only till 18-04-2005. As per the assessee averment, he used to issue cheque(s) to Padmavati Bullion after receipt of full cash/consideration from his parties. If that is so, there cannot be so much balance liability as on 18.4.2005. Secondly, the assessee has stated that his customers (not known to him) deposited cash in his bank account either at Mumbai or Ahmedabad as was convenient to them. This is not convincing. For example, if a customer, 'X' of Ahmedabad goes to assessee's Ahmedabad premises and inquires about availability of gold bars, price etc, it is not clear how he places orders without seeing the product or knowing its purity. Be that as it may, then if some one say 'Y' deposits cash on behalf of 'X' in assessee's bank account in Mumbai, 'Y' has to fill in name of Mr 'X'; in the pay-in- slip before depositing cash with bank. This is all the more important in a situation where more than one customer of the assessee go to bank to deposit cash in his bank account After confirming receipt of the full sale consideration in cash from each customer, the assessee issues cheque to M/s Padmavati Bullion for purchasing gold bars. Padmavati Bullion in turn, issues cheque to ICICI Bank. After the cheque is honoured, ICICI Bank will release the gold bars which will be delivered to the assessee at his business premises. Thereafter, the assessee delivers the gold bars to his customers. No doubt, all these procedural steps involve considerable time. Not only that, when crores of rupees are deposited, the party's cannot simply deposit without giving name, identity since any untoward incident like earthquake, fire, bank robbery etc. can happen the next moment. Thus, in view of the time lag, the assessee's theory of 'cash and carry' explained before your goodself is not convincing at all. Further, notices u/s 133(6) were issued to the following banks calling for details of customers who deposited cash. The details of information so received from the bank are as under:

1. ICICI Bank

No information has been received till date (Annexure-d)

2. The Akola Urban Cooperative Bank

Information received vide letter dated 25.8.2008 along with xerox copies of cash deposit slips (Annexure 5). No signature is found on cash-deposit-slips made on 5.4.2005 and 7.4.2005

3. HDFC Bank (Annexure-c)

Information received vide letter dated 10.10.2008 and copies of Cash-deposit slips enclosed.

As could be seen from the cash-deposit-slips, there is no signature of depositors (eg. 20.4.2005,29.4.2005)

Thirdly, M/s Padmavati Bullion got sales tax registration on 14.2.2005. The assessee also claims to have started business in March, 2005. The commencement of both the business are simultaneous.

Further, according to the details the assessee carried on the newly started business mainly till the end of April, 2005. Barring an instance of a stray sale in July, 2005, it was abruptly closed in April, 2005 itself. Likewise, M/s Padamavati Bullion also closed down business later and the exact date of dissolution of partnership of M/s Padmavati Bullion is not known as explained by the representative of the assessee.

According to the details filed, the details of turnover of the assessee's activity are as under:

Asst. Year.	Total Sales	G.P. rate	NP rate
2005-06	Rs.6,85,05,332	0.26%	0.07%
2006-07	Rs. 49,17,69,925	0.18%	0.03%

Thus, when the business was commenced i.e. in the very first month (March,2005) the assessee's sales are to the tune of Rs. 6.85 Crores. In a new business that too at a new place particularly in this type of business in precious metal, the

assessee cannot (on his own) attract customers having large amounts of hard cash who follow 'cash and carry method' as claimed by the assessee. Assuming but not accepting for a moment (for the sake of argument) that the assessee's name/goodwill in the new area as such that his customers base developed overnight, it is not understandable how that business was closed down in infant stage itself i.e. within a period of two months or so. Also it is not known whether the leave & licence agreement with land-lord remained in force for the entire period for which it was entered into by the assessee for the business premises.

It is also not clear how the banks like The Akola Urban Co-Op Bank Ltd, Centurion Bank did not insist on PAN/identity of depositors of cash particularly when the cash deposits on each occasion (3-4 occasions in a day) were indisputably large. That apart, there were only 16 customers during period of about 2 months. The moot point for consideration is whether, the customer or his nominee did not indicate his name while taking delivery or affixing signature on delivery note/book. In all probability, assessee developed acquaintances and contacts with the help of his friends/ relatives etc. to attract customers in the new business he started at a new place. Then only it would be possible to have sales of Rs. 49 crores in a month. Thus, in this back drop it is rather beyond imagination that assessee does not know nor remember name of a single customer out of 16 parties who did business of crores of rupees in cash with him.

The capital of the assessee at the beginning of this business in March,2005 was a paltry amount of Rs. 51,000/-. With that amount; the assessee could have done business if he received cash in advance in all cases as per his claim of "cash and carry" method. That apart, the cash on hand, of Rs. 49,76,987/- as on 31.03.2007 is by any standard, a huge amount particularly in view of the modus operandi of business claimed by the assessee. The cash flow statement submitted by the representative also does not support this in clear terms. The theory of cash on hand is not convincing for the following reasons also. The assessee has made sale of Rs.49.17 crores during the Financial year 2005-06 as against purchases of Rs.48.78 cr. The assessee has stated that the sales in this line of business is on 'cash and carry' basis. The customer deposits the money directly into his account which is then used to issue cheques to the purchaser/supplier for delivery

of gold. In such a scenario, it is not possible to have so much cash on hand and the balance if any, should be his bank balance. However, as on 31.3.2006, his bank a/c with ICICI Bank show Debit balance of Rs. 78,254/- debit balance .

As on 06.04.2005 M/s Padmavati Bullions sold goods worth Rs. 6,09,03,300/- but received Rs. 1,35,00,000/- only. This is against the modus operandi claimed by the assessee that his purchases were against orders after receipt of full amount in cash from parties and that he did not accept cheques as he needed instant money/profit.

Sales Tax Returns:- The assessee has filed a letter dated 17.11.2008 enclosing photo copies of some challans etc (in Gujarati) indicating month wise payment of sales tax. However, as per information received from the Sales Tax Department vide letter dated 31.1.2012 ((Annexure-7) the TIN Number 0713019280 allotted to M/s Padmavati Bullion w.e.f 30.3.2005 is cancelled. Thus it is not clear how M/s Padmavati Bullion carried on the trading activity after 30.3.2005 with the assessee and others. Further, I.C.I.CI Bank has deducted sales tax on purchase of bullion by Padmavati Bullion. However, it appears the same has not been included while fixing the sales price comprising cost of gold bar, sales tax and profit margin. Since a business man will not bear the sales-tax burden himself.

Yet another vital factor is that in the Tax Audit report u/s 44AB for A. Y. 2006-07 in the case of the assessee, the Auditors have put the remarks as follows against Column no. 28(a) of Form No. 3CD: "Stock record is not maintained. " This is a self serving remark for the simple reason that in this case, being a trading concern involving a particular item there should not be any difficulty for furnishing this information. But, the Auditor for reasons best known to him has chosen not to furnish the information.

M/s Padmavati Bullion

1. As stated by the representative of the assessee, this partnership-firm was constituted vide a deed of partnership dated 14.02.2005 with 2 partners viz Sri Champalal Sanghvi and Sri Rakesh Bafna. Regarding dissolution of this partnership the representative of the assessee has stated that

the date of dissolution was not available. Afterwards, ADIT (Inv.), Ahmedabad was requested to conduct inquiries about this firm. It has been reported by the ADIT(Inv) Ahmedabad about the non existence of the firm at the given address. However, the landlord informed the ADIT (Inv) that for some months there was some business activity: Here again, the capital account of both the partners **as on 31.3.2005 itself showed debit balances totaling 2,74,702/- and the debit balances continued as on 31.3.2006 also, totalling 3,18,663/-.** This is also a strange/unusual feature in a business of trading in gold involving several crores of turnover in the very first month. That is, in March,2005 the turnover achieved by this concern is Rs. 77.26 Cr for A. Y. 2005-06 which is indeed quite high although G.P. was only 1,65,847/- (0.02%). Interestingly, during F.Y. 2005-06 (AY 2006-07) **the firm carried on business up to 29.06.2005 only and yet. it has shown turnover of Rs.136.92 Cr which is abnormally high especially in a business commenced a few months earlier. If this was indeed a phenomenal growth, what was the reason (or closing down the business within few months of commencement.** There is no plausible answer which could be guessed stepping into shoes of an ordinary prudent business person.

2. Even now, summons were issued to Champalal Sanghvi who has not complied with it. Besides all these, partner of M/s Padamavati Bullion in an earlier sworn statement stated that the goods were sold only on receipt of money but the facts on records does not support this averment as mentioned earlier in this report. In an earlier statement recorded on 18.1.2010 in answer to question No 8 stated that after realization of cheque of the buyers bill will be raised and gold will be delivered to them but the facts on record does not support this averment.

3. It is also pertinent to mention here that regarding the modus operandi of the business carried by both the assessee and the parner of M/s Padmavati Bullion have given totally identical statements on oath" question No 8.

Meenakshi Enterprises:-

(started in April 2002 and continued till February, 2005)

This is a proprietary concern of the assessee, engaged in trading in Bright Bar. But no details have been brought out in the scrutiny assessment order u/s 143(3) dated 29.12.2008. In the return of Income, the assessee has shown loss of Rs. 38,248/- from the above firm. However, the details of turnover etc for latest for two assessment years are as follows.

A.Y.	Total turnover	G.P. Rate
2004-05	Rs. 1,91,59,822	6.15%
2005-06	Rs. 1,70,32,424	11.28%

Even though, the G.P rate showed upward trend in A. Y 2005-06 , the assessee closed down this business in Mumbai in February, 2005 and moved to Ahmedabad, with a calculated design after developing acquaintance/business relationship mainly with partners of M/s Padmavati Bullion.

In regard to this Business under this proprietary concern in his sworn statement has stated that the business was closed down on in February, 2005 and in the Month of March, 2005 started trading in Gold Bullion at Ahmedabad. Thus, there was no business liable for assessment after assessment year 2005-06. However the assessee has shown loss of Rs. 38,248/- in respect of Meenakshi Enterprises for A.Y 2006-07. This loss in respect of discontinued business is not allowable.

From the details on record, it is apparent that on one hand, the assessee received huge cash and on the other, he issued cheques for like amounts to his associate, M/s Padmavati Bullion. The assessee claimed to have earned very thin margin of profit. Substantial earnings in earlier information about the Associate's Sales Tax Return lends a little of support to the claim of sales, although it is not conclusive evidence of the business said to be carried on by the assessee. Further, more importantly, the assessee's Balance Sheet for subsequent Financial years do not reveal any investments in immovable properties, equity shares etc which could otherwise be evidence of the assessee's earnings/income in earlier years' business.

In view of the foregoing discussion it is apparent that the assessee by colluding with the M/S Padmavati Bullion and also with connivance of Banks, carried on an activity of trading in Bullion. In the case of the assessee, the Book result may not be acceptable and provisions of section 145(3) may be invoked to make addition on account of low Gross Profit. Looking to the circumstances of case addition on account of low G.P. may be considered at the rate of about 4% to 5%.

Lastly,. I would like to humbly bring to your notice certain facts which has dated 02.2005 been noticed only at the time of preparation of remand report.

One of the grounds for selection of case for selection of case for scrutiny the assessee was proprietor of M/s Meenakshi Enterprises. However, this aspect relating to Meenakshi Enterprises remained to be scrutinized On going through the assessment order, it is seen that the assessee's business income from M/s Meenakshi Enterprises which shows discrepancy in the capital balance has not been verified. The assessee has declared a loss of Rs. 38,248/- from the firm which trades in Bright Bars. The capital account of the assessee for the year ending 31.3.2006, as shown in the computation of income, filed with the return of income, shows capital of Rs. 5,13,241/- with Meenakshi enterprises while the balance sheet of M/s Meenakshi enterprises also filed with the return of income shows a balance of Rs. 6,48,757/-. There are no other documents to verify the exact balance amount of capital of the assessee in the firm M/s Meenakshi enterprises .It is submitted that this fact may also be taken into consideration at the time of deciding the appeal.

The action taken on directions given by CIT (A) are as below (point wise) :

I. To call for and examine the books of accounts of M/s Padmavati Bullion and prepare a stock statement of the said party with the help of books and to ascertain whether M/s

Padmavati Bullion had sufficient stocks to supply Bullion to the Appellant on the given dates.

• The stock statement has been prepared with details received from ICICI Bank in collaboration with the details of sales made to Shankeshwar Bullion (Annexure-B)

What is the normal practice of M/s Padmavati Bullion in maintaining primary documentation for purchase and sale of goods and whether any deviation is observed from such practice while dealing with the Appellant.

• This party failed to comply with the summons issued dated 1.2.2013 and hence the issue could not be examined.

3. Who were the other major customers of M/s Padmavati Bullion during the year under consideration and during the year under consideration and during April/May 2005 in specific and what is the trade practice followed in respect of such other customers.

• The other major Customers of M/s Padmavati Bullion are

1. M/s Kuber Bullion
2. M/s Chokshi Tejalkumar Pradipkumar & company
3. M/s Sanjay Agencies
4. M/s Kuber Bullion
5. Mr Punit K Mehta

4. What is the sale price charged by M/s Padmavati Bullion to the Appellant vis-a-vis other customers during April/May 2005 on the given dates and whether any abnormality is noticed in such transactions.

• No abnormal variation is noticed in the sale pricing noticed in respect of the Assessee viz-a-viz other parties. The variation notice may be to some extent due to market fluctuation in the market price of gold.

6. What is the G.P. ratio earned by M/s Padmavati Bullion in April/May 2005 and for the overall year.

• **Gross profit for Asstt year 2005-06 is Rs. 0.02%**

7. To examine the partners of M/s Padmavati Bullion once again if found necessary and to call for their clarifications if any on the discrepancies/abnormalities noticed by the A.O. on examination of books and other relevant materials in respect of transactions with Appellant.

Summons were issued to Partner Champalal B Sanghvi for which there was no compliance.

8. To collect data relating to profit margins in bullion trade during the F.Y. 2005-06 with specific emphasis on April/May 2005 and if any major deviations are noticed in comparison to the trade results of the Appellant to call for the clarifications and examine the same.

• Information U/S 133(6) was sought from The Secretary M/s Shree Choksi Mahajan Associates who is associated Bullion Market who has stated that the bullion market is very volatile and difficult to predict the price trend of bullion and also not possible to determine the profit margin in bullion trade, since the margin may differ from trader to trader depending on their style of functioning.

9. Any information with A.O. as to the Appellants assets and liabilities since F. Y. 2005-06 to the current date and whether additions made by the A.O. are substantiated by any such assets in the notice of the A. O.

• No such assets are found in the Balance Sheet of subsequent years. (Return of Income filed only upto 2008-09).

The assessee in rejoinder vide letter dated 12.4.2013, as under:-

“The appellant thankfully acknowledges a copy of remand report dated 28.03.2013 submitted by the Income-tax Officer-16(2)(3) through Postal Authorities on 12.04.2013.

2. I, before dealing with the contents of remand report, most respectfully submit that report submitted deals casually and in a routine matter, without any serious compliance. The lengthy part of the report deals with irrelevant details, to make it ornamental and has no relevance to the issue on the subject matter.

3. Your honour will appreciate that all the Courts including the Apex Court have in very clear, defined as to what onus is cast on an assessee.

4. The appellant has completely discharged onus cast on him as can be seen from the following:-

(a) The appellant has filed confirmation from the supplier of M/s. Padmavati Bullion confirming the purchases made by the appellant.

(b) The appellant has filed bank account of supplier to show that all the payments as made by the appellant, by payees account cheque, have gone into the bank account of supplier. The bank account also shows, utilization of funds by the supplier for payment of its purchases.

(c) The supplier has purchased goods, sold to the appellant, from ICICI Bank and the details thereof are placed on record.

(d) The turnover of supplier is very large and the appellant's activities can be compared as "Small fry" against "Giant Shark".

(e) The supplier has appeared before the AO, at the time of submissions of First remand report and absolutely no tenable reason existed to even remotely take an adverse view.

(f) The appellant placed on record all the purchase bills, which the supplier has accepted as issued by it and confirmed all the payments received by it.

4.2 The appellant having completely fulfilled, onus cast on him there was nothing more which can be produced by any assessee, in any proceedings. Yet, there was a consistent systematic and oppressive technique adopted by the AO is issuing summons to the appellant, harassing him beyond tolerance by use of all oppressive techniques, because the appellant is penniless, suffering from various illnesses.

4.3 It is regrettable that the appellant having totally discharged onus cast on him, the Assessing Officer; did not do anything to fulfill obligation cast on him, by law. Every Assessing Officer has only endeavored to justify the wrong and illegal doings of the Assessing Officer, who arbitrarily made addition. Such practice of succeeding the Assessing Officer which stands endorsed, should be suitably discouraged.

4.4 I am threatened with dire consequences of arrest and imprisonment for non-payment of tax, but no authority has done anything to reprimand the Assessing Officer, who made addition by disregarding or even referring to evidence placed on record by the appellant.

4.5 It will interest your Honour to note that at the time when First remand report was called for, my Assessing Officer was a different Assessing Officer and yet the Assessing Officer who originally completed the assessment was preferred to prepare remand report and the fact is placed by me on record.

4.6 The appellant had specifically brought to the notice of the CIT (Appeals) that the 'Assessing Officer who completed the assessment was prejudiced against me and was acting vindictively, but thus grievance of mine assessee did not find any favour.

Now I my comments on the remand report.

The first part of second page deals with attendance of the appellant. The attendance was not relevant appellant factually discharged the onus vesting on him.

On page 2 under caption M/s Shankeshwar Bullion is repetition of facts on record stated by me and considered in the assessment and by the learned CIT(A) who partly heard the appeal.

On page 3 observation that 'No doubt, all the procedural steps involve considerable time' is factually incorrect. The subsequent statements in the same para are only imaginary, presumptive and inferential without an iota of evidence.

ICICI BANK

No information is received - This is not appellant's fault. The A.O. in fairness should have dealt with bank or its ombudsman.

AKOLA URBAN CORP BANK & HDFC BANK:

The appellant cannot be asked to explain bank procedure. This observation is intentionally and with a purpose to deviate from the 'terms of reference' of remand sought. How can banks procedure affect the appellant? What is the sanctity of such fulfill observation.

On page 3 itself, the A.O. refers to sales tax No & my business. The entire observation is out of place. It was explained in the assessment that in Bullion Trade there was a sales tax chargeable in Mumbai while no sales tax was chargeable in Gujarat. This benefit of sales tax prompted Bullion Dealers to do gold business in Ahmedabad, as it would be more viable.

On page 4 all that is written in only an inference and surmises. The appellant has maintained regular books of accounts, which are duly audited and all entries therein are accepted without a murmur and the A.O. submitting the remand report, without reference to the books or other data, made imaginary inference, which are not relevant as appellant has proves to the hilt all his transactions, The A.O. completing the assessment was satisfied and only disbelieved purchases which are now proved.

On page 5 caption sales tax return

In Gujarat the sales tax on Bullion was introduced from 01.04.2005 and the next year business was closed. There was no sense in continuing which sales tax number on closure of business. This obvious fact is erroneously twisted.

There was no need to keep stock Register as explained by the appellant, on statement taken on oath on 05.11.2008 which is

fairly 5 reproduced by A.O. on page 2. The same, is reproduced here.

I used to get enquiry about availability of gold bars, quantity and rates, after that I used to confirm the availability from the purchaser. After getting confirmation from the purchaser the same was conveyed to the buyer. Subsequently the buyer has asked to deposit cash in my bank account at Mumbai/Ahmedabad wherever convenient. After confirming the cash deposit I used to issue cheque to purchaser mainly Padmavati Bullion, Ahmedabad. On submission of the cheque,. I used to take delivery of gold bar from Padmavati Jewellers and delivered the same to the buyer at my business address at Ahmedabad"

Again on page 5 under the caption M/s Padmavati Bullion, the appellant cannot be asked to explain its business. M/s Padmavati Bullion have conveyed the appellant as follows.

(a) M/s Padmavati Bullion have appeared for verification of appellant's transactions before

- (i) DDI Ahmedabad
- (ii) DDT Mumbai
- (iii) The Assessing Officer

And given all details with complete evidence. Every time when there is a change in the incumbent A.O. or the appellate authority, there are not bound to appear again and again for same matter and if the Department feel that it has a right to do so let them take any action against us.

Why did the A.O. did not insist on their attendance?

(b) M/s Padmavati Bullion is too big a party to collude with a small fry like me. The have traded in very huge quantity of Bullion. (The A.O. has admitted that the business of M/s Padmavati Bullion was 136.92 crores!).

(c) M/s Padmavati Bullion claims that their assessments are completed accepting the return. Not only that but assessments of several other of its parties (excepting the appellant) are completed accepting the income.

(d) In sub-para 2 according to the Assessing Officer, the sworn statement of M/s. Padmavati Bullion" is not supported by facts, ". How can the appellant be asked to explain it or how can that be used against the appellant? The observation of the A.O. is irrelevant and to weightage to it should be given while considering the appellant's submission. It is impossible for appellant to explain, third party's accounts.

In sub-para 3 the observation of A.O. that "modus operandi of the business by both the assessee and the partner of M/s Padmavati Bullion have given totally identical statement on oath" question No. 8, actually supports the case of the appellant because in any genuine set of transactions, the statement of parties are bound to be identical; only' contradiction would result in adverse inference.

On page 6 under caption 'Meenakshi Enterprise.' The AO has discussed business of years, the appellant for years prior to the year under review, which was altogether a different business and had absolutely no relevant to the facts and business of the year. No doubt the balance-sheet of the year prior to the year under review is relevant, which is on record and explains the position.

On same page in the last para the observation of the AO that assessee is colluding the Padmavati Bullion AND ALSO WITH CONVENIENCE OF BANKS' is a wild guess and malafide allegation, devoid of any truth and in blatant violation of all rules of natural justice. The concluding remarks that "Book result may not be acceptable and provision of section 145(3) may be invoked to make addition on account of low gross profit. Looking to the circumstances of case addition on account of low gross profit may be considered at the rate of about 4% to 5%. The appellant resist these remark and submits as follows:

(a) The suggestion, argument, contention, advise of direction whatever it may be cannot be a part of remand report and is bad in taste.

(b) The observation, though apparently look, as views of the AO in substance the same amount to directions to a Superior Authority in the garb of personal view.

(c) In substance of the guidance by the AO to your honour or whatever it may establishes genuineness of the purchases.

(d) There is no justification or even remote hint as for adoption of gross profit ratio, when the AO herself in later part of the remand report has admitted yield of gross profit in bullion is shown by the Principle Supplier 0.02%.

POINT WISE DISCUSSION:

Before dealing with point wise report, the appellant emphasis is that the entire exercise made in page I to 7 (part) are exercise in futility, irrelevant and is not worth its value, of paper on which is printed.

POINTS:

POINT NO. 1

Annexure 8 attached shows that M/s. Padmavati Bullion had sufficient stock of bullion to sell the same to the appellant and as such, no comment is offered by the appellant as it supports the facts of genuine purchase by appellant.

POINT No. 2

The A.O. states that party has failed to comply. The AO on directions of CIT(A) ought to have insisted on compliance. In many events M/s Padmavati Bullion had produced all primary records before AO who submitted the first remand report.

POINT No. 3

The AO has listed the major customer of M/s. Padmavati Bullion and stopped there. The AO hot the information and must have verified the same. In absence of any adverse finding, the transactions of M/s. Padmavati Bullion, with all other major parties stand fully explained.

POINTNo.4

The AO has admitted that no abnormality is seen between sale price charged to appellant and all other purchasers again prove the genuineness and bonafides of the appellant.

POINT No. 5

The AO admits that the principal M/s. Padmavati Bullion have shown gross profit of 0.02%

POINT No. 6

There was no discrepancy found of any kind by the AO and therefore question of clarification did not arise. In view of this the issue relating compliance by partner Champaklal B. Sanghvi is of no relevance.

POINT No. 7

The AO had erroneously approached the Choksi Mahajan Association as they cannot give any information on issue of gross profit of various different dealers who are its members. Their members do retail and wholesale business, some manufacture ornaments, some buy old gold ornaments and after melting them do business etc. The AO could have called for list of Bullion Dealers, and examined individually their gross profit ratio, if she really wanted to adhere to scope of remand. This is purposely avoided.

In view of above the appellant has proved his purchases (which only are doubted) to the hilt. A separate quantity account was not necessary as the commitment for purchase (after enquiry was made only after confirmed sale. The yield of gross profit shown is absolutely reasonable in the line of business.

The appellant therefore prays that addition made to the income be deleted as all when can be proved, is proved by the appellant. No one can be asked to do what is impossible. The appellant relies on statement of facts, written submissions filed with CIT(A) – 27, reply to first remand report and all other papers placed in your honour's file.”

The ld. CIT(A) after considering the submission of the assessee observed that business of purchase and sale of gold bars claimed to have entered into by the assessee is peculiar keeping in view the background of the assessee and the finances/capital of the assessee. It was observed by learned CIT(A) that it

is quite not believable that the sales of Rs. 49 crores were made by the assessee in 16 transactions, each averaging over Rs. 3 crores and were made to persons only on telephone and the assessee does not know/remember the names of even a single person to whom sales of gold bar was made. It was observed by learned CIT(A) that it was abundantly clear that there is much more to the whole issues than what is disclosed by the assessee and that the assessee by not giving out the names of the persons who have bought huge quantity of gold in cash is trying to shield them. It was observed that the purchases of gold by M/s. Padmavati Bullion, Ahmadabad from ICICI Bank has been established and since M/s. Padmavati Bullion, Ahmadabad has confirmed the sale of gold to the assessee which establishes that purchases were made by the assessee. The payments were made by the assessee through cheque to Padamavati Bullion. Once purchases were established there has to be corresponding sales, as it is no where alleged that the entire gold purchased was kept in stock by the assessee. The contention of the assessee that such substantial quantity of gold was sold in 16 transactions over telephone entirely in cash for which the payments have been deposited in the bank account much later upto August 2005 while sales were conducted by 28-04-2005 clearly reveals that the assessee is not coming out with truth and is hiding facts. The learned CIT(A) observed that the theory of cash sales has to be adopted to work out the profits in the hands of the assessee, for the purposes of taxation. The ld. CIT(A) observed that the theory of cash sales in 16 transactions of unaccounted funds which needs to be added in their respective hands u/s.69 or u/s 40A(3) of the Act i.e. disallowance of 20% of the amount of cash purchases. The learned CIT(A) observed that the assessee is not revealing the identity of purchaser and is shielding the purchaser of gold. The ld. CIT(A) referred to the second remand report of the A.O. wherein AO commented as under:-

“In view of the foregoing discussion it is apparent that the assessee by colluding with the M/s Padmavati Bullion and also with connivance of Banks, carried on an activity of trading in Bullion. In the case of the assessee, the Book result may not be acceptable and provisions of section 145(3) may be invoked to make addition on account of low Gross Profit. Looking to the circumstances of case addition on account of low G.P may be considered at the rate of about 4% to 5%.

The assessee was show caused by learned CIT(A) as to why the profit from sale of gold bars be not estimated @10%. In reply, the assessee submitted explanations vide letter dated 26.12.2013 which is reproduced as under:

“With reference to above and instruction from our above client, we hereby state your honour that, as per show cause regarding adding gross profit @ 10%, we hereby submit as under:

1. The appellant has maintained proper books of accounts and accounts have been duly audited u/s.44AB of the Income Tax Act, 1961. This said facts have been duly accepted by your honour and AO also.
2. The appellant duly co-operated with AO by providing required/necessary information and documents.
3. The gross profit @10% in this bullion business is much higher than normal industry gross profit.
4. Considering the above facts and circumstances, the gross profit declared in income tax return is as per audited books of accounts is correct and true facts of the case.

Finally, we pray your honour, kindly provide your decree considering the all submissions of appellant, facts and circumstances of the case. We and our client ever grateful for your justice.”

The ld. CIT(A) partly accepted the contentions of the assessee and observed that although 15 out of 16 sale transactions were concluded by 28th April, 2005 while the cash deposits in the assessee's bank account continued in the months of May, June, July and August 2005 as well. Thus the claim of the assessee that gold were delivered only after full payment was received by the assessee in cash or deposited by the customers in his bank accounts is factually incorrect. It was observed that almost Rs.27.55 crores was deposited by the assessee in the bank account after 28.4.2005, which meant that the sale proceeds were received in cash which were kept with the assessee and deposited in the bank account later or the sales proceeds were received subsequently, which in either case is not believable. The book results were therefore clearly not reliable and not acceptable were the observation of learned CIT(A). The ld. CIT(A) held that the meager G.P. ratio of 0.17% shown in the books of accounts is not acceptable, hence, a G.P. ratio of 5% would be more appropriate under the facts of the case considering that the assessee is shielding the purchasers of gold in cash. The ld. CIT(A) observed that immediately prior to the starting of this gold business, the assessee was doing trading business in bright bars under the name M/s. Meenakshi Enterprise and in the immediately preceding financial year, the assessee achieved a turnover of Rs.1.70 Cr. and the G.P. ratio shown was 11.28%. Thereafter, the assessee closed down this business and jumped into the trading in gold in the current financial year. The sudden switch to the gold business by the assessee must have been made keeping in view potential profits bring higher in gold business than what the assessee was earning earlier in bright bar business because he would not leave a business giving him GP ratio of 11.28% for a business that gives him G.P. ratio of 0.17%. Thus, the ld. CIT(A) accordingly directed the A.O. to work out the gross profit @5% on sales shown in the books of accounts and bring the resultant income to tax. The addition of Rs. 49,17,69,925/- made by the A.O. for the cash deposits in the bank account on cash sales by treating the cash sales as un-accounted cash of the

assessee was directed by learned CIT(A) to be deleted, vide appellate orders dated 10-01-2014.

7. Aggrieved by the appellate order dated 10-01-2014 passed by the ld. CIT(A) both the assessee and the Revenue are in appeal before us. The assessee is aggrieved with the decision of learned CIT(A) upholding of GP ratio of 5% on sales, while on the other hand the Revenue is aggrieved by the decision of learned CIT(A) in deletion of the entire addition of Rs. 49,17,69,925/- as undisclosed income of the assessee with respect to the cash sales which was deposited in the bank as held by the AO and instead upholding of additions by learned CIT(A) by estimating GP ratio of 5% on sales declared by the assessee.

8. It is the say of the ld. counsel for the assessee that the ld. CIT(A) upheld the additions by estimating GP ratio @5% on sales. Remand reports were called by ld. CIT(A) from the A.O.. The learned counsel for the assessee submitted that the A.O. denied proper opportunity to the assessee and the evidences filed by the assessee were not been taken note of by the AO. It is submitted that the assessee opened a proprietary concern in Ahmedabad as there is no VAT in Gujarat for the relevant period while there was VAT on gold bar in the State of Maharashtra. The learned counsel for the assessee submitted that the assessee was dealing in gold bars since March, 2005. It is submitted that the assessee had made purchases of gold from M/s Padmavati Bullion who in turn purchased the same from ICICI Bank. The ld. counsel drew our attention to paper book page 2 wherein the assessee's P&L account is placed to contend that all purchases and sales were accounted for and declared in return of income filed with Revenue. The learned counsel for the assessee drew our attention to page 19 of the appellate order of ld. CIT(A) and contended that payments for purchases were made by cheque to said Padmavati Bullion. The ld. counsel also drew our attention to paper book

page 158 wherein remand report by the AO to learned CIT(A) is placed. Our attention was also drawn to page 226/paper book wherein the remand report dated 28.3.2013 was placed. The ld. counsel also drew our attention to paper book page 3 wherein the balance sheet of the assessee is placed. The ld. counsel contended that the assessee has own capital invested in the proprietary concern of meager amount of Rs. 87,113/- and huge addition has been made i.e approx. Rs. 49.17 crores by the AO . Our attention was also invited to paper book page 164 wherein the stock statements are placed. Our attention was also invited to paper book page 1 and submitted that capital of the assessee was only Rs. 7.89 lacs and there are no investments, assets etc to justify such a huge additions of approx. Rs. 49 crores. It was submitted that learned CIT(A) restricted additions by applying GP ratio of 5% on sales. Our attention was also drawn to page 22 of learned CIT(A) appellate orders wherein the assessee has submitted replies to remand report before learned CIT(A). Our attention was also drawn to paper book page 145 and 80 wherein the confirmation from M/s Padmavati Bullion and bank statement of Padmavati Bullion are placed and the learned counsel for the assessee contended that all the payments were made through cheque. Our attention was also invited to paper book page 156 wherein the reply dated 25-01-2010 filed by Padmavati Bullion to the A.O. is placed wherein said concern filed its audited Balance Sheet for financial year 2004-05 and 2005-06, bank statement of Padmavati Bullion for financial year 2004-05 and 2005-06 , stock statement for April 2005(purchases from ICICI Bank and sales to the assessee) , purchase invoices from ICICI Bank and three year return of income of partner Mr Champalal B Sanghavi. Our attention is also invited to paper book page 267 wherein the stock statement of M/s Padmavati Bullion is placed. Our attention is also invited to paper book page 265 and 266 wherein the dealer search report of Gujarat Vat Department is placed w.r.t the proprietary concern of the assessee and Padmavati Bullion . It is submitted that M/s Padmavati Bullion was registered with Gujarat VAT

department on 14.2.2005 and the assessee was registered with Gujarat VAT department on 07.3.2005. It was submitted that there was no VAT chargeable on Gold Bar prior to 1st April 2006 in the State of Gujarat , hence, the assessee has not charged VAT on sales of gold bar made by it. It is submitted that the entire modus-operandi of the assessee's business is explained in the appellate order of learned CIT(A) at page 11. It was submitted that the Revenue has not framed scrutiny assessment in A.Y. 2005-06 .

With respect to ground no 2 raised by the assessee in its appeal before the tribunal, it is submitted that the addition of Rs. 1,35,516/- in respect of difference in closing capital of Meenakshi Enterprises (proprietary concern of the assessee) has led to the enhancing of income by learned CIT(A) and no query has been raised by the ld. CIT(A) before enhancing income of the assessee which is not justifiable, it is submitted that the said difference is highlighted by the A.O. in the remand report only and the AO did not raise this issue while framing assessment u/s 143(3). Thus, it was submitted that no opportunity to rebut was granted by any authority below before prejudicing assessee and it is prayed that this matter may be set aside and restored to the file of the AO for de-novo determination of the issue on merits after hearing the assessee.

9. The ld. D.R. submitted that the business of the assessee was started in the month of March, 2005 and the major transactions of sale/purchase took place in March 2005 and April 2005 and thereafter no business has been done by the assessee except small turnover of Rs 18.49 lacs in the month of July 2005. It is submitted that the notification by the Govt. of Gujarat levying VAT on Gold was issued on 29-03-2006 and the contention of the assessee that VAT registration was got cancelled due to imposition of VAT by Government of Gujarat was incorrect as the assessee VAT registration was

manually cancelled by Gujarat VAT authorities on 30-09-2005 itself and Padmavati Bullion registration was cancelled by VAT authorities on 30-03-2005 as confirmed by ACST , Circle -3, Ahmedabad vide letter dated 31-01-2012(pb/page 261) while VAT was imposed in State of Gujarat on Gold Bar only w.e.f. 01-04-2006 . These two concerns started their operations only in February/March 2005 itself and their registration was cancelled in short period itself and business got closed which raises serious concerns about genuineness of their transactions carried out in gold bar. The ld. D.R. drew our attention to the orders of the authorities below and submitted that the assessee has not declared the names of the persons to whom the gold bars were sold. It is submitted that no infrastructure has been maintained by the assessee and the assessee is not in a position to handle such a huge quantity of gold bars nor the assessee has infrastructure to handle and store cash of such a huge magnitude . The assessee has no store/strong room to protect and hoard gold bars. The assessee was stated to be holding gold bars in stock as on 01-04-2005 to the tune of 5 Kg. as per its financial statements and it is wrong to say that the assessee did not have inventory of gold bars. It was submitted that Identity of the persons to whom gold bars was sold in cash were not revealed . With respect to ground No.2 raised by the assessee regarding difference in closing capital of Meenakshi Enterprises(proprietary concern of the assessee), the ld. D.R. relied upon the appellate order of the ld. CIT(A).

10. We have considered rival contentions and carefully gone through the records placed on file. We have observed that the assessee is an individual running a proprietary concern under the name and style of 'Shankheshwar Bullion', stated to be engaged in the business of purchase and sale of gold bars. The assessee started his proprietary concern only in the month of March, 2005 wherein registration was obtained vide TIN No. 24071301929 w.e.f. 07-03-2005 with Gujarat VAT authorities in the state of Gujarat at

Ahmedabad(Gujarat) , although the assessee belonged to Mumbai (Maharashtra) . The reasons for seeking VAT registration in the State of Gujarat is stated to be levying of VAT @0.25% at first point of sale of gold bar during relevant period in the State of Gujarat, while said exemption was stated to be not available in the State of Maharashtra which as claimed by the assessee prompted assessee to open proprietary concern in the State of Gujarat keeping in view savings in VAT which could lower costs. The said proprietary concern undertook large magnitude of transactions of sale and purchase of gold bars in the month of March/April 2005 immediately after it was established on 07-03-2005 . The major transactions of cash sales of gold bar were to the tune of Rs. 6.85 crores in the month of March 2005 itself while the transactions of cash sales of gold bar were to the tune of Rs. 48.99 crores in the month of April, 2005. Thereafter , there was a solitary transactions of cash sale of gold bar of approx. Rs. 18.50 lacs in the month of July 2005 and thereafter said business of the assessee ceased to operate. The proprietary concern of the assessee namely Shankheshwar Bullion registration with Gujarat VAT was cancelled by Gujarat VAT authorities w.e.f. 30-09-2005(pb/page 261). The proprietary concern of the assessee namely Shankheshwar Bullion made purchases of gold bars in the subject assessment year mainly from a partnership concern namely M/s Padmavati Bullion, Ahmedabad of huge magnitude to the tune of around 796 kg in the month of April, 2005 itself which was sold by it to undisclosed customers in cash whose identities have been withheld by the assessee and the said cash from undisclosed sources have been deposited in the bank accounts of the assessee. Similarly it is observed from material on record that in the case of Padmavati Bullion from whom the assessee made purchases also started its business in the month of February, 2005 by getting VAT registration at Ahmedabad, Gujarat and within a short span of time registration of the said concern also stood cancelled by VAT department on 30-03-2005 itself (TIN No. 24071301928 effective date of TIN registration is 14.2.2005). Despite the

insistence of the authorities below requesting the assessee to reveal the identity of buyers of the gold bars from the assessee so that the genuineness of the transaction of cash sale of gold bars can be verified, the assessee did not reveal the identity of its customers who bought gold in cash from him on the pretext that there is no requirement under law to reveal the identity of the buyer. It is pertinent to mention that each invoice of cash sale of gold bar in majority of cases issued by the assessee is on an average exceeding Rs. 3,00,00,000/- in majority of cases. The assessee never revealed the identity of person who bought gold bars in such a huge quantity by paying cash. The assessee is stated to have purchased gold bars mainly from Padamavati Bullions. The partner of said firm Padmavati Bullion confirmed the sale of gold bars to the assessee in statement recorded u/s 131 but subsequently the said partner never appeared before the authorities below when he was called by the AO as Revenue sought more information from him.. The said Padmavati Bullion purchased this gold bars/bullion from ICICI bank for which necessary documents such as purchase invoices, payments for purchases by cheque through bank, delivery challan in favour of Padmavati Bullion issued by the ICICI bank are part of the records which are placed in the paper book. However, there is no material on record as to the delivery of gold bars to the assessee and also there is no evidence of movement of gold bars starting from receipt of gold bars by the assessee from Padmavati Bullions at the time of stated purchases till the said gold bars are delivered to the so called buyers of the assessee whose identities are not revealed Thus, the assessee did not bring on record any proof of delivery of material received by him from Padmavati Bullion and further no proof of delivery of gold bar by the assessee to the buyers to whom the gold bar is stated to be sold by the assessee in cash is placed on record. The assessee had stated to have received cash from un-known/undisclosed buyers which is deposited in the bank accounts of the assessee and cheques are issued to Padmavati Bullion towards purchases of gold bullion . The assessee has contended that only

after receipt of the payments from buyers which is deposited in the bank, delivery of the gold to the unrevealed/undisclosed buyers is effected but there is no such evidence on records which could substantiate that the gold bars have been delivered to the undisclosed buyers only after the receipt of cash rather the records reveal opposite wherein cash sales of gold bar to the tune of Rs. 48.99 crores was shown to have been made by the assessee in the month of April, 2005 while most of the cash proceeds against said stated sale of gold bars amounting to Rs. 27.54 crores was received post April, 2005 and was received in the month of May, June, July & August, 2005 which was deposited in bank of the assessee. Perusal of material on record reveals that the assessee's capital introduction in the firm is a meager sum of Rs. 87,114/- and the total capital of the assessee stood at Rs. 7,89,578/- and against this paltry capital of the assessee, the assessee has stated to have entered into huge transaction in gold bars of more than Rs. 56 crores(approx.) in the month of March/April 2005 and has extended credit of around Rs 27.55 crores to its undisclosed buyers whose identity were withheld by the assessee who have stated to have purchased gold bars in cash from the assessee and the whole theory of the assessee does not inspire confidence. It is also pertinent to mention that the assessee does not have any past experience of dealing in gold bars nor has maintained any infrastructure to handle, secure and store gold/cash of such magnitude as is emanating from the records. There is no evidence on record that security vaults or security personnel's were deployed by the assessee to secure highly expensive commodity being gold bars or even cash dealt/handled by the assessee. The financial statement of the assessee as at 31-03-2005 reveals that 5kg of stock of gold to the tune of Rs. 30.95 lacs was held as closing stock but there is no explanation as to how the said gold was stored/secured. Similarly, there is no explanation by the assessee that how it used to secure the movement of gold bars after its receipt from Padmavati Bullions till it is delivered to the buyer. There is also no material on record to suggest that any security vaults were

hired or constructed or any security personnel were deployed by the assessee nor there is any insurance policy being taken by the assessee to secure gold bars of huge value. The material on record also clearly reveal that the capital of the M/s Padmavati Bullion from whom the assessee made purchases is in negative and is merely (-) Rs. 2.75 lacs as compared to the huge transactions in sale of gold running into Rs. 77.26 crores in March 2005 and turnover of Rs. 136.92 crores from April 2005 to 29-06-2005 , aggregating to approx. Rs 215 crores were made by said Padmavati Bullions to its buyers .The financial documents of Padmavati Bullions are placed in paper book page 170 to 199. Gujarat VAT registration of Padmavati Bullions was also cancelled by Gujarat VAT authorities on 30-03-2005 itself and it ceased to undertake operation towards sale / purchase after 29-06-2005. On the complete appreciation of the facts and also touchstone of human probabilities, the story of sale of gold bars appears to be a smoke screen while real objective is to introduce undisclosed income into banking system by way of deposit of cash in bank accounts. Reference is drawn to decision of Hon'ble Supreme Court in the case of Sumati Dayal v. CIT (1995) 214 ITR 801(SC).

India is one of the major importer of gold in the world. The sale and purchase of imported gold including its end use is regulated, controlled and monitored by Reserve Bank of India(RBI). M/s Padmavati Bulion from whom the assessee has stated to have purchased gold bars has in turn purchased the said gold bars from ICICI Bank as is emanating from the records before us. The Gold bars sold by ICICI Bank to Padmavati Bullion is imported gold as is clearly reflected in the sale invoices and delivery challans issued by ICICI Bank in favour of Padmavati Bullion which are placed in paper book page 86-139. The said documents being invoices/challans raised by ICICI Bank in favour of Padmvati Bullion shows the prices of gold in US\$(United States Dollars) and the suppliers from whom ICICI Bank imported gold bar/bullion is also clearly mentioned. The attention is drawn to the following few RBI

Circulars/ guidelines/notification which regulated gold imports and its sale in India at relevant time:-

- 1.RBI/2004-05/30 A.P.(DIR Series) Circular No. 2 dated 09-07-2004
2. RBI Circular A.D.(G.P. Series) Circular No. 7 dated 06-03-1998
3. Guidelines on Know Your Customer norms and cash transactions DBOD AML.BC.18/14.01.001/2002-03 dated 16-08-2002
4. Circular No. AP(DIR Series)Circular No. 25 dated 01-10-2003
- 4.Master Circular No RBI/2005-06/07 Master Circular No. 7/2005-06 dated 01-07-2005

The mandate of these circular/ guidelines/ notification issued by the RBI from time to time is that the import of gold and its end use in India is being regulated, controlled and monitored by RBI and imports were allowed to be done through the government nominated agencies including approved banks. The RBI has directed these agencies who are authorized by the RBI to do due diligence/KYC and other checks and verification of the ultimate buyers of the gold so that the end use of the imported gold can be tracked , controlled and monitored and gold is handled/ utilized/ consumed by only authorized concerns for specified approved purposes and in no case it was allowed to be diverted for un-authorized use or/and to unauthorized persons . The master circular dated 01-07-2005 issued by RBI made these regulatory and controlled monitoring more stringent wherein onerous responsibilities were placed on the nominated agencies and banks to further tighten their monitoring both on suppliers as well on the importing concerns and the end users. This is mainly done by RBI to tackle/curb abuse and menace of money laundering and prohibit circulation of black money in the economy . In its circular no. 25 dated 01-10-2003 , RBI has expressed unhappiness about misuse of import LC's by unauthorized agencies for importing gold and strict instructions are issued for complying with regulations/guidelines. Further

stringning of regulatory norms for import of gold by RBI vide master circular of July 2005 onerous responsibilities have been placed on approved banks and nominated agencies to do due diligence/KYC/verification of suppliers, importers and user of the gold on a more tightened basis.

On the perusal of the documents which are on record it is crystal clear that the assessee was not having adequate infrastructure to handle such huge transactions in gold bars and had no experience to handle turnover in gold bars of such a huge magnitude , rather if the theory of assessee is accepted as to the sale and purchase of gold bars , then by not disclosing the names of ultimate buyers of gold who have allegedly bought gold through assessee, the assessee has in fact facilitated introduction of the undisclosed money of his buyers into the bank accounts of the assessee and its conversion into gold bars without disclosing their identity which also prevented end use of gold bars to be monitored. Reference is drawn to a recent decision of Hon'ble Supreme Court in the case of Binoy Viswam v. UOI reported in (2017) 82 taxmann.com 211(SC) , wherein Lordships have held in no uncertain terms that menace of the black money which is deep rooted in the economy need to be tackled by taking multiple actions at the same time, by holding as under :

“99. Unearthing black money or checking money laundering is to be achieved to whatever extent possible. Various measures can be taken in this behalf. If one of the measures is introduction of Aadhaar into the tax regime, it cannot be denounced only because of the reason that the purpose would not be achieved fully. Such kind of menace, which is deep rooted, needs to be tackled by taking multiple actions and those actions may be initiated at the same time. It is the combined effect of these actions which may yield results and each individual action considered in isolation may not be sufficient. Therefore, rationality of a particular measure cannot be challenged on the ground that it has no nexus with the objective to be achieved. Of course, there is a definite objective. For this purpose alone, individual measure cannot be ridiculed. We have already taken note of the recommendations of SIT on black money headed by Justice M.B. Shah. We have also reproduced the measures

suggested by the committee headed by Chairman, CBDT on 'Measures to tackle black money in India and Abroad'. They have, in no uncertain terms, suggested that one singular proof of identity of a person for entering into finance/business transactions etc may go a long way in curbing this foul practice."

Reference is also drawn to recent decision of Hon'ble Delhi High Court in the case of CIT v. D.K.Garg in ITA no 115 /2005 , wherein Lordships have held that an accommodation entry provider wanting to avail the benefit of the 'peak credit' has to make a clean breast of all the facts within his knowledge concerning the credit entries in the accounts. The tax-payer has to explain with sufficient detail the source of all the deposits in his accounts as well as the corresponding destination of all payments from the accounts. The tax-payer should be able to show that money has been transferred through banking channels from the bank account of creditors to the bank account of the assessee, the identity of the creditors and that the money paid from the accounts of the tax-payer has returned to the bank accounts of the creditors. The tax-payer has to discharge the primary onus of disclosure in this regard . Their Lordships held as under:

"15. The present case, however, is of a different nature. Here, we are dealing with an Assessee who does not deny that he is an accommodation entry provider. He, in fact, makes no bones of the fact that he either owned or floated 'paper companies' only for that purpose. He also does not dispute the fact that he has not been able to explain the source of all the deposits in his accounts or the ultimate destination of all the outgo from his accounts.

16. The Assessee's plea that he should be taxed only on a composite 'peak credit' is based entirely on principles of accountancy. He questions the logic behind allowing peak credits for some of the credit entries by way of cheques and denying it for the other entries in cash. He also questions the practice of working out separate peak credits for cheque and cash transactions.

17. The premise underlying the concept of peak credit is the squaring up of the deposits in the account with the corresponding payments out of the

account to the same person. In **Bhaiyalal Shyam Bihari v. CIT** (supra), the Allahabad High Court explained that benefit of peak can be given only when the assessee owns up all the cash credits in the books of accounts. It was further held:

"For adjudicating upon the plea of peak credit the factual foundation has to be laid by the assessee. He has to own all cash credit entries in the books of account and only thereafter can the question of peak credit be raised."

18. In that case, it was held that as the amount of cash credits stood in the names of different persons which the Assessee had all along been claiming to be genuine deposits, withdrawals/payments to different persons during the previous years, the Assessee was, therefore, not entitled to claim the benefit of peak credit. Later in **CIT v. Vijay Agricultural Industries** (supra), it was reiterated that: "The principle of peak credit is not applicable in case where the deposits remained unexplained under Section 68 of the Act. It cannot apply in a case of different depositors where there has been no transaction of deposits and repayment between a particular depositor and the assessee." On the facts of that case it was held that peak credit could be applied only in the case of squared up accounts. In other words, where an Assessee was unable to explain the sources of deposits and the corresponding payments then he would not get the benefit of 'peak credit'.

19. The legal position in respect of an accommodation entry provider seeking the benefit of 'peak credit' appears to have been totally overlooked by the ITAT in the present case. Indeed, if the Assessee as a self-confessed accommodation entry provider wanted to avail the benefit of the 'peak credit', he had to make a clean breast of all the facts within his knowledge concerning the credit entries in the accounts. He has to explain with sufficient detail the source of all the deposits in his accounts as well as the corresponding destination of all payments from the accounts. The Assessee should be able to show that money has been transferred through banking channels from the bank account of creditors to the bank account of the Assessee, the identity of the creditors and that the money paid from the accounts of the Assessee has returned to the bank accounts of the creditors. The Assessee has to discharge the primary onus of disclosure in this regard.

20. While the AO in the present case did not question the working out of the peak credit by the Assessee, he, at the same time, insisted that the additions made by him to the returned income of the Assessee should be sustained. The peak credit worked out by the Assessee was on the basis that the principle of peak credit would apply, notwithstanding the failure of the Assessee to explain each of the sources of the deposits and the

corresponding destination of the payment without squaring them off. That is not permissible in law as explained by the Allahabad High Court in the aforementioned decisions which, this Court concurs with.

Conclusion

21. As already noted, the ITAT went merely on the basis of accountancy, overlooking the settled legal position that peak credit is not applicable where deposits remain unexplained under Section 68 of the Act. The question of law framed by this Court, is accordingly, answered in the negative i.e. in favour of the Revenue and against the Assessee. The impugned order of ITAT is, accordingly, set aside and the order of the AO is restored to file."

Reference is also drawn to the decision of Hon'ble Calcutta High Court in the case of *Rajmandir Estates Private Limited v Pr. CIT* (2016) 386 ITR 162(Cal. HC), wherein Lordships has discussed the concept of laundering of black money as follows:

"In a commentary on the Prevention of Money Laundering Act, 2002 by Dr. M. C. Mehanathan published by Lexis Nexis, 2014, the steps of money laundering are described as follows:—

"STEPS OF MONEY-LAUNDERING

Although money-laundering often involves a complex series of transactions, it generally includes the following three basic steps:

1. Placement

It involves introduction of the proceeds of crime into the financial system. This is accomplished by breaking up large amounts of cash into smaller sums that are then deposited directly into a bank account, or by purchasing monetary instruments, transferring the cash overseas for deposit in banking/financial institutions, use for purchase of high value things such as gold, precious stones, art works etc. and reselling the same through cheques or bank transfers etc.

2. Layering

This involves formation of complex layers of financial transactions which distance the illicit proceeds from their source and disguise the audit trail. In this process a series of conversions or transactions are involved for moving the funds to places such as offshore financial centres operating in a liberal regulatory regime. Often "front" companies are formed to accomplish this task. These companies obscure the real owners of the money through the bank

secrecy laws and attorney-client privilege. The techniques used for the purpose are to lend the proceeds back to the owner as loans, gifts and etc., under invoicing the items exported to the real owner or etc. In some cases, the transfers may be disguised as payments for goods or services, thus giving them a legitimate appearance.

3. Integration

This involves investment in the legitimate economy so that the money gets the colour of legitimacy. This is achieved by techniques such as lending the money through "front" companies etc. The money may be invested in real estates, business and etc.

The stages at which money-laundering could be easily detected are those where cash enters into the domestic financial system, either formally or informally, where it is sent abroad to be integrated into the financial systems of tax haven countries and where it is repatriated in the form of transfers."

The role of the revenue authorities in tackling the menace of laundering black money was commented by the learned author as follows:—

"It has to be kept in view that India has a problem of black economy, which is unaccounted and many a time the holders of black money also launder the black money in order to acquire legitimate assets. Legal or illegal income which evades tax and illegal income that comes within the exempted taxation slab constitute the unreported Gross Domestic Product or black economy. Laundering the black money and laundering proceeds of crime are two different issues, although there is frequent overlap between the two. While laundering black money is to be handled through taxation laws or similar laws, the laundering of proceeds of crime is to be handled through special anti-money-laundering laws."

Now coming back to the controversy in hand , we have observed that the assessee has allegedly made sales of gold bars to the tune of Rs. 49,17,69,925/- during the impugned assessment year wherein sale proceeds have been stated to have been received in cash from undisclosed buyers which has been deposited by the assessee in the bank account of the assessee and hence sources of these cash deposit could not be satisfactorily explained by the assessee although the same is stated to be cash received on account of cash sales of gold bars to undisclosed buyers. Thus, if the story of the assessee is to be believed then he had acted in a manner to facilitate

conversion of undisclosed money of undisclosed persons to enable them to convert their undisclosed money into safe havens of gold bar at his own perils which got further aggravated by a consistent adamant and unacceptable stand of the assessee in not revealing the names of buyers of the gold bars by stating that the details of these buyers who have paid in cash for gold bar are not known to the assessee which stand of the assessee also prevented authorities below to make enquiry against these holders of undisclosed money leading to escapement of income in the hands of such undisclosed buyers due to the adamant stand of the assessee in not revealing the identities of the said undisclosed buyers , and the assessee is acting in a manner to shield these un-identified persons for which the assessee itself is to be blame for his own agonies. It is settled proposition that the Court will assist those who come to Court with clean hands and Court will not help those whose own hands are dirty. At this stage it is important to refer to provisions of Section 106 and 114(g) of the Indian Evidence Act,1872. Section 106 of the 1872 Act stipulates that burden of proving fact which is especially within the knowledge of any person is on that person. Similarly Section 114(g) of the 1872 Act stipulates that the evidence which could be and is not produces would , if produced, be unfavourable to the person who withholds it. The assessee in the instant appeal has withheld the details and identity of the buyers of gold bars for which the assessee is to be blamed and presumption is drawn against the assessee as it cannot be accepted that such a huge sales averaging more than Rs 3 crores executed per one sale invoice in majority of cases by the assessee to persons whose details are not known to the assessee rather the assessee is deliberately withholding such details at his own peril and is clearly hit by Section 106 and 114(g) of the 1872 Act and presumption is drawn against the assessee that either the assessee has introduced his own undisclosed income into the bank accounts of the assessee or if the story of the assessee is believed has facilitated introduction of undisclosed money of the undisclosed buyers of gold and its conversion

into gold without revealing identity of the buyers . It is stated by the assessee that there is no onus on the assessee under any law to reveal the identity of buyers who allegedly bought gold bars from the assessee, this argument is fallacious as the amount of cash allegedly received from unknown buyers of gold bars stood deposited in the bank account of the assessee and are cash credits appearing in books of accounts of the assessee and the assessee has to fulfill three ingredients requirements as are mandated u/s 68 before the said cash credits can be accepted viz. identity of the creditors, credit worthiness of the creditors and genuineness of the cash credits . Thus, to say that no burden lay on the assessee to fulfill all the three ingredient requirements stated above before its accepted wherein one of the ingredient requirement is to establish identity of the creditor.

Thus, these so called proceeds of cash sales deposited in bank accounts of the assessee are cash credits appearing in the books of accounts of the assessee sources of which are not satisfactorily explained by the assessee keeping in view detailed factual matrix of the case discussed by us in preceding para's of this order and mandate and onus cast under Section 68 on the assessee is not fulfilled. The genuineness of these cash receipts could not be satisfactorily proved by the assessee as there is no third party evidences to substantiate the authenticity of these cash deposits as no details of the said persons to whom cash sales were allegedly made by the assessee was revealed by the assessee. It is incomprehensible and unacceptable that the assessee having issued cash sales invoices of average value of around Rs. 3 crores per single invoice in majority of case and at the same time the assessee is claiming that the name of the said alleged buyers of gold bars is not known to the assessee rather it is the assessee who is actively concealing the identity of these so called buyers of gold bars. It is incomprehensible keeping in view factual matrix of the case that the assessee have extended credit of Rs. 27.55 crores to its so called buyers of gold bars out of sale of gold

bars of Rs. 48.99 crores concluded in April 2005 as the said amount of Rs. 27.55 crores was realized in the months of May, June, July and August 2005 which does not inspire confidence. The genuineness of the business of gold bars carried on by the assessee of such huge magnitude keeping in view background of the assessee based on material on record and infrastructure facilities maintained by the assessee as well no experience in this field itself cast serious shadow of doubt on the genuineness of said business carried on by the assessee. The onus was on the assessee to prove genuineness of the business of gold bars conducted by the assessee. Reference is drawn to decision of Hon'ble Supreme Court in the case of Sumati Dayal (Supra). Provisions of Section 68 of the Act is a special provision and is a deeming provision which cast obligation on the assessee to satisfactorily explain the cash credits appearing in books of accounts of the assessee by revealing identity, creditworthiness of the creditor and genuineness of the transaction which has not been fulfilled by the assessee and burden cast on the assessee is not fulfilled by the assessee in the instant case as detailed above. Provisions of Section 68 as were applicable for relevant assessment year are reproduced hereunder:

“Cash credits.

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

The assessee failed to satisfactorily explain the sources of these cash deposits in bank accounts of the assessee which are in the nature of cash credits in the books of accounts / bank accounts of the assessee, which is stated to be from cash sales of gold bar wherein identity of the buyers is not revealed by the assessee and is a device used to convert undisclosed income/money into gold bars without disclosure of the identity of depositor of cash in bank

accounts, and thus burden cast on the assessee u/s 68 did not stand discharged and the said cash credit will be deemed to be income of the assessee from the undisclosed income chargeable to tax within deeming fiction of Section 68 of the 1961 Act, which in the instant case we hold this issue against the assessee and in favour of Revenue based on factual matrix of the case detailed above. Reference is made to the decision of Hon'ble Calcutta High Court in the case of CIT v. Sanjay Jain (2015) 55 taxmann.com 512(Calcutta), wherein Lordships held as under:

"5. The judgements cited by Mr. Bagaria, according to us, have no application to the facts and circumstances of the case. It is not in dispute that alleged sale of share by the assessee was through the broker M/s. M.L. Dhingra & Associates that in fact is the case of the assessee as would appear from the order of the Tribunal. The name of the person to whom the shares were, in fact, sold has not been disclosed. The sale proceeds were admittedly received in cash. In case of sale of shares by a broker a sold note and bought note is issued in the usual course of business. But, no such sold note issued by the broker was issued by the assessee. Both the sale of shares and recovery of the alleged existing dues are in the special knowledge of the assessee and the alleged buyer and the alleged debtor. During the assessment the assessee was present. He could have adduced evidence which was in his special knowledge which is also the requirement of law in Section 106 of the Evidence Act.

"106. Burden of proving fact especially within knowledge.-When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him".

6. In a catena of judgments Supreme Court held that requirement of Section 106 is that the person concerned has to adduce such evidence as is supposed in the ordinary course of business to be within his power. If the shares were sold and sale proceeds were received in cash the assessee could have produced the sold note. The assessee could have also applied for issuance of summons both to the broker and the buyer. He could have led evidence through them proving the transaction of share. Similarly he could have applied for issuance of summons for examining the debtor who had allegedly repaid the money in cash and it could have been said that the assessee did whatever was within his power, but the assessee did not discharge his burden. Law requires the assessee to satisfy the Assessing Officer. Satisfaction of the Assessing Officer cannot be of a higher or lower level than the satisfaction of any person of ordinary prudence. If the assessee has taken steps to satisfy a person of ordinary prudence then he can be said to have discharged his burden, but if the assessee consciously chose not to do what was within his power then he could be said not to have discharged his burden. The judgement in the case of Exoimp Resources (India) Ltd. (supra) is distinguishable because in that case the case of the assessee was that he had furnished evidence which was not considered and

therefore the matter was remanded. The judgement in the case of Jaora Flour and Foods (P.) Ltd. (*supra*) is distinguishable because in a search and survey, a sum of rupees ten lakhs were found which the Revenue thought was unaccounted money, but it transpired that it had duly been reflected in the books of accounts. Double taxation could not have been permitted and that was not also a case of **Section 68**. **Section 68** is squarely applicable in this case because the money was found credited in the books of accounts of the assessee and the assessee was unable to satisfy the Assessing Officer by adducing proper evidence. Which evidence was not adduced by the assessee will appear from the judgement of the Assessing Officer which reads as follows:

"It is further found that assessee has shown cash receipt from M.L. Dhingra & Associates for Rs.10,61,834.44 and from **sale** of shares amounting to Rs. 21,55,950/-. In course of hearing A/R of the assessee as well as the assessee was requested to produce the documentary evidence in support of his claim regarding receipt of above cash but no documentary evidence has been filed. Neither any one from M/s. M.L. Dhingra & Associates was produced nor any confirmation filed. No request to issue summon made."

7. The Commissioner of Income Tax rejected an appeal preferred by the assessee agreeing with the views of the Assessing Officer opined as follows:

" I have perused the assessment order and considered the submission of the appellant. The AO has mentioned in the assessment order that the appellant could produce no evidence in support of his contentions. This fact has not been disputed by the appellant. There is no material on record to show that cash of Rs. 21,55,950/-was received on **sale** of share. Similarly, there is no evidence on record to show that cash of Rs. 10,61,834/- was received from M/s. M L Dhingra & Associates. Confirmation from the said party was not filed before the AO. Even during the course of appellate **proceedings**, the appellant could bring no material or evidence on record in support of his contentions. I also find no substance in the argument that, since the AO has not rejected the books of account, the provisions of **section 68** have no application. There is no requirement in law that books should be rejected before invoking the provisions of **Section 68**. In view of the above, I am of the opinion that the AO has rightly held that the appellant has failed to explain the source of the cash deposits totalling to Rs. 32,17,784/-. The addition made by the AO is confirmed. The grounds raised by the appellant are liable to be dismissed."

8. The judgement of the Assessing Officer and the CIT(A) disclose in no uncertain terms that the evidence including steps which the assessee could have taken were not resorted to. Therefore, the Assessing Officer was entitled in law to draw an adverse inference which is authorized by **Section 114(g)** of the Evidence Act which permits a presumption as follows:

"That evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it;"

9. For the reasons aforesaid, we are of the opinion that the judgement under challenge cannot be sustained and, therefore, judgement of the Tribunal is set aside. The judgement of the CIT(A) is restored."

Reference is also drawn to the decision of Hon'ble Karnataka High Court in the case of P M Abdulla v. ITO (2015) 60 taxmann.com 52(Kar.) , decision of Hon'ble Punjab and Haryana High Court in the case of Self Knitting Works v. CIT (2014) 27 Taxman 253(P&H HC) and decision of Hon'ble High Court of Karnataka in the case of Smt Rekha Krishnaraj v. ITO (2013) 215 Taxman 159(Kar) , wherein SLP filed against the said case stood dismissed by Hon'ble Supreme Court in the case of Rekha Krishnaraj v. ITO (2017) 85 taxmann.com 256(SC).

The whole controversy can also be seen from the another angle , the assessee could not satisfactorily explain the sources of expenditure incurred by the assessee towards purchases to tune of Rs. 48.78 crores during the subject assessment year as the payments for these purchases are stated to be made out of cash deposited in bank accounts out of so called cash sales of gold made by the assessee of which identity of the buyers is not revealed by the assessee. Provisions of Section 69C as were applicable for impugned assessment year are reproduced below:-

“ [Unexplained expenditure, etc.

69C. Where in any financial year an assessee has incurred any expenditure and he offers no explanation about the source of such expenditure or part thereof, or the explanation, if any, offered by him is not, in the opinion of the [Assessing] Officer, satisfactory, the amount covered by such expenditure or part thereof, as the case may be, may be deemed to be the income of the assessee for such financial year :]

[Provided that, notwithstanding anything contained in any other provision of this Act, such unexplained expenditure which is deemed to be the income of the assessee shall not be allowed as a deduction under any head of income.]”

The assessee in the instant case as we have seen could not satisfactorily explain the sources of cash deposit of huge magnitude of more than Rs. 49 crores in his bank account which he claimed to be from cash sales from gold bars to the persons wherein the identity of the buyers are not revealed by the

assessee. Thus, the assessee could not satisfactorily explain the sources of cash deposit in the bank account and consequently sources of incurring expenditure by way of purchases claimed by the assessee in its Profit and Loss Account of Rs.48.78 crores could not be satisfactorily explained by the assessee and onus cast u/s 69C was not satisfied which will make amount covered by such expenditure represented by purchases of gold bars to be deemed income of the assessee under the deeming fiction of Section 69C. The said Section 69C is further controlled by proviso which has an overriding effect and provides that notwithstanding anything contained in any other provision of the 1961 Act, such unexplained expenditure which is deemed to be the income of the assessee shall not be allowed as a deduction under any head of income. Thus , Section 69C read with proviso makes it abundantly clear that the amount represented by expenditure incurred by the assessee towards purchases of gold bars constitute income within deeming fiction of 69C of the 1961 Act. Thus, we set aside the order of learned CIT(A) and confirm the addition to the tune of Rs 49,17,69,925/- (Rs Forty nine crores seventeen lacs sixty nine thousand nine hundred and twenty five only) for detailed reasons as cited above. Thus, Revenue succeeds on this ground while the assessee fails on this issue in their respective appeals. We order accordingly.

11. With respect to ground no 2 raised by the assessee in its appeal before the tribunal, an addition of Rs. 1,35,516/- in respect of difference in closing capital of Meenakshi Enterprises (proprietary concern of the assessee) was proposed by learned CIT(A) based on remand report of the AO. The said additions has been made by learned CIT(A) for the first time in his appellate order which has led to enhancement of the assessment. The assessee had contended that the assessee was never show caused by learned CIT(A) before such enhancement of income and the principles of natural justice are vitiated while as per learned CIT(A) orders the assessee was asked to explain the said

difference in capital to which the assessee never replied. In fitness of things in the interest of justice, the assessee deserves one more opportunity and let the matter be restored to the file of the AO for fresh adjudication on merits after giving opportunity of being heard to the assessee and after considering the replies of the assessee . We order accordingly.

12. In the result, the appeal filed by the assessee in ITA No. 1295/Mum/2014 and the appeal filed by the Revenue in ITA No. 2415/Mum/2014 for the assessment year 2006-07 are disposed of as indicated above , wherein Revenue appeal is allowed while assessee appeal is partly allowed for statistical purposes.

Order pronounced in the open court on 3rd October, 2017.

आदेश की घोषणा खुले न्यायालय में दिनांक: 03.10.2017 को की गई ।

Sd/-

(Saktijit Dey)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated 03.10.2017

व.नि.स./ R.K., Ex. Sr. PS

Sd/-

(RAMIT KOCHAR)
ACCOUNTANT MEMBER

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned, Mumbai
4. आयकर आयुक्त / CIT- Concerned, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai "C" Bench
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

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