

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION NO. 13556 of 2021****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR. JUSTICE J.B.PARDIWALA****Sd/-****and****HONOURABLE MS. JUSTICE NISHA M. THAKORE****Sd/-**

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	Yes
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

DARSHAN ENTERPRISE THROUGH PARTNER ASHVINBHAI
KARSHANBHAI ZALAVADIYA

Versus

ADDITIONAL/ JOINT/ DEPUTY/ ASSISTANT COMMISSIONER OF INCOME
TAX/INCOME TAX OFFICER

Appearance:

MR MANISH J SHAH(1320) for the Petitioner(s) No. 1

MRS KALPANAK RAVAL(1046) for the Respondent(s) No. 1,2

CORAM: HONOURABLE MR. JUSTICE J.B.PARDIWALA

and

HONOURABLE MS. JUSTICE NISHA M. THAKORE

Date : 03/01/2022

ORAL JUDGMENT

(PER : HONOURABLE MR. JUSTICE J.B.PARDIWALA)

1. By this writ application under Article 226 of the Constitution of India, the writ applicant, a registered partnership firm through one of its partners, has prayed for the following reliefs;

“A) This Hon’ble Court be pleased to call for the records of the proceedings, look into them and be pleased to issue a writ of certiorari or any other appropriate writ, order or direction quashing the assessment order passed by Respondent No.1 u/s.143(3) r.w.s. 144B dated 19.04.20121 at Annexure-F and demand notice u/s.156 of even date at Annexure-G.

B) this Hon’ble Court be pleased to call for the records of the proceedings, look into them and be pleased to issue a writ of mandamus or any other appropriate writ, order or direction directing the Respondents to grant complete stay of demand arising out of assessment order passed u/s.143(3) r.w.s. 144B dated 19.04.2021 at Annexure-F.

C) Pending the hearing and final disposal of this application, this Hon’ble Court be pleased to stay operation and implementation of the assessment order passed u/s.143(3) r.w.s. 144B dated 19.04.2021 at Annexure-F and further stay the recovery of demand in pursuance of the notice issued u/s.156 at Annexure-G.

D) This Hon’ble Court be pleased to grant any further or other relief as this Hon’ble Court deems just and proper in the interest of justice, and

E) This Hon’ble Court be pleased to allow this application with costs against the respondents.”

2. The facts, giving rise to this litigation, may be

summarized as under;

2.1 The writ applicant came to be incorporated as a partnership firm on 16.12.2017. The partnership firm is engaged in the business of real estate development. It is the case of the firm that it has ten partners. For the year under consideration, as the firm was constituted on 16.12.2017 and had no business activity by that period of time, it filed its return of income on 02.06.2018 at Rs.Nil.

2.2 The case of the writ applicant was selected for scrutiny assessment and, accordingly, notice was issued under Section 143(2) of the Act dated 22.09.2019. The main ground on which the return was selected for scrutiny as communicated is “share capital/other capital”. For the purpose of carrying out assessment, notices under Section 142(1) of the Act were issued calling upon the writ applicant to furnish the necessary details therein. It is not in dispute that pursuant to such notices, the necessary information was furnished through various letters addressed by the C.A./Authorized Representative of the writ applicant.

2.3 It appears that specific information with regard to the introduction of capital by each of the partners in the firm and the source thereof was asked for from the writ applicant.

2.4 The necessary information with regard to the introduction of capital by each of the partners was furnished by way of reply dated 20.02.2021 running into almost seventeen pages.

2.5 It is the case of the writ applicant that although all the requisite information, as called for, was furnished, yet the respondent No.1 herein without verifying such details, thought fit to issue a show-cause notice cum draft assessment order dated 31.03.2021 Annexure-D calling upon the writ applicant to show-cause as to why an amount of Rs.2,71,75,000/- (Rupees Two Crore Seventy One Lakh Seventy Five Thousand Only) be not added to the returned income of the firm on the premise that the capital contribution by the partners remains unexplained.

2.6 We take notice of the detailed objections lodged by the writ applicant dated 02.04.2021 against the draft assessment order for scrutiny assessment proceedings for the year in question. The same is at page-73 of the paper-book, Annexure-E.

2.7 Ultimately, the final impugned assessment order came to be passed dated 19.04.2021 under Section 143(3) read with Section 144B of the Act. We quote few relevant paragraphs from the impugned order of assessment;

“4.5 Thus, the assessee has failed to justify the credit entries appearing in its books by not proving the creditworthiness of the parties from whom the capital shown to be received/taken and genuineness of transaction made with them. In the case of the partners, the income earned by parties is not sufficient so as to introduce the same in the capital of the firm. Therefore, the assessee has shown that the partners have taken loans from some other parties to introduce the capital in the firm which is not backed by supporting evidences. Therefore, as required the assessee has not prove the onus of the creditworthiness of the partners in introducing the capital in the assessee firm and also the genuineness and creditworthiness of the other parties from whom funds have been received from the partners.

4.6 In connection with the same for clear understanding, the provisions of Section 68 of the I.T. Act are reproduced as under;

“Section 68; Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him, is not, in the opinion of the (Assessing Officer, satisfactory, the sum so credited may be charged to Income Tax as the income of the assessee of that previous year.’

4.7 From the plain reading of the same, it is seen that the onus is on the assessee to clearly establish the genuineness, nature and sources of the transaction, to prove the identity and creditworthiness of the lenders from whom funds received. The initial catchphrase of the section is “where any sum is found credited in the books of account of the assessee” meaning thereby that Section 68 is attracted where an entry relating to a sum is found to have been credited in the books of the assessee, which thus implies existence of books

and recording of a sum which the A.O. considers as doubtful.

4.8 The question is what is the true nature and scope of Section 68 of the Act? When and in what circumstances Section 68 of the Act would come into play? A bare reading of section 68 suggests that there has to be credit of amounts in the books maintained by the assessee that such credit has to be of a sum during the previous year, and that the assessee offer no explanation about the nature and source of such credit found in the books of the explanation offered by the assessee in the opinion of the A.O is not satisfactory. It is only then the sum so credited may be charged to income-tax as the income of the assessee of that previous year. The expression 'the assessee offer no explanation means where the assessee offer no proper, reasonable and acceptable explanation as regards the sums found credited in the books maintained by the assessee.

4.9 Such opinion found itself constitutes as prima facie evidence against the assessee, viz. the receipt of money, and if the assessee fails to rebut the said evidence, the same can be used against the assessee by holding that it was a receipt of an income nature.

4.10 In view of the above facts and discussion, it is very much clear that assessee could not prove the creditworthiness of the partners of the firm who have introduced huge capital into the firm and also the identity, genuineness and creditworthiness of the other parties from whom funds have been received by the partners for introduction in the firm as capital. Thus, the relevant documentary evidences will not come to the rescue of the assessee as the assessee has failed to prove the creditworthiness of the parties from whom capital has been introduced and genuineness, nature and source of the transactions during the year of receipt itself. Hence, capital introduced by the partners whose creditworthiness

has not been proved and the identity, genuineness and creditworthiness of the other parties from whom the partners have shown to have received funds are also not proved are calculated as under;

Sr. No.	Name of the Partner	Amount (Rs.)
1.	Ashwinbhai K. Zalavaidya	22,63,000
2.	Bharatbhai M. Khunt	28,96,000
3.	Hareshbhai J. Zalavadiya	27,15,000
4.	Hashmukhbhai M. Khunt	28,96,000
5.	Jagdishbhai B. Hirpara	50,68,000
6.	Kaushik Kanubhai Hirpara	50,68,000
7.	Narendrabhai B. Hirpara	4,00,000
8.	Ravjibhai K. Patel	17,06,000
9.	Sanjaykumar M. Kanani	41,63,000
	Total	2,71,75,000

4.11 The amount of Rs.2,71,75,000/- is treated as unexplained cash credit in the books of the assessee firm and brought to tax under Section 68 r.w.s 115BBE of the Act being unexplained cash credits. Penalty proceedings u/s. 271AAC of the I.T. Act 1961 is initiated separately.

5.1 Subject to the above, the income of the assessee is determined as under;

		Amount in Rs.
	Total income as per order u/s.143(1) dated 26.01.2019	Nil
Add .	Unexplained Cash Credit u/s.68 rws 115BBE-capital introduced as per Para-4 above.	2,71,75,000/-
	Assessed Total Income	2,71,75,000

2.8 Thus, it appears from the aforesaid that the Assessing Officer took the view that the writ applicant firm, as an assessee, had failed to justify the credit entries appearing in its books of account by not proving the creditworthiness of the parties from whom the capital is shown to have been received. According to the Assessing Officer, although the partners have confirmed as regards the bringing the facts in the capital, yet, the Assessing Officer was not convinced with such transactions because of the fact that the partners had obtained loans from the other parties. To put it more succinctly, the Assessing Officer rejected the argument canvassed on behalf of the assessee as regards Section 68 of the Act on the ground that the assessee had not been able to prove the creditworthiness of the partners of the firm who introduced huge capital in the firm and also the identity, genuineness and creditworthiness of the other parties from whom funds had been received by the partners for being introduced in the firm as capital.

2.9 Being dissatisfied with the aforesaid impugned order passed by the Assessing Officer, the writ applicant is here before this Court with the present writ application.

3. Mr. Manish J. Shah, the learned counsel appearing for the writ applicant vehemently submitted that the impugned assessment order is erroneous and in absolute

violation of the principles of natural justice. Mr. Shah has a very short submission to canvass. According to Mr. Shah, a law does not expect the assessee to explain the source of a source. Mr. Shah would submit that when his client was called upon to explain the entries in the books of accounts of the firm, the firm furnished every bit of information pointing out that it is the partners of the firm who introduced the requisite amount in the capital of the firm. According to Mr. Shah, the matter should have stopped at that stage. There could not have been any further inquiry with the firm. If the Assessing Officer had any doubts with regard to the genuineness of the entire transaction, it could have questioned the individual partners and not the firm. This, according to Mr. Shah, would be in tune with Section 68 of the Act.

4. The second submission of Mr. Shah is that the impugned assessment order is an exact reproduction of the draft assessment order. It fails to consider any of the details/information furnished by the writ applicant with respect to the specific queries raised by the Investigating Officer. Mr. Shah would submit that it is just a mechanical exercise undertaken by the Assessing Officer and the same would frustrate the very object with which Section 144B came to be introduced in the Act with effect from 01.04.2021. Mr. Shah laid much emphasis on the sub-clause (9) to Section 144B which starts with a non-obstante clause. Sub-section (9) to Section 144B

provides that notwithstanding anything contained in any other provision of the Act, the assessment made under sub-section (3) of Section 143 or under Section 144 in the cases referred to in sub-section (2) would be treated as *non-est* if such assessment is found to be not in accordance with the procedure laid down under Section 144B of the Act.

5. Mr. Shah, in support of his aforesaid submissions, has placed strong reliance on one recent pronouncement of the Bombay High Court in the case of ***Mantra Industries Ltd. vs. National Faceless Assessment Centre (NFAC or NeAC)***, reported in (2021) 131 taxmann.com 165 (Bombay), wherein the Bombay High Court thought fit to set aside the impugned assessment order therein as the same was found to be in breach of sub-section (9) of Section 144B and left it for the Assessing Officer to take appropriate steps as he may be advised in accordance with law. Mr. Shah also placed reliance on one another order passed by the Bombay High Court in the case of ***Milestone Brandcom Private Limited vs. National Faceless Assessment Centre, New Delhi & Anr.***, Writ Petition (L) No.28212 of 2021, decided on 14.12.2021, wherein also the order of assessment was quashed and the matter was remanded for *de novo* consideration.

6. Over and above the aforementioned two orders passed by the Bombay High Court, Mr. Shah has also placed reliance

on the following decisions;

Sr. No.	Name	Citation
1.	Kranti Associates Pvt. Ltd. vs. Masood Ahmed Khan & Ors. (SC)	(2010) 9 SCC 496 (SC)
2.	UOI vs. Kamlakshi Finance Corporation (SC)	1992 Supp. (1) SCC 443 (SC)
3.	Air Conditioning Specialists Pvt. Ltd vs. UOI (Guj.)	(1996) 221 ITR 739 (Guj.)
4.	Malini Construction Company vs. State of Gujarat (Guj.)	SCA No.13971 of 2019 (Guj.)
5.	Poonjar Service Co. Op. Bank Ltd. vs. ITO (Kerala)	(2021) 130 Taxmann.com 116 (Kerala)
6.	Claris Life Science Ltd . vs. UOI (Bombay)	SCA No.12686 of 2012
7.	Ajanta Manufacturing Private Limited vs. UOI	SCA No.3318 & 3320 of 2021

7. Mr. Shah, in particular, has placed strong reliance on the judgment of this High Court in the case of Malini Construction Company (supra) to fortify his submission that the present matter needs to be remitted for *de novo* consideration as the impugned order is not sustainable in view of Section 144B(9) of the Act. In other words, Malini Construction Company (supra) has been relied upon in support of the submission that when the impugned assessment order is bereft of reasons, then the same could be said to be passed in gross violation of the principles of natural justice and the alternative remedy of filing an appeal under Section 246 of the Act before the

Commissioner would not be a bar in entertaining the writ application.

8. In such circumstances, referred to above, Mr. Shah prays that there being merit in this writ application, the same be allowed and the reliefs as prayed for be granted.

9. On the other hand, this writ application has been vehemently opposed by Ms. Kalpana Raval, the learned senior standing counsel appearing for the Revenue. Ms. Raval vehemently submitted that no error, not to speak of any error of law, could be said to have been committed by the Assessing Officer in passing the impugned assessment order. She would submit that even if there is violation of the principles of natural justice, or the order is without jurisdiction, the Writ Court may decline to entertain the writ application if there is an alternative remedy in the form of a statutory appeal. According to Ms. Raval, the decision of the Supreme Court in the case of **Baburam vs. Zila Parishad**, AIR 1969 SC 556 makes such position of law abundantly clear. Ms. Raval would submit that in **Titaghur Paper Mills Co. Ltd. vs. State of Orissa**, AIR 1983 SC 603, the appellant therein had pleaded that there was violation of principles of natural justice and the impugned order was without jurisdiction, yet the Supreme Court held that the writ applicant should avail his alternative remedy of appeal. Thus, according to Ms. Raval, it is well settled that when an alternative and equally efficacious remedy is open to the litigant, he

should be required to pursue that remedy and not invoke a special/equitable jurisdiction of the High Court to issue a prerogative writ. The second contention canvassed by Ms. Raval is that it is wrong to assert that the impugned assessment order is an exact reproduction of the draft assessment order without considering the stance of the writ applicant. Ms. Raval would submit that the Assessing Officer made himself very clear that he is not convinced with the genuineness of the entries in the ledger account of the firm. She would submit that although the firm might have said that it received a particular amount from individual partners, yet that by itself, would not be sufficient to bring the case within the ambit of Section 68 of the Act. The third and the last submission of Ms. Raval is that all the aspects which have been highlighted by the learned counsel appearing for the writ applicant could be looked into by the Commissioner of Appeals and, in such circumstances, this writ application may not be entertained and the same be rejected.

ANALYSIS

10. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration is whether the present writ application should be entertained?.

11. Before adverting to the rival submissions canvassed

on either side, we must look into the provisions of Section 144B of the Act. Section 144B talks about faceless assessment. Section 144B came to be inserted w.e.f. 01.04.2021. Section 144B starts with a non-obstante clause. Section 144B(1) reads thus;

144B. (1) Notwithstanding anything to the contrary contained in any other provisions of this Act, the assessment under sub-section (3) of section 143 or under section 144, in the cases referred to in sub-section (2), shall be made in a faceless manner as per the following procedure, namely:—

(i) the National Faceless Assessment Centre shall serve a notice on the assessee under sub-section (2) of section 143;

(ii) the assessee may, within fifteen days from the date of receipt of notice referred to in clause (i), file his response to the National Faceless Assessment Centre;

(iii) where the assessee—

(a) has furnished his return of income under section 139 or in response to a notice issued under sub-section (1) of section 142 under or sub-section (1) of section 148, and a notice under sub-section (2) of section 143 has been issued by the Assessing Officer or the prescribed income-tax authority, as the case may be; or

(b) has not furnished his return of income in response to a notice issued under sub-section (1) of section 142 by the Assessing Officer; or

(c) has not furnished his return of income under sub-section (1) of section 148 and a notice under sub-section (1) of section 142 has been issued by the

Assessing Officer,

the National Faceless Assessment Centre shall intimate the assessee that assessment in his case shall be completed in accordance with the procedure laid down under this section;

(iv) the National Faceless Assessment Centre shall assign the case selected for the purposes of faceless assessment under this section to a specific assessment unit in any one Regional Faceless Assessment Centre through an automated allocation system;

(v) where a case is assigned to the assessment unit, it may make a request to the National Faceless Assessment Centre for—

(a) obtaining such further information, documents or evidence from the assessee or any other person, as it may specify;

(b) conducting of certain enquiry or verification by verification unit; and

(c) seeking technical assistance from the technical unit;

(vi) where a request for obtaining further information, documents or evidence from the assessee or any other person has been made by the assessment unit, the National Faceless Assessment Centre shall issue appropriate notice or requisition to the assessee or any other person for obtaining the information, documents or evidence requisitioned by the assessment unit;

(vii) the assessee or any other person, as the case may be, shall file his response to the notice referred to in clause (vi), within the time specified therein or such time as may be extended on the basis of an application in this regard, to the National Faceless

Assessment Centre;

(viii) where a request for conducting of certain enquiry or verification by the verification unit has been made by the assessment unit, the request shall be assigned by the National Faceless Assessment Centre to a verification unit in any one Regional Faceless Assessment Centre through an automated allocation system;

(ix) where a request for seeking technical assistance from the technical unit has been made by the assessment unit, the request shall be assigned by the National Faceless Assessment Centre to a technical unit in any one Regional Faceless Assessment Centre through an automated allocation system;

(x) the National Faceless Assessment Centre shall send the report received from the verification unit or the technical unit, based on the request referred to in clause (viii) or clause (ix) to the concerned assessment unit;

(xi) where the assessee fails to comply with the notice referred to in clause (vi) or notice issued under sub-section (1) of section 142 or with a direction issued under sub-section (2A) of section 142, the National Faceless Assessment Centre shall serve upon such assessee a notice under section 144 giving him an opportunity to show-cause, on a date and time to be specified in the notice, why the assessment in his case should not be completed to the best of its judgment;

(xii) the assessee shall, within the time specified in the notice referred to in clause (xi) or such time as may be extended on the basis of an application in this regard, file his response to the National Faceless Assessment Centre;

(xiii) where the assessee fails to file response to the

notice referred to in clause (xi) within the time specified therein or within the extended time, if any, the National Faceless Assessment Centre shall intimate such failure to the assessment unit;

(xiv) the assessment unit shall, after taking into account all the relevant material available on the record make in writing, a draft assessment order or, in a case where intimation referred to in clause (xiii) is received from the National Faceless Assessment Centre, make in writing, a draft assessment order to the best of its judgment, either accepting the income or sum payable by, or sum refundable to, the assessee as per his return or making variation to the said income or sum, and send a copy of such order to the National Faceless Assessment Centre;

(xv) the assessment unit shall, while making draft assessment order, provide details of the penalty proceedings to be initiated therein, if any;

(xvi) the National Faceless Assessment Centre shall examine the draft assessment order in accordance with the risk management strategy specified by the Board, including by way of an automated examination tool, whereupon it may decide to—

(a) finalise the assessment, in case no variation prejudicial to the interest of assessee is proposed, as per the draft assessment order and serve a copy of such order and notice for initiating penalty proceedings, if any, to the assessee, along with the demand notice, specifying the sum payable by, or refund of any amount due to, the assessee on the basis of such assessment; or

(b) provide an opportunity to the assessee, in case any variation prejudicial to the interest of assessee is proposed, by serving a notice calling upon him to show cause as to why the proposed variation should not be made; or

(c) assign the draft assessment order to a review unit in any one Regional Faceless Assessment Centre, through an automated allocation system, for conducting review of such order;

(xvii) the review unit shall conduct review of the draft assessment order referred to it by the National Faceless Assessment Centre whereupon it may decide to—

(a) concur with the draft assessment order and intimate the National Faceless Assessment Centre about such concurrence; or

(b) suggest such variation, as it may deem fit, in the draft assessment order and send its suggestions to the National Faceless Assessment Centre;

(xviii) the National Faceless Assessment Centre shall, upon receiving concurrence of the review unit, follow the procedure laid down in—

(a) sub-clause (a) of clause (xvi); or

(b) sub-clause (b) of clause (xvi);

(xix) the National Faceless Assessment Centre shall, upon receiving suggestions for variation from the review unit, assign the case to an assessment unit, other than the assessment unit which has made the draft assessment order, through an automated allocation system;

(xx) the assessment unit shall, after considering the variations suggested by the review unit, send the final draft assessment order to the National Faceless Assessment Centre;

(xxi) the National Faceless Assessment Centre shall, upon receiving final draft assessment order follow the procedure laid down in—

(a) sub-clause (a) of clause (xvi); or

(b) sub-clause (b) of clause (xvi);

(xxii) the assessee may, in a case where show-cause notice has been served upon him as per the procedure laid down in sub-clause (b) of clause (xvi), furnish his response to the National Faceless Assessment Centre on or before the date and time specified in the notice or within the extended time, if any;

(xxiii) the National Faceless Assessment Centre shall, —

(a) where no response to the show-cause notice is received as per clause (xxii),—

(A) in a case where the draft assessment order or the final draft assessment order is in respect of an eligible assessee and proposes to make any variation which is prejudicial to the interest of said assessee, forward the draft assessment order or final draft assessment order to such assessee; or

(B) in any other case, finalise the assessment as per the draft assessment order or the final draft assessment order and serve a copy of such order and notice for initiating penalty proceedings, if any, to the assessee, alongwith the demand notice, specifying the sum payable by, or refund of any amount due to, the assessee on the basis of such assessment;

(b) in any other case, send the response received from the assessee to the assessment unit;

(xxiv) the assessment unit shall, after taking into account the response furnished by the assessee, make a revised draft assessment order and send it to the National Faceless Assessment Centre;

(xxv) the National Faceless Assessment Centre shall, upon receiving the revised draft assessment order,—

(a) in case the variations proposed in the revised draft assessment order are not prejudicial to the interest of the assessee in comparison to the draft assessment order or the final draft assessment order, and—

(A) in case the revised draft assessment order is in respect of an eligible assessee and there is any variation prejudicial to the interest of the assessee proposed in draft assessment order or the final draft assessment order, forward the said revised draft assessment order to such assessee;

(B) in any other case, finalise the assessment as per the revised draft assessment order and serve a copy of such order and notice for initiating penalty proceedings, if any, to the assessee, alongwith the demand notice, specifying the sum payable by, or refund of any amount due to, the assessee on the basis of such assessment;

(b) in case the variations proposed in the revised draft assessment order are prejudicial to the interest of the assessee in comparison to the draft assessment order or the final draft assessment order, provide an opportunity to the assessee, by serving a notice calling upon him to show-cause as to why the proposed variation should not be made;

(xxvi) the procedure laid down in clauses (xxiii), (xxiv) and (xxv) shall apply mutatis mutandis to the notice referred to in sub-clause (b) of clause (xxv);

(xxvii) where the draft assessment order or final draft assessment order or revised draft assessment order is forwarded to the eligible assessee as per item (A) of sub-clause (a) of clause (xxiii) or item (A) of sub-clause (a) of clause (xxv), such assessee shall, within the period specified in sub-section (2) of

section 144C, file his acceptance of the variations to the National Faceless Assessment Centre;

(xxviii) the National Faceless Assessment Centre shall,—

(a) upon receipt of acceptance as per clause (xxvii); or

(b) if no objections are received from the eligible assessee within the period specified in sub-section (2) of section 144C,”

12. Thus, the assessment order under sub-section (3) of Section 143 shall now have to be made in a faceless manner in accordance with the procedure prescribed.

13. Sub-section (9) to Section 144B reads thus;

“9) Notwithstanding anything contained in any other provision of this Act, assessment made under sub-section (3) of section 143 or under section 144 in the cases referred to in sub-section (2) (other than the cases transferred under sub-section (8), on or after the 1st day of April, 2021), shall be non-est if such assessment is not made in accordance with the procedure laid down under this section.”

14. Sub-section (9) referred to above makes it clear that if the procedure laid down under Section 144B is not followed or complied with, the assessment would be rendered *non-est*. When the legislature has thought fit to use the word *non-est*, it would mean a nullity. If it is to be treated as a nullity, then the argument of alternative remedy of an appeal should fail. The Writ Court should not

be hesitant to quash and set aside an order which could be termed as *non-est*. Why do we say that the impugned assessment order in the present case could be termed as *non-est*?. We have read and re-read the draft assessment order and also the impugned assessment order. Mr. Shah is right in his submission that the impugned assessment order is nothing but an exact reproduction of the draft assessment order. Nothing as pointed out by the assessee has been taken into consideration. All that has been done by the Assessing Officer is to express doubts as regards the genuineness of the entries. We fail to understand what the Assessing Officer has tried to convey. When a partnership firm says that it received a particular amount in its capital through its partners and the identity of such partners with necessary details is disclosed, any further information in that regard would be asking the assessee to disclose source of the source. Even this part has been taken care of by the firm. In other words, the source of the source has also been disclosed.

15. Section 68 of the Income Tax Act reads thus;

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

16. Section 68 of the Act of 1961 says that where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Income Tax Officer, satisfactory, the sum so credited may be charged to income tax as the income of the assessee of that previous year. Therefore, according to Section 68, the first burden is on the assessee to satisfactorily explain the credit entry in the books of account of the previous year. If the explanation given by the assessee is satisfactory, then that entry will not be charged with the income of the previous year of the assessee. In case the explanation offered by the assessee is not satisfactory or the source offered by the assessee firm is not satisfactory, then in that case, the amount should be taken to be the income of the assessee.

17. Once it is established that the amount has been invested by a particular person, be he a partner or an individual, then the responsibility of the assessee-firm is over. The assessee-firm cannot ask that person who makes investment where the the money invested is properly taxed or not. The assessee is only to explain that this investment has been made by the particular individual and it is the responsibility of that individual to account for the investment made by him. If that person owns that entry, then the burden of the assessee-firm is discharged.

It is open to the Assessing Officer to undertake further investigation with regard to that individual who has deposited this amount. So far as the responsibility of the assessee-firm is concerned, it is satisfactorily discharged. Whether that individual person is an income tax payer or not or from where he has brought this money is not the responsibility of the firm. The moment the firm gives a satisfactory explanation and produces the person who has deposited the amount, then the burden of the firm is discharged and in that case that credit entry cannot be treated to be the income of the firm for the purposes of income tax. It is open to the Assessing Officer to take appropriate action under Section 69 of the Act against the person who has not been able to explain the investment.

18. In the aforesaid context, we may refer to and rely upon a very lucid and irudit judgment of the Gauhati High Court in the case of **Nemi Chand Kothari vs. Commissioner of Income Tax & Ors.**, reported in (2004) 136 Taxman 213 (Gau), wherein the Division Bench of the Gauhati High Court has explained the meaning and scope of Section 68. We quote the relevant observations as under;

“13. While interpreting the meaning and scope of Section 68, one has to bear in mind that normally, interpretation of a statute shall be general, in nature, subject only to such exceptions as may be logically permitted by the statute itself or by some other law connected therewith or relevant thereto. Keeping in

view these fundamentals of interpretation of statutes, when we read carefully the provisions of Section 68, we notice nothing in Section 68 to show that the scope of the inquiry under Section 68 by the Revenue Department shall remain confined to the transactions, which have taken place between the assessee and the creditor nor does the wording of Section 68 indicate that Section 68 does not authorise the Revenue Department to make inquiry into the source(s) of the creditor and/or sub-creditor. The language employed by Section 68 cannot be read to impose such limitations on the powers of the Assessing Officer. The logical conclusion, therefore, has to be, and we hold that an inquiry under Section 68 need not necessarily be kept confined by the Assessing Officer within the transactions, which took place between the assessee and his creditor, but that the same may be extended to the transactions, which have taken place between the creditor and his sub-creditor. Thus, while the Assessing Officer is, under Section 68, free to look into the source(s) of the creditor and/or of the sub-creditor, the burden on the assessee under Section 68 is definitely limited. This limit has been imposed by Section 106 of the Evidence Act, which reads as follows :

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

Illustrations :

(a) When a person does an act, with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him."

14. On a careful reading of Section 106, we notice that what is the source from which an assessee has obtained the loan can be safely held to be a fact, which is actually within the special knowledge of the assessee ; hence, it is the burden of the assessee to show the source(s) from which he has received the loans. Once the assessee discloses the source(s) from which he has received the loans, his burden under Section 106 stands discharged and the onus, then, shifts to the Assessing Officer to show, if he wants to treat the loan as an income of the assessee from undisclosed source, that the transaction(s) between the assessee and the creditor is/are not genuine or that the creditor has no creditworthiness and/or that the money, which has been received by the assessee in the form of loans, actually belonged to the assessee himself.

15. There can be no doubt that in order to establish the receipt of cash credit as required under Section 68, the assessee must satisfy three important conditions, namely, (i) identity of the creditor, (ii) genuineness of the transaction, and (iii) financial capability of the person giving the cash credit to the assessee, i.e., the creditworthiness of the creditor.

16. What, thus, transpires from the above discussion is that while Section 106 of the Evidence Act limits the onus of the assessee to the extent of his proving the source from which he has received the cash credit, Section 68 gives ample freedom to the Assessing Officer to make inquiry not only into the source(s) of the creditor, but also of his (creditor's) sub-creditors and prove, as a result, of such inquiry, that the money received by the assessee, in the form of loan from the creditor, though routed through the sub-creditors, actually belongs to, or was of, the assessee himself. In other words, while Section 68 gives the liberty to the Assessing Officer to enquire into the source/sources from where the creditor has received the money, Section 106 makes the assessee liable to disclose only the source(s) from

where he has himself received the credit and it is not the burden of the assessee to show the source(s) of his creditor nor is it the burden of the assessee to prove the creditworthiness of the source(s) of the sub-creditors. If Section 106 and Section 68 are to stand together, which they must, then, the interpretation of Section 68 has to be in such a way that it does not make Section 106 redundant. Hence, the harmonious construction of Section 106 of the Evidence Act and Section 68 of the Income-tax Act will be that though apart from establishing the identity of the creditor, the assessee must establish the genuineness of the transaction as well as the creditworthiness of his creditor, the burden of the assessee to prove the genuineness of the transactions as well as the creditworthiness of the creditor must remain confined to the transactions, which have taken place between the assessee and the creditor. What follows, as a corollary, is that it is not the burden of the assessee to prove the genuineness of the transactions between his creditor and sub-creditors nor is it the burden of the assessee to prove that the sub-creditor had the creditworthiness to advance the cash credit to the creditor from whom the cash credit has been, eventually, received by the assessee. It, therefore, further logically follows that the creditor's creditworthiness has to be judged vis-a-vis the transactions, which have taken place between the assessee and the creditor, and it is not the business of the assessee to find out the source of money of his creditor or of the genuineness of the transactions, which took between the creditor and sub-creditor and/or creditworthiness of the sub-creditors, for, these aspects may not be within the special knowledge of the assessee.

17. A person may have funds from any source and an assessee, on such information received, may take loan from such a person. It is not the business of the assessee to find out whether the source or sources from which the creditor had agreed to advance the

amounts were genuine or not. If a creditor has, by any undisclosed source, a particular amount of money in the bank, there is no limitation under the law on the part of the assessee to obtain such amount of money or part thereof from the creditor, by way of cheque in the form of loan and in such a case, if the creditor fails to satisfy as to how he had actually received the said amount and happened to keep the same in the bank, the said amount cannot be treated as income of the assessee from undisclosed source. In other words, the genuineness as well as the creditworthiness of a creditor have to be adjudged vis-a-vis the transactions, which he has with the assessee. The reason why we have formed the opinion that it is not the business of the assessee to find out the actual source or sources from where the creditor has accumulated the amount, which he advances, as loan, to the assessee is that so far as an assessee is concerned, he has to prove the genuineness of the transaction and the creditworthiness of the creditor vis-a-vis the transactions, which had taken place between the assessee and the creditor and not between the creditor and the sub-creditors, for, it is not even required under the law for the assessee to try to find out as to what source or sources from where the creditor had received the amount, his special knowledge under Section 106 of the Evidence Act may very well remain confined only to the transactions, which he had with the creditor and he may not know what transaction(s) had taken place between his creditor and the sub-creditor. No such additional burden can be placed on an assessee, which is not envisaged by Section 106 of the Evidence Act. The Revenue/Assessing Officer, however, remains free to show that the amount, which has come to the hands of the assessee by way of loan from the creditor actually belonged to the assessee, but this conclusion cannot be reached by mere failure on the part of the sub-creditor to show his creditworthiness and/or the genuineness of the transaction between the creditor and sub-creditor,

for, the creditor may receive any amount from sources known to the creditor only and if he fails to show how he has received the amount, in question, or if he fails to show the creditworthiness of his sub-creditor, such an amount may be treated as the income from undisclosed source of the creditor or of the sub-creditor, as the case may be, but such failure, on the part of the creditor cannot, in the absence of any clinching evidence, be treated as the income of the assessee derived from undisclosed source.

18. Since it is not the business of the assessee to find out the source(s) from where the creditor has accumulated the amount, which he has advanced, in form of the loan, to the assessee, Section 68 cannot be read to show that in the case of failure of the sub-creditors to prove their creditworthiness, the amount advanced as loan to the assessee by the creditor shall have to be read, as a corollary, as the income from undisclosed source of the assessee himself.

19. If sections 106 and 68 have to survive together, the logical interpretation will be that while the assessee has to prove only his special knowledge, i.e., the source from where he has received the credit and once he discloses the source from which he has received the money, he must also establish that so far as his transaction with his creditor is concerned, the same is genuine and his creditor had the creditworthiness to advance the loan, which the assessee had received. When the assessee discharges the burden so placed on him, the onus, then, shifts to the Assessing Officer if the Assessing Officer wishes to assess the said loan as the income of the assessee from undisclosed source, to prove either by direct evidence or indirect/circumstantial evidence that the money, which the assessee received from the creditor actually belonged to, and was owned by, the assessee himself. If there is direct evidence to show that the loan received by the assessee actually belonged to the assessee, there

will be no difficulty in assessing such amount as the income of the assessee from undisclosed source ; but if there is no direct evidence in this regard, then, the indirect or circumstantial evidence has to be conclusive in nature and must, in such circumstances, unerringly point to the assessee as the person from whom the money had actually flown to the hands of the sub-creditor and, then, routed through the hands of the sub-creditor to the hands of the creditor. For this purpose, the circumstantial evidence has to be not only consistent with the hypothesis that the money belonged to the assessee, but that this hypothesis must also be inconsistent with the hypothesis that none other than the assessee owned the said money. If the conclusion be that the money received, as loan, by the assessee may or may not belong to him or if the possibility exists that the money received, as loan, by the assessee may not belong to him, then, in none of such two cases, the loan amount can be conclusively treated as income from undisclosed source of the assessee inasmuch as for assessing the money as income of the assessee from undisclosed source, there must be clinching evidence to show that the money actually belonged to none but the assessee himself. If no such clinching evidence is available, the money may be treated as the income from disclosed source of the creditor or of the sub-creditor, as the case may be. If the inquiry under Section 68 reveals that though the creditor had the creditworthiness, on the day on which he had advanced the loan to the assessee, yet the source of the creditor is not genuine, that is to say, though the transaction between the assessee and the creditor is genuine, the transaction between the creditor and the sub-creditor is not genuine, then, in such a situation, it cannot be read as a corollary nor can it lead to the lone and only conclusion, in the absence of any other material, that the money that has changed hands from the sub-creditor to the creditor was received by the sub-creditor from none other than the assessee himself.

20. In other words, though under Section 68, an Assessing Officer is free to show, with the help of the inquiry conducted by him into the transactions, which have taken place between the creditor and the sub-creditor, that the transaction between the two were not genuine and that the sub-creditor had no creditworthiness, it will not necessarily mean that the loan advanced by the sub-creditor to the creditor was income of the assessee from undisclosed source unless there is evidence, direct or circumstantial, to show that the amount, which has been advanced by the sub-creditor to the creditor, had actually been received by the sub-creditor from the assessee. We are fortified in adopting this view from the following observations made in Tolaram Daga's case [1966] 59 ITR 632 (Assam) (page 635) :

"At the outset, we have to point out that there is no substance in the contention that the sources from which the money was realised by the third party are within the special knowledge of the petitioner as the depositor happens to be his wife. Whether he has knowledge at all of the source of the money deposited by the third-party is a matter which has to be decided on evidence. Under law, in the absence of specific proof of that knowledge, it cannot be assumed that the assessee has the knowledge in question within the meaning of Section 106 of the Evidence Act. To require the firm or the individual partners to go further and adduce proof of the sources from which the deposits in question appearing in the accounts in the name of third parties were derived by them, would be placing a burden on the firm as well as the partners, which is not required or justified by law. For ought we know, in most cases it may well-nigh be impossible for the firm or the partners to know or determine the sources from which the money deposited with them had been realised by the depositors,.... The enquiry as to the source from which this amount was acquired or obtained by Smt. Munni Devi Daga may,

perhaps, be relevant in an investigation into the assessment to be made regarding her income and when determining the correctness of the return submitted by her. But the mere fact that the petitioner was unable to satisfy the authorities as to the source from which Smt. Munni Devi Daga derived the monies which she deposited with the firm cannot, in our opinion, be used against the petitioner. The Tribunal, therefore, was not justified in either demanding this proof or in drawing an adverse inference against the assessee on his failure to produce the same." (emphasis is supplied)"

19. The relevant aspects as pointed out by the assessee cannot be said to have been looked into from a proper perspective. We don't find any discussion in the impugned assessment order. This is the reason why we are saying that the procedure as contemplated under Section 144B cannot be said to have been duly followed in the case on hand.

20. In view of the aforesaid, we are left with no other option but to quash and set aside the impugned assessment order and remit the entire matter to the Assessing Officer for *de novo* consideration. On remand, we expect the Assessing Officer to meaningfully look into all the relevant aspects as highlighted by the assessee including the observations made by this Court in this order and even if the Assessing Officer still deems fit to reject the stance of the assessee, he shall do so by assigning cogent reasons.

21. In the result, this writ application succeeds in part. The impugned assessment order is quashed and set aside. The matter is remitted for *de novo* consideration to the Assessing Officer. The Assessing Officer shall hear the writ applicant once again and look into the various replies filed by the assessee which are on record and pass an appropriate reasoned order in accordance with law. Let this exercise be completed within a period of eight weeks from the date of the receipt of the writ of this order.

(J. B. PARDIWALA, J)

(NISHA M. THAKORE, J)

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THE HIGH COURT
OF GUJARAT

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