Assistant Commissioner of Vs. Kumar Ice

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Court : Income Tax Appellate Tribunal ITAT Patna

Decided On : May-12-1997

Reported in : (1998)64ITD93(Pat.)

Appellant : Assistant Commissioner of

Respondent : Kumar Ice

Judgement :

1. This is an appeal, filed by the Department and a Cross Objection (C.O.), filed by the assessee. They are being disposed of by a common order for the sake of convenience.

2. The departmental appeal is directed against an order of the CIT(A) deleting the addition of Rs. 1,25,000 as cash under section 68 of the Act, in the names of 12 person, 6 of whom were minors, as listed below :12. Rabindra Kumar Singh Rs. 11,000 ---------- 3. The Assessing Officer (A.O.) observed in the assessment order that the assessee had furnished confirmations of all the creditors who were being assessed to income-tax at Calcutta. However, a perusal showed that the deposits were unaccounted money of the partners. The creditors had given a common address at 10, Ezra Street, Calcutta, which was actually the office address of the Chartered Accountant of the whole group. The parents of the minors were also the creditors and had given their addresses as Maharani Road, Gaya. The Assessing Officer took a view that the Calcutta address had been given only to escape intense scrutiny. He also observed that from a perusal of the Income-tax Statements filed with the Return, it appeared that the creditors had no genuine source of income. He gave the following particulars in the assessment orders :Name of the partners Source of income Amount (major source)Chandan Kumar Singh Petty gift Rs. 14,162Ranjan Kumar Singh " Rs. 21,055Shiwani Singh " Rs. 28,799Gunjan Kumar Singh " Rs. 20,866Kundan Kumar Singh Commission income(He is a college going & other sources Rs. 17,000 (Appx.)student, age 20 years)Miss Shalini Petty gift Rs. 27,560Unayan Kumar Singh " Rs. 16,170Chandani Singh " Rs. 40,128 4. The Assessing Officer further held that the cash gifts and commission income were not verifiable and had been shown for capital formation only. He presumed that the gifts had been made by family members but the withdrawal of the male elder members was Rs. 49,800 only while the total gifts in the name of minors was more than Rs. 1.5 lacs. He, therefore, held that the credits were unexplained.

5. The Assessing Officer thereafter referred to the creditors at serial numbers 9 to 12 above and observed that the assessee had furnished respective confirmation and computation of income as filed with their Income-tax Return. All were assessed at Gaya. However, he took a view that it was a case of capital formation because all had shown rental/speculation income which was not supported by any evidence. The bank pass book showed that the accounts were opened in UCO Bank with cash deposits of different sums on 19-9-1985 and they appeared in continuous serial Nos. He, therefore, did not give importance to the credits made by giving account payee cheques. These deposits were also treated as unexplained. An addition of Rs. 1,25,000 was, accordingly, made under section 68 of the Act.

5A. The assessee submitted before the CIT(A) that all the above persons were assessed to income-tax for more than 10 years and the returns had been filed from year to year in time and their first assessments had

been completed after scrutiny under section 143(3). Copies of some of the assessment orders were also produced before him and have been mentioned in the appellate order. It was further stated that the loans were reflected in the Statement of Account filed by them in their Income-tax Returns which had been duly accepted in their assessments.

It was further submitted that contrary to the observations of the Assessing Officer the major source of income was interest on investment and it had been mentioned in the assessment orders that confirmations in respect of petty cash gifts had been filed. Reliance was placed on the decision of the Patna High Court, in the case of Sarogi Credit Corpn. v. CIT 6. The CIT(A) found merit in the contention. He observed that the assessee had furnished adequate evidence in regard to the genuineness of the cash credits and it had been rejected merely on presumption. The first return and the first assessments of the loan creditors had been completed long before the accounting year under consideration in case of the assessee. He, therefore, accepted the explanation regarding the source of deposits and deleted the addition of Rs. 1,25,000.

6A. The ld. D.R. for the assessee reiterated the reasons given in the assessment orders and emphasised that all the creditors were relatives of the partners and, therefore, the burden of proof on the assessee was higher than the burden in the case of the credits from third parties, as held by the Patna High Court in the case of Sarogi Credit Corpn.

(supra). The assessee's burden extended to proving the nature and source of the entries. It was further submitted that filing of a return by the creditors was only prima facie evidence of the source of income but not conclusive evidence. Reliance was placed on the decision of the Bombay Bench of the Tribunal in the case of IAC v. Indian Art Emporium [1994] 50 ITD 21 (TM). In reply to a query from the Bench whether the assessee had been confronted with the doubts and suspicions of the Assessing Officer, the ld. D.R. very fairly submitted that the assessee had not been confronted. However, she submitted further that it was a fit case where the matter should be restored to the file of the Assessing Officer for confronting the assessee with the suspicions and carrying out further enquiry.

7. The ld. counsel for the assessee, on the other hand, supported the order of the CIT(A). He submitted further that a finding had been given in the assessment order that money belonged to male members of the family and, therefore, as far as the assessee-firm was concerned, stood explained. After giving such a finding the addition could be made, it at all, in the hands of the male members but not in the hands of the firm. He also submitted that it was not the obligation of the assessee-firm to establish the source of the source, i.e., the source from where the male members obtained their funds.

8. We have considered the rival submissions carefully. All the creditors were related to the partners of the firm and, therefore, we accept the contention of the ld. D.R. that the burden of proof on the assessee extended to proving the nature and source of entries in view of the decision of the Patna High Court in the case of Sarogi Credit Corpn. (supra). The question now arises whether that burden has been discharged by the assessee. Confirmatory letters were filed from all the creditors and they were all assessed to income-tax. The CIT(A) has verified that the assessments were completed under section 143(3) and not summarily under section 143(1) and the source of petty gifts was also accepted. The loans were shown in the Statement of Accounts of the creditors. The facts are distinguishable from the facts in the case of Indian Art Emporium (supra). In that case, there were cash credits in the accounts of two HUFs where it was claimed that they had agricultural income. The statements of two kartas were recorded and other attendants circumstances were taken into account and contradictions were found. It was in that back-ground that the Tribunal observed that mere declaration of income in a return filed before the Department did not prove the existence of income and the return could only provide prima facie evidence but not conclusive evidence. In that case, the returns had been filed but the assessments had not yet been made. The facts in the present case are distinguishable inasmuch as the returns of the creditors were duly scrutinised and assessments made.

Further there was no effort on the part of the Assessing Officer to verify the doubts either by examining the

creditors or by looking at the assessment records of the creditors. He proceeded on conjectures and surmises only.

9. In this connection, the decision of the Hon'ble Supreme Court in the case of CIT v. Orissa Corpn. (P.) Ltd. [1986] 159 ITR 78/25 Taxman 80F is also relevant and was mentioned by the Bench in the Court. An extract from the decision is reproduced below : "In this case, the assessee had given the names and addresses of the alleged creditors. It was in the knowledge of the revenue that the said creditors were income-tax assessees. Their index numbers were in the file of the revenue. The revenue, apart from issuing notices under section 131 at the instance of the assessee, did not pursue the matter further. The revenue did not examine the source of income of the said alleged creditors to find out whether they were creditworthy or were such who could advance the alleged loans. There was no effort made to pursue the so-called alleged creditors. In those circumstances, the assessee could not do anything further. In the premises, if the Tribunal came to the conclusion that the assessee has discharged the burden that lay on him, then it could not be said that such a conclusion was unreasonable or perverse or based on no evidence. If the conclusion is based on some evidence on which a conclusion could be arrived at, no question of law as such arises." 10. Considering the entire facts and circumstances of the case, including the fact the due verification was made in the assessments of the creditors, we hold that the assessee had discharged the burden of proof under section 68 of the Act and CIT(A) has rightly deleted addition of Rs. 1,25,000. The Departmental appeal is, therefore, dismissed.

11. We will now take up the Cross Objection of the assessee. It only supports the order of the CIT(A) stating that it was justified deleting the addition of Rs. 1,25,000. In view of our decision in the departmental appeal, the C.O. is allowed.

1. I have studied the order passed by my ld. Brother (AM) and with regard to him, I am unable to concur with his finding and conclusion that the assessee-firm discharged the onus which lay upon it in law in respect of loans obtained by it from various minors, ladies and other relatives of the partners of the assessee-firm aggregating to Rs. 1.25 lacs. My ld. Brother has very succinctly narrated the facts of the case and, therefore, I do not wish to say anything on that.

2. According to me, the Assessing Officer (AO) has committed illegality and error in failing to conduct valid and proper enquiry as envisaged in law, in respect of the loan transactions which were not from any outsider but from close relatives of the partners of the assessee-firm and include minors and ladies also. Admittedly, the assessee-firm and its partners are permanent residents of Gaya and are assessed to income-tax by the concerned territorial Assessing Officer at Gaya. The minors/ladies and other relatives have filed their Income-tax Returns at Calcutta declaring their permanent residence at 10, Ezra Street, Calcutta which the Assessing Officer, after enquiry, has stated that it is an office address of the Chartered Accountant who filed the returns of those ladies/minors. It is too curious and strange as to how those minors/ladies/relatives who are, in fact, permanent residents of Gaya and staying with their respective parents/husbands came to file Income-tax Returns with the ITO at Calcutta, declaring in the verification part of the return that they all are resident of 10, Ezra Street, Calcutta and got their income-tax assessment finalised there 3. It is no concern of the territorial Assessing Officer at Calcutta to find out whether the assessee who filed his/her return before him is or is not a permanent resident of Calcutta but that of Gaya. But surely it is the duty of the Assessing Officer at Gaya assessing the firm which took loans from those minors and ladies to find out the truth as to how when the minor/ladies are actually resident of and staying at Gaya with their respective parents/husband, filed Income-tax Returns showing their permanent residence at some place and investigation and it is not mere doubt and suspicion which the Assessing Officer harboured in his mind. In my view, it is the actual and real truth; it is the veracity and bona fides of the transactions which require to be enquired into and brought to surface. In addition to this, there are several queries which are required to be answered, viz., as to where the moneys were kept; who brought the cash from Calcutta to Gaya; and how the ladies/minors came to earn income; what was saved from which loans were advanced to the assessee firm No doubt these questions have to be put by the Assessing Officer at Calcutta but in the present peculiar facts and circumstances of the case when

the parents/husbands are residing at Gaya and Income-tax Returns for several years are filed at Calcutta showing their permanent residence in some locality at Calcutta then it is equally the duty of the Assessing Officer at Gaya to demand answers in respect of the queries. From the contents of the assessment order it is abundantly clear that no such enquiry was made or conducted by the Assessing Officer at Gaya, assessing the assessee-firm.

4. Mere filing of returns for few past assessment years by the partners/ladies at Calcutta and get the assessments completed there, do not go to establish that the loans are genuine or that those ladies had explainable and valid sources to advance loans to the assessee-firm.

Nor mere filing of confirmation letters go to establish that the loans are genuine and that the assessee-firm discharged the legal onus which lay upon it.

5. Though the Tribunal is the highest and final fact-finding authority; yet neither the assessee nor the revenue filed a single copy of the so-called confirmation letters stated to have been filed by the lenders. When asked for by me during the course of hearing of the appeal, the ld. counsel for the assessee Shri K. N. Jain showed to me from his file a printed copy on which it was written 'statement of accounts' and some figures noted in the body of the assessee-firm and the other of the so-called lender. Though directed, copy of that paper has not been filed for appeal records. I fail to understand how can such a paper constitute legal evidence and be given credence in quasi-judicial proceedings. That paper stated to be a 'confirmation letter' does not inspire any confidence in the mind of any reasonable man. In may view such a paper cannot be construed or taken as a valid legal evidence on the strength of which it can be held that the assessee discharged the legal onus which lay on it. The A/C has given much credence to the copies of statements of incomes declared by the lenders which accompanied Income-tax Returns filed at Calcutta and copies of the assessment orders passed by the Assessing Officer at Calcutta. All these papers were perhaps filed only before the A/C and it is not known whether the same were filed before the Assessing Officer as I do not find any discussion in this regard in the assessment order though eloquently discussed by the A/C in the impugned order. According to me, those papers do not constitute sufficient proof of ladies and minors having explained source ultimately leading to the conclusion that the burden stood discharged in terms of section 68 of the Act. In my view, I repeat, the same does not constitute valid, legal and reliable evidence establishing genuineness of loans nor on the basis of such papers it can be said or held lawfully that the burden is fully discharged by the assessee-firm.

6. The Assessing Officer is right in saying that those minors/ladies filed the returns at Calcutta though permanent residence of Gaya in order to avoid proper scrutiny and enquiry at Gaya. It is well-known common fact that very many assessees, in order to explain away sources of credit entries in respect of alleged loans file returns of minors and ladies at a places other than their actual residences particularly in metropolitan cities like Bombay, Madras, Delhi, Calcutta showing interest income from out of petty gifts received in the course of earlier several years or the ladies having derived income from speculative transactions, tailoring embroidery, Papad and Achar making, etc. These type of returns filed in metropolitan cities came to be known as 'capital built-up' cases as has been remarked by the Assessing Officer also in his assessment order. The loans obtained by the assessee-firm cast a doubt and suspicion in the mind of any prudent and reasonable man that this assessee-firm also might have followed the same pattern to explain away the alleged loans. I am not saying that the assessee-firm is a part of such capital built-up scheme. But the mode and manner in which loans are started to have been obtained and the filing of returns of minors and ladies at Calcutta while in fact they are permanent resident at Gaya do positively cast doubts and shakes the validity of the evidence filed and produced in this case before the A/C.7. The Hon'ble Patna High Court has laid down in the case of Sarogi Credit Corpn. (supra) at page 349 that "if the credit entry stands in the name of assessee's wife and children, or in the name of any other near relation or an employee of the assessee, the burden lies on the assessee though the entry is not in his name to explain satisfactorily the nature and source of that entry." 8. It is by now a trite law through various judgments of different Courts that an assessee in whose accounts a credit entry appears in the name of lender then he has not only to prove the genuineness of such loan transaction

but also has to prove the identity of the lender/creditor and the creditworthiness of such lender/creditor.

Proving or establishing creditworthiness does not mean that the borrower has to prove the source of the lender in advancing loan to the assessee. By creditworthiness is meant that the lender is a man of means and not man of grass and/or that the evidence filed by the lender in support of the loans is not sham or created for the purpose or it is not a make believe arrangement between him and the assessee and further that such evidence is credible and cogent so as to make any prudent and reasonable man to accept it and believe the same to be true.

9. The Hon'ble Supreme Court in the celebrated case of CIT v. Durga Prasad More [1971] 82 ITR 540 has observed that "science has not invented any instrument to test the reliability of the evidence placed before a Court or Tribunal. Therefore, the Courts and Tribunals have to judge the evidence before them by applying the test of human probabilities. Now it is against human conduct and probability that minors/ladies who are permanent residents of Gaya went all the way to a far of place like Calcutta to earn income from money-lending, speculation and commission etc., filed their Income-tax Returns there and got their assessments completed for the past several years. Even if there is truth in such state of affairs, the same has to be enquired, probed and explored which the Assessing Officer in this case has miserably failed. The Assessing Officer has been amply clothed by the Legislature under the various provisions of Income-tax Act, 1961 for conducting valid and proper enquiries under section 142/143 of the Income-tax Act. He has also plenary powers of discovery and production of evidence, etc., as per the provisions of section 131 of the Act.

This apart, the Assessing Officer has been vested with very wide powers in terms of sections 133A, 133B and 134 of the Act. All these powers under these provisions remained dormant in this case. Legal errors have been committed by the Assessing Officer in this case. They have to be corrected and the best way to correct is to remit the case to the base officer, viz., the Assessing Officer for reframing the assessment after thorough enquiry, as per law, which at the original stage, was not done. In this case, the judgment of the Hon'ble Supreme Court in the case of Guduthur Bros. v. ITO [1960] 40 ITR 298 deserves mention and discussion. In that case it has been held by their Lordships that 'if an order of an ITO is vitiated by illegality supervening during the course of assessment proceedings then such error or illegality can be corrected by an appellate authority (AAC) by remand and the ITO can proceed with the case from that stage where illegality occurred'. Again the Hon'ble Supreme Court in the case of Kapurchand Shrimal v. CIT [1981] 131 ITR 451/7 Taxman 6 have laid down that "an appellate authority has the jurisdiction as also the duty to correct all errors in the assessment proceedings under appeal and issue, if necessary, appropriate directions to the authority against whose decision, the appeal is preferred, to dispose of the whole or any part of the matter afresh, unless forbidden from doing so by the statute. The statute does not say that such a direction cannot be issued by the appellate authority in a case of this nature.

10. The Hon'ble Supreme Court in the case of Rampyari Devi Saraogi v.CIT [1968] 67 ITR 84 and again in the case of Smt. Tara Devi Aggarwal v. CIT [1973] 88 ITR 323 has held that if the ITO fails to make proper enquiries then the order passed by him is erroneous causing prejudice to Revenue and, therefore, Commissioner can step in under section 263 of the Act and correct such an order by setting aside the said assessment order with direction for redoing the assessment.

11. The jurisdictional Patna High Court has also in the case of CIT v.Smt. Pushpa Devi [1988] 173 ITR 445/40 Taxman 375 taken similar view following the above-mentioned two decisions of the Apex Court. This apart there are several decisions of different High Courts taking similar view. Various Benches of this Tribunal have also adopted such a view. I then see no reason why this Tribunal in this case possessing powers 'to pass order as it thinks fit' under section 254 of the Act, should not correct the order passed by the Assessing Officer which is erroneous on account of lack of or improper enquiry being conducted by the Assessing Officer. This is precisely what has happened in this case.

12. My ld. Brother has taken support from the observations of their Lordships of the Hon'ble Supreme Court

in the case of Orissa Corpn.

(P.) Ltd. (supra) that if an Assessing Officer fails to pursue the matter further with the creditors after issuing summons, then no question of law arose from Tribunal's order holding that the burden stood discharged.

In my view, these observations are limited to the facts and circumstances of that case and are not of universal application.

Moreover, the facts before the Hon'ble Supreme Court in that case are at variance with the facts in the present case. In that case, the ITO after issuing summons under section 131 did not make any further enquiries and, therefore, such observations were made by their Lordships. In this case, no enquiry whatsoever has been made by the Assessing Officer and not a singly creditor was examined by issuing summons under section 131 of the Act nor any type of private enquiries were conducted as laid down in section 142 as well as 143 of the Act.

Further their Lordships of the Hon'ble Supreme Court in that case were dealing with the appeals arising from the decision of the Orissa High Court refusing to direct the Tribunal to state a case under section 256(2) of the Act for reference of certain questions said to be questions of law arising out of the Tribunal's order. After examining the facts and circumstances of that case, the Hon'ble Supreme Court came to the conclusion that no question of law arose and, therefore, Orissa High Court was right in refusing to refer the questions sought for. The relevant portion of that judgment has been extracted by my ld.Brother at page 6 para 9 which clarifies the position narrated by him.

The Hon'ble Supreme Court in the case of Orissa Corpn. (P.) Ltd. (supra) have not laid down a ratio or principle that if no proper enquiries are made, done or conducted by the Assessing Officer then it shall be deemed that the loans are genuine or that the burden which lay upon the borrower assessee under section 68 stood duly discharged. The decision of the Supreme Court in Orissa Corpn. (P.) Ltd.'s case (supra) has to be read simultaneously and in conjunction with the two judgments of the Supreme Court in the case of Guduthur Bros. (supra) and Kapurchand Shrimal (supra).

13. It is well-settled proposition in law that a person has to establish and prove his case on the strength of merits and supporting legal and cogent evidence. He cannot stand of lack or proper pursuit of the case by the opposite side. Similarly in tax matters also an assessee cannot escape tax liability and stand to gain on the specious plea that the ITO acted perfunctorily and failed to make proper enquiries though authorised by law. While other similarly placed assessee's undergo proper enquiries and establish their case at the hands of vigilant and deligent Assessing Officer, this assessee cannot escape enquiries on account of laxity on the part of the Assessing Officer in making proper enquiries as per law. In tax matters if an Assessing Officer commits legal errors like failing to conduct a valid and proper enquiry though authorised by law then it does not mean that the matter stands concluded, shut or foreclosed or that the case cannot be restored to the file of the Assessing Officer with further directions for conducting valid and proper enquiries and for reframing fresh assessment as per law. In short, my view is that the Assessing Officer does not miss the bus. He still gets a chance.

(a) that the assessment order is vitiated and has to be vacated and set aside owing to supervening illegalities and errors committed by the Assessing Officer in failing to conduct valid and proper enquiries into the loan transactions though empowered and authorised by law.

(b) that the matter has to be restored to the file of the Assessing Officer with a direction to conduct valid and proper enquiry into the entire loan transactions amounting to Rs. 1.25 lacs and then to arrive at a fresh decision and reframe another assessment in accordance with law, but of course not without giving fair, proper and reasonable opportunity to the assessee-firm of being heard to state its case.

15. In the result, the appeal is disposed of accordingly with above directions.

REFERENCE TO THE HON'BLE PRESIDENT, INCOME-TAX APPELLATE TRIBUNAL UNDER SECTION 255(4) OF THE INCOME-TAX ACT, 1961 As we have different in our view in the above-mentioned appeals, we are making a reference to the Hon'ble President, ITAT of the below given two points for reference to Third Members as laid down in sub-section (4) of section 255 of the Income-tax Act, 1961. The points for reference are as under :- "(a) Whether, for the reasons given by the Accountant Member, the burden which lay on the assessee-firm under section 68 of the Income-tax Act, 1961 stood discharged (b) If not, whether for the reasons given by the Judicial Members, the matter is required to be restored to the file of the Assessing Officer for further enquiries in relation to the loans obtained by the assessee-firm to the tune of Rs. 1.25 lacs and for framing of a fresh assessment in accordance with law ?" 1. The appeal is by the revenue and the cross objection by the assessee. Both of them are consolidated and disposed of by the Patna Bench of the Tribunal. While disposing of, there was difference of opinion between the Members of the Bench. Two points of reference were made to me as Third Member, which are as follows : "(a) Whether, for the reasons given by the Accountant Member, the burden which lay on the assessee firm under section 68 of the Income-tax Act, 1961 stood discharged (b) If not, whether for the reasons given by the Judicial Member, the matter is required to be restored to the file of the Assessing Officer for further enquiries in relation to the loans obtained by the assessee-firm to the tune of Rs. 1.25 lacs and for framing of a fresh assessment in accordance with law." 2. I have heard Shri Ramjee Prasad, the learned counsel for the assessee, and Shri P. C. Mishra, the learned Departmental Representative.

3. The assessee is an Association of Persons. The assessment year involved is 1986-87, for which the previous year ended by 31-3-1987.

Return dated 7-9-1987 was filed disclosing total income at "Nil". There was search & seizure operation conducted under section 132 in the assessee's premises on 22-12-1987 and certain documents were seized from those premises, for which photo-copying was allowed to the assessee. In the accounting year in question, no sales and purchases were made. The assessee was investing amounts towards construction of factory building and purchase of machinery, etc. A sum of Rs. 3,20,170 has been credited in the balance sheet towards unsecured loans. Sources of these unsecured loans were gone into. Some of the unsecured loans amounting to Rs. 1.25 lakhs were shown to have been borrowed from 6 minors and also their fathers. The names of the minor creditors as well as the amounts said to have been borrowed from each of them were shown to have been as follows : Rabindra Kumar Singh) Rs. 5,000(2) Chandan Kumar Singh (minor son of Jitendra Kumar Singh) Rs. 17,000(3) Ranjan Kumar Singh (son of Jitendra Kumar Singh) Rs. 12,000(4) Unayan Kumar Singh (minor son of Krishna Kumar) Rs. 23,000(5) Kundan Kumar Singh (minor son of Krishna Kumar) Rs. 4,000(6) Gunjan Kumar Singh (minor son The fathers of the minors, who are members of the AOP, were found to have introduced cash said to have been derived from their respective HUFs on the dates and amounts shown against each of them : Name Date Amount(1) K. K. Singh 23-9-85 Rs. 9,000(2) -do- 31-3-86 Rs. 4,500(3) Jaykumar Singh 21-12-85 Rs. 10,000(4) -do- 31-3-86 Rs. 6,500(5) Jitendra Kumar Singh 31-3-86 Rs. 11,000(6) Rabindra Kumar Singh 31-3-86 Rs. 11,000 Confirmatory letters were filed with regard to each and every cash credit mentioned above before the Assessing Officer. All the cash creditors, either minors or majors, are income-tax assessees. However, the minors were assessed to income-tax at Calcutta and their address was given as 10, Ezra Street, Calcutta, whereas their father's address always remained at Maharani Road, Gaya. As per the appraisal report of the D.D.O. Ranchi, the Calcutta address given does not represent residence of any of the minors but is only found to be representing the office address of the Chartered Accountant of the whole group. It is significant that the computation sheet filed along with the income-tax return in the case of each of the minors was also filed before the Assessing Officer. The income-tax statements filed along with the return were all examined by the Assessing Officer and they revealed that the major source of income from which the minors derived the amounts which were ultimately lent to the assessee all came from petty gifts received by them. The amounts of petty gifts said to have been received by each of them are set out in the following statement :----------Name of minor creditor Source of income Amount----------(1) Chandan Kumar Singh Petty cash Rs. 14,162(2) Ranjan Kumar Singh - do - Rs. 21,055(3) Gunjan Kumar Singh - do - Rs. 20,866(4) Unayan Kumar Singh - do - Rs. 16,170(5) Chandani Singh - do - Rs. 40,128(6) Kundan Kumar Singh Commission

(He is a college-going income & Rs. 17,000 student of 20 years) other sources approx.---------- The Assessing Officer held that all the gifts were shown to be cash gifts and the were not verifiable. Similarly, the receipt of commission is not verifiable. The amounts shown against each of the minors were bogus amounts shown for the purpose of capital formation with an intention to later introduce in the business concern of the family. The Assessing Officer also held that in the absence of absence of details of the gifts and donors, it is presumed that they have been received from the family members. He found out that the rest of the family members have shown ludicrously low withdrawals. Their withdrawals totaled only to Rs. 49,800, whereas the total gifts in the names of the minors come to about more than Rs. 1.5 lakhs. The Assessing Officer also examined the computation of income filed along the income-tax returns by the fathers of the minors who were assessed at Gaya. After examination, he gave a finding that they revealed attempts of capital formation. According to him, the said fact would be found out by the following two factors : (1) All the major creditors have shown income having been derived in earlier years from rental/speculation which are not supported by any evidence.

(2) Major portion of the cash credits is made by giving account payee cheque. On examination of the Bank Pass Book, it is revealed that the accounts in the name of the major creditors were opened in UCO Bank on 19-9-85. All the accounts appear in a continuous Serial No. from 11785/6211790.

From the above, it is concluded by the Assessing Officer that the whole exercise has been done by the assessee to give legitimate colour to the unaccounted money and, therefore, all the cash credits have been considered as unexplained. Thus, he made an addition of Rs. 1.25 lakhs by his assessment order passed under section 143(3) on 31-3-1989.

4. Before the learned CIT (Appeals), it was submitted that all the above creditors were assessed to income-tax for more that 10 years and their first assessments were completed after scrutiny under section 143(3). The assessment order of Shri Chandan Kumar Singh for assessment year 1981-82 was filed which disclosed that it was completed under section 143(3) on interest income from investments of petty gifts, etc.

Interest income was shown at Rs. 5,250 and petty gifts of Rs. 2,950 had been offered for taxation. His assessment was completed on 7-4-1984 and thereafter he was regularly assessed to income-tax in subsequent years.

Similarly, Ranjan Kumar Singh was assessed for the first time in assessment year 1981-82 under section 143(3) and thereafter he is being assessed regularly. Similarly, Gunjan Kumar Singh was assessed continuously from assessment year 1981-82 and his assessment was completed in that year under section 143(3). Similarly, Kundan Kumar Singh was assessed to tax from assessment year 1981-82 in which the assessment was completed under section 143(3). Similarly, Chandani Singh was being assessed to tax for assessment year 1982-83 in which the assessment was completed under section 143(3). So also Unayan Kumar Singh was being assessed continuously from assessment year 1981-82 in which the assessment was completed under section 143(3). The fathers of the minors and the major cash creditors were being assessed to tax from assessment year 1964-65 and on wards and were also assessed to wealth-tax.

5. In this factual back-drop, we will have to decide whether the burden of proof was adequately discharged by the assessee and whether the burden was shifted to the revenue. It is common knowledge that burden of proof has got two meanings. In its primary meaning, it means the burden of establishing the case. The second meaning, it burden of proof is as a principle of evidence. In the second sense, the burden would be shifting from one party to the other as and when adequate evidence to discharge the burden which lay on a party is being produced by the part. Whether the burden shifts from one party to the other is always a question of fact and it would depend upon the facts and circumstances of each case. In a case of cash credits, the burden of establishing the truth of the cash credits always lies on the person who introduces the cash credit and who seeks a fact-finding authority to believe the truth of the cash credit. That means the burden of proof in its primary sense in the case of cash credits lay upon the assessee. However, in the secondary sense,

the initial burden would be on the assessee and if he is able to produce adequate and sufficient material to discharge his burden, then the further burden to falsify the evidence let in by the assessee and ultimately to prove that the cash credits may not be true is on the revenue.

6. While examining the income-tax proceedings and also while weighing the evidence let in by the assessee, we should bear in mind that our evaluation of evidence should be just like in any civil proceeding as against in a criminal proceeding. Whereas in a criminal proceeding a fact must be proved beyond reasonable doubt, while in a civil proceeding such strict proof is not essential and what we should look for is preponderance of probabilities. Even in this case, the cash creditors are only minor sons and daughters of the members of the AOP.Even the members of the AOP also introduced their own HUF moneys. In these circumstances, any higher degree of proof is required for establishing the cash credits falls for my consideration. In support of the contention, the ld. Departmental Representative contended that in the facts of the case under consideration it is not simply enough for the assessee to prove the identity of the creditor and the truth of the transaction, but it is also essential to prove the source of a source.

That means, the assessee has to prove the sources wherefrom the creditor has obtained moneys, and to buttress this part of the argument, the ld. Departmental Representative cited the following authorities : (3) Jamnaprasad Kanhaiyalal v. CIT [1981] 130 ITR 244/6 Taxman 61 (SC) In the first of the cases cited, the ratio of the decision can be found out from the statement of law mentioned at page 349. After referring to several cases of Nagpur, Allahabad and Bombay, it was held by the Patna High Court as follows : "... if a credit entry stands in the name of the assessee himself, the burden is undoubtedly on him to prove satisfactorily the nature and source of that entry and to show that it does not constitute a part of his income liable to tax. If the credit entry stands in the names of the assessee's wife and children, or in the name of any other near relation, or an employee of the assessee, the burden its on the assessee, though the entry is not in his own name, to explain satisfactorily the nature and source of that entry. But, if the entry stands not in the name of any such person having a close relation or connection with the assessee, but in the name of an independent party, the burden will still lie him to establish the identity of that party and to satisfy the Income-tax Officer that the entry is real and not fictitious. Once the identity of the third party is established before the Income-tax Officer and other such evidence are prima facie placed before him pointing to the fact that the entry is not factitious, the initial burden lying on the assessee can be said to have been duly discharged by him. It will not, therefore, be for the assessee to explain further as to how or in what circumstances, the third party obtained the money and how or why he came to make an advance of the money as a loan to the assessee. Once such identity is established and the creditors, as in the instant case, have pledged their oath that they have advanced the amounts in question to the assessee, the burden immediately shifts on the department to show as to why the assessee's case could not be accepted and as to why it must be held that the entry, though purporting to be in the name of a third party, still represented the income of the assessee from a suppressed source." Thus, when the entry stands in the name of either the assessee or his relation, the source of the money from which the creditor had lent the amount should also be established, whereas if the creditor is an outsider, the identity as well as the truth of the transaction would suffice to shift the burden from the assessee to the department.

6.1. In the second of the decisions in Anupam Udyog's case (supra), identifying two important departures from the law as it stood under the 1922 Act and the law as it stands after the 1961 Act, Their Lordships of the Patna High Court found as follows as per part of the head-note : "If there are cash credits in the books of a firm in the accounts of the individual partners and it is found as a fact that cash was received by the firm from its partners, then is the absence of any material to indicate that they are the profits of the firm, they cannot assessed in the hands of the firm though they may be assessed in the hands of the individual partners. Cash credits in the individual accounts of the members of an HUF with a third party cannot be assessed as the income of the family unless the Department discharges the burden of proof to the contrary. After the lapse of ten years, the assessee should not be placed upon the rack and called upon to explain not merely the origin and source of his capital contribution but the origin of origin and the source of source as well." 6.2. The third

of the decisions, i.e., Jamnaprasad Kanhaiyalal's case (supra) in fact, does not contain any relevant ratio which would help us decide the present case on hand either way. The point decided in that case was whether the declaration made under Voluntary Disclosure Scheme [under section 24(2) of Finance (No. 2) Act of 1965] enures to the benefits of only that minor who had declared the income under the Scheme or it would enure to all the minors who figured as cash creditors. Therefore the ratio of that decision is neither here nor there.

6.3. Similarly, the last of the cases cited, i.e., Sumati Dayal's case (supra), does not also help decide this case. In that case, Their Lordships of the Supreme Court laid down as how surrounding circumstances to the evidence let is should also be appreciated by applying the test of human probabilities. In that case, Their Lordships were considering whether there was probability for the assessee to receive a total amount of Rs. 3,11,831 in assessment year 1971-72 and an amount of Rs. 93,500 in assessment year 1972-73 by way of race winnings in jackpots and treble events in races at turf clubs in Bangalore, Madras and Hyderabad. That case was decided in the Settlement Commission. The Chairman of the Settlement Commission took one view, whereas the other Members of the Settlement Commission took the opposite view. The Chairman of the Commission laid emphasis on the fact that the assessee had produced evidence in support of the credits in the form of certificates from the racing clubs giving particulars of the crossed cheques for payment of the amounts for winning of jackpots, etc. The Hon'ble Supreme Court, ultimately deciding the case, held that the view of the Chairman of the Settlement Commission was superficial and they felt that the matter has to be considered in the light of human probabilities. According to their Lordships, the fact that the assessee possessed the winning ticket which was surrendered to the Race Club and in return she obtained a crossed cheque is neutral circumstance. Even if she had purchased the winning ticket after the event, she would be having the winning ticket in her possession.

7. Now, there is no question of disputing the ratios contained in the first two decisions which are very much relevant to be kept in mind before deciding the issue before us. Now, let us examine the facts of the case after duly keeping in mind the ratios of the above decisions.

8. Firstly, the assessee in the case is an Association of Persons but not any member constituting that AOP. In the accounting year in question, the AOP did not start its business at all. The Assessing Officer clearly found that there are neither sales nor purchases recorded in its books of a account and the exclusive activity with which the assessee is involved is in the construction of the factory building and purchase of machinery, etc. It is not even the allegation of the Assessing Officer that either the AOP or any member of the AOP conducted business in earlier years and there is likelihood of earning secret income or income outside the books of account or business or businesses conducted earlier by either the AOP or its members and either the whole or any part of cash credits representing such suppressed income of earlier years. Amongst the creditors, there are six minors. The mere fact that they were assessed at Calcutta need not be viewed with any serious suspicion so long as their assessments were completed under section 14(3) for the first time in assessment year 1981-82 long prior to the assessment year in question. There is ample opportunity for the Assessing Officer at Calcutta to thoroughly examine the sources of income which were returned by the minor assessees. It is significant that even in the initial years, the minors used to show the petty gifts derived by them as part of their income. Now, in this case, we are improbable to cook up sources of income for the minors even in assessment year 1981-82 onwards. Therefore, the theory that the gifts were make-believe and cooked up only for capital formation with a view to later introduce in the business concern of the family does not appear to hold water or sound believable. The Assessing Officer presumed that the gifts must have been received by the minors only from the family members. The presumption may not be correct. It is not uncommon for children of wealthy families to receive birthday gifts, Diwali gifts, Raksha Bandhan gifts, etc., from their wealthy relatives also and, therefore, the mere fact that the total withdrawal of the family members was only Rs. 49,800 whereas the gifts amounted to Rs. 1.5 lakhs, cannot assume any significance. Further, the families to which the minors belong may be having vast agricultural lands also.

Nothing prevented the Assessing Officer to examine the fathers of the minor creditors and elicit their sources before indicting then that they have got sufficient sources or low sources to lend the amounts.

Further, the Assessing Officer could have gathered the income-tax statements of the minor children right from assessment year 1981-82 order to falsify the version that they could not lend the amounts said to have been lent by them in assessment year 1986-87 to the assessee-AOP. Under the circumstances relying upon the decision of the Hon'ble Supreme Court in Orissa Corpn. Ltd.'s case (supra) extracting portion of the said decision in the order and holding that under the facts and circumstances, the burden which lay upon the assessee was duly discharged as was found in the order of the learned Accountant Member, does not appear to be either wrong or unreasonable. On the other hand, I hold that the appreciation of evidence on record by the learned Accountant members is on correct lines.

9. On the other hand, in the order of the learned Judicial Member, I found him observing that it is too curious and strange as to how those minors/ladies/relatives, who are, in fact, permanent residents of Gaya and staying with their respective parents/husbands came to file income-tax returns at Calcutta. However, the learned Judicial Member failed to find what exactly is the ultimate motive for these minors even in assessment year 1981-82 to file their returns at Calcutta.

Unless their motive is questionable or unpardonable, nothing can be found from out of mere highlighting that fact. The learned Judicial Member fund in para-3 of his order that some queries, on the facts and the particular circumstances of the case, though not put by the Assessing officer, Calcutta, should have been out by the Assessing Officer, Gaya, who assessed the firm (AOP). For instance, he found in para-3 as follows : "But surely it is the duty of the Assessing Officer at Gaya assessing the firm which took loans from those minors and ladies to find out the truth as to how when the minor/ladies are actually resident of and staying at Gaya with their respective parents/husband, filed I.T. returns showing their permanent residence at some place or locality in Calcutta. Such state of affairs do require a thorough probe and investigation and it is not mere doubt and suspicion which the Assessing Officer harboured in his mind. In my view, it is the actual and real truth; it is the veracity and bona fides of the transactions which require to be enquired into and brought to surface. In addition to this, there are several queries which are required to be answered, viz., as to where the moneys were kept ?, who brought the cash from Calcutta to Gaya and how the ladies/minors came to earn income ?, what was saved from which loans were advanced to the assessee-firm No doubt these questions have to be put by the Assessing Officer at Calcutta but in the present peculiar facts and circumstances of the case when the parents/husbands are residing at Gaya and I.T. returns for several years are filed at Calcutta showing their permanent residence in some locality at Calcutta then it is equally the duty of the Assessing Officer at Gaya to demand answers in respect of the queries. From the contents of the assessment order it is abundantly clear that no such enquiry was made or conducted by the Assessing Officer at Gaya, assessing the assessee-firm." "Mere filing of returns for few past assessment years by the partners/ladies at Calcutta and get the assessments completed there, do not go to establish that the loans are genuine or that those ladies had explainable and valid sources to advance loans to the assessee-firm. Nor mere filing of confirmations letters go to establish that the loans are genuine and that the assessee-firm discharged the legal onus which lay upon it." The reason as to why the returns filed for earlier years do not establish that the loans are genuine is not stated anywhere. So also the reason why confirmation letters should not be believed was also not given. The whole of para-5 in the learned Judicial Member's order appear to be a clear misappreciation of facts on record. The learned Judicial Member says that confirmation letters were not filed which is against the specific observation made by the Assessing Officer in his assessment order. If the learned Judicial Member wants to see the confirmation letters, he could have summoned the same from the assessment records. A reading of the learned Judicial Member's order at para-5 would show a misconception that the confirmatory letters, copies of statements of incomes accompanying the income-tax returns filed at Calcutta were filed before the CIT (Appeals) but not before the Assessing Officer. The learned Judicial Member further says that 'I do find any discussion in this regard in the assessment order though eloquently discussed by the A/C in the impugned order'. This observation is against facts. The Assessing Officer mentioned the confirmations, computer sheets filed along with the income-tax returns and a thorough discussion on their income-tax statements. In para-6, the learned Judicial Member states that the minor/ladies filed the returns at Calcutta in order to avoid proper scrutiny and enquiry at Gaya. However, nothing prevented the Assessing Officer at

Calcutta to thoroughly investigate the sources wherefrom they obtained gifts and other incomes. Having stated so much about the capital built-up cases, the learned Judicial Member states in para-6 itself "I am not saying that the assessee-firm is a part of such capital built-up scheme" and, thus, contradicts his earlier statement. However, even after reading paragraphs 3, 4, 5 and 6, the main question how the filing of the income-tax returns by the minors at Calcutta casts doubts and shakes the validity of evidence filed and produced in this case before the CIT (Appeals) is not known. As far as the members of the AOP who contributed capital to the assessee are concerned, they are all found to be both income-tax assessees and wealth-tax assessees right from assessment year 1964-65. Having regard to the said fact, the Assessing Officer felt no necessity to further enquire into the creditworthiness of those persons to lend the amount to the assessee. In view of the said position, the observation of the learned Judicial Member at the close of para-8 "By creditworthiness is meant that the lender is a man of means and not man of gross and/or that the evidence filed by the lender in support of the loans is not shame or created for the purpose or it is not a make believe arrangement between him and the assessee and further that such evidence is credible and cogent so as to make any prudent and reasonable man to accept it and believe the same to be true" pales into insignificance. It is, no doubt, true that law does not invent any instrument to test the reliability of evidence placed before the Tribunal and, therefore, the Tribunal has to judge the evidence before it by applying the test of human probabilities as was found by the Hon'ble Supreme Court in Durga Prasad More's case (supra).

But, at the same time, it is difficult to accept the finding of the learned Judicial Member that it is against human conduct and probability that minors/ladies, who are permanent residents of Gaya, went all the way to a far off place like Calcutta to earn income from money-leading, speculation, commission, etc., filed their income-tax returns there and got their assessments completed for the past several years. This conduct, no doubt, raises suspicion but however, strong the suspicion may be cannot supplant proof. There is definite evidence produced on behalf of the assessee that minors filed their returns in Calcutta even in assessment year 1981-82, which is long before the assessment year under consideration, and submitted their returns to the ITO at Calcutta. The ITO did not even say one word disbelieving the truth of the minors being assessed at Calcutta. Unless the strange behaviour and pattern adopted was found out for any ulterior motive and unless it was further found that the ulterior motive was achieved, the suspicious circumstances or facts found in the case cannot be read against the assessee. The learned Judicial Member, except stating that it is strange human conduct to get the income of the minors assessed at Calcutta for the past several years nothing is found out as to for achieving what ulterior motive such strange behaviour is adopted. The learned Judicial Member himself stated that the state of affairs have to be enquired, probed and explored, which the Assessing Officer has miserably failed. He further stated that the Assessing Officer has got sufficient powers to conduct valid and proper enquiries. He was also pleased to observe the following : "He has also plenary powers of discovery and production of evidence, etc., as per the provisions of section 131 of the Act. This apart, the Assessing Officer, has been vested with very wide powers in terms of sections 133A, 133B and 134 of the Act. All these powers under these provisions remained dormant in this case. Legal errors have been committed by the Assessing Officer in this case. They have to be corrected and the best way to correct is to remit the case to the base officer, viz., the Assessing Officer for reframing the assessment after thorough enquiry, as per law, which at the original stage, was not done." The learned Judicial Member appears to have overlooked important pieces of facts or evidences already gathered by the Assessing Officer. For instance, the fact that search operations were conducted in the assessee's premises even on 22-12-1987 before the assessment enquiry was conducted in this was overlooked. The learned Judicial Member was not able to state what type of investigation was failed to be done in this case, who were not examined. He also failed to state that the evidence produced does not establish the case of the assessee or establish the truth of the cash credits and some more evidence which is very important to know about the truth of the cash credits was left out. In fact, the learned Judicial Member omitted to note that the Assessing Officer himself or the CIT (Appeals) in appeal did not feel any dearth of evidence or insufficiency of the material already procured into the records. After going through the record and the pieces of evidence produced, I hold that the whole of the evidence which can be produced to establish the genuineness of the cash credits was already secured into the records. Taking into consideration the bulk of evidence produced in favour of the assessee, the burden which

lay upon the assessee to prove the cash credits was duly discharged and I hold that the burden of proof is clearly shifted to the revenue to establish that the cash credits are not genuine. In this regard, I entirely agree with the findings of the learned Accountant Member and I hold that his appreciation of evidence on record is perfectly justified and legally correct. What are justifiable reasons for a Tribunal to remand the case falls for my consideration in this respect.

10. In this connection, the Hon'ble High Court's decision in Maharani Kanak Kumari Sahiba v. CIT [1955] 28 ITR 462 (Pat.) is felt instructive. The following is what is stated in the head-note of the decision : "Though section 33(4) has granted a very wide statutory discretion to the Income-tax Appellate Tribunal in disposing of an appeal, the discretion given under this section to the Incomes-tax Appellate Tribunal is a judicial discretion which must be exercised in accordance with legal principles, and not in an arbitrary or capricious manner and it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself.

Where all evidence had been produced and the Assistant Commissioner had, after full investigation of the evidence and examination of the accounts, came to a definite finding in favour of the assessee, but the Appellate Tribunal remanded the case to the Income-tax Officer directing him to come to a finding on the same point again after bringing on record further evidence, making a further investigation and examining the accounts again : Held, that, on the facts and circumstances of the case, the order of remand was not legally valid, and that the appeal preferred to the Appellate Tribunal should be treated as still pending before the Tribunal and should be disposed of by the Tribunal in accordance with law." Again, in Jeypore Timber & Veneer Mills (P.) Ltd. v. CIT [1982] 137 ITR 415/[1983] 12 Taxman 191, the Gauhati High Court held, inter alia, as follows : "A passing glance creates an impressing that the Tribunal has been endowed with plenary powers under section 254 to pass any order as it thinks fit. However, it is not so, as will appear from the expression 'such orders thereon as it thinks fit' in section 254.

The word 'thereon' in the expression is a serious constriction on the exercise of the power by the Tribunal." Again, in United Commercial Bank v. CIT [1982] 137 ITR 434/9 Taxman 260, the Hon'ble Calcutta High Court held, speaking about the powers of remand vested with the Tribunal, as follows : "The Tribunal has power to remand a case for a further investigation of facts but the power has to be exercised with proper discretion.

It should not be exercised if all the basic facts necessary for the disposal of the matter are already on record and if these facts appear in the order of the ITO and the AAC." I hold that on the case now under scrutiny before me, all necessary facts and findings were already given by both the lower authorities and under the circumstances, the remand order sought to be passed by the learned Judicial Member is quite unwarranted and opposed to law and, hence, it should not be allowed.

11. Further, the learned Judicial Member had cited some decisions which are not at all relevant for the point in discussion. For instance, he called in aid the following decisions : They are cited out of context in the order of the learned Judicial Member. For instance, Guduthur Bros.' case (supra) comes into play only when some illegality had crept into the proceedings but not otherwise.

I don't know what is the relevance of that decision in the case before me. The appreciation of evidence on record has nothing to do with the illegality of the proceedings. So also Kapurchand Shrimal's case (supra) is a case where an error had crept into the order of the Tribunal. There is no question of any error in the order of the Tribunal at this stage. I am on the point of appreciating the evidence concerning the truth of the cash credits. Therefore, in my humble opinion, Karurchand Shrimal's case (supra) has no role to play.

Similarly, Rampyari Devi Saraogi's case (supra) and Smt. Tara Devi Aggarwal's case (supra) come into play when we want to judge whether there is any justification to invoke the revisionary powers under section 263. So also, after going through Smt. Pushpa Devi's case (supra), I find that it is not relevant. I am unable to agree with the learned Judicial Member's view that the assessment order is in any way vitiated and is liable to be vacated for any supervening illegalities and errors committed by the Assessing Officer. On the other hand, I

find that valid and proper enquiries were also made by the Assessing Officer regarding the loan transactions and the assessee had let in sufficient evidence on record in support of the truth of the cash credits. I fully agree with the decision of the learned Accountant Member in this case, in that the assessee had discharged the burden of proof under section 68 of the Income-tax Act, and the CIT (Appeals) had rightly deleted the addition of Rs. 1,25,000. On a conceptus view of all the facts of the case, I hold that for the reasons given by the learned Accountant Member which, according to me, are perfectly justified and valid under law, the burden which lay on the assessee under section 68 of the Income-tax Act stood discharged and consequently I hold that there is no need for this matter to be restored to the file of the Assessing Officer for further enquiries in relation to the loans obtained by the assessee to the tune of Rs. 1.25 lakhs and for framing of a fresh assessment in accordance with law.

Therefore, the matter should go back to the Division Bench which has to decide the matter according to the majority view.