

आयकर अपीलीय अधिकरण, चण्डीगढ़ न्यायपीठ "ए", चण्डीगढ़  
IN THE INCOME TAX APPELLATE TRIBUNAL, CHANDIGARH BENCH "A", CHANDIGARH

श्रीमती दिवा सिंह, न्यायिक सदस्य एवं डा. बी.आर.आर, कुमार, लेखा सदस्य  
BEFORE: SMT. DIVA SINGH, JM & DR. B.R.R. KUMAR, AM

आयकर अपील सं./ ITA NO. 204/Chd/2017

निर्धारण वर्ष / Assessment Year : 2012-13

The DCIT, Circle-1 Ludhiana	बनाम	M/s C.L. Engineering Limited C-201, Phase-VII, Focal Point, Ludhiana
स्थायी लेखा सं./PAN NO: AACCC9790Q		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारित की ओर से/Assessee by : Shri. Ashwani Kumar, CA

राजस्व की ओर से/ Revenue by : Smt. Geetinder Maan, Sr. DR

सुनवाई की तारीख/Date of Hearing : 19/03/2019

उद्घोषणा की तारीख/Date of Pronouncement : 31/05/2019

**आदेश/Order**

**PER DR. B.R.R. KUMAR, A.M**

The present appeal has been filed by the Revenue against the order of the Ld. CIT(A)-1, Ludhiana dt. 30/11/2016

2. In the present appeal Assessee has raised the following grounds:

*Whether upon facts and circumstances of the case, the Ld. CIT(A) was justified in reversing the action of Assessing Officer for treated the surrendered income as deemed income u/s 68, 69A, 69B & 69C of the I.T. Act, 1961 and treating the same as business income and allowed the same to be set off against business loss/depreciation loss or any other expenses?*

*Whether upon facts and circumstances of the case, the Ld. CIT(A) was justified in deleting the disallowance made u/s 36(1)(iii) of the Income-tax Act, 1961, on capital advances?*

*That the order of the Ld. CIT (A) be set aside and that of the Assessing Officer be restored.*

*That the appellant craves leave to add or amend any ground of appeal before it is finally disposed off.*

3. Facts taken from the record of the CIT(A) are as under:

*A survey u/s 133A of the IT Act was conducted on 07/09/2011 on the premises of the assessee. The assessee surrendered an amount of Rs.3 crore on account of the following discrepancies:-*

(a)	Unaccounted investment in building	Rs.60 lacs
(b)	Discrepancy on account of excess cash	Rs.50 lacs
(c)	Unaccounted investment in machinery	Rs.50 lacs
(d)	Sundry creditors written off	Rs.1.40crores

The assessee was asked to show cause as to why not the income surrendered during the survey be not considered as part of business and taxed u/s 69, 69A, 69B and 69C as applicable and as per judgement of jurisdictional High Court in the case of M/s Kim Pharma. In response, the AR submitted the detailed reply with which the AO was not satisfied as the AO held that the assessee had surrendered an amount of Rs.3 crore, Rs.1.40 out of the surrendered amount was covered u/s 41(1) of the IT Act being unexplained creditors. The said amount was held to be not taxable u/s 68 of the IT Act and the balance surrendered amount of Rs.1.60 crore was treated as deemed income u/s 69, 69A, 69B, 69C of the Act and not allowed by the AO to set off the business loss against the surrendered income.

2.1 The AR submissions are as under:

1.1 During the course of survey proceedings survey parties have conducted extensive search work to find out various irregularities. They have also conducted physical verification of stock, machinery and other assets. The surrender income of Rs.3 crore has been shown in the profit and loss account under the head "Revenue from Operation" (Note-17) under sales of services i.e. Tower Erection & Other Charges having amount of Rs.36495493.06. The company is maintaining all the statutory records required under the provision of Central Excise Act, Vat Act and Companies Act. All the books of accounts up to the date of survey along with the relevant purchase bills, sales bills, expenditure vouchers and other supported documents and details were verified during the course of survey but no discrepancy was found there in. Further stock was verified with the excise records showing details of purchase of raw materials, consumable stores, and raw material used for production, sale of finished goods and closing stock of raw materials and no discrepancy was found during the course of survey operation. Further no document, information records showing ownership of any valuable assets was found. At the end of survey statement of the director was also recorded. The relevant part of statement is reproduce as under-

#### Regarding cost of Building

Q-1 During the course of survey u/s 133A conducted on your premises, it is seen that there is a newly constructed business shed in front of Furnace Division constructed in respect of which is still going on. However, as per books of a/c of the company, no such investment on a/c of construction of building shed has been accounted for in the regular books of a/c belonging to company. Please explain the discrepancy.

Ans. In fact, this investment in construction of building shed has not been accounted for in regular books of a/c of the company and investment in same is being outside the books out of unaccounted income of the company. The total investment upto till date including all type of construction investment, till date is Rs.58.75 lacs approximately. Since this investment has not been accounted for in the books of company. I Sanjay Gupta, being Director of the company M/s. C. L. Engineering Ltd. surrender an amount of Rs.60 lac on a/c of unaccounted investment in building. This surrender of Rs.60 lacs will be over and above the normal business income of the company during the current financial year.

#### Regarding Cash

Q-2 During the course of survey, inventory of cash lying at your business premises has found as per this inventory, cash amounting to Rs.5277948/- was found from your business premises which has been returned to you.

However as per cash in hand as on 07.09.2011, cash in hand as per cash book is Rs.371693/-only (as per books of M/s. C. L. Engg. Ltd.). There is discrepancy of Rs.4906255/- being excess cash found from premises of M/s. C. L. Engineering Ltd. Please explain this discrepancy and to state to whom this cash belongs.

Ans. This cash of Rs. 50 lacs approximately belong to company and have come as a result of a property deal in the name of company. However I am not in position to explain this discrepancy and I Sanjay Gupta, as a Director of M/s. C.L. Engineering Limited, surrender an amount of Rs.50 lacs as income of the

company M/s. C.L. Engineering Limited over and above the normal business income of the company for the current financial year.

Regarding cost of Machinery

Q-3 As per inventory of machinery found during the course of survey u/s 133A at Unit II at F-

4, Focal Point, Ludhiana belonging to your company i.e. M/s. C. L. Engineering Limited, Machinery installed at the premises i.e. F-4, Focal Point, Ludhiana comes of value of Rs.8225617/- where machinery as per books of a/c installed at your premises F-4, Focal Point comes of Rs.3570777/- going discrepancy of Rs.4654840/-. Please explain this discrepancy.

Ans. The excess of value machinery at Rs.4654840/- is in fact new machinery installed during the year which has not been accounted for in the regular books of a/c of company i.e. C.L. Engineering Ltd. The total investment of Rs.50 lac (including erection charges) has been made outside the regular books of account of the company and I Sanjay Gupta, being director of the company M/s. C. L. Engineering Limited surrender an amount of Rs.50 lac in the hands of company over and above the normal business profits of the company for the current financial year.

In the above statement, nothing has been brought to establish that the assessee company has earned undisclosed income other than its regular business.

The department, during the course of survey, was not able to find out any source of income except the regular business of manufacturing of Steel Ingots, Auto Parts and Tower Fabrication. No adverse finding or note given by the survey party. Even the Assessing Officer could not point out a single defect in the books of accounts and also the books maintained by the company has been accepted as it is without rejecting the same.

The Learned Assessing Officer heavily relied upon the decision of Hon'ble High Court in the case of Kim Pharma. No other evidence/paper is available to justify the surrender income being deemed income u/s 68. The fact in Kim Pharma case is similar to the fact of our case as in the Kim Pharma case there are two kinds of surrender. One on account of cash and other on account of sundry creditors/repair to building. The Learned Assessing Officer has treated cash surrender of Rs.5 lacs as deemed income u/s 69A of the Act and Rs.10 lacs on account of sundry creditor/repair to building as being business income.

Regarding surrender of Rs.50 lacs on account of cash we have specifically stated in our statement that the same is against dealing in property therefore business in nature. Survey party has not controverted this statement hence undoubtedly it becomes in the nature of business activity therefore adjustable against regular business loss.

We have kept reliance in following judgments for establishing that surrender income is a kind of business income therefore adjustable against losses from other business activity;

*Gaurish Steels Private Limited vs. ACIT (127 DTR (Chd) (Trib) 266)*- In this case it has been held that surrender income apart from cash is to be taxed under the head Business Income therefore assessee is entitled to get this income adjusted against business loss.

The Hon'ble Bench of Chandigarh Tribunal in the case of Kumar Enterprises ITA No.525/CHD/2014, has held that the surrender income is a part of business income and also it has been stated that the judgment of Hon'ble jurisdictional High Court in the case of Kim Pharma is related with surrender cash amount therefore surrender amount other than cash is out of the purview of this judgment.

1.6 In the light of above submission it is respectfully requested to dispose of the appeal after considering the all relevant facts and delete the addition of Rs. 16000000/- made by the Assessing Officer.

The surrendered income has been shown in the income tax return as business income. Out of the same, the appellant's explanation regarding the surrendered amount of Rs. 1.40 crore was accepted by the Assessing Officer being surrender u/s 41(1) of the Act as unexplained creditors reflected in the books of accounts. For the balance amount, the Assessing Officer placed reliance on the decision in the case of Kim Pharma Pvt. Ltd. vs. CIT & Anr. 2013 258 CTR (P&H) 454 and on the case of Fakir Mohd. Haji Hasan vs. CIT 247 ITR 290 of the Hon'ble Gujarat High Court and held that the said income of Rs. 1.60 crore surrendered by the appellant during the survey is to be treated as deemed income u/s 69, 69A, 69B and 69C of the Act and the same was not allowed to be set-off against business loss/depreciation. Before the Assessing Officer, the appellant had submitted that the case of Kim Pharma (supra) is not relevant to the facts of the case, since in the said case reliance was placed on the case of Fakir Mohd. Haji Hasan (supra), which has been distinguished by the Hon'ble Gujarat High Court itself in the case of DCIT vs. Radhe Developers (I) Ltd. & Anr. (2010) 329 ITR 1 Guj and also relied on the case of CIT vs. Shilpa Dyeing & Printing Mills Pvt. Ltd. (2013) 39 [taxmann.com](http://taxmann.com) 3 (Guj). The AR contended that the facts of the case are different to the case of Kim Pharma (supra) as in the appellant's case are out of the balance surrender amounting to Rs. 1.60 crore, Rs. 60 lacs pertains to investment in building and Rs. 50 lacs pertains to investment in machinery, which is also related to business activity. The AR has further contended that as per the provisions of sec 56 the classification of income is based on its chargeability and not as per its nature and unexplained income chargeable to tax u/s 68 cannot be charged to tax under the remaining heads and therefore is a part of the residual head i.e. income from other sources. Reliance was placed on the judgment of ITAT, Ahmedabad in the case of KR Automobiles vs. CIT (2014) 161 TTJ (Ahd)(UO) 39 wherein it has been held that business loss can be set-off against addition u/s 68. It was also pointed out by the AR that in the surrender letter the head-wise breakup was given and that nothing was recorded during the survey which could establish that the company is doing any other activity except for its business activity. The AR contended that the appellant company is maintaining all the statutory records under Excise Act, VAT Act and Companies Act. All the books of accounts upto the date of survey along with relevant bills and vouchers were verified during the survey and stock was also verified but no discrepancy was found. Reliance has been placed by the AR on the case of Gaurish Steels Pvt. Ltd. vs. ACIT 127 DTR (Chd) (Trib) 266 wherein it has been held that surrendered income apart from cash is to be taxed under the head business income and is to be allowed to be adjusted against business loss. Further, the Hon'ble ITAT Chandigarh Bench in the case of Kumar Enterprises ITA no. 525/Chd/2014 has held that surrendered income is part of the business income and also held that the judgement of Hon'ble Jurisdictional High Court in the case of Kim Pharma supra is related with surrendered cash and therefore surrender other than cash is out of the purview of the said judgment.

On similar facts, it has been held in the case of M/s Khurana Rolling Mills (P) Ltd. in Appeal No. 518/ IT/CIT(A)-I/Ldh./2014-15 dated 31.03.2016 for A.Y. 2012-13 as under:

"I have carefully considered the facts of the case, the basis of the addition made and the argument of the AR. During the course of the survey operations conducted at its business premises, the appellant surrendered an amount of Rs. 1 crore. The said income has been shown in the P&L account by the appellant. The Assessing Officer assessed the surrendered income as deemed income u/s 69 and 69B by relying on the judgment of M/s Kim Pharma Pvt. Ltd. ITA no. 106 of 2011 (P&H) & Fakir Mohamad Haji Hasan in IT A no. 165 CTR 1011 (Guj). Thus, the business losses were not allowed to be set off against the surrendered income. The AR contended that the appellant is maintaining all the statutory records required under the provisions of the Central Excise Act, VAT Act and Companies Act and that there is no finding during the course of the survey operations or the assessment proceedings to the effect that the appellant is engaged in any activity outside the books of accounts. The AR further contended that all the books of accounts upto the date of the survey along with the relevant purchase bills, sales bills, expenditure vouchers, capital expenditure and other supporting documents and details were verified during the course of the survey but no discrepancy was found therein. Further, the stock was verified with the excise and stock records showing details of purchase of raw material, consumable stores, raw material used for production, sale of finished goods, wastage and

closing stock of raw materials and no discrepancy was found during the course of the survey operations. No discrepancy was found in the cash in hand verified with the books of accounts. Therefore, there is force in the appellant's contention that it was maintaining complete books of accounts with proper records on the date of the survey and no incriminating evidence or record not in consonance with the books of accounts was found. There was no cash credit found during the survey which the appellant could not explain. No investment was found which was not recorded in the books of accounts. Further, no document, information, records showing ownership of any money, bullion Jewellery or other valuable article was found and neither any evidence showing that the appellant was the owner of any bullion jewellery or other valuable article where it was found that amount invested in the same exceeded the amount recorded in the books of accounts. No evidence was found showing that the appellant had incurred any expenditure for which no explanation could be offered regarding the source of the said expenditure. Thus, the AR contended that sec 68, 69, 69A, 69B and 69C are not applicable in its case. The appellant surrendered Rs. 1 crore as business income in the form of sundry debtors during the survey operations. The AR has contended that the surrender offered by appellant on account of undisclosed sundry debtors is purely related to the business carried out by the appellant. No undisclosed business activity has been found during the survey. The AR pointed out that as per the statement of Sh. Baljinder Singh s/o Sh. Charan Singh recorded during the survey operations, the amount of Rs. 1 crore was surrendered as income of the company over and above the normal business income. The AR has rightly pointed out that in the case of Kim Pharma Ltd. vs. ITO, ITAT Chandigarh bench, the amount surrendered on account of cash was not allowed to be assessed as business income since the source has not been explained and the same was assessed u/s 69A of the Act whereas in the appellants case mode and manner has been applied to the surrendered income as applied to the income earned during the regular course of the business. No evidence has been found during the survey operations and the discrepancies found were related to the assessee's business and not to any other source of income. The said submissions of the AR were not controverted in the remand report. Reliance has been placed by the AR on the decision of Sh. Kuldeep Kumar vs. CIT Hon'ble ITAT Chandigarh bench in ITA 1015/CHD/2009 for A.Y. 2006-07 wherein it has been held, after considering the case of the Hon'ble Gujarat High Court in the case of Fakir Mohamad Haji Hasan, that income cannot fall beyond the five heads made under the act. Further, reliance has been placed on the decision of the Hon'ble Apex court reported in CIT vs. D.P. Sandhu & Bros. 273 ITR 1 wherein it has been held that section 56 provides for chargeability of income of every kind which has not been excluded from the total income under the act only if it is not chargeable to income tax under any heads specified in sec 14 and if the income is included under any one of the heads it cannot be taxed u/s 56. Further, reliance has been placed on the case of DCIT vs. Radhe Developers India Ltd. & Anr. (Guj) 329 ITR 1 wherein the judgment of Fakir Mohamad Haji Hasan has been considered and the judgment of the Hon'ble Apex Court in the case of D.P Sandhu & Bros. P. Ltd. Supra have been referred to and it has been held that the act does not envisage taxing income under any head not specified u/s 14 of the Act. The Department did not find any other source of income except the business of manufacture of steel items and, according to the AR, the same is clear as per the offer letter of surrender also wherein it is stated that the surrender amount is over and above the book version which shows that the income offered is a part and parcel of its existing business activities. Reliance has also been placed by the AR on the judgment of Hon'ble Gujarat High Court in the case of Shi I pa Dyeing and Printing Mills 39 taxmann 3 wherein, after considering its earlier judgment of Radhe Developers India Ltd. and of D.P Sandhu & Bros.(SC), the issue was decided in favour of the assessee and the judgment in the case of Kim Pharma Ltd. (P&H) was considered and distinguished. The surrender made by the appellant was on account of advances and receivables which are considered under the head 'business income'. The Assessing Officer has not been able to establish in the assessment order with supporting evidence that the income surrendered was not out of the business of the appellant. Further, there is force in the appellant's contention that the Assessing Officer has nowhere objected to the heads under which the appellant has surrendered these amounts. In the case of M/s Kim Pharma P. Ltd.(P&H) supra reliance has been placed on the ratio laid down in Fakir Mohamad Haji Hasan vs. CIT 247 ITR 290 (Guj) wherein it has been held that only where the nature and source of

investment made or the nature and source of acquisition of money, bullion etc. owned by the assessee or the source of expenditure incurred by the assessee are not explained, then the value of such investments or money and the value of articles not recorded in the books or the unexplained expenditure may be deemed to be the income of such assessee and that the moment a satisfactory explanation is given about the nature and source by assessee, the income would be treated under the appropriate head of income. However, in the appellant's case, the Assessing Officer could not establish that payments received as per the slips were from sources other than the business of the appellant. Therefore, apart from the cash, all other income surrendered is to be brought to tax under the head business income while the cash is to be taxed under the head deemed income u/s 69A of the Act. Moreover, the Assessing Officer has not disputed the business losses of the appellant. The Assessing Officer has not found any disallowable expenditure to show that the appellant has manipulated its books of accounts to bring down its total income. No such evidence has been brought on record to show that the assessee has booked any bogus expenditure and there is therefore no reason to doubt the veracity of the books of accounts and the expenditure therein. The heads under which the surrender has been made has not been challenged by the survey team or the Assessing Officer. In the case of Kim Pharma Vs. CIT in ITA no. 106 of 2011 (P&H) supra the Hon'ble High Court has upheld the treatment of additional income on account of sundry credits, repairs to building, and advances to staff to be treated under the head 'income from business and profession' and only in respect of cash found where no clear source could be established by the appellant the same was treated under the head 'income from other sources'. The Assessing Officer has not appreciated the decision in the case of Kim Pharma (supra) properly and has misapplied it. The AR has placed reliance on the case of M/s Gaurish Steels Pvt. Ltd. reported in 43 ITR 41 dated 17.09.2015 of the Hon'ble ITAT Chandigarh Bench, wherein the Assessing Officer did not dispute the business losses incurred by the assessee and did not reject the books of accounts. Relying on the case of Kim Pharma P. Ltd. Vs. CIT (P&H) (supra) and referring to the case of Fakir Mohamad Haji Hasan vs. CIT (Guj) (supra), it was held in the said case that the income apart from cash, in the shape of discrepancies in the cost of construction of building, in stock and in advances and receivables was to be treated as 'business income' as the Assessing Officer and the survey team failed to find other source of income except for business income. Therefore, in the said case only the cash found was treated as income from other sources and it was held that all other income surrendered could be brought to tax under the head 'business income' and the business losses incurred by the assessee during the year were allowed to be set-off against the income surrendered during the survey except the amount of cash surrendered. The appellant's case is covered by the said decision of the Hon'ble Jurisdictional ITAT in the case of M/s Gaurish Steels Pvt. Ltd. (supra)

Respectfully following the above decision of the Hon'ble ITAT, Jurisdictional Bench it is held that the income surrendered under the head 'Debtors' is to be brought to tax under the head 'business income' and benefit of set-off of business loss is to be given against the same. These grounds of appeals are allowed."

Considering the facts and circumstances of the case, the judicial precedents on the issue and following the above order, it is held that the surrender of Rs. 60 lacs on account of unaccounted investment in building and Rs. 50 lacs on account of unaccounted investment in machinery is to be treated as business income and the business loss/depreciation loss is allowed to be set-off against the same.

However, the surrender of Rs. 50 lacs on account of excess cash found is to be treated as deemed income u/s 69, 69A, 69B and 69C and benefit of set-off of business loss, depreciation loss is not to be treated against the same. This ground of appeal is partly allowed.

4. The Ld. DR vehemently argued as per the written submissions placed below:

In the present case the assessee surrendered additional income Rs 3 crore detailed as under during the course of survey operation as he could not explain the transaction mentioned in the documents found.

- Unaccounted investment in building - Rs 60 lacs
- Excess cash found- Rs 50 lacs
- Unaccounted investment in machinery - Rs 50 lacs
- Sundry creditors written off- Rs 1.4 crore

2. Surrendered Income of Rs 1.4 crore on account of SC written off was covered u/s 41(1) and was accepted by the AO. Further, the assessee set off the business loss against the balance surrendered income of Rs 1.6 crore. During assessment proceeding the assessee could not explain the source of such surrendered amount of Rs 1.6 crore. Relying upon the statement of the Director (reproduced in para 4.7, page 13 of assessment order) the AO invoked provision of section 69/69A/69B and treated the surrendered amount as deemed income. Consequently following the decision of Hon'ble Punjab High Court in the case of Kim Pharma, set off of loss against deemed income u/s 69/69B of Rs 1.6 crore was disallowed.

3 In this regard it is submitted that merely crediting the surrendered amount to P/L a/c doesn't entitle the assessee to say that it is business income and consequently claim set off of losses. Following submissions and reliance on following case laws are made for the revenue.

Kind attention is invited to Hon'ble Punjab and Haryana High Court decision in the case of Pr. CIT vs Khushi Ram 2 sons foods (P) Ltd in ITA No. 126 of 2015 dated 29.07.2016 wherein following question of law was answered in favour of revenue

*"ii) Whether in the facts and circumstances of the case, the order of Hon'ble ITAT is perverse in law in quashing the order under section 263 ignoring that assessment order is erroneous in so far as it is prejudicial to the interest of the revenue as the Assessing Officer has not followed the decision of Hon'ble Court of Punjab and Haryana in the case of M/s Kim Pharma (P) Ltd v. CIT Panchkula, ITA No. 106 of 2011 (O&M) dated 27.04.2011 that income surrendered during survey is to be taxed u/s 69-A and set off losses u/s 70 and 71 is not permissible against such income."*

The facts of this case (Para 6 of the order) is that surrendered income of Rs. 80 Lac (bifurcated as- Rs. 50 lacs on account of building renovation, Rs. 15 lacs on account of office equipment and Rs. 15 lacs on account of sundry receivable) were set off against unabsorbed loss u/s 70 & 71. The Hon'ble High Court following its earlier decision in Kim Pharma Pvt Ltd vs CIT ITA No. 106 of 2011 dated 27/04/2011 held that:

*"13. It is not necessary that the surrendered amount is from business income. It could be on account of any other transaction legal or otherwise. Merely because an assessee carries on certain business, it does not necessarily follow that the amounts surrendered by him are on account of its business transactions. There is no presumption that absent anything else an amount surrendered by an assessee is his business income. It is for the assessee to establish the source of such surrendered amount*

*14. Question No. (ii) is, therefore, answered in favour of the appellant (revenue)."*

The crux of this decision is that the assessee has to offer an explanation regarding the source of investments and to substantiate it with documentary evidence. Only when the assessee establishes the source of surrendered amount, only then can it be treated as business income and set off against loss be allowed. Mere statement that surrendered amount is business income does not suffice and in such a scenario it has to be assessed as deemed income u/s 69A and set off against loss cannot be allowed

ii. In the case of Kim Pharma a definite principle was laid down by the Hon'ble Punjab & Haryana High Court; that unexplained source of investment/expenditure/ownership of money etc has to be assessed as deemed income u/s 69,69A,69B and 69 C and that set off of deemed income against business loss is not allowable. The facts in Kim Pharma were that the cash of Rs. 5 lacs found during survey was surrendered by the assessee in A.Y. 2006-07. Apart from this cash found, the assessee additionally surrendered Rs. 10 lac for A.Y. 2005-06 on account of Sundry Credits, repairs and advance to staff. The assessment for

A.Y. 2006-07 was completed by AO by treating the excess cash of Rs. 5 lac found during survey as unexplained income u/s 69A and this decision of AO was adjudicated by Hon'ble High Court in favour of revenue. For A.Y. 2005-06, the AO held that the surrendered amount of Rs. 10 lac on account of repairs, credits and advance was business income (last 4 lines of para 4 page 2 of Hon'ble ITAT decision) and hence this issue was not agitated before any higher forum. The point to be noted here is that the surrendered income does not automatically become business income unless and until it is established by the assessee. For the A.Y. 2005-06 the assessee was able to establish before the AO that surrendered income of Rs. 10 lac on account of repairs etc. was business income which was accepted by the AO. However for A.Y. 2006-07, the assessee claimed that the surrendered income of Rs. 5 lac was income from job work (Para 4 Page 2 of ITAT order) but could not produce any evidence to substantiate its claim (Para 7 and Para 9 of ITAT order). Hence this surrender was adjudicated as deemed income u/s 69 A for A.Y. 2006-07 by Hon'ble High Court and Hon'ble ITAT.

iii. In the case of Mrs. Promila Jain Vs DCIT ITA No. 1449/Chd/2010, dated 25/09/2017 the Hon'ble ITAT, Chandigarh following the decision of Hon'ble High Court in Kim Pharma held that surrendered amount of Rs. 4 Lakhs on account of cash and excess stock is assessable u/s 69 & 69 A and consequently the set off against business loss was disallowed. It was held by Hon'ble ITAT that the assessee could not explain the source of investment in excess stock during the course of survey, or before AO or before CIT(A). The assessee did not give any evidence to prove that the investment in excess stock was made out of his business income earned outside the books of account (para 7/4.3 of the order) Thus the appeal of assessee was dismissed.

iv However, in the case of M/s Gaurish Steel Pvt. Ltd. Vs. ACIT, ITA No. 1080/Chd/2014 dated 17/09/2015, the Hon'ble ITAT took a different view and without considering the full fact of Kim Pharma held that only the cash found during survey is to be treated as deemed income u/s 69, while all other components of surrendered income such as investments made in repairs, stock etc. even though not explained is to be treated as business income. Further the court cast the onus on the revenue to establish that the surrendered amount was not out of business. The court observed as under:

*"14. Nowhere in his order, the Assessing Officer has been able to bring on record the fact that the income surrendered during the course of survey was not out of the business of the assessee. Also nowhere he has objected to the heads under which the assessee had surrendered these amounts, i.e. cash, construction of building, discrepancy in stock and discrepancy in advances and receivable. Further, even the survey team has not found any source of income except the business income. Now following the judgment of Jurisdictional High Court, in the background of the facts of the present case, we can safely infer that apart from cash all other income surrendered may be brought to tax under the head 'business income' while the cash has to be taxed under the head deemed income under section 69A of the Act."*

The decision of Hon'ble ITAT in Gaurish Steel is not correct in law as it did not appreciate that the only issue for adjudication in Kim Pharma before Hon'ble High Court was regarding cash for A.Y. 2006-07 and not amount surrendered for A.Y. 2005-06. The AO assessed the surrendered amount on account of repairs, credits etc as business income for A.Y. 2005-06 as the assessee was able to explain the source of investment and hence this issue was not adjudicate by any higher authorities. While for A.Y. 2006-Page 3 of 6 surrendered income of Rs. 10 lac on account of repairs etc. was business income which was accepted by the AO. However for A.Y. 2006-07, the assessee (Kim Pharma) was not able after any adequate explanation and hence the surrendered amount was treated as deemed income. In any case this matter has been adequately settled by Hon'ble High Court in recent judgment in the case of Khushi Ram & Sons wherein it has been held that the onus is heavy on assessee (and not on revenue) to establish the source of surrendered amount; and in case there is no explanation than the same has to be treated as deemed income of u/s 69, 69 A and consequently set off against loss of u/s 70 & 71 is not permissible.

v. Further reliance is place on the decision of Hon'ble ITAT Delhi in the case of ACIT vs M/s Sant Steel & Alloys Pvt. Ltd in ITA No. 2808 & 2809/Del/2013 dated 02/06/2016. Hon'ble ITAT Delhi in Para 9.2 held that deemed income of chapter VI (containing charging provision section 68 to 69 D) is distinct and has to be aggregated with the income computed under chapter IV (containing section 14) and Chapter V (containing clubbing provision). Consequently setoff of loss against deemed income is not permissible. Further Hon'ble ITAT Delhi distinguished the facts of following cases as being income arising from known source of income viz-a-viz deemed income source of which is unexplained / unknown.

(i) Hon'ble SC decision in the case of CIT vs DP Sander Bros. Chambur (P) Ltd 273 ITR 1.

In this case the amount of Rs. 35 lacs received by the assessee on account of premature termination of lease agreement was treated by the AO as income from other sources u/s 10(3) r.w.s. 56 as casual and on-recurring receipts. Hon'ble Supreme Court held that income from sale of tenancy rights is a capital asset, which is taxable under the head capital gain and not under head other sources In this case the source of Income received was not disputed. Hon'ble ITAT Delhi distinguished this case stating that since income was from known source, section 14 is attracted and hence no reference can be made to section 68/69 (para 10 & 10.1 of ITAT Delhi order).

(ii) Gujarat HC decision in the case of DCIT vs Radhey developers India Ltd. 329 ITR 1.

Here again, Hon'ble ITAT Delhi held that the observation of Gujarat HC was with reference to known sources of income as opposed to deemed income u/s 68/69.

(iii) Gujarat HC decision in the case of CIT vs Shilpa Dyeing & Printing Mill Ltd (2013) (39 [taxmann.com](http://taxmann.com) 3)

ITAT Delhi observed that Gujarat HC followed its earlier decision in Radhey developers and since the said amount was explained and found to be sourced from business: no question of law arises and accordingly appeal of revenue was dismissed.

4. Liberty Plywood (P) Ltd. V/s Assistant Commissioner of Income Tax In this case Hon'ble ITAT has held that the decision of Hon'ble Punjab and Haryana High Court in Kim Pharma is not applicable to depreciation loss u/s 32(2). Hon'ble ITAT has distinguished business loss viz-a-viz depreciation loss to arrive at the decision. In this regard it is submitted that Supreme Court in the case of Garden Silk Weaving factory V/s CIT(1991 AIR 1322, order dated 22.03.1991, copy enclosed in page 1 to 24) has held that unabsorbed depreciation is a part of business loss. The relevant extract is as under:-

*i) "Sri Salve contends that these provisions talk only of "loss" and that to take this expression as including "unabsorbed depreciation" as well will obliterate the distinction in the treatment meted out to these as separate items by S. 32(2) and S. 72(2) and (3). We think this argument is misconceived. An unabsorbed depreciation is indeed a part of the "loss". This is so because, in the first place, "depreciation" is a normal outgoing though in a sense notional, which has to be debited in the computation of the profits of a business on commercial principles (quite apart from statute) and it is difficult to see why, when such deduction yields a negative figure of profits, it cannot be a "loss" as generally understood. Jaipuria definitely says so as pointed out earlier. Again, as pointed out earlier, if it is treated as a genus totally different from a "loss", there is no statutory provision that will permit its adjustment against other business income-implicit in S. 32(2) itself- and against all other income of the assessee as held by the above decisions. We therefore do not see why "loss" and "unabsorbed depreciation" should be treated as antithetical to, or mutually exclusive of, each other.*

ii) Nor are we persuaded that any mix-up or anomaly will result as, suggested by counsel if we treat the expressions as synonymous except to the extent specifically treated differently by the statute. In our view, there is nothing anomalous or absurd in the statute providing for a dissection of the amount of loss for purposes of carry forward and providing for a special or different treatment to unabsorbed depreciation in this regard although it is a component element of the genus described as "loss". To illustrate, suppose an assessee, has a "profit" of Rs. 5,000 in one business before deduction of depreciation of, say, Rs. 10,000 and a loss of Rs. 15,000 in another business, it will be quite correct to say that he has a business loss of Rs.20,000 in that assessment year. But for purposes of carry forward this has to be considered under two headings: (a) an unabsorbed depreciation of Rs.5,000 and (b) a business loss of Rs. 15,000. The amount of Rs.20,000 will be carried forward to the subsequent year but the carry forward of Rs.5,000 will be according to the provisions of S. 32(2) and the carry forward under S. 72 will have, perforce, to be restricted to the other amount of Rs. 15,000. The language of S. 72(2) itself contains an indication that, where unabsorbed depreciation is a component of the figure of loss carried forward, the amount of loss proper should be set off first and the unabsorbed depreciation later. But for the special treatment accorded by S. 32(2) and S. 72 for purposes of carry forward, there is no difference between an item of "unabsorbed depreciation" and an item of "loss".

iii) As per the Supreme Court the business loss and unabsorbed depreciation are synonymous and hence the Kim Pharma decision is equally applicable to both of these items. It is submitted that while rendering the judgment of Liberty Plywood, the decision of Supreme Court in the case of Garden Silk has not been considered.

iv) Commissioner of Income Tax-II V/s Shilpa Dyeing & Printing Mills P Ltd. In this decision Gujarat High Court followed its earlier decision in Radhey Developers wherein the surrendered amount was explained and found to be sourced from business. While in the present case, the surrendered amount has not been treated by the AO as business income but as unexplained income from unknown sources u/s 69, 69B (Para 4.4 to 4.7 of assessment order).

5. In view of above submission it is requested that the order of the AO may kindly be upheld since the surrendered income is from unknown sources and since the assessee has failed to establish with documentary evidence that it is from business.

5. We have heard the arguments of both the parties and perused the facts on record, the case laws relied upon by the Ld. Sr. DR as well as the Ld. CIT(A) and the rationale thereof has been examined in detail. The concurrent reading of the case of Khusi Ram & Sons in ITA No. 126 of 2015, Kim Pharma, Pramila Jain in ITA No. 1449/CHD/2010, Gauri Shankar Steel, Liberty Ply Wood, Radhey Developers India Ltd. 329 ITR 1, Shilpa Dyeing and Printing Mills 39 Taxmann 3 reveals that the surrender income if not explained about the sources cannot be allowed to be set off against business loss, depreciation loss. In the instant case during the statement recorded the assessee has explained that the sundry creditors are long outstanding and the amount on account on the long standing sundry creditors has been surrendered which is a part of business income. Further, in the same statement the assessee has explained that the surrender of Rs. 3 Crores is over and above the normal business profits of the company for the Financial Year which the Revenue has duly accepted. The Ld.

CIT(A) has diligently examined the issue on account of unaccounted investment in building as well as in machinery and treated them as income from business and accordingly the set off of losses was allowed. At the same time, the surrender on account of cash of Rs. 50 lacs was not treated as business income. This amount of cash has been rightly held to be deemed income under section 69 and benefit of set off of business loss and depreciation was not allowed against this surrender of Rs. 50 lacs rightly following the spirit of the case laws quoted by the Ld. DR. Hence, we hereby decline to interfere in the order of the Ld. CIT(A).

**Disallowance u/s 36(I)(iii):**

6. The second ground relates to disallowance of Rs.17360/- u/s 36(I)(iii) of the Income Tax Act.

7. During the course of assessment proceedings, it was noticed that the assessee had made advance of Rs.1,44,725 /-against machinery. The assessee was asked to explain whether proportionate interest had been capitalized on addition to fixed assets, capital advance / CWIP under proviso to sec 36(1)(iii) for the period from the date of payment to date on which the asset to use, as the assessee was making payment out of mixed funds and incurring huge expenses on interest payments. In this regard the Ld. CIT(A) held that two conditions are required to be fulfilled before Section 36(1)(iii) can be evoked i.e. capital should have been borrowed for the acquisition of the asset and the asset should have been acquired for the extension of the existing business and profession. However the Assessing Officer has given no finding regarding the fulfillment of these two conditions. The company has made an advance of Rs. 1,44,725/- as advance against machinery. No funds have been borrowed for the said purpose. Further, the assets were purchased for the purpose of business. There is no finding of the Assessing Officer that the same was purchased for the extension of the existing business. Reliance is placed on the decision of the Hon'ble Supreme Court in the case of DCIT vs. Core Health Care Ltd. 2008 298 ITR 194(SC) wherein it has been held that interest on money borrowed for the purpose of business is a necessary item of expenditure in a business. Further, it has been held in the case of Vardhman Polytex Ltd. vs CIT (2012) 349 ITR 690 (SC) that interest paid in respect of borrowings for acquisition of capital asset not put to use in the concerned financial year can be permitted as allowable deduction u/s 36(I)(iii). The AR has placed reliance on the judgment of the Hon'ble Supreme Court in the case of Hero Cycles vs. CIT 128 DTR SC wherein it

has been held that advances in the nature of business expediency are out of the purview of disallowance on account of interest. In view of the same, the said disallowance is not justified and is hereby ordered to be deleted. Since the decision of the Ld. CIT(A) is rightly based on the judgment of the Hon'ble Apex Court we hereby decline to interfere in the order of the Ld. CIT(A).

8. As a result, the appeal of the Revenue is dismissed.

Order pronounced in the open Court.

Sd/-  
दिवा सिंह  
(DIVA SINGH )  
न्यायिक सदस्य/ Judicial Member  
AG  
31/05/2019

Sd/-  
डा. बी.आर.आर, कुमार,  
( DR. B.R.R. KUMAR, AM)  
लेखा सदस्य/ Accountant Member

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

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय आधिकरण, चण्डीगढ़/ DR, ITAT, CHANDIGARH
6. गार्ड फाईल/ Guard File

आदेशानुसार/ By order,  
सहायक पंजीकार/ Assistant Registrar