<u>आयकर अपीलीय अधिकरण</u> "बी" **<u>न्यायपीठ मुंबई में।</u>**

IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, MUMBAI

श्री डी. मन्नमोहन, उपाध्यक्ष **एवं** श्री संजय अरोड़ा, लेखा सदस्य के समक्ष ।

BEFORE SHRI D. MANMOHAN, VP AND SHRI SANJAY ARORA, AM

आयकर अपील सं./I.T.A. No. 5818/Mum/2014

(**निर्धारण वर्ष /** Assessment Year: 2009-10)

Color Craft C/o. Jayesh Sanghrajka & Co. Chartered Accountants, Unit No. 405, Hind Rajasthan Centre, D. S. Phalke Road, Dadar (E), Mumbai -400 014	**<u>बनाम</u>**/ Vs.	ITO-16(2)(4), Matru Mandir, Tardeo, Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AADFC 7740 A		
(निर्धारिती/Assessee)	:	(राजस्व /Revenue)

&

आयकर अपील सं./I.T.A. No. 6664/Mum/2014

(**निर्धारण वर्ष /** Assessment Year: 2009-10)

ITO-16(2)(4), Matru Mandir, Tardeo, Mumbai	**<u>बनाम</u>**/ Vs.	Color Craft C/o. Jayesh Sanghrajka & Co. Chartered Accountants, Unit No. 405, Hind Rajasthan Centre, D. S. Phalke Road, Dadar (E), Mumbai -400 014
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AADFC 7740 A		
(राजस्व /Revenue)	:	(निर्धारिती/Assessee)

निर्धारिती की ओर से / **Assessee by**	:	Shri Harshvardhana Dattar
राजस्व की ओर से/**Revenue by**	:	S/Shri S. J. Singh & N. P. Singh

सुनवाई की तारीख / **Date of Hearing**	:	07.07.2015
घोषणा की तारीख / **Date of Pronouncement**	:	17.07.2015

आदेश / O R D E R

Per Sanjay Arora, A. M.:

These are cross appeals, i.e., by the Assessee and the Revenue, agitating the part allowance of the assessee's appeal contesting its assessment u/s.144 r/w section 145 r/w section 143(3) of the Income Tax Act, 1961 ('the Act' hereinafter) for the assessment year (A.Y.) 2009-10 vide order dated 30.12.2011 by the Commissioner of Income Tax (Appeals)-23, Mumbai ('CIT(A)' for short) vide his order dated 18.08.2014.

Assessee's Appeal (in ITA No. 5818/Mum/2014)

2. The only issue argued before us, initially, in pursuance to grounds 1 and 2 of its appeal by the assessee, who did not press ground no. 5, alleging non grant of opportunity, is the validity or otherwise in law of the assessment for the relevant year, impugned on the ground of non service of the jurisdictional notice u/s.143(2) of the Act.

Background facts

3. The assessee is a partnership firm, consisting of two partners, namely Shri Shripal Shah and Shri Sriraj Puzikunity, engaged in the business of, as per the assessment order, offset and screen printing, with its registered address at 662, Forjet Hill, 3/37, Navyug Nagar No. 1, Tardeo, Mumbai-400 036, which is also its registered address with the Income tax Department. It is an assessee with the Department (under PAN No. AADFC 7740 A), and filed its return of income for the relevant year, which was duly accompanied by audited accounts, with its jurisdictional Assessing officer (A.O.), i.e., ITO-16(2)(4), Mumbai, on 30.09.2009. The same came to be selected for verification under the verification procedure under the Act. Accordingly, notice u/s.143(2) was issued on 23.08.2010 (RPB pg. 17). It is the service of this notice which is the subject matter of dispute; the same being vital for the assumption of jurisdiction to frame an assessment u/s. 143(3), which stood finally made by the A.O. at Rs.18.65 crores, invoking section 145(3) of the Act, and since confirmed by the first appellate authority at an income of Rs.18,06,74,262/-, i.e., by allowing the assessee its claim for indirect expenditure at

Rs.58,00,975/- from the assessed gross profit (GP). It may be clarified that the assessee in response to notice u/s.142(1) of the Act dated 09.11.2011, requiring it to attend on 18.11.2011, raised an objection to the service of notice u/s.143(2) on it on 17.11.2011 vide letter of even date (APB pg.1). The objection stood reiterated in appeal, to meet which a remand export was called for by the ld. CIT(A). The notice under reference having been sent per registered post, as evidenced by the speed post dispatch folder dated 30.08.2010, as maintained by the office of the AO, at the assessee's registered address, which remain unchanged and which had came back unserved and, besides, evidenced by a receipt, again duly received from the Postal Department (RPAD pg. 18), the assessee could not claim non-service and its objection was, therefore, without merit. Aggrieved, the assessee is in second appeal.

4. *The respective cases*

The assessee's case, relying on case law, as before the authorities below, is along with the following lines:

a. that there is no justification for the time lag between date of issue of the notice and date of service as contended by ld. A.O.

b. that there is no evidence of the issue of the notice.

c. that the evidence cited by ld. AO to prove the service has no credibility and authentication.

d. that, in any case, evidence cited by ld. AO does not prove the service of the notice on the specified person.

The Revenue, on the other hand, relies on the evidences in the form of register of dispatch maintained by the office of the concerned Assessing Officer (A.O.) and the acknowledgment received from the postal authorities, besides the provisions of section 27 of the General Clauses Act, 1897 and section 114 of the Indian Evidence Act, 1882, the import of the application of which stood considered by the Hon'ble high court in the case of *Milan Poddar vs. CIT* [2013] 357 ITR 619 (Jharkhand). The service in another case, i.e., Yamni Patil, whose name appears at sr. No. 139 of the dispatch list, dated

30.08.2010, as against the assessee's name at sr. No. 138 of the said list, service in which case is not in dispute, is advanced in support of the authenticity of the said list which bears the assessee's name at sr. No. 138 thereof.

In rejoinder, the ld. Authorized Representative (AR), the assessee's counsel, relied on section 21 of the Evidence Act, defining the circumstances when an admission could be proved by and on behalf of the assessee making it. The resister of dispatch maintained by the Department is an admission by it and, therefore cannot by itself prove it. Further, the decision in the case of *Milan Poddar* (supra) would not apply, as in that case, making reference to para 14 of the said decision, there was no record of service with the Revenue, in which case therefore the presumption u/s.27 of the General Clauses Act and section 114 of the Indian Evidence Act would become applicable, while in the instant case the concerned recipient had denied the receipt of any notice from the IT Department.

Discussion

5. We have heard the parties, and perused the material on record.

5.1 It would be appropriate to proceed by reproducing the relevant provisions, i.e., in their relevant parts, being sections 282 and 292BB of the Act:

> **'Service of notice generally.**
>
> **282.** (1) The service of a notice or summon or requisition or order or any other communication under this Act (hereafter in this section referred to as "communication") may be made by delivering or transmitting a copy thereof, to the person therein named,—
>
> (*a*) by post or by such courier services as may be approved by the Board; or
>
> (*b*) in such manner as provided under the Code of Civil Procedure, 1908 (5 of 1908) for the purposes of service of summons; or
>
> (*c*) in the form of any electronic record as provided in Chapter IV of the Information Technology Act, 2000 (21 of 2000); or
>
> (*d*) by any other means of transmission of documents as provided by rules made by the Board in this behalf.
>
> (2) The Board may make rules providing for the addresses (including the address for electronic mail or electronic mail message) to which the communication referred to in sub-section (1) may be delivered or transmitted to the person therein named.

Explanation.—For the purposes of this section, the expressions "electronic mail" and "electronic mail message" shall have the meanings as assigned to them in Explanation to section 66A of the Information Technology Act, 2000 (21 of 2000).'

'**Notice deemed to be valid in certain circumstances.**
292 BB. Where an assessee has appeared in any proceeding or co-operated in any inquiry relating to an assessment or reassessment, it shall be deemed that any notice under any provision of this Act, which is required to be served upon him, has been duly served upon him in time in accordance with the provisions of this Act and such assessee shall be precluded from taking any objection in any proceeding or inquiry under this Act that the notice was—

(*a*) not served upon him; or
(*b*) not served upon him in time; or
(*c*) served upon him in an improper manner:

Provided that nothing contained in this section shall apply where the assessee has raised such objection before the completion of such assessment or reassessment.'

Section 27 (of the General Clauses Act):

'**Meaning of service by post**
27. Where any Central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression "serve" or either of the expressions "give" or "send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.'

Section 114 (of the Indian Evidence Act, 1882):

'**Section 114 in The Indian Evidence Act, 1882**
114. Court may presume existence of certain facts. —The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. Illustrations The Court may presume—

(a) That a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession;
(b) That an accomplice is unworthy of credit, unless he is corroborated in material particulars;
(c) That a bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration;
(d) That a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or state of things usually cease to exist, is still in existence;
(e) That judicial and official acts have been regularly performed;
(f) That the common course of business has been followed in particular cases;
(g) That evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it;
(h) That if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him;
(i) That when a document creating an obligation is in the hands of the obligor, the obligation has been discharged.'

The assessee's right to object to service of notice u/s.143(2) dated 23.08.2010 is saved on account of his taking the same before the A.O. during the assessment proceedings vide letter dated 17.11.2011, filed on that date, the contents of which, being relevant are as under:

'To,
ITO 16 (2)(4),
Matru Mandir,
Mumbai.

Subject: Non Receipt of 143(2) for M/s Color Craft
A.V 2009-10 (PAN: AADFC7740A)

Dear Sir,

As informed by the assessee, it is hereby respectfully submitted that notice under section 143(2) has not been served on the assessee within statutory limit.

It is further submitted that submissions are made to co operate with department in good faith under humble objection and protest.

Compliance is hereby made for non Issue of notice under section 143'(2) as specified in section 292BB.

Kindly take the above on records and oblige.

Thanking You.
Yours truly,
For Jayesh Sanghrajka & Co.
Chartered Accountants
Sd/-
Pratik Joshi
(Authorised Signatory)'

5.2 It is, therefore, apparent that the assessee disputed the service on the basis that it was not within the stipulated time. That is, the service *per se* is not denied thereby, but only of it being not within the stipulated time period. Section 292BB supra is both explicit and succinct in this regard, enlisting separately the aspects of service which could be objected to before the completion of the assessment/reassessment proceedings. The assessee is, in our considered view, in view of the clear mandate of the provision, precluded from enhancing the scope of his objection in the appellate proceedings, as by contending non-service in the instant case. The word 'such' in the *proviso* which carves an exception to the general rule proscribing the raising any objection in any proceedings other than of assessment/reassessment, i.e., the primary proceedings, limits the same to that as taken in such proceedings, saving thereby the right of objection in its respect.

Coming to the aspect of timeliness of the service, the same having been caused by the Revenue per post, the same shall have to be considered with reference to the relevant provisions of law governing the same. Section 282B of the Act clearly provides for service by post as one of the accepted modes of service of any communication (as defined therein) under the Act. Accordingly, section 27 of the General Clauses Act shall apply. What, therefore, we are required to see is if the parameters of the said section are met or not. We say so as, even though only the aspect of the timeliness of service stands objected to, invoking the deeming of section 27 of the General Clauses Act could only be where all its elements are satisfied. In the present case, the service has been made by 'speed post'. The issue as to whether the same constitutes 'registered post', the species of post referred to in section 27 of the General Clauses Act, and to which only, therefore,

the said provision is applicable, stands, as noted with approval in *Milan Poddar* (supra), clarified by the Tribunal, whose order was under challenge before it, applying the principle of updating construction, that registered post would take within its sweep not only 'speed post' but also all other mails forming part of the establish system of mails in which their receipt and movement is recorded to assure safe delivery (para 21). All the principal attributes of 'registered post' were inherently present in 'speed post', so that the two were of the same genus (para 14). The term registered post being not defined, it could only be so in terms of its elements, which the tribunal gathered from the dictionary meaning of the word 'registered'; its common parlance meaning; and its substance (paras 13, 14). *How could, we wonder, a different view of the matter be taken or adopted*?. In other words, 'speed post' was in substance only 'registered post' and, consequently, the statutory presumption of section 27 shall hold in its respect as well. It was further noted by the tribunal that section 27 did not require the mail to be sent by registered post together with acknowledgment due (AD). The additional requirement of AD could not, therefore, be read into the provision (para 11). The legal fiction of section 27 would, therefore, imply service within the time by which a speed post is in the ordinary course of business, delivered. The same, as per the records of the Revenue, duly acknowledged by the postal department, is 30/8/2010 (RPB, pgs. 4, 15). The same was given to the post office, Grant Road, Mumbai, for delivery at an address in Mumbai. In the ordinary course of events, the same would stand to be delivered in a couple of days or perhaps a little more as where there is a holiday/s in the intervening period; it being nobody's case that the communication is not properly addressed or prepaid. However, the Revenue itself claims to have delivered the same on 30.09.2010. That is, but for the Revenue adducing evidence, and claiming on its basis, the impugned service on 30.09.2010, the statutory presumption of section 27 would have prevailed, unless of-course contrary is exhibited by the assessee-addressee. In other words, the presumption of service by that date stands successfully and effectually rebutted by the Revenue itself by adducing evidence as to its service on 30.09.2010. It is equally open to the assessee to, on the basis of the evidence; either discredit the Revenue's claim, proving service on any other date, either prior or

after 30.09.2010. The same would not, however, in any manner by itself operate to dislodge the presumption of section 27, save and except to the extent that the time of the service shall be on the basis of the evidence led. The only 'evidence' produced by the assessee is that Shri Akshay V. Shah, the person whose signature and mobile number appear on the receipt, 'denies' having received the same. In this regard, the question that arises is as to who in that case received the notice; its service being not in dispute, but only the time thereof. That is, there is no evidence or basis to test or disprove the service on 30.09.2010, which is admittedly in time in terms of section 143(2) of the Act read with *proviso* thereto. The fact of the service on Yamini Patil, another noticeee, on 01.09.2010, i.e., the date similarly specified on the receipt, similarly prepared by the Postal Department, lends credence to the claim of the dispatch list as prepared being genuine and authentic and, further, that the notices (communications) were actually dispatched as per the said document. The same thus bolsters the Revenue's case of the service being actually effected on the date as specified therein, which could only be challenged on the basis of some controverting evidence/material, and which, in view of the opposing claims, it needs to be appreciated, would have to be the date specified and, further, bear corroboration by the postal department. There being in fact no contrary material, the date of service, on the strength and the basis of the material on record, which is only as generated in the ordinary course of its business by the Revenue, i.e., as to delivery of communications and the arrangement entered with the postal department in its respect, is 30.09.2010. We, accordingly, hold the same to be on the said date and, therefore, the service of notice u/s. 143(2) dated 23.08.2010 as within time.

5.3 We may, without prejudice to the foregoing, also discuss the assessee's case as to non service, i.e., as later made out to, expanding the scope of the objection raised in the assessment proceedings, and which we have therefore found as in excess of the right saved by the assessee u/s.292BB and, thus, not valid. The assessee, as afore-stated, denies the receipt of the notice by Shri Akshay V. Shah, who in any case is not related therewith, so that service on him, i.e., assuming so, is not valid. We are unable to, on a

perusal of the material on record, accept the assessee's claim, even in the expanded form. We have for the purpose perused the statement of Shri Akshay V. Shah, placed at pgs. 10-13 of the assessee's paper book (APB). He does not deny either the receipt of the document; the signature on the receipt; or the phone number mentioned therein, least of all the date. He, after identifying himself, agrees to the likeness of his signature with that affixed on the receipt. Rather, how could he then deny a signature which matches his; dated (30.09.2010) and, further, is accompanied by his mobile number (9222495148), written in the same hand, and which is only his, and for which we have also compared it with the signature and date as appearing in the statement on oath – unless, that is, claim of forgery is made and proved, and which is not the case. That is, the same is only a tacit admission of it being his signature. Again, on being questioned as to how could he accept the documents of Color Craft, a firm having its registered address located at the same address, and with which he denies any relation, he explains of possibly signing it, considering it as documents relating to his father's business (answers to Q. Nos. 13 and 14). Yes, he also explains of not having signed any notice relating to income tax or not visiting the Income Tax Office (Q. No. 13). In this regard, visiting the income tax office is irrelevant. As to the denial of not having signed any income tax notice, the same flies in the face of his having signed on the receipt, which clearly bears the particulars, which we may reproduce for ready reference:

No. ITO-16(2)(4)/U/S.143(2) A.Y. 2009-10 No.100 _____ To, M/S. COLOR CRAFT Mumbai-36

Continuing further, his statement of not knowing the firm, M/s. Color Craft, which has its registered office at the same address, in terms as specific and detailed as possible, is ludicrous. This is even ignoring and *de hors* the signature on a receipt of a document addressed to the said firm. One is, given his educational qualification (B.Com/Q. No. 2), even otherwise hard put to explain his behaviour in accepting a

document under his signature, particularly of a firm with which he claims no relation. It becomes incomprehensible and outside the bounds of credulity where he, as contended, has no knowledge of the said firm. The contention of no knowledge of the said firm is even otherwise incomprehensible on facts, i.e., given the fact that the firm has its premises at the stated address, and he himself was physically present thereat at the relevant time, stating of the same to also be the address of his father's business.

5.4 It is for the foregoing evidences and reasons that, notwithstanding the respondent's claim of not knowing the addressee firm and having not received any notice from the income tax department, that we find no merit whatsoever in the assessee's claim of non service of the notice under reference, even as, at the cost of repetition, we state that the same could be contested only *qua* its timing. We may toward this also deal with the assessee's other contentions in the matter. True, the notices or the envelope containing the notices, having been duly handed over to the postal department, as signified by the stamped dispatch list maintained by the concerned office, on 30.08.2010, the delay in its delivery, being only on 30.09.2010, is not acceptable and remains to be explained. However, to our mind that does not, in any manner, vitiate the delivery, duly evidenced. What is relevant, and what we have to decide, is whether the service on the assessee on 30.09.2010 can be said to have taken place in law, in the given facts and circumstances of the case. The reason/s for the delay, viz. the premises being locked or closed, and/or no responsible person to take delivery, or its refusal, etc. on an earlier occasion/s the postman came to deliver the notice, could only be ascertained from the postal department, would thus be of little consequence. Rather, the very fact of 'delay', in-as-much as the same is reckoned with reference to 30.08.2010, implies acceptance of the register/document (of dispatch) maintained by the office of the A.O. There is, in fact, even otherwise no reason to doubt the validity or authenticity of the same, being maintained by the Revenue in the ordinary course of its business, so that the presumption of section 114(f) of the Evidence Act would apply, and which it has sought to establish with reference to a case of undisputed receipt for an addressee whose name follows that

of the assessee on the said list. The service on the assessee is, to our mind, proved in view of sec. 27 of the General Clauses Act r/w s. 114 of the Evidence Act. Citing several decisions by the hon'ble apex court, the scope of the said provisions stands explained by the tribunal (refer paras 23 to 26, at pgs. 634-635 of the reports), whose order in the relevant part stands reproduced by the hon'ble court in *Milan Poddar* (supra) (and which also explains our reference to the para numbers thereof). The rebuttal of the statutory presumption, it is further explained with reference to, again, decisions by the apex court, could only be where the party denying the service proves that it was not really served and that he was not responsible for the absence of proof by the party denying the service that he has not received it or that he was not responsible for the non service (para 27/pg. 636 of the reports). No such rebuttal, or evidence to this effect, as afore-stated, has been led in the instant case. The foregoing would also show that the reliance on the said decision by the Revenue is not, as contended, misplaced, and toward which we may also refer to the substantial question of law '(a)' raised before the hon'ble court (pg. 623 of the reports). Rather, in the facts of that case, there was no proof of delivery and the only basis for averring service was the speed post having not returned back unserved. The ratio of the said decision is, therefore, squarely applicable in the facts of the present case.

5.5 As regards the Revenue's reliance on case law, we have, drawing on the settled law on service per post, which is a prescribed mode of service u/s.282(1)(a) of the Act, as clarified by the hon'ble court in *Milan Poddar* (supra) with reference to several decisions by the hon'ble apex court, found it to be a case of valid service. Even no infirmity in the said decision stands brought to our notice despite being specifically the ld. AR being specifically questioned in the matter during hearing. The decision by the tribunal relied upon would thus be of little consequence. The decision in the case of *CIT vs. Cebon India Ltd.* [2009] 184 Taxmann 290 (P & H) is based on a definite finding of fact as to date of service by the tribunal, confirming that of the first appellate authority. Again, in the case of *M. L. Narang vs. CIT* [1981] 6 Taxmann 61 (Delhi), the decision turned on the lack/absence of the identity of the person on whom the notice was served. The

presumption provided by law is, after all, rebuttable. These decisions would thus be of little assistance to the assessee; the decision in the case of *Milan Poddar* (supra), as afore-stated, being a clear exposition of the law in the matter, including as to the ambit of the presumption available when service is sought to be made through registered post.

Conclusion

6. In view of the foregoing, we hold the service on the assessee to be on 30.09.2010, invoking the presumption of section 27 and section 114(f) of the General Clauses Act and the Indian Evidence Act respectively, as well as noticing and appreciating the material placed on record. This, despite, we may reiterate, the position in law, i.e., as to the controversy arising, in view of the objection raised by the assessee during the assessment proceedings being limited to the time of service, which itself therefore becomes undisputable. Whichever way one may thus look at the matter, service on the assessee-firm on 30/9/2010 is in law proved under the given facts and circumstances of the case. The same being within the time limitation stipulated under *proviso* to s. 143(2), assailing the assessment for want of jurisdiction on that score is misplaced. We decide accordingly.

7. We may next discuss the case on its merits, i.e., of the income assessed, for which opportunity was specifically granted, and the matter finally heard after several adjournments. At the outset, the ld. AR informed the Bench that he was not in a position to furnish any bills, vouchers, etc. in support of assessee's case in-as-much as the same has been lost in fire in April, 2010. So however, it was incumbent on the assessing authority to estimate income, i.e., upon the rejection of the book results, after considering all the relevant facts/materials. The assessee has during the year traded in paper, which yields a gross profit rate of 1% to 1.5%, i.e., as disclosed. As such, adopting the profit rate of the assessee's business of offset and screen printing, which stood at 41.08 % & 48.89 % for AYs 2007-08 and 2008-09 respectively, was not valid. The AO, however, we observe, estimated the profit for the current year at 41.08 %, i.e., as returned for the immediately preceding year, being in fact the lowest of the profit rates obtaining for the past three years, relying on the decisions in the case of *Action Electricals vs. Dy. CIT*

[2002] 258 ITR 188 (Del) and *P. Venkanna vs. CIT* [1969] 72 ITR 328 (Mys.), so that a best judgement assessment based on past years results is valid and not arbitrary. The same stood confirmed by the first appellate authority in-as-much as he found no reason to disturb the same. He, however, allowed the assessee's claim of all expenses claimed through debit to the profit and loss account for the year, at Rs.58,00,975/-, against which the Revenue is in appeal. The ld. AR was, at this stage, asked by the Bench, if there was anything on record to show of a change of business for the current year, viz., the changed profile of the customers; the sales tax returns; the audited report u/s.44AB, which, vide column 8 thereof requires the Auditor to report/specify the nature of the business as well as if there is any change in the business during the year, etc., to which he (ld. AR) replied by stating that the same was not readily available with him, for him to render any definite reply. His attention was then drawn by the Bench to para 4 of the 'Statement of Facts' (SOF) before the ld. CIT(A), which clearly states of trading in printing paper as having been added to the assessee's business during the year. The same implies that the said business was, if at all, also carried out during the year. He again had no explanation for the same, though would submit that the Revenue has itself assessed the assessee's profit for a later year at 20%, thereby accepting the assessee's contention of a change over - in whole or in part, to the trading business.

The ld. DR would, on the other hand, submit that the fire referred to by the assessee, as clarified by the ld. CIT(A), occurred in another building, specifying its address, and which housed the office/premises of another concern, M/s. Shruti Arts (P.) Ltd. The same is thus a false plea, and which is the reason for the Revenue in not accepting the assessee's explanation for non-production of the account books, rejecting the same at the threshold as a mere excuse/self serving statement toward not producing the account books.

8. We have heard parties and perused the material on record.

Though the assessee impugns the rejection of books of account and the consequent estimation of gross profit vide its ground no.3, the same was not pressed during hearing.

In fact, there are clear findings by the A.O. (refer paras 17 to 27.1 of his order), listing various deficiencies, as well as by the ld. CIT(A) (refer paras 13 – 15 of his order), which have not been rebutted by the assessee in any manner. The books were not produced under a false plea of the same having been destroyed in fire. How could the assessee, under the circumstances, we wonder, challenge the non acceptance of its book results and the invocation of the best judgement assessment by the assessing authority?

Our second observation in the matter, as would also be apparent from the foregoing, is that the assessee has not brought any material on record to substantiate its claim of a change in business, in whole or in part, even as the audit report u/s.44AB of the Act; the assessee's accounts being audited, being further by an independent professional, is the most direct and pertinent material, and which would be available. On the contrary, the ld. CIT(A) clearly refers to the audit report furnished (at pg. 14 of his order), stating of it as reporting the assessee's business as: 'Off set and screen printing', i.e., as mentioned in the assessment order and as being taken by the Revenue, and of there being no change in the business during the year, vide columns 8(a) and 8(b) thereof. In fact, why, again, one may ask, one switch from a highly profitable business to one which can hardly be said to be profitable and, thus, as 'business' at all – profit motive being an essential feature of an activity to qualify as 'business'. The assessee's reply, on this question being asked during hearing, of the earlier business as no longer viable, can hardly be countenanced. A business would cease to exist only on an alternate good/service, more economical than the existing product, arriving in, and in fact accepted by, the market, which transition itself would take place only over a period of time. There is no such explanation; rather, no reference to any such product? There is further nothing on record to show of the Revenue having accepted the assessee's profit at 20% for a later year, which, even where so, does not in any manner lead to the inference of the assessee having switched to the trading business, much less during the current year. The assessee's claims, accordingly, hardly pass muster. There is accordingly no question of acceding to its plea for acceptance of additional evidence in the form of industry average of the profit of the trading in paper, disclosing a profit rate of 1%.

So, however, there are some tell tale signs which cannot be ignored. We capsule the book results for the relevant year and the preceding three years, i.e., as considered by the assessing and the first appellate authority while estimating and confirming the assessee's income for the year, as under: (Amt. in Rs.)

A.Y.	Turnover (Rs.)	GP (%)	NP (%)
2009-10	45,39,31,931	1.36	0.08
2008-09	70,64,029	41.08	4.56
2007-08	92,62,077	48.89	4.22
2006-07	32,86,170	60	(-)0.1.40

The first thing that strikes one is the quantum increase in the turnover for the year vis-a-vis the immediately preceding year, or even the average for the past three years (at Rs.65.37 lacs); witnessing an increase of about 65 times. The sales after March, 2007, in fact, exhibit a downward trend, which would signify the sales for the current year to be lower than, or at best at par with the sales for the immediately preceding year (at Rs.70.64 lacs). The sales *qua* manufacturing/production activity, which the assessee's business activity denotes, are even otherwise, it is to be borne in mind, constrained by structural limitations as to capacity – physical or financial, marketing resources, etc.

The second aspect that draws our attention is the change in the level of indirect expenditure. The same, at 36.52% for the immediately preceding year, and at 44.67% for the year prior thereto, falls to as low as 1.28% for the current year, indicating, once again, of a change in the business profile. True, the said expenditure being largely fixed or semi fixed, tends to remain constant, but that assumption would be valid only for the same level of physical activity/output, or where it falls in the same range and, besides, would not fall to negligible levels (in terms of turnover), i.e., were it to bear the same character, as it does. In fact, holding the same constant at Rs.25.80 lacs, i.e., as obtaining for the immediately preceding year, implies an increase of Rs.32.21 lacs (Rs.58.01 lacs – Rs.25.80 lacs) for the current year, and which works to 0.72% of the incremental turnover

of Rs.4468.68 lacs for the year, i.e., as against a level of 36%-37% (of the turnover for the preceding year, falling, thus, to as low as 2% of its earlier level, signifying, again, a change in the business profile. Couple this with the fact that the Revenue itself states of the assessee's sale for the current year being, in the main, to its' two sister concerns, doubting the same on that basis, i.e., as, inferably, not genuine transactions.

Under the circumstances, we only consider it fit and proper to estimate the assessee's income for the year holding of a change in the assessee's business for the current year, so that trading in paper, as stated in its SOF, was also added to the existing business of printing. We estimate the income for the year by ascribing the incremental sales to the trading business (in printing paper), retaining the sales and the net profit of the existing business to the level as disclosed for the immediately preceding year, i.e., at Rs.70 lacs and 5.0% respectively (by rounding of the same). For the balance sales of Rs.4469.32 lacs for the current year, we estimate the net profit at 1.0%, i.e., at 1/5 of the profit on the manufacturing activity, and is also in line with the industry average, at least apparently. The Revenue has also not brought or even relied upon any material in this regard. This, i.e., the said estimation by us, shall also take care of the Revenue's appeal as well, which impugns the allowance of the indirect expenditure as claimed by the assessee. We decide accordingly.

9. In the result, both the assessee's and Revenue's appeals are partly allowed.

Order pronounced in the open court on July 17, 2015

Sd/-	Sd/-
(D. Manmohan)	(Sanjay Arora)
उपाध्यक्ष / Vice President	लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 17.07.2015
व.नि.स./Roshani, Sr. PS

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)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

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