

INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "C": NEW DELHI  
BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER  
AND  
SHRI K. N. CHARY JUDICIAL MEMBER

ITA No. ( By Assessee)	ITA No ( By Revenue)	Assessment Year
1182/Del/2018	1464/Del/2018	2009-10
1189/Del/2018	1465/Del/2018	2010-11
1190/Del/2018	1466/Del/2018	2011-12
1185/Del/2018	1467/Del/2018	2012-13
1186/Del/2018	1468/Del/2018	2013-14
1180/Del/2018	1469/Del/2018	2014-15
1181/Del/2018	1470/Del/2018	2015-16

G.D. Foods Manufacturing  
(India) Pvt. Ltd,  
Plot NO. 14, B Block,  
Community Centre, Janakpuri,  
New Delhi  
PAN: AAACG9952A

(Appellant)

ACIT,  
Central Circle-26,  
New Delhi

(Appellant)

Vs.

ACIT,  
Central Circle-26,  
New Delhi

(Respondent)

G.D. Foods Manufacturing  
(India) Pvt. Ltd,  
Plot NO. 14, B Block,  
Community Centre,  
Janakpuri, New Delhi  
PAN: AAACG9952A

(Rzespondent)

Assessee by :

Revenue by:

Date of Hearing

Date of pronouncement

Shri Ajay Wadhwa, Adv

Ms. Bharti Sharma, CA

Shri Sanjit Singh, CIT DR

26/06/2018

06/09/2018

ORDER

Per bench.

1. These are 14 appeals filed by the assessee, M/s G.D. Foods Industries Private Limited, and the learned assessing officer (revenue) for the

Assessment Year 2009-10 to 2015-16, i.e. Seven assessment years involving common issues on identical facts, therefore at the request of the parties heard together, and disposed of by this common order. For the sake of convenience of both the parties stated that lead matter should be taken as appeals of the parties for AY 2014-15 and they argued their respective appeals for that year only. Their submission was that their arguments are similar for all other years as the facts are common. Therefore, we will set out the facts for AY 2014-15, record the arguments of the parties, also give our findings on the various issues for that year, and then apply the same for other years.

### **AY 2014-15**

2. M/S G.D. Foods Manufacturing Industries Private Limited [ The Assessee/ Appellant] as well as the learned Assistant Commissioner Of Income Tax, Central Circle – 26, New Delhi [ The Ld AO] has preferred appeals against the order of The Commissioner Of Income Tax (Appeals) – 29, New Delhi [ The Ld CIT (A) ] dated 26/12/2017 for Assessment Year 2014 – 15.
3. The assessee has raised the following grounds of appeal in ITA No. 1180/Del/2018 for the Assessment Year 2014-15:-
  1. *That the order of the Ld. CIT (A) dated 26.12.2017 is bad in law and on facts.*
  - 1.1 *That the Ld. CIT(A) has erred on facts and in law in ignoring the settled legal preposition that admittedly there was no incriminating material found as a result of search, assessment order passed u/s 153A of the Act was bad in law and void ab initio.*
  - 1.2 *That the Id. CIT(A) failed to consider the fact that documents found and seized were essentially the actual profit & loss account which depicted losses only and there was no unexplained assets or wealth found during the course of search.*
  2. *That the Id. CIT(A) has erred in not adjudicating the ground that neither the copy of statements recorded during the course of*

*search were provided nor an opportunity of cross examination was accorded to the assessee.*

3. *That the Id. CIT (A) has erred in not considering the contemporary and conclusive evidence in the form of excel sheet recordings and monthly profitability statements giving the real/actual profitability found in the computers seized during course of search.*
- 3.1 *That the Id. CIT (A) has ignored the settled principles of taxing real income as laid down by the Hon'ble Supreme court in various decisions.*
- 3.2 *That the Id. CIT (A) has erred in considering only selective part of actual profitability statements as true and correct and ignoring the rest i.e. Income shown in actual profitability has been added into the hands of assessee without allowing the claim of expenses made in this regard.*
- 3.3 *That the Id. CIT(A) has overlooked the presumption laid down u/s 132(4A) of the Act which say that documents/material found during the course of search are supposed to be true and correct and same are to be considered for the purpose of assessment for the relevant assessment year.*
- 3.4 *That the Ld. CIT (A) has erred in not adjudicating the grounds 3 to 3.3 (supra) which were the grounds 4 to 4.2 raised before Id. CIT(A).*
4. *That the Id. CIT(A) has erred in sustaining the addition of Rs. 4,96,44,574/- on account of bogus purchase.*
- 4.1 *That Ld. CIT(A) further erred in stating that no supporting detail regarding expenses incurred in cash was filed therefore no cash expense was incurred despite the fact that he himself accepted the seized excel sheets showing unaccounted cash expenses as true.*
- 4.2 *That without prejudice to the above, the Id. CIT(A) has failed to consider the fact that if assessee had recorded and accounted for the alleged bogus purchases in its audited accounts then equivalent amount of stock would also have inflated which negated the effect on profitability.*
5. *That The Ld CIT (A) has erred in sustaining the addition f Rs. 48,68,267/- on account of undisclosed income from scrap sales despite the fact that the same was considered and disclosed by the assessee in actual profitability statement filed by the assessee during assessment as well as CIT (A) proceedings.*
6. *That the appellant craves leave to add, alter, amend, substitute, delete and modify any or all the grounds of appeal, which are*

*without prejudice to one another, before or at the time of hearing of the appeal.”*

4. The revenue has raised the following grounds of appeal in ITA NO. 1469/Del/2018 for the Assessment Year 2014-15:-
- “1. *That on the facts and in the circumstances of the case the Id CIT(A) has erred in law and on facts in deleting the addition of Rs. 29,79,37,366/- on account of undisclosed sales, which was arrived at by the AO on the basis of matching of data retrieved from seized server and disclosed sales.*
  2. *That on the facts and in the circumstances of the case, the Id CIT(A) has erred in law and on facts in deleting the addition of Rs. 53,00,000/- made u/s 68 of IT Act as creditworthiness of the employee along with non genuine allotment of shares has not been verified.”*
5. Briefly stated, the facts shows that assessee is a private limited company mainly engaged in the business of manufacturing and trading of Fast Moving Consumer Goods [FMCG] products under the brand name” TOPS”. The company is engaged in production and marketing of pickles, sauces, Jams, biscuits, cakes and muffins etc. It is the exclusive seller of products of its sister concern M/s G. D. Backers Private Limited who manufactures cakes and muffins. A search and seizure operation under section 132 of the Income Tax Act, 1961 [The Act] was carried out on 22/12/2014 in the group cases; case of the assessee company was also covered in that search. During the course of search, certain documents and storage devices belonging to the assessee company were found and seized. Notice under section 153A of the act was issued to the assessee on 13/4/2016 which was served upon the assessee and assessee filed its return of income on 9/5/2016 showing income of ₹ 3,62,24,350/-. The learned assessing officer made following addition to the total income of the assessee:

- i. addition of ₹ 53,00,000/- on account of shares issued to Shri Vijay Mannon
  - ii. addition on account of bogus purchases of Rs. 4,96,44,574/-
  - iii. addition of Rs. 29,79,37,366/- being gross profit on account of undisclosed sales
  - iv. Addition of ₹ 48,68,267 on account of undisclosed income from scrap sales.
6. Consequently the learned assessing officer passed assessment order under section 153A/143 (3) of the Act on 30.12.2016 at a total income of ₹ 39,39,74,557/-. The assessee preferred appeal against the order of the learned assessing officer before the learned CIT – A, who passed an order on 26/12/2017 wherein he deleted
- (1) addition on account of ₹ 5,300,000/- being shares issued to Shri Vijay, who was one of the employees of the appellant company and
  - (2) Addition of Rs. 29,79,37,366/- made by the AO on account of gross profit on unaccounted sales.
- The revenue is aggrieved with the order and therefore, the Id AO has preferred appeal before us.
7. Further, the Ld CIT (A) confirmed the addition of Rs. 4,96,44,574/- on account of bogus purchases and addition of ₹ 4868267/- on account of suppression of scrap sales. Therefore, assessee aggrieved with the confirmation of above two-additions, has preferred appeal before us.
8. First, we come to the appeal of the assessee. Ground number 1, 2 and 3 are all general grounds which are basically raised as support to contest the ground number 4 and 5 of the appeal of the assessee which are against substantial addition made by the learned assessing officer and

confirmed by the learned CIT – A on account of bogus purchases and undisclosed income from scrap sales. Therefore there is no separate arguments raised on these grounds and hence, are not required to be adjudicated separately but would be considered while adjudicating ground number 4 and 5 of the appeal of the assessee.

9. Ground number 4 of the appeal of the assessee is against the sustenance of the addition of Rs. 4,96,44,574/- of bogus purchases. The brief facts of shows that seized documents from the hard disk found during the course of search, certain excel sheets containing name of the parties, the dates, amount of cheque, cash received, bill no, Bill date, is mentioned in those sheets maintained by one employee of the assessee, Mr. Binod Kumar was found. Therefore, the learned assessing officer noted that assessee used to receive cash after issuance of the cheques. It was also noted by the assessing officer that these parties are the parties from whom regular purchases are made by the assessee. Therefore, he held that it is a clear-cut case of the bogus purchase. According to him, the bills are received from the parties to inflate purchases. From annexure A-9, annexure A-36, the learned assessing officer extracted the excel sheets which shows name of more than 30 parties where, in a table, name of the distributors, date and the year for which the assessee has indulged into receiving bogus purchase bills and inflating its expenses was found. When questioned, it filed a letter explaining its stand. The assessee submitted that the
- a. Assessee along with the group concern does not have earned any income whatsoever over and above what is declared in the audited profit and loss account.
  - b. During the course of search no unexplained assets in the form of cash, stocks, loans, or debtors jewelry etc. was found to even

suggest that assessee has earned any undisclosed income, which is invested in the undisclosed assets.

- c. On the contrary, it was submitted that assessee is incurring huge losses, which is also evident from the seized documents found from the same hard disk. It was submitted that for each of the year a statement of actual profit and loss earned by the assessee is found during search. Those statements were shown to be various profit and loss account for various years where in records of all the transactions of income and expenses recorded in the regular books of accounts of business of the assessee as well as the profit and loss generated from the transactions not recorded in the regular books of accounts was shown. It was further stated that Mr. Binod Kumar, from whose computer,s these files were seized has left the company because of some personal reason and therefore complete information could not be provided. It was further stated that the company has struggled to collate and reconcile the information in those computer and after many efforts, it would be fair conclusion of evidence to explain each information in the seized computer. It was submitted that for each assessment year in question the income and expenditure statement, which incorporates the so-called unexplained expenditure in the form of wages, salaries and cash expenses, are shown. In fact, the income and expenditure account for each of the impugned assessment year on the credit side records the real cash sales of products and money taken out of purchase invoices etc. during the year. The expenditure side includes all the real expenses which are partially recorded in the books of accounts and partially not. Assessee further reconciled the profit and loss statement found during the course of search with the audited accounts to show that when the unaccounted purchases

money was converted in to cash, assessee incurred equivalent amount of expenditure in cash, which is found in the seized documents and increased its closing stock with the inflated purchases.

- d. It was further stated in a simplified manner that transactions of the company would be recorded in the memoranda cash account maintained by Mr. Binod and the real and actual income and expenditure would be drawn. The actual real income and expenditure account for each of the assessment years existed in the seized computers.
  - e. The assessee further contested that only the real income of the assessee is required to be taxed.
  - f. In nutshell it was submitted that all expenses, purchases, sales, which are said to be, unexplained which is showing that for all these years the assessee has incurred the real loss and therefore there cannot be any addition on account of any of these entries.
10. The learned assessing officer rejected the contention of the assessee about the overall loss and the profitability statement prepared by the assessee for the reason that that
- a. Excel sheets found from the desktop of Shri Vinod Kumar was incomplete and therefore the profitability statement which are enclosed by the learned assessing officer as annexure 1 at page number 70 to 80 of the assessment order are not clear and reliable.
  - b. Further, the learned assessing officer did not believe the purpose and intent of maintaining such a profitability statement, which are unverifiable facts as finance cost and addition in the fixed assets are also different from the audited balance sheet and profit and loss account shown by the assessee. The differences were also there in insurance and provident fund as well as the various expenses and

therefore learned assessing officer noted that the assessee's plea of maintaining an actual profitability record was not accepted.

- c. The learned assessing officer further noted that the data recovered from the desktop of Mr. Vinod Kumar is incomplete and therefore the financial statement shown by the assessee are also not complete. The learned assessing officer further noted that the account shown by the assessee of the profitability are also maintained in pieces as and when information is received. Therefore, they are not maintained in continuity and hence cannot be relied upon.
- d. Further the learned assessing officer was also of the opinion that according to the submission dated 15/12/2016 the assessee itself submitted that the assessee indulged in booking excess purchases to the tune of Rs. 23,48,19,023/-, in total for assessment year 2009-10 to 2015-16 (FY 2008-09 to 2014-15), therefore the excess purchases of ₹ 4,80,41,760/- stated by the assessee but actual tabulated from the seized material comes out to ₹ 4,96,44,574/- and therefore same was added to the income of the assessee.
11. The assessee contested the above addition before the learned CIT(A). Many contentions were raised. However, the learned CIT A rejected all of them and stated that the fact remains that the documents relating to bogus purchases are found and seized from the business premises of the assessee. The documents clearly indicate that the appellant received bogus bills of purchases from the various parties. The assessee issued cheques to them but same amount of cash was received back. Therefore the complete details of purchase bills, items, parties, dates, cheques and amount of cash received, contained in the excel sheets is found in seized hard disk. These excel sheets, accounts were maintained by the

accountant of the assessee, and the bogus purchases were shown in the audited accounts by which the purchases were inflated and thereby the profit was suppressed. Therefore, he did not find any merit in the argument of the appellant that excel sheets shows actual profit and loss account which covers expenses incurred in cash also. As expenses incurred in cash were not taken into account while preparing the audited accounts and filing of return of income, therefore the figure of cash expenses should have been reduced while arriving at the figure of the bogus purchases. He further rejected the contention of the assessee that only real income is to be taxed stating that no supporting details of expenses which were incurred in cash were filed before the AO or before him and therefore the AO was justified to calculate the figures of bogus purchases as income without reducing the expenditure shown in those excel sheets. He further rejected the argument of the appellant that the expenses incurred in cash were not included in the audited accounts. He further held that if the expenses were not taken into account by the appellant while arriving at in the figures of total income then, why there was any need to inflate the purchases, no plausible reasons, or details were given in this regard. In short, He confirmed the addition on account of bogus purchases made by the learned AO.

12. Ground number 5 of the appeal is against the addition of Rs. 4868267/- on account of undisclosed income from scrap sales despite the fact that the same was considered and disclosed by the assessee in actual profitability statement filed by the assessee, during the course of assessment proceedings as well as before the learned CIT(A). During the course of assessment proceedings, it was noted by the AO that assessee is selling scrap and earning considerable amount of income which is not disclosed in return of income. During the course of search annexure A-9, Annexure A-36 was found wherein it was noted that in the excel sheets

some scrap sale are shown pertaining to Neemrana plant however for other plants no such detail was available. The learned AO further noted that scrap should detail was also found from some data in excel sheets. Further, the learned assessing officer noted that revenue is in possession of evidences, which support that assessee does not book its income from scrap in its books of accounts and only 50% of the scrap sale is booked in its accounts. Assessee was confronted with the seized computerized sheets in party A-9, Annexure A- 3, 6, 7, 15 and various pages. The learned assessing officer consequently made addition of Rs. 48,68,267/-.

13. The assessee preferred an appeal before the learned CIT(A) who vide paragraph No. 9 of his order confirmed finding of the learned AO. Though assessee submitted before him that all the items of scrap sale were duly considered in the actual profit and loss account maintained by Sri Binod and Shri Biswas and actual sale of the scrap has already been included in the actual profit and loss account found during the course of search.
14. With respect to bogus purchases addition, the learned authorized representative vehemently contested the reasons given by the learned AO and the learned CIT(A) for addition and confirmation of the same. He submitted that
  - i. No incriminating documents were found because of search, which indicated undisclosed income for the year under consideration.
  - ii. He further stated that the documents found and seized were essentially the actual profitability statements where in loss for each of the assessment year shown to which they pertain. He referred to the actual profitability statement seized for assessment year 2014 – 15 which is placed at page number C to E of paper book number 1.

- iii. He further stated that no undisclosed assets or wealth was found during the course of search from the premises of the assessee company as well as from the residence of the directors of the assessee company. Therefore, in fact the cash received from the bogus purchases was not invested by the assessee in any of the real asset but only for the purpose of the defraying the regular business expenditure incurred by the assessee in the ordinary course of the business.
- iv. He further stated that actual profitability statement found for assessment year 2009–10 to 2011–12 which were seized during the course of search were not provided to the assessee despite specific request made by the assessee company to the learned assessing officer. He referred to the letter dated 26/9/2016 placed at page number 290 and letter dated 28/12/2016 placed at page number 478 to 479 of the paper book number 2.
- v. He further referred to the profitability statement for assessment year 2012–13 to 2014–15, which specifically shows that assessee has incurred huge losses. He further submitted that assessee has reconciled each item of seized actual profitability statement with the figures of the audited financial statements by filing the reconciliation statement along with the reasons and the supporting documents before the lower authorities. He specifically referred to page number B to 344 of paper book number 1, which shows the reconciliation statement and supporting evidences.
- vi. He further submitted that the contemporary and conclusive evidences in the form of excel sheets recorded on monthly basis from which the profitability statement was derived

shows the real and actual profitability found in the computer seized during the course of search. He submitted that such a vital evidences cannot be ignored and all the evidences found during the course of search should be analyzed and appreciated in holistic manner. He further submitted and referred to letter dated 23/12/2016 and 26/12/2016 filed before the learned assessing officer and also before the learned CIT(A). He submitted that these letters explain the entire procedure from which actual profitability of the whole business transaction is derived.

- vii. He submitted that the profit and loss account seized during the course of search must be considered as income of the assessee. He submitted that that cash was received against the bogus purchases booked and such cash was disbursed for the various expenses, which are incurred by the assessee outside the audited books and are part of the consolidated actual profitability statement. In short, his submission was that that whatever cash is generated by booking the bogus purchases by receiving the cash from the parties whose bills were taken and from whom cash was received in turn was spent in incurring the expenditure which are out of the books – not recorded in the books – but are part of the actual profitability statements found during the course of search.
- viii. With respect to the incompleteness of the records, for all the years, he submitted that each and every difference between the actual profitability statement found during the course of search and the audited statements filed with the return of income are reconciled by the assessee and such reconciliation was placed before the assessing officer as well as before the

learned 1<sup>st</sup> appellate authority. Both lower authorities have seen it but because of the reasons, that such accounts could not be found to be maintained in continuity, were rejected.

- ix. He further submitted that for assessment year 12-13 the income shown by the assessee as per the income tax return is ₹ 24,400,000 whereas actual profit earned by the assessee is only ₹ 6,279,000. For the assessment year 2013 – 14 he submitted that the income shown by the assessee in the return of income is Rs. 2,71,00,000/- whereas the actual loss incurred by the assessee as per the profitability statement seized during the course of search is ₹ 75,700,000. Further, he also showed that for assessment year 2014 – 15 the assessee has shown income of ₹ 36,200,000 whereas it has actually incurred losses as per the profitability statement found of ₹ 62,300,000.
- x. He further stated that the actual profitability statement found in seized by the revenue for assessment year 2009–10 to 2011–12, copies were not provided to the assessee despite making specific request.
- xi. He therefore stated that reasons of showing the higher profit to the investor in the income tax return as well as in the audited accounts were for strategic purposes. Assessee used to show the profit and not the loss but in reality, it has incurred those losses during the course of the business of the assessee. He therefore submitted that the assessee must be granted the deduction of expenditure incurred by the assessee outside the books of accounts, which are not recorded in the books of accounts but were defrayed out of the bogus purchases booked by the assessee.

- xii. He further stated that the real income is required to be taxed and the real income for all these years of the assessee is actual loss. He further stated that the learned assessing officer and the first appellate authority has chosen to adopt the income side and did not give credit for the expenditure side of the profitability statement. If the expenditure side were considered then there would be a net loss, which respectfully is the real income in the form of losses of the assessee company. He said there is no reason that part of the seized documents are accepted by revenue and part of the documents , which are in favour of the assessee, is ignored for flimsy reason.
- xiii. He submitted that the expenses could not be disallowed to the assessee, which is recorded in the profitability statement shown by the assessee in seized documents found during the course of search. He submitted that where the receipts are recorded in the search documents are believed to be the income of the assessee, entries of expenditure recorded therein are also to be believed, without asking for more evidences for such expenditure. He vehemently relied upon the decision of the Hon'ble Delhi High Court in case of CIT versus Indeo Airways private limited 349 ITR 85 (Delhi). He vehemently referred to para number 14, 16 and 17 of the decision to support his claim.
- xiv. With respect to the expenditure, he submitted that it is not the case of the Id AO / CIT (A) to state that such expenses are otherwise not allowable to the assessee. The only reason given is the incompleteness of the seized documents as well as absence of further evidences. He further stated that same

were the facts before the honourable Delhi high court in 349 ITR 85.

- xv. He further pressed upon vehemently the decision of the Hon'ble Supreme Court in case of Union of India versus, Kamalakshmi Finance Private Limited to show that the judgment of the jurisdictional High Court must be followed unreservedly. He therefore submitted that the tribunal is duty bound to follow the above decision of the Hon'ble Delhi High Court.
- xvi. With respect to the taxation of the real income, he submitted that real income in the case of the assessee is the income, which has been drawn from the actual business activity showing the receipt, and expenses whether accounted for or unaccounted. He submitted that the assessee was maintaining the actual profitability statement to determine the profitability of the company and the said actual profitability statement contained both audited and unaudited items of any income and expenditure, which was found during the course of search. He is relied upon the decision of the Hon'ble Supreme Court in case of CIT versus Excel industries limited 258 ITR 295(SC) wherein it has been held that only the real income of the assessee is ought to be taxed.
- xvii. He further pressed into service an interesting argument to say that the bogus purchases booked by the assessee does not have any impact on the income of the assessee because the cash generated out of such bogus purchases were used for incurring the business expenditure which could not be recorded in the books of accounts for showing higher profitability to the proposed investor as well as to the bankers

etc.. He therefore submitted that, commercially, if the bogus purchases are booked and they are equally carried on in the stock at the end of the year, then it does not have any impact on the profit and loss account of that particular financial year. He explained that if rupees hundred is booked as bogus expenditure or bogus purchases in the books and if rupees hundred is also carried on in the inventory at the end of the year, it neutralizes the debit side of the profit and loss account as well as credit side of the profit and loss account and therefore it does not have any impact on the profitability of that particular year. He specifically shown that this happened in this case also. He stated that the discrepancy in the stock difference between the closing stock as per the audited books and actual stock found on the date of search proved that such stocks were not available with the assessee but assessee was carrying on the stock in the books of accounts. He stated that during the course of search, the assessee was found to be showing more stocks then it was actually having. Thus, it proves that that bogus purchases booked by the assessee and consequently same were shown at inflated amount in the closing stock at the end of the year does not have any impact in the profitability of the financial year. He further submitted that difference existed on the stock less than the book stock of Rs. 213145000/- . He submitted that the closing stock as per the audited books on the date of search was of ₹ 502,000,000 whereas actual stock found by the search party was only ₹ 288,900,000. He further stated that the physical verification of the stock made by the search party at ₹ 288,900,000 was also incorrect and perhaps

overstated as same was made in hurried manner without any assistance from the appellant or without verifying the actual cost of those products. Therefore he submitted that assessee has allegedly debited bogus purchases of ₹ 242,200,000 and out of which the stock of ₹ 213,100,000 is not at all found existing, itself shows that out of the cash generated of the expenditure, assessee has incurred expenditure out of the books of accounts but has shown consequent closing stock which was not existing physically. He therefore submitted that that profit is reduced on the debit side of profit and loss account by debiting the bogus expenditure but identical stock is increased without having such stocks physically available with the assessee neutralizes the impact of bogus purchases booked in the profit and loss account. He therefore submitted that it does not have any impact on the profitability and hence no addition can be made.

- xviii. He further stated that during the course of search statement of several employees of the company were recorded which were heavily relied upon by the learned assessing officer for making the above addition. He referred to the statement of Shri Vinod Kumar, Shri Biswas and submitted that even though statement have been used against the assessee however the learned assessing officer did not consider it appropriate to furnish and provide such copies of statements to the assessee and further to give an opportunity of cross-examination on explaining those excel sheets on which the addition is made. He further submitted that even the assessing officer during the course of assessment proceedings did not examine those persons once again to come at the

correct picture of those documents. He vehemently relied upon the decision of the Hon'ble Supreme Court in case of M/s Anadaman Timber Industries versus CCE, in civil Appeal No 4228/2006. He further stated that the above decision of the Hon'ble Supreme Court clearly says that any addition made by the learned assessing officer relying upon the statement which was not provided to the assessee and also the opportunity of cross-examination was provided therefore the whole addition made by the learned assessing officer and confirmed by the learned CIT(A) deserves to be deleted on this count only. He further supported his contention by the several decisions of the Hon'ble Delhi High Court as well as other high courts and coordinate benches.

- xix. He further stated that that according to the provisions of section 132 (4A) and 292C of the Act, whatever the information or documents found during the course of the search are presumed to be true unless proved false. He further stated that such presumption is available to the assessing officer, but it should also be applicable to the revenue. He further stated that actual profitability statement found during the course of search, where the actual income or expenses incurred by the assessee are properly recorded in the excel sheets, there is no reason to presume that the actual profitability statement shows incorrect picture. Therefore, they cannot be ignored and has to be accepted as correct. He further submitted that identical presumption is also available under section 292C of the Income Tax Act, wherein during the course of assessment proceedings also such statement or documents found during the course of

search are held to be true. He further stated that such presumption is available to both the parties and not to the assessing officer only. He further stated that if there is any expenditure or elements available to the assessee, which should have been allowed to the assessee on the basis of the seized documents on which the income of the assessee is, inferred, then income and the expenditure both should be considered for the purpose of determining the income of the assessee. He therefore submitted that assessing officer as well as the learned CIT(A) are duty-bound to consider the profitability statement as provided under section 132 (4A) as well as under section 292C of the Income Tax Act.

- xx. He further pressed into service an argument that if the purchases are found to be bogus and if the sales are recorded in the books of accounts, then the addition can only be made with respect to the gross profit to that extent. He submitted that quantitative details of the assessee are undisputed. He submitted that addition even otherwise of the whole amount is unjustified . He relied upon
- ii. Geolife Organice v/s ACIT (3699/MUM/2016) dated 05.05.2017
  - iii. CIT 5(3)(1) v/s M/s Allied Blender and Distillers P Ltd (ITA No. 2447/Mum/2015) dated 21.02.2017
  - iv. ACIT v/s Tarla Shah (ITA No. 5295/MUM/2013) dated 02.02.2016
  - v. ITO – 25(2)(2) v/s Shri Paresh Arvind Gandhi (ITA No. 5706/MUM/2013 dated 13.05.2015)
  - vi. Commissioner of Income Tax – 25(2) v/s Shri Ramila Pravin Shah (ITA No.5246/Mum/2013) dated 5.03.2015
  - vii. Shri Ganpatraj A Sanghavi v/s ACIT (ITA No2826/MUM/2013)

- viii. ITO vs. Deepak Popatlal Gala (ITAT Mumbai)
  - ix. Ramesh Kumar & Co vs. AC1T (ITAT Mumbai)
  - x. DCIT 25(3) v/s Shri Rajeev G. Kalathil (ITA No.6727/MUM/2012 dated 20.08.2014)
  - xi. The Commissioner of Income Tax, Mumbai vs M/s. Nikunj Eximp Enterprises Pvt. Ltd.
- i. He further stated that assessment year 2009 – 10 to 2013 – 14 were completed assessments on the date of search and no incriminating documents indicating undisclosed income was found during the course of search, therefore, the addition made was unjustified and deserves to be deleted on this account. He vehemently relied upon the decision of the Hon'ble Delhi High Court in CIT versus Kabul Chawla 380 ITR 573 (Delhi). He further supported the above contention by the series of the decision of Hon'ble Delhi High Court.
15. With respect to the addition of scrap sale as per ground number 5 of appeal, his arguments also remained the same as pertaining to the addition of the bogus purchase. He submitted that the same is included in the actual profitability statement found during the course of search and when the assessee has incurred losses actually, there is no reason that there is a separate addition is required to be made of this amount. He further stated that even the scrap sales, amount shown by the assessee in the actual profitability statement has also been used in the business expenditure, there cannot be any separate additions made on this account.
16. The learned departmental representative vehemently contested the argument of the assessee. On the addition of bogus purchases he submitted as under:-

- i. He referred to para no. 5 of the order of the learned assessing officer and submitted that there are more than 30 parties from whom the assessee has purchased only the bills and not material . He further submitted that assessee himself is saying that it has not purchased any material but only taken the bills and therefore there is no infirmity in the order of the learned assessing officer in taxing the total purchases, which are bogus.
- ii. He further referred to para number 6 of the order of the learned CIT(A) and stated that in para number 6.2 the learned CIT(A) has given the detailed reasons wherein it has been proved that the documents show that the appellant received bogus bills of purchases from the various parties and those parties were paid by the cheque and cash was returned to the assessee.
- iii. With respect to the argument of the assessee that assessee has not earned any sum out of the above bogus purchases, he submitted that the bogus purchases were shown in the audited accounts by which the purchases were inflated and thereby the profit was suppressed.
- iv. He further stated that merely because the assessee does not have the physical existence of the stock equivalent to or more or less similar to the amount of bogus purchases that the bogus purchase cannot be taxed neutral. He stated that assessee has not reduced its stock and has taken it as a debit in the opening balance of stock in the subsequent years, thereby it has also got deduction of bogus purchases from the year in which bogus purchases were booked to the next year when opening stock was taken into the profit and loss account and there was no closing stock to that extent.

- v. He further extensively referred to the order of the learned assessing officer as well as the learned CIT – A. In view of this, he submitted that the addition made by the learned assessing officer as well as by the learned CIT – A is in order.
17. With respect to ground number 5 of the appeal of the assessee on addition because of scrap sales, he submitted that assessee has nothing to say before the lower authorities on this addition and therefore the same deserves to be confirmed by the coordinate bench also. He submitted that the only claim of the assessee is that it has been included in the actual profitability statement and therefore no reason that it should be made separately on this account. However when the bogus purchases additions have also been made separately there is no reason why the scrap sale addition cannot be made separately.
18. The Id AR in rejoinder submitted that:-
- i. Until now, there is no instance where the stock has been not carried out in the books of accounts less than bogus purchases alleged.
  - ii. None of the unaccounted expenses is found to be illegal or otherwise disallowable. Naturally, he submitted that such vouchers and bills as available in case of expenses recorded in the books of accounts are not expected.
  - iii. He submitted that there is no denial that provision of section 132 (4A) and section 292C of the Act says that documents found during the course of search are true applicable both to assessee as well as revenue. If the AO wants to dispute that it is not correct burden is on the revenue.
  - iv. Profitability statement reconciliation is not at all doubted by the Id AO but rejected only for the reason of incompleteness. However, after reconciliation, there is no finding that how it is incomplete.

19. We have carefully considered the rival contentions and perused the orders of the lower authorities. Apparently during the course of search a hard disk was seized which contained some excel sheets titled as party A – 9, annexure A – 36, Binod, November 08/ purchase – 10.xlsx, party A – 9, annexure A – 36, (G:\IIST-2/Binod/binod Nov.08/Purchase-10.xlsx) (path). It shows name of more than 30 parties. It also shows the date ranging from March 2010 to September 2014. In the same, excel sheets the tables are shown from FY 2008 – 09 to 2014 – 15. The total of the various years are tabulated. From this excel sheets learned assessing officer noted that it contains the amount of cheque and date for which cash received back by assessee by booking purchases. It was further noted by him that bill received with Bill date and Bill number is also mentioned in those excel sheets maintained by the assessee. Therefore, he noted that it appears to be cash received after issuance of cheques. It was further noted by him that on perusal of records these parties are the parties from whom purchases are made. Therefore, he reached the conclusion that it is a clear that bogus purchase bills were received from these parties to inflate purchases. Before the assessing officer, assessee contented that there are several documents found during the course of search, which shows that assessee has prepared a parallel profit and loss account, which records the whole transactions of purchases found in the excel sheets and there are also certain expenditure which are incurred by the assessee out of cash received by booking bogus purchases shown in those excel sheets. These parallel profit and loss account shows that assessee has incurred expenditure out of that cash received by the assessee. It was further noted that assessee has prepared a profit and loss account for each of the year, which also shows the entries recorded in the books of accounts as well as the entries not recorded in the books of accounts. Therefore, it shows that it is the

recording of the transactions of the assessee of the whole business whether accounted for in the audited books of accounts or not. The learned assessing officer has attached on illustrative basis such profit and loss account of March 2014 as part of his order-vide annexure – 1. Further, the cash book of the assessee company was also attached as annexure to the assessment order which shows that all these entries have been accounted for in that particular cash book which records the amount of cash received on account of the bogus purchases. Further looking at the profitability statement of the assessee, it shows that it is recorded on monthly basis where the sales are shown and total profit is worked out. All the financial charges are also included therein. Above chart of the profit and loss account up to March 2014 show that assessee has incurred loss of ₹ 62,200,000/- for the financial year 2013 – 14. The learned AO further rejected that the purpose and intent of maintaining such profitability has not been clarified by the assessee. Naturally, this projection is not for any other purpose such as bank et cetera otherwise assessee would not have shown the losses but profits only. For this reason, we do not believe that the statement is prepared for any other purpose other than the actual result of business of the assessee for that financial year.

20. Now coming to the reliability of the statements found during the course of search from the computer hard disk, Vide para no. 5.3 of the order of the learned assessing officer, he has rejected the argument of the assessee that when the complete books of accounts of the assessee in the form of various excel sheets have been found which shows that instead of assessee earning profit from the operations, have in fact actually incurred huge losses and as only real income can be taxed in the hands of the assessee, no addition in the hands of the assessee is warranted as actual profitability statement shows that it has incurred

huge losses. The reasons for rejection of the actual profitability statement the learned assessing officer has stated that one employee, Shri Vinod Kumar used to prepare the details of cash received and further from that Shri Vishwas, another employee was preparing profitability statement. He further held that, as according to the statement of Mr. Binod Kumar that data found from his desktop are incomplete, therefore, the profitability statement prepared by Shri Vishwas could not be complete, as he might not have access to the complete data from Mr. Binod. During the course of assessment proceedings assessee submitted, that it is the actual state of affairs of the business results of the assessee. Further assessee has reconciled all the figures in the profitability statements found during the course of search with the audited accounts and except few minor differences here and there, it tallied. These facts have been disputed neither by the assessing officer, learned CIT(A) nor by the learned departmental representative. Such reconciliation statement for some years is also produced before us by the assessee at page no B, C, D and E of paper book filed before the learned CIT(A) containing written submission of 27 pages and annexure B showing reconciliation statement of difference between the actual profitability statement found in seized excel sheets and audited profit and loss account filed. The paper book also contains the actual profitability statement found and seized for the assessment year. We have also perused the reconciliation statement. As a sample, profit and loss account for assessment year 13-14 was reconciled with the profit statement found from the hard disk. According to the audited profit and loss account statement sales on account of scrap sales not recorded in the audited balance sheet and further on account of sales from the assessee to other sister concern M/s G D Bakers of ₹ 10888540/-. Further, there are certain trade discounts, which are shown in the advertisement expenditure, are also adjusted.

Therefore, the assessee has reconciled the difference of ₹ 10049659/- being the difference in the turnover in the actual profit and loss account as well as the audited balance sheet filed by the assessee along with the return of income. Further in the operating revenue, assessee has not shown the sales tax subsidy in the actual profitability statement and further the interest income is recorded in actual profitability statement on cash basis whereas in the audited balance sheet it has been shown on the accrual basis. Therefore, assessee has also reconciled the operating revenue income of the assessee. Further, with respect to the purchases, assessee has reconciled to show that the difference in the purchases because of that there is an unvouched purchases of ₹ 50376379/- which has not been shown in the audited balance sheet and ₹ 10888540/- being sale to G D Bakers is also not considered in the profitability balance sheet. Further, there are certain minor adjustments of goods in transit. With respect to the freight and forwarding expenses also there is a difference of Rs. 29563/- which has been reconciled by the assessee on account of the timing difference because of the booking on accrual basis and recording in the actual profitability statement on cash basis. All other administrative expenses are also reconciled by the assessee to show that that actual profitability statement as well as the audited balance sheet does not have any difference except to the account of the purchases debited by the assessee in the books of accounts and corresponding expenditure incurred by the assessee out of those bogus purchases. He further referred to reconciliation statement of the opening stock which shows that as on 1/4/2011 the actual stock available with the assessee was only ₹ 154,161,592/- whereas as per the audited balance sheet the assessee has shown stock of ₹ 180832814/-. It therefore shows that there is a difference in the opening stock of the assessee according to the actual profitability statement and the audited balance

sheet of ₹ 2,66,71,222/-. Further, there was several cash expenditure incurred by the assessee of ₹ 13954312 which are not recorded in the audited balance sheet but are shown in the actual profitability statement. With respect to the closing stock of the assessee, according to the actual profitability statement assessee has shown the closing stock of ₹ 213,774,123/-, whereas the audited balance sheet showed the closing stock of Rs. 268,176,103/- which showed that the assessee has shown the higher closing stock in the books of accounts to the tune of ₹ 5,44,01,980/- for the year. Therefore, it is apparent that assessee has maintained the actual profitability statement for the consolidated transactions of the business whether recorded in the regular books of accounts or not. Therefore, the finding of the Id AO as well as the Id CIT (A) that these documents are incomplete for the reason that full data was not available from Mr. Binod Kumar to Mr. Vishwas is found to be incorrect. Had that been the case, then the reconciliation shown by the assessee before lower authorities was bound to be irreconcilable. That is not the case. These has been conclusively shown by the assessee that major revenue, non operating revenue, various expenses and other charges are reconciled and assessee has also demonstrated the amount of unrecorded expenses in the books of accounts. Further assessee has also demonstrated that bogus purchases and scrap sales booked by the assessee are carried forward in fictitious closing stock in books of accounts higher than actual stocks available with the assessee. Therefore, it cannot be accepted that merely because these statements have minor infirmities they are incomplete. On such ground, these statements cannot be rejected in toto. However we will come to our own observation on these, excel sheets in later part of our order.

21. The next question that arises whether the profitability found during those statements are required to be accepted or not. Further, if the addition is

deservedly made in the hands of the assessee on account of Bogus purchases and scrap sale's found in the excel sheets, then documents which are found from the same hard disk wherefrom addition on account of bogus purchases are made, cannot be ignored when same are interlinked, correlated and reconciled. We do not find any reason that when certain documents found from the hard disk are considered by the assessing officer for enhancing the income of the assessee, what could be the reason for ignoring other excels sheets found from the same hard disk. It is also not correct approach that income portion from the documents seized are taxed and closing the eyes towards the expenditure part of such expenses. Hon'ble Delhi High Court in 349 ITR 85 (del) in CIT versus Indeo Airways private limited on identical question about the allowability of the claim of the assessee of expenditure found during the course of search in seized documents but not recorded in the books of accounts where the income is also recorded which has been taxed by the revenue, has held as under:-

9. The above discussion reveals that consequent to the search, a sum in excess of Rs. 3 crores was determined as the undisclosed receipts of the assessee ; it was sought to be brought to tax. The assessee contended, inter alia, that if that were correct, the other amounts shown as expenditure should be allowed as business expenses. This was not upheld by the Assessing Officer, who disallowed the entire amount. The Commissioner of Income-tax (Appeals) accepted the assessee's contentions and directed deletion of a major portion of the disallowance. The Revenue's appeal was rejected by the Tribunal, which, by the impugned order, accepted the

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assessee's cross-objection. The threshold point which this court has to decide is whether the assessee is right in contending that since the Revenue has suffered concurrent findings on questions of fact, no substantial question of law arises for consideration by the court. There is authority for this proposition, in the form of this court's judgment in CIT v. S. J. Knitting and Finishing Mills P. Ltd. [2004] [266 ITR 582](#), that in such circumstances, the findings of the lower authorities are to be treated as pure findings of fact, and the reference consequently has to be answered against the Revenue.

10. This court does not wish to rest its decision on the narrow ground of the appeals involving pure issues of fact, especially since the parties made elaborate submissions on the merits of the case.

11. In order to resolve the main issue in controversy, it would be relevant to notice certain provisions of the Income-tax Act. The Explanation to section 37(1) is relevant and reads as follows :

"37.(1) Any expenditure (not being expenditure of the nature described in sections 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee), laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head 'Profits and gains of business or profession'.

Explanation.—For the removal of doubts, it is hereby declared that any expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession and no deduction or allowance shall be made in respect of such expenditure."

12. Section 37 is a residuary provision and allows expenditure as deductible while computing the income on the subject to fulfilment of these conditions :

- (a) the expenditure should not be deductible under sections 30 to 36 of the Act ;
- (b) the expenditure must have been incurred wholly and exclusively for the purposes of the assessee's business ;
- (c) it should not/must not be personal in nature ; and
- (d) it should not/must not be capital in nature."

13. The Explanation to section 37(1) of the Act was inserted by the Finance (No. 2) Act, 1998, with retrospective effect from April 1, 1962, i.e., inception of the Act. This appears to have been a public policy driven amendment, disallowing deduction benefits in respect of illegal activities which could potentially be brought to tax. The phraseology of the provision clarifies that if the (business or commercial) activity is "an offence or which is prohibited by law" deduction, which might otherwise be eligible to the benefit of section 37(1) would not be granted.

14. In the present case, the Assessing Officer and, to a certain extent, the Commissioner of Income-tax (Appeals) appear to have proceeded, inter alia, to disallow the heads of expenditure towards commission payments, sundry expenses (termed "R") and green boxes expenses. As far as the "green boxes" expenses are concerned, the assessee had relied on the books relied on by the Revenue to assess the income, to urge that these constituted expenses entitled to deduction. The Assessing Officer held these expenses to be excessive. The assessee argues that once the Revenue seeks to draw a presumption, by relying on section 132(4A) of the Act that the presumption has to be given full effect. In other words, if the correctness of the contents of books and other materials is to be presumed, such a deemed state of affairs would have to be assumed in respect of all entries in the books, and not merely the entries of income (or receipts).

15. Section 132(4A) reads as follows :

"(4A) Where any books of account, other documents, money, bullion, jewellery or other valuable article or thing are or is found in the possession or control of any person in the course of a search, it may be presumed—

(i) that such books of account, other documents, money, bullion, jewellery or other valuable article or thing belong or belongs to such person ;

(ii) that the contents of such books of account and other documents are true ; and

(iii) that the signature and every other part of such books of account and other documents which purport to be in the handwriting of any particular person or which may reasonably be assumed to have been signed by, or to be in the handwriting of, any particular person, are in that person's handwriting, and in the case of a document stamped, executed or attested, that it was duly stamped and executed or attested by the person by whom it purports to have been so executed or attested."

As to the nature of the presumption, the Kerala High Court, in ITO v. T. Abdul Majeed [1988] [169 ITR 440](#), held as follows (page 444) :

"It is true that section 132(4A) of the Act enables the court to presume the truth of the contents of such books. However, it is a presumption which can be rebutted. Moreover, the presumption envisaged therein is only a factual presumption. It is in the discretion of the court, depending upon other factors, to decide whether the presumption must be drawn. The expression used in the sub-section is 'may be presumed' as is used in section 114 of the Evidence Act, 1872. It is not a mandate that whenever the books of account are seized, the court shall necessarily draw the presumption, irrespective of any other factors which may dissuade the court from doing so."

16. In P. R. Metrani v. CIT [2006] [287 ITR 209](#) (SC) ; [2007] 1 SCC 789 the Supreme Court elaborated upon the nature of presumption under section 132(4A) and the scheme of the provision, in the following words (page 219 of 287 ITR) :

"Sub-section (4A) was inserted by the Taxation Laws (Amendment) Act, 1975, with effect from October 1, 1975, to permit a presumption to be raised in the circumstances mentioned therein. Before the insertion of sub-section (4A) the onus of proving that the books of account, other documents, money, bullion, jewellery, etc., found in possession or control of a person in the course of a search belonged to that person was on the Income-tax Department. Sub-section (4A) enables an assessing authority to raise a rebuttable presumption that such books of account, money, bullion, etc., belonged to such person ; that the contents of such books of account and other documents are true, and, that the signatures and every other part of such books of account and other documents are signed by such person or are in the handwriting of that particular person.

Raising of such presumption has been enacted by the Legislature to enable the assessing authority to make a provisional adjudication within the time frame prescribed under section 132. Otherwise, it may not be possible to do so. The object of introduction of section 132 is to prevent the evasion of tax, i.e., to unearth the hidden or undisclosed income or property and bring it to assessment. It is not merely an information of undisclosed income but also to seize money, bullion, etc., representing the undisclosed income and to retain them for the purposes of realization of taxes, penalties, etc. Search and seizure is a serious invasion in the privacy of the person. Section 132 which is a complete code by itself provides that the money, bullion or the books of account, etc., should not be retained unnecessarily and that the provisional assessment made under section 132 for the purpose of retention of the books is passed within a specified time in accordance with law. It provides that the books of account, money and bullion which are not required are not retained unnecessarily thereby causing harassment to the person concerned. In order to see that the assessment order is framed within the time frame provided under section 132, the Legislature provided for a rebuttable presumption to be raised against the person from whose possession and control the books of account, money, bullion, etc., are seized so that the order can be passed within the time frame provided under section 132.

A presumption is an inference of fact drawn from other known or proved facts. It is a rule of law under which courts are authorized to draw a particular inference from a particular fact. It is of three types, (i) 'may presume', (ii) 'shall presume', and (iii) 'conclusive proof'. 'May presume' leaves it to the discretion of the court to make the presumption according to the circumstances of the case. 'Shall presume' leaves no option with the court not to make the presumption. The court is bound to take the fact as proved until evidence is given to disprove it. In this sense such presumption is also rebuttable. 'Conclusive proof' gives an artificial probative effect by the law to certain facts. No evidence is allowed to be produced with a view to combating that effect. In this sense, this is irrebuttable presumption.

The words in sub-section (4A) are 'may be presumed'. The presumption under sub-section (4A), therefore, is a rebuttable presumption. The finding recorded by the High Court in the impugned judgment that the presumption under sub-section (4A) is an irrebuttable presumption in so far as it relates to the passing of an order under sub-section (5) of section 132 and rebuttable presumption for the purpose of framing a regular assessment is not correct. There is nothing either in section 132 or any other provisions of the Act which could warrant such an inference or finding.

The presumption under sub-section (4A) would not be available for the purpose of framing a regular assessment. There is nothing either in section 132 or any other provision of the Act to indicate that the presumption provided under section 132 which is a self-contained code for search and seizure and retention of books, etc., can be raised for the purposes of framing of the regular assessment as well."

If the Revenue was of the opinion that the expenses claimed towards "green boxes" was inadmissible or was excessive, or not genuine, in order to reject the entries in the books of account and other documents of the assessee, seized during the search, it ought to have relied on other materials. Having once drawn the presumption that the contents of the documents (of the assessee) taken into

possession during the search were true, the Revenue could not have, consistently with that presumption, proceeded to require the assessee to produce materials in support of the expenditure entries. Such an inconsistent approach in respect of the contents of the same book appears to have been founded only on suspicion that they were not genuine. However, suspicion cannot replace proof. Moreover, the full effect of the presumption should be given effect to, whenever the statute directs a particular non-existent state of affairs to be assumed (Ref. State of Bombay v. Pandurang Vinayak Chaphalkar, AIR 1953 SC 244 ; Karnataka State Road Transport Corporation v. B. A. Jayaram, AIR 1984 SC 790). In these circumstances, the effect of the presumption (which bade the Revenue, when it chose to invoke it, to presume that the "contents of such books of account and other documents are true". Therefore, in the absence of any materials, in the form of documents, the Revenue could not have denied the benefit of any expenses which would otherwise have inured to the assessee, as an allowable deduction under section 37(1).

17. So far as the heads of expenses are concerned, the Revenue was unable to show how any of them were prohibited by law, or amounted to offences. The assessee's business was to transport export goods, and ensure their door to door delivery in Moscow. Confirmations had been received during the course of proceedings, from some of the assessee's clients. The Assessing Officer himself allowed some deductions ; which in turn implied that what aroused his suspicion was the seemingly high level of expenditure. On this aspect, however, the Commissioner of Income-tax (Appeals) held that the margin of profit, a little over 17 per cent., compared favourably with the general trend in the business. In view of these facts, the Income-tax Appellate Tribunal, in the opinion of this court, did not commit any error of law in holding that such expenses were deductible under the main part of section 37(1) of the Act."

22. Further provisions of section 292C of the income tax act provides that:-

**292C. PRESUMPTION AS TO ASSETS, BOOKS OF ACCOUNT, ETC**

(1) Where any books of account, other documents, money, bullion, jewellery or other valuable article or thing are or is found in the possession or control of any person in the course of a search under section 132, it may, in any proceeding under this Act, be presumed—

(i) that such books of account, other documents, money, bullion, jewellery or other valuable article or thing belong or belongs to such person ;

(ii) that the contents of such books of account and other documents are true ; and

(iii) that the signature and every other part of such books of account and other documents which purport to be in the handwriting of any particular person or which may reasonably be assumed to have been signed by, or to be in the handwriting of, any particular person, are in that person's handwriting, and in the case of a document stamped, executed or attested, that it was duly stamped and executed or attested by the person by whom it purports to have been so executed or attested.

(2) Where any books of account, other documents or assets have been delivered to the requisitioning officer in accordance with the provisions of section 132A, then, the provisions of sub-section (1) shall apply as if such books of account, other documents or assets which had been taken into custody from the person referred to in clause (a) or clause (b) or clause (c), as the case may be, of sub-section (1) of section 132A, had been found in the possession or control of that person in the course of a search under section 132."

23. Therefore, in case of the documents found during the course of search in possession of the assessee the presumption lies for all the purposes in any proceedings under this act that contents of such books of accounts and documents are true. The law nowhere provides that such presumption is only available to the revenue. It also applies equally in favour of the assessee also. If any party either revenue or the assessee, would like to state otherwise, then they have to prove it with more credible and strong evidences to prove contrary. It is not an inviolable rule applicable to all situations and to all cases, that every seized document should be corroborated before any addition can be made based on it. If calculations and computations have been made in the seized document in such a manner that its probative value and genuineness cannot be doubted, nothing prevents the Assessing Officer from making additions on the basis of such document despite the absence of any corroboration. It must be remembered that in some cases it is difficult to obtain corroboration, particularly of the type contemplated by the revenue. It is not necessary that the seized documents should be in the form of pro-per books of account so that they can be relied upon for the purpose of making additions. They could be in any form, including loose papers on which notings or scribbling have been made. Such is the view taken by Honourable Delhi High court in case of 359 ITR 532 in CIT V Sonal Constructions. Provision of law applies on all such documents found during the course of search whether in favour of revenue or in favour of assessee. Therefore such excel sheets found during the course of search cannot be ignored even if in corroborated, incomplete etc.

24. The another argument of the learned AR is that for assessment year 2009–10 to assessment year 2013–14 are completed assessment on the date of search and no incriminating documents indicating undisclosed income was found during the course of search therefore the addition made was unjustified and deserves to be deleted for those years. In the present case, the search took place on 22/12/2014 in case of the assessee. During the course of search, certain documents were found from the computer of the assessee company in electronic form, which clearly suggests that assessee has debited bogus purchases and unaccounted sale of scrap in its books of accounts and therefore it cannot be said that there is no incriminating found during the course of search. According to us, those are the material, which can enhance the income shown by the assessee in the original return of income. Therefore, there is no reason to hold that those materials are not incriminating material found during the course of search. Further, the learned assessing officer has also made addition on account of bogus purchases and scrap sales only. Therefore, this argument of the assessee deserves rejection at the threshold itself.
25. The next argument of the assessee is that the learned assessing officer has not examined Shri Vinod Kumar, ex- employee of the assessee company whose statement was recorded during the course of search proceedings. It is also stated that statement of Shri Biswas, another employee of the company who prepared the actual profitability statement, was recorded during the course of assessment proceedings. These two statements have been used by the assessing officer against the assessee for making the addition on account of bogus purchases as well as on sale of scrap outside books of accounts. The grievance of the assessee is that learned assessing officer has not granted an opportunity for cross-examination of these two persons during the course of

assessment proceedings. The claim of the assessee is that it is trite law that no material/statement can be used against the assessee, unless the same is provided to the assessee for giving an opportunity to rebut the same and to cross examine the person whose statements have been used from which the adverse inferences are drawn. In the present case, Mr. Vinod Kumar and Shri Biswas both are the employees of the assessee company at that particular relevant time. The statement of the employees was recorded during the course of search. If the assessee was at all aggrieved with the statement of Shri Biswas and Shri Binod Kumar, then during the course of assessment proceedings, assessee should have produced them before the assessing officer as its witness to show that the statement made by them is incorrect. No such efforts have been made by the assessee, but to scuttle the process of determination of the income of the assessee, such arguments are raised. We have also not been shown any request by the assessee to the assessing officer for cross-examination of these two persons. In no submissions produced before us, it was shown that the statement of Shri Vinod Kumar and Mr. Biswas was incorrect, containing factual inaccuracies. Therefore, we do not find any merit in this argument of the assessee.

26. Vide para no 14 (xx) of his submission, Id AR mentioned that if the purchases are found to be bogus and if the sales are recorded in the books of accounts then the addition can only be made with respect to the gross profit to that extent. He submitted that quantitative details of the assessee are undisputed. He submitted that addition even otherwise of the whole amount is unjustified. He also referred to plethora of decision. We reject these arguments of the assessee, as it is fact that assessee has booked bogus purchases and shown sales of scrap in the books of accounts lesser than what it should have been. There are no quantitative

details matching with the sales details. In fact there is an excess stock of goods in the books than the actual physical stock of goods. Various decision cited by the Id AR in that para are on facts of those cases, we have perused them and find that those are not applicable to the facts of the case before us. Hence, we reject this plea of the assessee.

27. Now the real issue arises that in seized documents assessee has shown losses in some assessment years and profits in some assessment year. Further, for some assessment years though excel sheets were found during the course of search; however, copies of the same were not given to the assessee for reconciliation. For example for assessment year 2012-13 the return of income shows income of the assessee of ₹ 2,44,32370/-, whereas from the documents found during the course of search the income of the assessee is shown at ₹ 62,79,097/-. For assessment year 2013-14 the income of the assessee as per income tax returns is Rs. 2,70,88,070/- whereas as per the seized documents the assessee has incurred the losses of ₹ 7,57,03,890/-. For assessment year 2014-15 the return of income shows income of the assessee of ₹ 36224350/- whereas the documents seized shows the loss of ₹ 622,90,793/-. Further for assessment year 2015-16 the assessee has shown income as per the return of income of ₹ 21315300/-, whereas no similar documents were found during the course of search. For assessment year 2009-10 to Assessment Year 2011-12, the seized documents were found but same were not provided by the assessing officer to the assessee. During the course of hearing before us, no such documents were produced by revenue before us. Assessee has also shown us many reminders to AO for providing such copies but same were not responded to by the AO. It is also not the case that revenue has denied at any time that no such statements were found and seized. Even the copy of the hard disk was also not provided to the assessee, as

stated. Letters dated 26/09/2016 placed at page no 290 of the paper book as well as letters dated 28/12/2106 placed at page no 478 to 479 of the paper book were relied up on very heavily by the LD AR. Before CIT (A) this was agitated by the assessee, which is evident from page no seven of the order of the Id CIT (A). Therefore, in view of the above facts it would be fruitless exercise to set aside the additions made by the lower authorities for those years.

28. Now the next issues is pertaining to Ground no 5 of the appeal of the assessee which is also interlinked with the ground no 4 as the bogus purchases as well as the sales of scrap both were recorded in those excel sheets which were seized during the course of search. The overall profitability found during the course of search in those documents also shows that while deriving the profit, assessee has considered the sale of scrap in those statements. Assessee has claimed that it has also been spent for the purposes of the business. These facts are evident from the seized documents found during the course of search. The option of dealing the scrap sales issue independent of bogus purchases is not appropriate for the reason that in overall profitability, assessee has shown loss as evidenced by those statements. Sale of scrap is also the business income of the assessee and documents seized shows that assessee has incurred losses in the business. Further, similar efforts are also required to be made by the assessee in selling scraps out of the books. Further, the money generated out of sale of scrap is also used purportedly by the assessee for incurring expenditure for the business of the assessee. Therefore, according to us, scrap sales cannot be taxed separately for those reasons, but have to be clubbed together with the issue of Bogus Purchases and incurring expenses from the common pool of cash generated.

29. Now coming to the issue of determination of income of the assessee on the basis of twin transactions of booking of bogus purchases in the regular books of accounts and not recording sales of scrap in the regular books of accounts , and use such cash allegedly for incurring expenses for the business purposes of the assessee. If the excel sheets found during the course of assessment proceedings are taken for determination of income, it will show that for AY 2102-13 , 2013-14 and AY 2014-15 , the profitability statements shows huge difference i.e. For AY 2012-13 the returned income is Rs. 2.44 crores where such seized documents shows income of merely Rs 62.97 Lakhs, For AY 2103-14 the returned income is 2.70 Crores where as the seized documents shows loss of Rs 7.57 Crores, for A Y 2104-15 the returned income is Rs. 3.62 Crores whereas the seized documents shows loss of Rs. 6.22 crores. Further for AY 2009-10 to 2011-12 , the revenue has not provided such seized documents to the assessee nor before us, therefore it is not known to either of the parties about the variance between the income returned and profit/ loss shown for that years in those seized documents. On specific queries, such statements were not produced. For AY 2015-16, no such material was available with the revenue as well as with assessee; it was also not found during the search. However, the modus operandi remains the same for that year too. Further, the breakup of the expenses incurred by the assessee out of the books to the parties to whom it is paid is also not made available. Merely the heads of such expenses are available. For this reason it cannot also be fully verified and vouched that all the business expenditure are for the purposes of the business and are allowable under the scheme of computation of income under the head profits and gains of the business and profession. Further, for many Assessment years the income of the assessee would be below the returned income of the assessee, if such excel sheets are considered.

Further, the appeals before us are emanating out of search proceedings. The search proceedings cannot result in to the benefit to the assessee. Such is also not the case, and the issue before the Honorable Delhi High court in 349 ITR 85 as in that case the income found during the search was much higher than the expenses claimed resulting in to net taxable income increased during search. Therefore, so far that issues of computing the income, that decision does not help the case of the assessee. The honorable Supreme Court in case of Sun Engineering 198 ITR 297 has held so in respect to the reassessment proceedings u/s 148 of the Act. Proceedings u/s 148 and section 132 of the Act are for the benefit of revenue therefore similar principles applies to it also. Proceedings u/s 153A and subsequent section deals with taxation and computation of undisclosed income found during the course of search, which naturally cannot be the loss. We also have other reason for showing infirmities in those statements when we consider computation aspect. Assessee is undisputedly engaged in booking bogus purchases. For booking bogus purchases, assessee has to compensate other parties with commission for issuing the bogus bills. If the same is also through the agents, then the commission rates are higher, we did not find any such expenditure in those statements found during the course of search, and therefore it is not possible to ascertain that what amount of expenditure has been incurred by the assessee in obtaining those bills. Further, some of the bills are containing the component of excise duty and sales tax. Assessee has taken credit of those sums in its books of accounts while discharging its obligation under those laws, however closing stock is also required to be increased by the adequate amount of duties and taxes. Further assessee has handled the cash generated out of bogus billing as well as the sale of scrap, handling of cash also involves some expenses .These expenses did not find any mention in those

statements. Further, it is also the trite law that real income embedded in these transactions is required to be taxed. During the course of search, the assessee was found to be having goods in its possession of Rs. 28,89,38,712/- where as the book stock was Rs. 50,20,83712/- , thereby resulting in to a difference of Rs. 21,31,45,000/-. The addition on account of bogus purchases is made for AY 2009-10 to 2015-16 is Rs. 24,22,96,780/-. Further, vide letter dated 12-12-2105 assessee has pointed out that during the course of search, 11 different units of assessee company were covered. It was further stated that there were many discrepancies/ variations in the valuation, counting of the quantities of stock brought to the notice of the search team. It was stated that in the Punjab unit no stocktaking of raw materials, packing material and consumable item was carried out. In respect to Tronica units for Soya, there was proper stocktaking, however for noodles unit no stocktaking of finished goods material was carried out. In Semiya unit, there were several errors in counting such as semi finished goods were not at all counted. Packing material were also in packed conditions were ignored. Further with respect to Matiala and swaroop Nagar Unit, physical verification of finished goods was not carried out. At Neemrana, no stocktaking of semi finished goods and packing material was carried out. Further, at Delhi unit stocktaking of finished goods was not carried out. All these facts were pointed out before the Deputy Director (Investigation) long back in December 2015. However, there is no response from either the investigation wing or the learned assessing officer. In view of this, the stock physically verified also cannot be looked at with sacrosanct eyes. If the above discrepancies are rectified perhaps it may show the correct picture of difference between, the stocks physically held by the assessee and carried on in the books. However as the situation stands today, the assessee has lower physical stock

available with him then what is carried in the books of accounts. Therefore, it is possible that the bogus purchases by the assessee and excess stock in the books of the assessee compared to the physical stock are more or less of similar amount. Further, the Id Departmental Representative stated that debiting of the bogus purchases in the profit and loss account, not recording scrap sales in the books of accounts, and carrying the equal or some similar amount in the closing stock, is not profit neutral, as at some point of time assessee is claiming the bogus purchases booked in one year carried on in the stock in trade in the same year, which becomes the opening stock of the next year. Therefore, in the next year the equal amount of opening stock is claimed deduction. This argument of the Id DR is not acceptable because at this moment assessee shows higher opening stock in its profit and loss account, it has an obligation either to show the sales or to carry the same in the closing stock. If the assessee shows the sales, resultant profit is credited in the profit and loss account. If the assessee carries the same in closing stock, for that year it becomes profit neutral, as the closing stock is once again inflated by the bogus purchases debited in the earlier year. Similar is the situation placed before us, as the excess stock held by the assessee in its books of account is almost similar to the total bogus purchases booked by the assessee in all those years. Hence this argument of the learned departmental representative cannot be accepted. It could not be shown to us that in this situation how the profit of a particular year is impacted. Therefore, it is now clear that both the amount debited of Bogus bills of purchases and sale of scraps nor the income stated in the excel sheets found during the course of search can be taken as the real income of the assessee. Both the extremes are required to be rejected for the reason given herein above. As we have already held that for obtaining the invoices for purchase of goods without receiving the material, receiving

cash back from the suppliers, deploying the same cash for the purpose of incurring various expenditure, the activity of not booking the expenditure in its books of account i.e. incurring expenditure without obtaining bills et cetera, all these activities have expense built in as cost in it. Neither the assessee nor the learned AO, has shown us that what kind of expenditure is involved in these activities. In the seized document also neither of the parties could show us the element of such expenditure. Therefore, we do not have any alternative but to estimate such expenditure on bogus purchases and scrap sale, which is required to be taxed in the hands of the assessee. Generally, the expenditure of all these activities would be ranging between 5% to 10%. Further, on the purchases booked by the assessee, it has already taken credit of sales tax and excise duty charged therein therefore to that extent its profit has also impacted as same is required to be carried forward in the closing stock inclusive of the duty. Further as the scrap sale has also been shown by the assessee part of the seized documents, where the overall profitability has been shown, there cannot be any separate addition on account of the scrap sales to the trading result of the assessee. It has to be subsumed in the activity of overall profit determination because of bogus purchases and scrap sales are part of the profitability statement found and seized during the course of search. In the present case, it is not disputed that any cash or other valuable items were found from the search wherein it could be assumed that cash derived from bogus purchases and scrap sales have been invested in other assets, which are not accounted for. Further this is not the case where assessee has debited the purchases from the parties different from the parties from whom goods have been received from other parties. This is the case where assessee has booked the bogus purchases and cash utilized for incurring the expenditure, which are not recorded in the books of accounts. The evidence with respect to receiving

the cash back from the parties from whom purchase bills were obtained was found and evidences of incurring expenditure from that cash generated was also found. During the course of assessment proceedings, the audited profit and loss account with the profit and loss account seized and found during the course of search were reconciled. The excess of stock was also shown in the closing stock as inventory, compared with the actual stock to the extent of bogus purchases booked. All these combined facts were found during the course of search. Generally in case of Bogus Purchases two types of additions have been judicially sustained. Firstly, Gross profit percentage rates are generally applied by courts when goods purchased from parties other than the parties whose bills are recorded in the books of accounts and consequent sales are fully recorded in the books of accounts of those goods. Secondly in case where it is found that there is no receipt of goods but assessee has merely booked bogus purchases and taken away the money and created unaccounted assets, then addition of the whole amount of bogus purchases are made as assessee takes that money for utilization in other assets out of the books of accounts. This case before us is different from both the above types of cases. In the present case there is no purchase of goods from the parties whose bills are booked as bogus purchases, hence no goods from parties other than the parties whose bills are booked is received. Assessee has shown the bogus purchases as fictitious excess closing stock to that extent in the books for showing good profit. Cash generated out of Bogus purchases is used for incurring expenses of dealers. Amount received in cash is not utilized for creation of any asset but such income has been expended by the assessee for the business purposes. Further, no assets were also found unaccounted during the course of search. Therefore, both the above types of addition are not appropriate in facts and circumstances before us. Then the issue arises that whether there

could be any addition or if yes, what could be the addition/ or adjustment to the total income of the assessee in such cases. It cannot be disputed that only real income of assessee is required to be taxed. It is further undisputed that if the assessee has shown higher profits in return of income than actual profits/ losses incurred by the assessee in its business, that cannot be substituted in search cases. Hence, only addition that can be made is appropriate percent of bogus purchases booked and sale of scrap outside the books by the assessee of unaccounted expenditure, which has been incurred, by the assessee for carrying out all these activities. Therefore, in view of above, we hold that only the profit element embedded therein or unaccounted expenditure not disclosed in the seized documents is required to be added to the income of the assessee. In view of our above finding, we hold that it will meet the ends of the Justice, if unaccounted expenditure incurred in the whole activity is charged to tax at the rate of 8% of the total bogus purchase and scrap sales found in the seized material. For the year the assessee has been found of accounting bogus purchases of Rs. 4,96,44,574/- and unaccounted scrap sale of ₹ 48,68,267/- totaling to Rs. 54512841/-, therefore, unaccounted expenditure at the rate of 8% thereof amounting to ₹ 43,61,027/- is required to be taxed over and above the income shown in the return of income of the assessee. Accordingly, ground numbers 1 to 5 of the appeal of the assessee are disposed off allowing appeal of the assessee partly.

30. In the result, appeal filed by the assessee for assessment year 2014 – 15 in ITA number 1180/del/2018 is partly allowed.
31. Now we come to the appeal of the learned assessing officer where the 1<sup>st</sup> ground of appeal is that on the facts and in the circumstances of the case, the Id CIT(A) has erred in law and on facts in deleting the addition of Rs. 29,79,37,366/- on account of undisclosed sales, which was arrived

at by the AO on the basis of matching of data retrieved from seized server and disclosed sales.

32. The brief fact of the issue shows that during the course of search a server was seized. On perusal of the data contained therein, it was found that purchases and sales made at Neemrana and Delhi shows higher purchases and sales. Accordingly the learned assessing officer noted that Assessee Company is involved in unaccounted sales and purchases. On query to the assessee, it was informed that these are the stock transferred from branches and as there is no financial value attached to it-audited balance sheet does not show these items as purchases and sales. The learned AO noted that assessee could not reconcile the difference between the figures disclosed in the audited balance sheet with the figures shown in the data. During the course of search, statement of Shri Nitin Sheth was recorded on 16/2/2015 wherein it was stated that voluminous invoices mostly in triplicate relating to inter unit transfer of finished goods to Neemrana and Matiala was found and seized. He was asked to explain as all the copies of invoices duly stamped are found in his premises, which he did not offer any explanation. Therefore, the learned AO noted that assessee is engaged in unaccounted sales and purchase and generating unaccounted income. He therefore held that in the books of account of the assessee did disclosed sales of Rs. 183,84,68,356/- whereas as per the server data same is ₹ 2,95,64,32,205/- and therefore undisclosed sales of Rs. 1,11,79,63,849/- and gross profit rate therein of 26.65%, the addition was made of Rs. 29,79,37,366/-. Further, he the noted that there are multiple data retrieved which shows that purchases in cash were booked by the assessee in excess of ₹ 20,000 each. Therefore he held that assessee is engaged in unaccounted purchases of Rs. 29,06,805/-. He further held that during the course of search annexure A-23 it was noted that one of

the employees of the company is showing part of the sales by cheque and part of the sales in cash. Therefore annexure A-23, he held that assessee is booking only one third of the sales in the regular books of accounts. He further referred to the statement of Shri Vinod to support his addition of ₹ 29, 79, 37, 366/-

33. The assessee aggrieved with the order of the learned AO preferred an appeal before the learned CIT – A. The learned CIT appeal dealt with the whole issue as under:-

*"7. Ground no.6 relates to contention of the appellant against addition of Rs.29,79,37,366/- made by the AO on account of undisclosed sales. The fact of the case is that an invoice no.E-24 dated 01.12.2014 issued from M/s GD Food Manufacturing India P. Ltd. Plot no.204, Tronica City, Ghaziabad which was raised to M/s GD Food Manufacturing India P. Ltd., Neemrana in triplicate was found. All the three invoices were found from the office premise whereas one counter foil of the invoice should have been at designated place but all the three were lying in the corporate office. There was wide gaps in maintenance of stock transfer invoices and since there was irregularities found in stock transfer invoices vis-a-vis maintenance of stock, statement of Sh. Nitin Seth was recorded but the same was not found to be satisfactorily. The AO had also noticed evidences of cash purchases/sale. The AO noted that the appellant was engaged in the practice in suppressing its sales. Evidences of cash receipt in other forms were also noticed. Further, in the Annexure A-23 (party A-9) seized during the search action, it was noticed that only one third sale of the bakery product manufactured by M/s GD Sakers P. Ltd. which were exclusively purchased and sold by the appellant were recorded in the books of accounts, the balances two third sale was made out of aooks, thereby, the appellant would have followed the same modus operandi for other products also. Evidences of unaccounted cash expenditure in the form of rent was also found. It was also noted that the appellant made huge payment as impress and the same was utilized for cash purchases and unaccounted*

*expenditure. Substantial receipt were also recorded in the Imprest account. In view of above facts, the AO concluded that there was undisclosed sale made by the appellant, figures of the same was worked out on which QP @26.65% was calculated and accordingly, addition was made.*

*7.1 However, the appellant has submitted :*

*"..... Estimation of undisclosed sales without rejecting the books of accounts is not permitted*

*While the books of account of the appellant had not been rejected, the Id. Assessing Officer has erred in resorting to an estimation of income and such exercise undertaken by them was not sustainable.*

*i. Section 145(3) lays down that the Id. AO can proceed to make assessment to the best of his judgment under section 144 only in the event of not being satisfied with the correctness of the accounts produced by the assessee.*

*ii. The Id. Assessing Officer has not made out a case that conditions laid down in section 145(3) are satisfied for rejection of the books of account. Thus, when the books of account are maintained by the assessee in accordance with the system of accounting, in the regular course of his business, same would form the basis for computation of income.*

*iii. Once the Id. AO decides not to reject the books of accounts, the books of accounts are expected to be maintained in the prescribed accounting standards and hence the Id. AO cannot make any estimation of undisclosed sales to be outside the the books of accounts.*

*iv. There is plethora of decisions wherein it has been held that estimation of income by the Id. AO without rejecting the books of accounts of the assessee is not permitted.*

*Reliance is placed on the following (Copy of decision is enclosed)*

*a. Commissioner of Income-tax-9, Mumbai v. Teletronics Dealing Systems (P.) Ltd [2015] 53 taxmann.com 20 (Bombay);*

- b. *Commissioner of Income-tax, Belgaum v. Anil Kumar & Co [2016] 386 ITR 702 (Karnataka);*
- c. *Commissioner of Income-tax vs. Pashupati Nath Agro Food Products Pvt. Ltd. ITA No. 165 of 2010;*
- d. *Amarjit Singh v. Income-tax Officer, Ward-1, Phagwara [2017] 81 taxmann.com 444 (Amritsar - Trib.);*
- e. *Assistant Commissioner Of Income-Tax v. Trilok Chand Khetwat [2001] 114 TAXMAN 124 (CAL.)(MAG.);*
- f. *Assistant Commissioner of Income-tax, Central Circle 2(1), Pune v. Intermedia Cable Communication (P.) Ltd [2012] 19 taxmann.com 190 (Pune);*
- g. *Jai Pulse Mills v. Income-tax Officer, Ward 3(4), Ahmedabad [2010] 39 SOT 312 (Ahmedabad);*
- h. *P.M. Abdul Razak v. Income-tax Officer [1997] 63 ITD 398 (COCH.);*
- i. *Gayotri Oil Mills v. Assistant Commissioner of Income-tax Berhampur [2012] 23 taxmann.com 186 (Cuttack - Trib.);*
- j. *Assistant Commissioner of Income-tax, Circle-1 v. Ercon Composites [2014] 49 taxmann.com 489 (Jodhpur - Trib.).*

#### **FACTUAL ANALYSIS**

*Re: Stock transfer is not undisclosed sales*

*Procedure for stock transfer:-*

*Movement of goods*

- a. *The appellant operates from four different states and had different units in Delhi, Rajasthan, UP and Punjab.*
- b. *The company had its manufacturing units at SSI-32 (Delhi), Neemrana (Rajasthan), Tronica City (UP), Khadur Sahib (Punjab);*
- c. *The distribution depots were situated at Matiala (Delhi) and Neemrana (Rajasthan).*

d. *In order to sell its products, the company used to transfer its finished goods, Semi finished goods and raw material to its distribution depots from its different manufacturing units.*

e. *For example:-*

*- Pickles (finished goods) were manufactured in SSI-32 and were transferred to Neemrana as well as Matiala distribution depots;*

*- Vermicilli (finished goods) were manufactured in Tronica City and were transferred to Neemrana distribution depot;*

*- Soya Sauce (semi-finished goods) were produced in Tronica City and were transferred to Neemrana, after further processing the same were sold directly from Neemrana as well as again transferred to Matiala sale depot; Sugar (Raw material) was purchased at SSI-32, Delhi and the same was transferred to Neemrana unit for its utilization under the production unit. Accounting for stock transfer*

*f. The assessee company prepares consolidated accounts after taking accounting data of units located at four states i.e Delhi unit, Rajasthan unit, U.P unit and Punjab unit;*

*g. for Sales Tax purposes, the assessee company prepares state-wise profit & loss account and balance sheet, this is due to different mechanism for sales tax collection followed by each states;*

*h. In the state-wise profit & loss a/c, sales and purchases include stock transfer inwards and outwards whereas in consolidated accounts, amount' of stock transfer gets nullified;*

*i. The data in chart reproduced at page no. 24 of the order pertains to Delhi unit and Neemrana unit. The purchases made at these two units include purchase of raw material, finished goods etc. Similarly, sales include sales made to the customers as well as stock transfer to the other depots. (Refer detailed submissions enclosed in respect of stock transfer)*

*Addition made is completely devoid of merits & on facts*

*v. The Ld. AO has ignored the detailed submissions / details / reconciliations made by the appellant in relation to the stock transfer.*

vi. *The AO has ignored the very basic fact that the company had to transfer its stock to/from its various distribution depots.*

vii. *The Ld. AO assumed that the appellant has made undisclosed sales & purchases in the form of stock transfer even after understanding the complete procedure of stock transfer & due verification of the same.*

viii. *Moreover, the Ld. AO picked up the total amount of sales from the data sized from the server (reproduced at pa 24 of the order) and on the other hand ignored the corresponding amount of purchases from the same data;*

ix. *The Ld. AO has taken a one sided approach and has ignored the other part of the transactions and resorted to estimations of income of the appellant.*

x. *The entire flow of how stock transfer takes place is enclosed.*

*Re: deleting of old records*

xi. *The Ld. AO has relied upon a document in party A-9; Annexure A-8 page 20 which was a sheet of paper in the notepad maintained by Mr. Sunil Puri (Manager Finance). The said instruction was noted by him as an action point;*

xii. *Following instructions were noted in the scanned copy referred by the Ld. AO on page 27 of the order:*

- 1) *Books re-write - Delhi & NMR*
- 2) *Server format*
  - a) *Back up of all data*
  - b) *Restore relevant data*

xiii. *The company maintained a server in its corporate office at Janakpuri and all the accounting systems (nodes) were connected to such server. Company used to maintain its books of accounts on Busy accounting software;*

xiv. *In order to generate the correct reports, the assessee was required to refresh the data by rewriting the data in Busy software due to the small capacity of the server;*

xv. *Under the aforesaid instructions, relied upon by the AO (reproduced above) nowhere "delete the data" has been mentioned;*

xvi. *One fails to understand that, if the assessee had an intention of deleting/ discarding its old data, then why he would have mentioned to back up the data, restore relevant data, restore other data on node".*

xvii. *The Ld. AO has ignored this fact even after seeking clarifications from the appellant in relation to the aforesaid.*

*Re: unaccounted purchases through imprest accounts*

xviii. *The Ld. AO has ignored the detailed submissions made by the appellant in relation to the show cause notice dated 19.12.2016; (copy enclosed at pg 459)*

*A detailed chart showing imprest amount of employees as per the excel sheets of Binod Kumar and the imprest amount as per the audited books of accounts was filed before the Id. AO.*

*- The reasons for minor difference in some entries were duly explained to the Id. AO. It was explained that Binod Kumar used to record the imprest amount in his excel sheets, he would not follow up with the fate of the imprest amount in the audited books of accounts and there may be instances where cash may have been returned or the difference would have been paid to the employee.*

*- A complete reconciliation of the amounts referred by the Id. AO having been paid to Mr. Jitendra Chaudhary reflecting the amounts recorded in the audited accounts and that paid in the accounts maintained by Mr. Binod Kumar was filed before the Id. AO.*

xxi. *The Ld. AO resorted to estimations by ignoring the fact that the entire amount of imprest account was duly considered under the audited books of accounts. (Copy of letter / details is enclosed at pg 403,459,475 & 481)*

*- Appellant vide its letter dated 27.12.2016 submitted a detailed flowchart along with documentary evidence found during the course of search in respect of recording of transactions by various individuals;*

*- Complete mode and manner of recording the imprest transactions and defraying of expenses through imprest accounts was duly explained to the Id. AO.*

*Re: booking of only 1/3rd sales*

*xxii. The unaccounted 2/3rd sales pertained only to the cookies manufactured by G.D. Bakers Pvt. Ltd and the same were duly accounted for in the actual profitability statement maintained by Mr. Biswas;*

*xxiii. Not even a shred of paper has been found during the course of search to even remotely suggest that unaccounted cash was received on account of sales in any other product. Even the Ld. AO has not referred to any document relating to the company;*

*xxiv. The Ld. AO assumed & presumed that the company is involved in booking only 1/3rd part of its entire sales and ignored the detailed submissions made by the appellant, (copies attached at PB pg 468, 368 & 369)*

*xxv. In search related proceedings, there is no room for presumptions & suppositions. All the vouchers recording 2/3rd sales find place in the actual profitability statement found during search. (Reconciliation PB Pg. 1)*

*Reliance is placed on the following (Copy of decision is enclosed)*

*a. Commissioner of Income-tax v. Anand Kumar Deepak Kumar [2007] 160 taxman 206 (Delhi);*

*b. Deputy Commissioner of Income-tax v. Narendra Garg & Ashok Garg (AOP) [2016] 72 taxmann.com 355 (Gujarat)*

*Re: unaccounted cash expenditure in the form of rent*

*xxvi. Rent paid in cash for the Factory SSI 32 in different assessment years were duly accounted for in the actual profitability statement maintained by Sh. Biswas; hence this expense is accounted for (Reconciliation PB Pg. 13); xxvii. The Ld. AO has ignored all the submissions made by the appellant in relation to the rent expense incurred in cash. (Copy attached at pg 466 & 467);*

*Contemporary evidence & provisions of Section 132(4A) of the Act were ignored*

*i. The contemporary & conclusive evidence in the form of excel sheet recordings and monthly profitability statements giving the real / actual profitability found in the computers seized during the course of search were ignored and instead estimation was resorted to.*

*ii. Reliance is placed on the provisions of section 132 (4A) of the Act wherein:*

*a. It has been very clearly stated that whenever a search takes place, the documents vouchers or any evidence found is believed to be correct and true unless the contrary is proved;*

*b. This is a deeming fiction and has to be accepted in totality;*

*c. If cash income is found and there is cash expense as well, the expense has to be netted of and cannot be ignored.*

*iii. Further reliance is placed on the following decision of Hon'ble Supreme court & Delhi High Court (Copy of the judgment is enclosed)*

*a. The State of Bombay vs. Pandurang Vinayak Chaphalkar and others 1953 AIR 244;*

*b. Karnataka State Road Transport v. B.A. Jayaram and Others 1984 AIR 790;*

*c. Commissioner of Income-tax v. Indeo Airways (P.) Ltd [2012] 26 taxmann.com 244 (Delhi HC)*

*Determining hypothetical income has no place in Income-tax Law*

iv. *The Ld. AO has overlooked the actual profitability statements submitted by the appellant during the course of assessment proceedings.*

v. *Estimation were resorted to even though all the so-called undisclosed sales and expenses etc. found recorded in the actual profit and loss account made by Mr. Biswas and found during the course of search.*

vi. *Each and every alleged unexplained entry was a part of the actual P&L account found in the seized computer but the Ld. AO chose to ignore :e very important fact and resorted to estimation of income.*

vii. *The Ld. AO has ignored the fact that it is the real income that has determined and there is no scope of creating any fictional and assumes income.*

VIII. *There is plethora of decisions wherein it has been held that estimation of undisclosed sales in the absence of corroborative material found during re-course of search is not permitted.*

*Reliance is placed on the following (Copy of the same is enclosed)*

a. *Commissioner of Income-tax v. H.C. Chandna (P.) Ltd. [2008] 299 ITR 41? (Delhi);*

b. *Commissioner of Income-tax v. Dr. M.K.E. Memon [2001] 248 ITR 31C (Bombay);*

c. *Commissioner of Income-tax v. Lachman Das Bhatia [2012] 26 taxmann.com 167 (Delhi);*

d. *Commissioner of Income-tax v. Pradeep Goel [2008] 174 TAXMAN 421 (DELHI);*

e. *Deputy Commissioner of Income-tax v. Royal Marwar Tobacco Product (P.) Ltd. [2009] 120 TTJ 387 (Ahmedabad)*

*Ad-hoc addition is not permissible in law*

*IX. The Ld. AO has made several additions to the income on pro rata basis by estimating the sales of the appellant on ad hoc basis.*

*x. It is trite law that no addition on ad-hoc basis can be made.*

*xi. Reliance is placed on following decisions (Copy of decisions is enclosed)*

*a. National Industrial Corpn. Ltd. v. Commissioner of Income tax [2002] 258 ITR 575 (DELHI HC);*

*b. Friends Clearing Agency (P.) Ltd. v. Commissioner of Income-tax-II [2011] 332 ITR 269 (Delhi);*

*c. K.J. Arora v. Deputy Commissioner of Income-tax-[2009] 180 TAXMAN 131 (DELHI) (MAG);*

*d. Continental Device India Ltd. v. Additional Commissioner of Income-tax, Range 3, New Delhi [2015] 63 taxmann.com 364 (Delhi - Trib.);*

*e. UEM India (P.) Ltd. v. Additional Commissioner of Income-tax [2015] 53 taxmann.com 387 (Delhi - Trib.)*

*Critical information from the seized computers was not provided*

*xii. During the course of search, certain computers / hard disks were seized from various premises of the appellant.*

*xiii. Out of the data seized for AY 2009-10 to 2015-16, only the information pertaining to AY2013-14 to 2015-16 were provided to the appellant.*

*xiv. Balance critical information from the computers seized during the course of search in respect of AY 2009-10, 2010-11 & 2011-12 were not furnished despite repeated requests made by the appellant.*

*xv. The Ld. AO is duty bound to provide each and every information available with him to the assessee.*

*xvi. Reliance is placed on following decisions (Copy of decisions is enclosed)*

- a. *Kishinchand Chellaram v. Commissioner of Income-tax (1980) 125 ITR 713 (SC);*
- b. *Additional Income-tax Officer v. Ponkunnam Traders [1976] 102 ITR 366 (Kerala);*
- c. *Babcock Power (Overseas Projects) Ltd v. Deputy Commissioner of Income- tax [2003] 131 Taxman 86 (Delhi) (Mag.) ITA No. 1388 and 1389 (Delhi) of 1993;*
- d. *Smt. Surjeet Kaur v. Income-tax Officer [2001] 119 Taxman 33 (Hyd.) (Mag.) ITA No. 354 (Hyd.) of 1996"*

7.2 *I have considered the facts and circumstances of the case, submission of the appellant and perused the assessment order. It was submitted that the appellant company prepares its accounts as per Accounting Standards prescribed by the Companies Act. As per the requirement of the Companies Act, the appellant company prepares consolidated accounts after taking accounting data of units located at four states i.e Delhi unit, Rajasthan unit, U.P unit and Punjab unit. Moreover, for sales tax purposes, the appellant company prepares state- wise profit & loss account and balance sheet. The second requirement is due to different mechanism for sales tax collection followed by each state. The consolidated as well as state-wise accounts, both, are audited accounts. The difference between the two is that, in state-wise profit & loss a/c, sales and purchases include stock transfer inwards and outwards whereas in consolidated accounts, amount of stock transfer inwards and outwards gets nullified. The data in chart reproduced at page no. 24 pertains to Delhi unit and Neemrana unit only. As explained above, the purchases made at these two units include purchase of raw material, finished goods etc. and also stock received by way of transfer from branches. Similarly, sales include sales made to the customers as well as stock transfer to the other branches. In order to substantiate the aforesaid, the appellant painstakingly took the AO through the entire procedure. Difference analysis of sales and purchases considered by the AO as actual sales and purchases reflected in audited accounts of Delhi and Neemrana unit was shown. Enclosed at page no. 211 of paper book-II, is the copy of chart*

*(annexure-1) in which the difference in sales and purchases adopted by the AO and actual sales and purchases reflected in the audited accounts of Delhi and Neemrana unit. In part "A" of this chart, was shown the sales and purchases considered by the Ld. AO in her order. These figures were extracted by the AO from the server seized in which data was recorded in "Busy" software. The appellant company uses this software for its accounting. Various reports can be generated from this software for different analysis. These sales and purchases reflect the sales and purchase analysis of MIS report, in which effect of debit or credit note has not been considered i.e. purchases and sales without adjustment of debit or credit notes. Further, due to different configuration settings of bill sundries, some other difference may be seen in MIS report. The Details of Adjustment of Debit Note ,Credit Note & other head have been enclosed at page no. 539,580 & 595 of Paper book-II. The said purchase and sales analysis of MIS report is enclosed at page no. 212 to 231 of paper book-II. In part "B" of the chart, the sales and purchases reflected in the audited profit & loss accounts of Delhi and Neemrana unit were shown. The said audited profit & loss accounts have been filed by the appellant company with the sales tax department of respective state. (Refer P& L account of Delhi at page no. 113 & 115 and P&L account of Neemrana at page no. 142 & 144 of paper book-II). In part "C" of the chart, the difference between part "A" and part "B" was shown. Part "C" clearly reflects that the difference is due to non adjustment of debit or credit notes and bill sundries in the figures taken by the AO. If adjustment of these differences are made the figures of sales and purchases reflected in the audited accounts of respective states will arrive. The sales tax returns of Delhi and Neemrana unit at page no. 232 to 297 of paper book-II in support of our claim was enclosed. Further the General Ledger of Stock Transfer for the m/o Feb. & March 2014 of Delhi, Neemrana and Tronica City Ghaziabad at page no.465 to 531 of paper Book-II was also filed. Difference analysis of sales and purchases reflected in state wise profit & loss account and consolidated profit & loss account was given. In consolidated profit & loss account, the data of all units of appellant company are merged, as a result of which, the entry of stock transfer from one unit to another gets eliminated. A chart (Annexure-2) at page no. 349 was*

*filed which clearly reflects the difference between state- wise audited accounts and consolidated accounts is only due to the stock transfer made from one branch to another. If the stock transfer figures are excluded, then the figures in the consolidated audited profit and loss account shall tally fully with state-wise profit & loss account. Further, (Annexure-3) at page no. 233 shows month wise details of stock transfer inwards and stock transfer outwards in respect of Delhi unit. Similarly (Annexure -4) at page no. 278 shows month wise details of stock transfer inwards and stock transfer outwards in respect of Neemrana unit. The figures of stock transfer inwards and outwards are tallied fully with quarterly sales tax returns of Delhi at page no. 234 to 277 and Neemrana unit at page no. 280 to 297. The process of stock transfer and the supporting evidences in order to dispel the department's belief that no stock transfer was taking place. An example was given to show is in respect of goods transferred from Tronica City, Loni Ghaziabad to Delhi. The stock ledger at Tronica City in respect of Semiya is at page 363 of the paper book. It shows that on 06.08.2013, sale was made to the head office in Delhi of 55 CB. This sale is misnomer and appears in the software named called "Busy". This is actually a stock transfer. Ghaziabad, Tronica City is a manufacturing unit and hardly any sales takes place from that place. All production is transferred to various depots. The stock register shows transfer to Delhi. The invoice at page 364 shows that the goods have been transferred to the company at Uttam Nagar, Delhi against Form "F". Form F is a form issued by the department, where transfer of goods is involved. Copy of Form F is attached at page 365. The transporter's GR/LR of Jai Tempo Service at page 369 was attached. Form T-2 which states that goods represent stock transfer being on Form F is attached at page no. 370 which is the requirement in Delhi (sales tax deptt.). The form is from the department of Trade and taxes and is evidence of goods transferred. Then page 371 is the sales voucher where the entry of transfer is passed. The entry is Delhi office debit and sales transfer) credit. At page 372 is the stock ledger of Delhi. On 06.08.2013, the stock register shows purchase/Branch Tronica of 55CB.(quantity). The goods transferred from Tronica are received in the stock ledger of Delhi. Attached at : 3ze no. 374 is the invoice which came with the transporter which shows that the concerned Accountant in Delhi*

*received the goods and bearing stamp is also cached. Accounting entry in the books of Delhi is Branch Office (Tronica) credit and purchase (stock transfer) debit. (Refer purchase voucher at page no. 377 of paper book-II). Now, the goods after having been received, some of them were sold at subsequent date i.e. 07.08.2013 only to M/S V.K. Enterprises, Ghazipbad. The sales are shown as such in the stock ledger at page 372 and the sales invoices at page 378 of the paper book-II. The entry on account of sales is at page 379 of PB-II. Similar is a set of examples for goods transferred from Tronica city to Meemrana. The stock ledger at Tronica City in respect of Semiya is at page 384 of the paper book. It shows that on 05.08.2013, sale was made to the Neemrana of 50 CB. This sale is misnomer and appears in the software named called "Busy". This is actually a stock transfer. Ghaziabad, Tronica City is a manufacturing unit and hardly any sales takes place from that place. All production is transferred to various depots. The stock ledger shows transfer to Neemrana. The invoice at page 385 shows that the goods have been transferred to the company at Neemrana (Rajasthan) against Form "F". Form F is a form issued by the department, where transfer of goods is involved. Copy of Form F is attached at page 386-394. The transporter's GR/LR of Ashok Tempo Service at page 395 is attached. Form Vat -47 which states that goods represent stock transfer being on Form F is attached at page 396 which is the requirement in Neemrana (Rajasthan). The form is from the department of Trade & taxes and is evidence of goods transferred. Then page 397 is the sales voucher where the entry of transfer is passed. The entry is Neemrana office debit and sales (stock transfer) credit. At page 399 is the stock ledger of Neemrana. On 06.08.2013, the stock ledger shows purchase/Branch Tronica of 50CB.(quantity). The goods transferred from Tronica are received in the stock ledger of Neemrana. Attached at page no. 400 is the invoice which came with the transporter which shows that the concerned Accountant in Neemrana received the goods and bearing stamp is also attached. Accounting entry in the books of Neemrana is Branch Office (Tronica) credit and issue (stock transfer) debit. (Refer purchase voucher at page no. 403 of paper book-II). Now, the goods after having been received, some of them were sold at subsequent date i.e. 06.08.2013 only to M/s B & B Traders, Zirakpur. The sales are shown as such in the stock ledger at*

*page 399 and the sales invoices at page 404 :he paper book-II. The entry on account of sales is at page 405 of PB-II. Another T" of example is of goods transferred from Delhi (SSI) to Neemrana. The stock Ledger at Delhi (SSI)in respect of Pickle (Mango) is at page 410 of the paper book. It shows that on 05.08.2013, sale was made to the Neemrana of 295 CB. This sale s misnomer and appears in the software named called "Busy". This is actually a mock transfer. Delhi (SSI) is a manufacturing unit and hardly any sales takes place mom that place. All production is transferred to various depots. The stock ledger snows transfer to Neemrana. The invoice at page 411 shows that the goods have seen transferred to the company at Neemrana (Rajasthan) against Form "F". Form F is a form issued by the department, where transfer of goods is involved. Copy of Form F is attached at page 412-415 of page book-II. The transporter's GR/LR of Jai Tempo Service at page 416 was filed. Form Vat -47 which states that goods represent stock transfer being on Form F is attached at page no. 417 which is the requirement in Neemrana (Rajasthan). The form is from the department of Trade & taxes and is evidence of goods transferred. Then page 418 is the sales voucher where the entry of transfer is passed. The entry is Neemrana office debit and sales (stock transfer) credit. At page 419 is the stock ledger of Neemrana. On 06.08.2013, the stock ledger shows purchase/Branch Delhi (SSI) of 295CB. (quantity). The goods transferred from Delhi (SSI) are received in the stock ledger of Neemrana. At page no. 420 is the invoice which came With the transporter which shows that the concerned Accountant in Neemrana received the goods and bearing stamp is also attached. Accounting entry in the books of Neemrana is Branch Office (Delhi SSI) credit and purchase (stock transfer) debit. (Refer purchase voucher at page no. 423 of paper book II). The goods after having been received, some of them were sold at subsequent date i.e. 06.08.2013 only to M/s B & B Traders, Zirakpur. The sales are shown as such in the stock ledger at page 419 and the sales invoices at page 425 of the paper book. The entry on account of sales is at page 426 of PB-II. Yet another set of example from Neemrana to Delhi V 2: a a). The stock ledger at Neemrana in respect of Sauce (Snack) is at page 431 of the paper book. It shows that on 05.08.2013, sale was made to the Delhi Vataia) of 350 CB. This sale is misnomer and appears in the software named. This is*

*actually a stock transfer. The stock ledger shows transfer to Delhi (Matiala). The invoice at page 432 shows that the goods have been erred to the company at Delhi (Matiala) against Form "F". Form F is s form issued by the department, where transfer of goods is involved. Copy of Form F attached at page 433-446 of paper book-II. The transporter's GR/LR of S.K. Gupta at page 448 is filed. Form T-2 which states that goods represent stock transfer being on Form F is attached at page no. 449 which is the requirement in Delhi. The form is from the department of Trade & taxes and is evidence of goods transferred. Then page 450 is the sales voucher where the entry of transfer is cassed. The entry is Delhi (Matiala) debit and sales (stock transfer) credit. At page 451 is the stock ledger of Delhi (Matiala). On 06.08.2013, the stock ledger shows purchase/Branch Neemrana of 350 CB. (quantity). The goods transferred from Neemrana are received in the stock ledger of Delhi (Matiala). Attached at page no. 453 is the invoice which came with the transporter which shows that the concerned Accountant in Delhi (Matiala) received the goods and bearing stamp is also attached. Accounting entry in the books of Delhi is Branch Office (Neemrana) credit and purchase (stock transfer) debit. (Refer purchase voucher at page no.457 of paper book-II). Now, the goods after having been received, some of them were sold at subsequent date i.e. 07.08.2013 only to M/s V.K. Enterprises, Ghaziabad. The sales are shown as such in the stock ledger at page 452 and the sales invoices at page 459 of the paper book II. The entry on account of sales is at page 460 of PB II. These are four sets of examples which will show the entire flow of transfer. The aforesaid will clearly demonstrate that the goods were duly transferred from one place to the other as normally happens in any business. The AO has just brought out one example where she found three invoices in the office. The triplicate copies of invoices were found at Delhi head office due to the reason of verification/cross examination of invoices by the Auditors of the appellant company. The said example cited by the AO in all the orders does not lead to inference that no actual sale/purchase was undertaken because appellant had filed substantive documents in form of sales tax returns, financial statements, general ledgers, bills, vouchers etc. with the AO which duly justify the difference sale/purchase recorded by the AO was on account of stock transfer. Hence the aforesaid*

*procedure will clearly demonstrate the fact that not even one rupees sale and purchase has been made outside the books of account. Further, the AO made one more allegation in para 6.3 at page 25 that goods moved from Jehangirpuri unit in Delhi to Matiala without valuation. Relevant para is reproduced below for the -sake of convenience; "While preparing the accounts, there is different price mechanism. There are wide gaps in maintenance of stock transfer invoices. Jehangirpuri unit in Delhi transfer the finished goods to Matiala Depot in Delhi without valuing the finished goods." In this regard it is submitted that Jahangirpuri and Matiala are the units of Delhi state and moving of goods within same state does not require valuation of goods as per VAT rules. This intrastate movement of goods even does not amount to stock transfer for which form F is required. The accounting is done for these goods at one place i.e. Delhi head office, so there is no question to value these goods differently at same place."*

*7.3 The above mentioned submission has been verified with the supporting documents in the Paper Book. The appellant has also given detailed charts of reconciliation of sales and the sales tax returns as per Paper Book-II which has also been perused. The appellant has further submitted that the Assessing Officer has relied upon the triplicate invoice in respect of stock transfer in the case of Invoice no. E-24 dated 01.12.2014 issued from G.D. Foods Manufacturing (I) Pvt. Ltd., Plot No.-204, Tronica City, Ghaziabad raised to Neemrana distribution depot to hold that the stock transfer constitutes undisclosed sales but in view of the submission (supra), no cognizance should be taken in respect of the alleged invoices.*

*Without prejudice, the appellant has also submitted that it must have been a one of case wherein for the purpose of audit, an invoice might have been brought to the head office for verification and if the said invoice would show that they carry the stamp of different branches to which they were sent. Hence, no adverse inference can be drawn from just one original triplicate invoices found, if any.*

*7.4 According to the appellant, the amount constitutes stock transferred from headquarter too branches or one branch to the other which cannot be held to be used outside the books of account.*

*Even otherwise, no document has been found to even remotely suggest that any of the sales, as held by the Assessing officer, were made or found recorded outside the books of account. Hence, this addition on of Rs.29,79,37,366/- made by the AO on account of GP on unaccounted sale deserves to be deleted.*

*7.5 I have considered the facts and circumstances of the case, submission of the ne appellant and perused the assessment order. On perusal of the details/documents filed by the appellant, I find merit in their arguments that mere was no sale made by head office to branches or one branch to another branch but it was just stock transfer for convenience of the business. To support its argument, they filed all the relevant details/documents as mentioned in the earlier paras which were also before the AO. Further, there was no material found during the course of search action which suggests that the transfer of stock from head office to branches or one branch to other branch was sale. It is understood that a prudent businessman carry out his business activity as per their convenience which is benefited to its business. The stock as various places was transferred to support the business activities. Under these circumstances, I am of the considered view that the AO was not justified to make addition on account of GP with reference to unaccounted sale.”*

34. The learned CIT DR vehemently supported the order of the learned assessing officer. He submitted that when there were several such documents found in triplicate relating to inter unit transfer of finished goods from one to unit to another, and they were seized, there is no reason to believe that assessee is not engaged in unaccounted sales of the goods. He further stated that learned assessing officer with respect to annexure A- 23 has completely proved that one third sales is only accounted for by the assessee. He further submitted that the learned CIT – A has ignored all the evidences, which have been brought on record by the learned assessing officer.

35. The learned authorized representative vehemently stated that only one sample invoice was found which was in triplicate. He further referred to the paper book filed by the assessee where each detail of the transfer is provided for. He referred to the paper book wherein the details of stock transferred from depot is accounted for in the depot where goods sent. He further showed the details of transfer by the assessee in the sale tax return of the branch transfer from one branch to branch. He further stated that such documents necessitated because of the requirement of the sales tax provisions. He further stated that only one document was found and there were no other documents found during the course of search as stated by the learned assessing officer. He further stated that there are no unaccounted sales made by the assessee. He further supported the order of the learned CIT(A).
36. We have carefully considered the rival contentions and also perused the orders of the lower authorities. The learned CIT – A in para number 7.5 of his order held that there was no sale by the head office to branches or one branch to another branch, it was just stock transfer for convenience of the business and as per requirement of the sales tax act. He appreciated that assessee has filed all relevant details and documents as mentioned in that paragraphs which were also before the learned assessing officer. He further held that there was no material found during the course of search, which suggests that the transfer of stock from head office to branches from one branch to another branch was a sale. He further held that a prudent businessperson carries out the business activity as per his own convenience and benefit. He further stated that stock records at various places also supported claim of assessee. The Id CIT departmental representative, could not show us what are those voluminous documents that are referred by the learned assessing officer. Contrary to that, the learned authorized representative stated

that there is only one invoice, which was found in triplicate. In the paper book assessee has also submitted all the sales tax return of the branches to show that there is a stock transfer. During the course of hearing, he also took us extensively through all these stock transfer entries, which shows that goods have been transferred from the plant to head office or from one branch to another branch for organizing the sales activities of the assessee. We have also seen that in stock transfer details there is no mention of the parties other than the branches or head office. Therefore we do not find any infirmity in the order of the learned CIT(A) in deleting the addition on account of gross profit worked out on such transfer of stocks by the Assessing Officer. Accordingly ground No. 1 of the appeal of the revenue is dismissed.

37. The 2<sup>nd</sup> ground of appeal of the revenue is that on the facts and in the circumstances of the case, the Id CIT(A) has erred in law and on facts in deleting the addition of Rs. 53,00,000/- made u/s 68 of IT Act as creditworthiness of the employee along and non genuine allotment of shares has not been verified. The brief facts of the issue shows that assessee has allotted 21200 shares to Sri Vijay at face value of ₹ 10 and the share premium of Rs. 240/- per share and total consideration of ₹ 5,300,000 was received. The share certificates were issued in the name Shri Vijay found with the appellant company unsigned. For payment of consideration of ₹ 5,300,000/-, he got loan arranged from the bank and for the repayment of the loan installments, his salary was increased by the assessee. In view of this, the learned assessing officer noted that the transactions are not genuine and therefore he made the addition of the above sum. The assessee challenged the above addition before the learned CIT(A) who deleted it holding that shareholder was one of the employees of the appellant company and he obtained the loan from the bank, money was given to the company in consideration of the shares

allotted. The learned CIT(A) noted that identity of the shareholder was proved. Since the money was received from the bank, the source of the source was also explained and that transaction of the issue of the share cannot be faulted with. He therefore deleted the addition. Hence the learned AO has challenged this order.

38. The learned departmental representative submitted that assessee has created a façade by which the employee of the assessee was asked to borrow the loan from bank for the purpose of making investment in the shares of the company and to make that employee repay the loan, his salary is increased. He further submitted that merely identity and creditworthiness of the transaction is not to only to be proved but the last ingredient of genuineness of the transaction is also to be proved. He submitted that there is no word in the order of the learned CIT(A) on the same.
39. The learned authorized representative vehemently supported the order of the learned CIT(A). He submitted that assessee has issued shares to one of the employees who borrowed money from the bank for the purpose of purchase of the shares. He submitted that increase in salary of the employee was on account of performance of the employee and not for the purpose of repayment of the loan by that employee. He further submitted that interest of the loan is borne by the assessee. He further submitted that such employee is the shareholder of the company and there is no doubt about the ownership of those shares. He further submitted that identity, creditworthiness, and genuineness of the transaction have been proved by the assessee beyond doubt. He therefore submitted that there is no error in the order of the learned CIT(A) in deleting the addition of ₹ 53,00,000/-.

40. We have carefully considered the rival contention and also perused the orders of the lower authorities. The only issue involved is that one employee of the assessee company has applied for the shares valued at ₹ 5,300,000/- for which borrowing was made by him from bank for purchase of the shares. There was also increase in the salary of that employee. The learned assessing officer noted that increase in the salary payment of the employee is for the purpose of subscribing to the shares of the company. Therefore, the above sum was added to the total income of the assessee under section 68 of the income tax Act. On appeal before the learned CIT(A) he deleted the above addition holding as under:-

*"8. Ground no.7 relates to addition of Rs.53,00,000/- made by the AO under section 68 of the IT Act. The fact of the case is that it was found by the AO that during the year under consideration, 21200 shares were allotted to Sh. Vijay Mannan at a face value of Rs.10 and share premium of Rs.240 each share, thereby, total consideration of Rs.53,00,000/- claimed to have been received. The share certificates were lying with the appellant company and these certificates were found unsigned. To make payment, loan were got arranged from the bank and repayment of loan, his salary was increased. Under these circumstances, the AO found that the transaction was not genuine, therefore, he made addition of the same.*

*8.1 The appellant has submitted that:-*

*"....Addition made u/s 68 of the Act not tenable in law & on facts*

*i. Section 68 of the Act seeks to tax the unexplained cash credits in the books of account of the assessee for which the assessee offers no satisfactory explanation about the nature & source.*

*ii. Appellant had discharged his onus of proving the nature & source of credits in its books of accounts, (copy Letter dated 22.11.2016 is enclosed)*

*iii. Mr. Vijay Mannan in his statement u/s 131 of the Act recorded on 10.11.2016, has stated that he has given a loan to the appellant out of the loan taken by him in his personal capacity from a bank.*

*iv) The fact that Mr. Mannan has taken a loan and was repaying the same was verified from the bank. Hence, the source of funds was the bank.*

*v) From the aforesaid, it is amply clear that the nature & source of the credits in the books of the appellant was proved and hence the question of unexplained cash credits cannot arise. Section 68 talks of the source of funds & not the nomenclature / term used for recording it in books. The source is crystal clear being a bank.*

*i. There is no finding or even an allegation that cash was given in exchange for the cheque.*

#### *Other crucial facts*

*ii. List of shareholders with address & percentage of holding was filed before the Ld. AO.*

*iii. Appellant further submitted, Form no.2, return of allotment with the bank account where the share application money had been received.*

*iv. A copy of the balance sheet along with share allotment form duly filed with the ROC was filed before the Ld. AO. Statement of Sh. Vijay Mannan deserves to be ignored as the same is contradictory*

*v. Without prejudice to the aforesaid, it is submitted that Sh. Vijay Mannan has made a false statement as he had never given a loan to the appellant and in fact had subscribed to the shares of the company out of his own source of income.*

*vi. Why Mr. Mannan has never filed any claim for recovery of loan? (Page 9 of the order).*

*vii. Mr. Mannan has shown increased salary in his return and paid tax. How -e now say that it was recompense by the company towards a loan page 9 of the order).*

*viii. Unsigned share certificates found from the company only proves that it is only a draft and the original, duly signed certificate must have been with Mr. Mannan who would have kept it in safe custody.*

*ix. Why was not the counter reply filed by the assessee when confronted to Mr. Mannan and why is the Id. AO trying to believe a concocted and unsustainable story of Mr. Mannan and not the assessee.*

*x. Mr. Viiav Mannan had made a contradictory statement since he had signed a share transfer deed and on the other hand professes giving a loan, copy of share transfer deed is attached)*

*xi. There is plethora of decisions wherein it has been held that once assessee has discharged its burden of proving identity, creditworthiness of shareholders and genuineness of transaction - revenue cannot invoke Section 68 and is free to re-open individual assessments of the shareholders.*

*Reliance is placed on the following (Copy of decisions is enclosed)*

- a. Commissioner of Income-tax v. Lovely Exports (P.) Ltd. [2008] 216 CTR 195 (SC);*
- b. Commissioner of Income-tax v. Steller Investment Ltd. [2001] 115 taxman 99 (SC);*
- c. Commissioner of Income-tax-II v. Kamdhenu Steel & Alloys Ltd. [2012] 19' taxmann.com 26 (Delhi);*
- d. Commissioner of Income-tax v. Oasis Hospitalities (P.) Ltd. [2011] 198 taxman 247 (Delhi);*
- e. Commissioner of Income-tax-IV v. Dwarkadhish Investment (P.) Ltd. [2010] 194 taxman 43 (Delhi);*
- f. Commissioner of Income-tax (Central)-II v. Samir Bio-Tech (Pvt.) Ltd. ITA No. 415/2008 (Delhi);*
- g. Bhav Shakti Steel Mines (P.) Ltd. v. Commissioner of Income-tax [2009] 179 taxman 25 (Delhi);*

*h. Commissioner of Income-tax v. Value Capital Services (P.) Ltd. [2008] 307 ITR 334 (Delhi);*

*i. Orient Trading Co. Ltd. v. Commissioner of Income-tax (Central) [1963 ] 49 ITR 723 (Bombay)*

*Copy of statement recorded was not confronted to the appellant*

*xii. Even though the same has been used against the appellant.*

*xiii. The AO is duty bound to suo moto furnish the statement / evidence etc he seeks to rely upon against the appellant.*

*xiv. Following decision are relied upon (Copy of decisions is attached)*

*a) Kishinchand Chellaram v. Commissioner of Income-tax (1980) 125 ITR 713 (SC);*

*b. Dhakeswari Cotton Mills Ltd v. Commissioner of Income-tax (1954) 26 ITR 775 (SC);*

*c) Commissioner of Income-tax v. JMD Computers & Communications (P.) Ltd. [2009] 180 Taxman 485 (Delhi);*

*d) Commissioner of Income-tax v. G.C.B. Capital Finance (P.) Ltd [2009] 2 taxmann.com 23 (Delhi);*

*e) Additional Income-tax Officer v. Ponkunnam Traders [1976f 102 ITR 366 (Kerala);*

*f) Cheil India (P.) Ltd v. Assistant Commissioner of Income-tax [2012] 146 TTJ 17 (Delhi-Trib.);*

*g) Income-tax Officer v. Puneet Chugh [2005] 2 SOT 101 (Delhi trib);*

*h) Babcock Power (Overseas Projects) Ltd v. Deputy Commissioner of Income- tax [2003] 131 TAXMAN 86 (DELHI) (MAG.) IT A No. 1388 and 1389 (Delhi) of 1993;*

*i) Smt. Surjeet Kaur v. Income-tax Officer [2001] 119 TAXMAN 33 (HYD.) (MAG.) IT A No. 354 (HYD.) OF 1996;*

*Opportunity for cross examination of Sh. Vi jay Mannan was not provided to the appellant*

*xv. The appellant was again deprived from the very basic fundamental right available to them under law.*

*xvi. Following decision are relied upon (Copy of decisions is attached)*

- a. Commissioner of Income-tax v Rajesh Kumar 306 ITR 27 (Delhi);*
  - b. Ashok Lalwani v. Income-tax Officer 328 ITR 272 (Delhi);*
  - c. Commissioner of Income-tax v. Independent Media (P) Ltd [2012] 25 taxmann.com 276 (Delhi) ITA No. 456 of 2011;*
  - d. Commissioner of Income-tax v. Ashwani Gupta [2010] 322 ITR 396 (DELHI);*
  - e. Commissioner of Income-tax v. Jindal Vegetables Products Ltd [2009] 315 ITR 265 (DELHI);*
  - f. Commissioner of Income-tax v. S.M. Aggarwal [2007] 293 ITR 43 (Delhi);*
  - g. Commissioner of Income-tax, Delhi v. SMC Share Brokers Ltd [2007] 159 TAXMAN 306 (DELHI);*
  - h. HR Mehta v. Assistant Commissioner of Income-tax ITA No. 58 of 2001 (Bombay HC);*
  - i. Multitex Filtration Engineers (P.) Ltd v. Deputy Commissioner of Income Circle-5(1), New Delhi [2007] 13 SOT 208 (DELHI);*
- Amarjit Singh Bakshi (HUF) v. Assistant Commissioner of Income-tax [2003] 85 ITD 13 (Delhi) <sup>TM</sup>*

*8.2 I have considered the facts and circumstances of the case, submission of the appellant and perused the assessment order. I find that Sh. Vijay Mannan was one of the employees of the appellant company. He stated that the loan was received from the bank which was given to the company. On perusal of the facts, that*

*the identity was proved. Since, the money was received from the bank, e the source of source was also explained. Thereby, the transaction is found to be genuine. Under these circumstances, I find merit in the argument of the appellant, therefore, appeal on this ground is allowed."*

The learned departmental representative has only grievance that the learned CIT(A) could not show about the genuineness of the transaction. In this present case, there is an increase in the salary which has been allowed by the Id Assessing Officer as deduction under section 37 (1) of the Act. It was also not stated by the learned assessing officer that the salary so excess paid is related to the subscription of the shares by the employee. Further the share certificates found by the revenue at the time of search, were in the name of the employee only. Further it is also not denied by the shareholder that there is a personal loan obtained by him though alleged by the help of company of ₹ 3,000,000/- from one and Rs. 15,00,000/- from another bank. As the assessee has received the share application money/share subscription money from the person whose sources are known, the share certificates are in the name of that person, there is no evidence that such staff held shares for the benefit of the assessee company, the salary so paid by the assessee to the employee it is not found excessive but allowed in toto, all these facts shows that the assessee has Shown Identity, Creditworthiness and Genuineness of the Transaction of Share Subscription of ₹ 5,300,000/-. In View of this we do not find any infirmity in the order of the Learned CIT(A) in deleting the addition under Section 68 of the Act of the above sum. In the Result Ground No. 2 of the Appeal of the Revenue Is Dismissed.

41. Accordingly, appeal of the revenue is dismissed.
42. In the result, appeal of the assessee for assessment year 2014-15 is partly allowed and appeal of the revenue is dismissed.

43. With respect to all other years involved in these appeals, it is submitted by both the parties that the facts involved are similar to the facts for Assessment Year 2014-15, therefore their arguments also remains the same. It was stated that the common issues are involved in the appeal of the assessee with respect to the addition on account of bogus purchases and chargeability of income from scrap sales. In the appeal of the revenue the issue remains with respect to addition on account of undisclosed sales and undisclosed investment in purchases for assessment year 2009-10 and shortage of stock and undisclosed sales for assessment year 2015-16. It was further stated that the revenue also contest the addition of ₹ 16,200,000/- for Assessment Year 2011-12 on account of allotment of shares. The parties submitted that these arguments might be considered for deciding appeals of other years.
44. Now we proceed to decide the appeal of both the parties for A Y 2009 – 10 to 2013 – 14 and 2015-16.

### **AY 2009-10**

45. The assessee has raised the following grounds of appeal in 1182/Del/2018 for the Assessment Year 2009-10:-
- "1. *That the order of the Ld. CIT (A) dated 26.12.2017 is bad in law and on facts.*
  - 1.1 *That the Ld. CIT(A) has erred on facts and in law in ignoring the settled legal proposition that admittedly there was no incriminating material found as a result of search, assessment order passed u/s 153A of the Act was bad in law and void ab initio.*
  - 1.2 *That the Id. CIT(A) failed to consider the fact that documents found and seized were essentially the actual profit & loss account which depicted losses only and there was no unexplained assets or wealth found during the course of search.*
  - 2 *That the Id. CIT(A) has erred in not adjudicating the ground that neither the copy of statements recorded during the course of search were provided nor an opportunity of cross examination was accorded to the assessee.*

3. *That the Id. CIT (A) has erred in not considering the contemporary and conclusive evidence in the form of excel sheet recordings and monthly profitability statements giving the real/actual profitability found in the computers seized during course of search.*
- 3.1 *That the Id. CIT (A) has ignored the settled principles of taxing real income as laid down by the Hon'ble Supreme court in various decisions.*
- 3.2 *That the Id. CIT(A) has erred in not considering the fact that the actual profitability statement and other critical data seized during the course of search for the impugned assessment year was not provided to the assessee company inspite of repeated requests made by the assessee company in this regard.*
- 3.3 *That the Id. CIT (A) has erred in considering only selective part of actual profitability statements as true and correct and ignoring the rest i.e. Income shown in actual profitability has been added into the hands of assessee without allowing the claim of expenses made in this regard.*
- 3.4 *That the Id. CIT(A) has overlooked the presumption laid down u/s 132(4A) of the Act which say that documents/material found during the course of search are supposed to be true and correct and same are to be considered for the purpose of assessment for the relevant assessment year.*
- 3.5 *That the Ld. CIT (A) has erred in not adjudicating the grounds 3 to 3.4 (supra) which were the grounds 4 to 4.3 raised before Id. CIT(A).*
- 4 *That the Id. CIT(A) has erred in sustaining the addition of Rs. 1,21,57,660/- on account of bogus purchase.*
- 4.1 *That Ld. CIT(A) further erred in stating that no supporting detail regarding expenses incurred in cash was filed therefore no cash expense was incurred despite the fact that he himself accepted the seized excel sheets showing unaccounted cash expenses as true.*
- 4.2 *That without prejudice to the above, the Id. CIT(A) has failed to consider the fact that if assessee had recorded and accounted for the alleged bogus purchases in its audited accounts then equivalent amount of stock would also have inflated which negated the effect on profitability.*
5. *That the appellant craves leave to add, alter, amend, substitute, delete and modify any or all the grounds of appeal, which are*

*without prejudice to one another, before or at the time of hearing of the appeal.”*

46. The only issue involved in this appeal of the assessee is with respect to the addition on account of bogus purchases made by the learned assessing officer and confirmed by the learned CIT(A). We have already decided the above issue in appeal of the assessee for assessment year 2014-15, wherein we have held that the whole addition on account of bogus purchases cannot be made. For the similar directions, the addition made by the learned assessing officer and confirmed by the learned CIT(A) of ₹ 12,157,660/- cannot be sustained, but appropriate percentage for which we have held that 8 % is the appropriate percentage to sustain the addition of unaccounted expenditure. Accordingly, we direct the learned assessing officer to sustain the addition to that extent only. Accordingly appeal of the assessee is partly allowed.
47. The revenue has raised the following grounds of appeal in ITA NO. 1464/Del/2018 for the Assessment Year 2009-10:-
- “1. *That on the facts and in the circumstances of the case, the Id CIT(A) has erred in law and on facts in deleting the addition of Rs. 8,06,42,856/- on account of undisclosed sales, which was arrived at by the AO on the basis of matching of data retrieved from seized server and disclosed sales.*
  2. *That on the facts and in the circumstances of the case, the Id CIT(A) has erred in law and on facts in deleting the addition of Rs. 21,32,08,562/- on account of undisclosed investment in purchases.*
  3. *That the grounds of appeal are without to each other.”*
48. The ground No. 1 of the appeal of the revenue is with respect to deletion of addition of ₹ 80642856/- was made on account of undisclosed sales. Identical issue has been decided by us in appeal of the revenue for assessment year 2014 – 15 in ground No. 1 where we have upheld the order of the learned CIT(A) as the amount involved was only on account of stock transferred from head office to branch and branch to head office or other branches and not the sales. Accordingly, we also held in ground

No. 1 of the appeal of the revenue against the learned assessing officer and direct him to delete the addition of ₹ 80642856/- on account of undisclosed sales. Accordingly, ground number 1 of the appeal is dismissed.

49. Ground number 2 of the appeal of the revenue is against the deletion of addition of ₹ 213,208,562/- on account of undisclosed investment in purchases. The learned assessing officer estimated the undisclosed sales of the appellant on the basis of the data found during the course of the search. The Id Assessing Officer held that to make the sales of that much amount the assessee must have made investment in purchases and stock. The learned assessing officer therefore estimated the alleged undisclosed purchases by applying the gross profit ratio on the estimated undisclosed sales of the appellant. It was the contention of the assessee that addition on account of undisclosed investment can be made only when there is an unexplained investment found during the course of search. It was stated that during the course of search, no stock was found. It was further stated that merely on the basis of the guesswork and presumptions, such additions couldn't be made. The assessee further relied upon the decision of the Hon'ble Delhi High Court in case of CIT Vs. Kabul Chawla holding that there is no incriminating material found during the course of search, which even remotely suggests that assessee has made any investment, which is not recorded in the books of accounts. On appeal before the learned CIT(A) same was deleted. Therefore revenue is in appeal before us.
50. The learned departmental representative vehemently supported the order of the learned assessing officer whereas the learned authorized representative supported the order of the learned CIT(A). It was stated that when the addition itself has been deleted by CIT(A) on account of

unaccounted sales, there is no reason that such addition with respect to the addition in stock is sustained.

51. We have carefully considered the rival contention and also perused the order of the learned CIT(A). When we have upheld the order of the learned CIT(A) wherein he has deleted the addition on account of unaccounted sales, there is no question of sustaining the said additions when the original addition of unaccounted sales stands deleted. Accordingly, we dismiss ground number 2 of the appeal of the revenue.
52. Accordingly, we dismiss appeal of the revenue for assessment year 2009-10.
53. Accordingly, appeal of the assessee for assessment year 2009-10 is partly allowed and appeal of the revenue for the same assessment year is dismissed.

### **AY 2010-11**

54. The assessee has raised the following grounds of appeal in 1189/Del/2018 for the Assessment Year 2010-11:-
- "1. *That the order of the Ld. CIT (A) dated 26.12.2017 is bad in law and on facts.*
- 1.1 *That the Ld. CIT(A) has erred on facts and in law in ignoring the settled legal proposition that admittedly there was no incriminating material found as a result of search, assessment order passed u/s 153A of the Act was bad in law and void ab initio.*
- 1.2 *That the Id. CIT(A) failed to consider the fact that documents found and seized were essentially the actual profit & loss account which depicted losses only and there was no unexplained assets or wealth found during the course of search.*
- 2 *That the Id. CIT(A) has erred in not adjudicating the ground that neither the copy of statements recorded during the course of search were provided nor an opportunity of cross examination was accorded to the assessee.*

3. *That the Id. CIT (A) has erred in not considering the contemporary and conclusive evidence in the form of excel sheet recordings and monthly profitability statements giving the real/actual profitability found in the computers seized during course of search.*
- 3.1 *That the Id. CIT (A) has ignored the settled principles of taxing real income as laid down by the Hon'ble Supreme court in various decisions.*
- 3.2 *That the Id. CIT(A) has erred in not considering the fact that the actual profitability statement and other critical data seized during the course of search for the impugned assessment year was not provided to the assessee company inspite of repeated requests made by the assessee company in this regard.*
- 3.3 *That the Id. CIT (A) has erred in considering only selective part of actual profitability statements as true and correct and ignoring the rest i.e. Income shown in actual profitability has been added into the hands of assessee without allowing the claim of expenses made in this regard.*
- 3.4 *That the Id. CIT(A) has overlooked the presumption laid down u/s 132(4A) of the Act which say that documents/material found during the course of search are supposed to be true and correct and same are to be considered for the purpose of assessment for the relevant assessment year.*
- 3.5 *That the Ld. CIT (A) has erred in not adjudicating the grounds 3 to 3.4 (supra) which were the grounds 4 to 4.3 raised before Id. CIT(A).*
- 4 *That the Id. CIT(A) has erred in sustaining the addition of Rs. 2,34,61,740/- on account of bogus purchase.*
- 4.1 *That Ld. CIT(A) further erred in stating that no supporting detail regarding expenses incurred in cash was filed therefore no cash expense was incurred despite the fact that he himself accepted the seized excel sheets showing unaccounted cash expenses as true.*
- 4.2 *That without prejudice to the above, the Id. CIT(A) has failed to consider the fact that if assessee had recorded and accounted for the alleged bogus purchases in its audited accounts then equivalent amount of stock would also have inflated which negated the effect on profitability.*
5. *That the appellant craves leave to add, alter, amend, substitute, delete and modify any or all the grounds of appeal, which are*

*without prejudice to one another, before or at the time of hearing of the appeal.”*

55. The only issue involved in this appeal of the assessee is with respect to the addition on account of bogus purchases made by the learned assessing officer and confirmed by the learned CIT(A). We have already decided the above issue in appeal of the assessee for assessment year 2014 – 15 wherein we have held that the whole addition on account of bogus purchases cannot be made. For the similar reasons the addition made by the learned assessing officer and confirmed by the learned CIT(A) of ₹ 23461740/- cannot be sustained but appropriate percentage for which we have held that 8 % is the appropriate percentage to sustain the addition. Accordingly, we direct the learned assessing officer to sustain the addition to that extent only. Accordingly, appeal of the assessee is partly allowed.
56. The revenue has raised the following grounds of appeal in ITA NO. 1465/Del/2018 for the Assessment Year 2010-11:-
- “1. *That on the facts and in the circumstances of the case, the Id CIT(A) has erred in law and on facts in deleting the addition of Rs. 10,07,49,180/- on account of undisclosed sales, which was arrived at by the AO on the basis of matching of data retrieved from seized server and disclosed sales.”*
57. The ground No. 1 of the appeal of the revenue is with respect to deletion of addition of ₹ 100749180/- was made on account of undisclosed sales. Identical issue has been decided by us in appeal of the revenue for assessment year 2014 – 15 in ground number 1 of the appeal where we have upheld the order of the learned CIT(A) as the amount involved was only on account of stock transferred from head office to branch and branch to head office or other branches and not the sales. Accordingly, we also decide ground No. 1 of the appeal of the revenue, against the Learned Assessing Officer and direct him to delete the addition of ₹

100749180/- on account of undisclosed sales. Accordingly, ground number 1 of the appeal is dismissed.

58. Accordingly, appeal of the assessee for assessment year 2010-11 is partly allowed and appeal of the revenue for the same assessment year is dismissed.

### **AY 2011-12**

59. The assessee has raised the following grounds of appeal in 1190/Del/2018 for the Assessment Year 2011-12:-

- "1. *That the order of the Ld. CIT (A) dated 26.12.2017 is bad in law and on facts.*
- 1.1 *That the Ld. CIT(A) has erred on facts and in law in ignoring the settled legal proposition that admittedly there was no incriminating material found as a result of search, assessment order passed u/s 153A of the Act was bad in law and void ab initio.*
- 1.2 *That the Id. CIT(A) failed to consider the fact that documents found and seized were essentially the actual profit & loss account which depicted losses only and there was no unexplained assets or wealth found during the course of search.*
- 2 *That the Id. CIT(A) has erred in not adjudicating the ground that neither the copy of statements recorded during the course of search were provided nor an opportunity of cross examination was accorded to the assessee.*
3. *That the Id. CIT (A) has erred in not considering the contemporary and conclusive evidence in the form of excel sheet recordings and monthly profitability statements giving the real/actual profitability found in the computers seized during course of search.*
- 3.1 *That the Id. CIT (A) has ignored the settled principles of taxing real income as laid down by the Hon'ble Supreme court in various decisions.*
- 3.2 *That the Id. CIT(A) has erred in not considering the fact that the actual profitability statement and other critical data seized during the course of search for the impugned assessment year was not provided to the assessee company inspite of repeated requests made by the assessee company in this regard.*

- 3.3 *That the Id. CIT (A) has erred in considering only selective part of actual profitability statements as true and correct and ignoring the rest i.e. Income shown in actual profitability has been added into the hands of assessee without allowing the claim of expenses made in this regard.*
- 3.4 *That the Id. CIT(A) has overlooked the presumption laid down u/s 132(4A) of the Act which say that documents/material found during the course of search are supposed to be true and correct and same are to be considered for the purpose of assessment for the relevant assessment year.*
- 3.5 *That the Ld. CIT (A) has erred in not adjudicating the grounds 3 to 3.4 (supra) which were the grounds 4 to 4.3 raised before Id. CIT(A).*
- 4 *That the Id. CIT(A) has erred in sustaining the addition of Rs. 3,55,78,162/- on account of bogus purchase.*
- 4.1 *That Ld. CIT(A) further erred in stating that no supporting detail regarding expenses incurred in cash was filed therefore no cash expense was incurred despite the fact that he himself accepted the seized excel sheets showing unaccounted cash expenses as true.*
- 4.2 *That without prejudice to the above, the Id. CIT(A) has failed to consider the fact that if assessee had recorded and accounted for the alleged bogus purchases in its audited accounts then equivalent amount of stock would also have inflated which negated the effect on profitability.*
5. *That the Id CIT(A) has erred in sustaining the addition of Rs. 1,62,00,000/- as unexplained credit u/s 68 of the Act despite the fact that assessee has sufficiently discharged the onus of proving identity, genuineness and creditworthiness by filing detailed submission supported with contemporary and conclusive evidences."*
60. One of the issue involved in this appeal of the assessee with respect to ground no. 1 to 4 is with respect to the addition on account of bogus purchases made by the learned assessing officer and confirmed by the learned CIT(A). We have already decided the above issue in appeal of the assessee for assessment year 2014 – 15 wherein we have held that the whole addition on account of bogus purchases cannot be made. For the similar reasons, addition made by the learned assessing officer and

confirmed by the learned CIT(A) of ₹ 35578162/- cannot be sustained but appropriate percentage of unaccounted expenditure for which we have held that 8 % is the appropriate percentage to sustain the addition. Accordingly, we direct the learned assessing officer to sustain the addition to that extent only. Accordingly, Ground no. 1 to 4 of the appeal of the assessee is allowed.

61. Ground No 5 of the appeal of the assessee is with respect to addition of Rs 1,62,00,000/- in the hands of the assessee u/s 68 of the act confirmed by the Id CIT (A).
62. Brief facts of the case is that during the course of search on 22.12.2014 at the premises of the company, original share certificate and original share application letter were seized in the name of the company for shares allotted to Excel Infotech Pvt. Ltd and M/s. Artiligence Bio Inovation Pvt. Ltd. It was found that assessee has allotted 6500 shares and 13750 shares at a share premium of Rs. 719/- each to both the companies respectively. The Id AO noted that original share certificate were usually kept by the share owner and should not have been found from the assessee. The Director of this company was questioned on 22.12.2014 wherein, he confirmed that these companies have invested as share holder of the assessee company. However, he could not explain the business affairs of these companies and he did not know the contact person. He mentioned that his father is aware about it. His father Shri Brij Mohan Seth was also examined on 22.12.2014 wherein, he stated that he knows these two companies and Shri Sashi Garg introduced them to the assessee. He further stated that as assessee is engaged in agro based food industry and these companies are interested in making investment, they have invested in shares. The Id Assessing Officer issued noted u/s 133(6) to the assessee which remain un-served. Further, inspector was deputed, where it was found that at the given address these companies

are not found. The assessee explained the detail of investment of these parties, however, for the reason that why the original share certificate were lying with the assessee company and how assessee managed to sale its shares at such a huge premium, the Id AO made addition. The Id Assessing Officer made addition of Rs. 1.62 crores holding as under:

*"4. During the course of search at the premises of the company M/s. G.D. Foods Manufacturing India Pvt. Ltd., at Plot No. 14, B-Block, Community Centre, Janakpuri, New Delhi original share certificate and original share application letter was seized in the name of M/s. Excel Infotech Pvt. Ltd. and M/s. Artiligence Bio-Innovation Pvt. Ltd. / from Party A-9, Annexure AO-1, page no. 3 and 4. On perusal of record it was noticed that the company at allotted shares to both the parties at high share premium. In the assessment year 2011-12 M/s. Excel Infotech Pvt. Ltd. purchase 6500 shares at face value of Rs. 10 and share premium of Rs. 790/- and paying in total Rs.52,00,000/-. Similarly in A.Y. 2011-12 it was noticed that Artiligence Bio-Innovation Pvt. Ltd. has purchased 13750 shares at face Rs.10 and share premium of Rs.790/- making a total M/s. G.D. Foods Manufacturing India Pvt. Ltd., Order u/s 153A/143(3), A.Y. 2011-12 investment of Rs.1,10,00,000/-. Both these companies are not agro based companies and further investigation was done as original shares certificate are usually kept by shares owner but in this case it was found in the premises of assessee. Further the shares certificate were unsigned till the date of search (copy enclosed as below:-*

G.D. Foods Manufacturing (India) Pvt. Ltd Vs. ACIT  
 ( By Assessee) 1182/Del/2018,1189/Del/2018,1190/Del/2018,1185/Del/2018,1186/Del/2018,1180/Del/2018  
 1181/Del/2018  
 ( By Revenue) 1464/Del/2018, 1465/Del/2018, 1466/Del/2018, 1467/Del/2018, 1468/Del/2018,  
 1469/Del/2018, 1470/Del/2018  
 Assessment Year  
 2009-10 to 2015-16

**SHARE CERTIFICATE**

**G. D. FOODS MFG. (I) PVT. LTD.**  
 Plot No.: 14, B-Block, Community Centre,  
 Janak Puri, New Delhi- 110058  
 (Incorporated under the Companies Act, 1956)

No. of Shares **13750**

Certificate No. **082** Share Ledger Folio **078**

No. of Shares **13750** from **1706301**  
 to **1715050** (both inclusive)

Name **ARTILENENCE BIO-INNOVATIONS LTD**

Father/Husband's Name **M.A.**

Occupation **BUSINESS**

Address **ANERTHANA SIDE No. 5 & 6, NITYAM  
 NAIDU, HILDA PATH, WEST RENWAL**

Given under the Common Seal of the Company  
 This **2<sup>ND</sup>** day of **DECEMBER** **2010**

Secretary / Authorized Signatory **[Signature]** Director **[Signature]**

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**SHARE CERTIFICATE**

**G. D. FOODS MFG. (I) PVT. LTD.**  
 Plot No.: 14, B-Block, Community Centre,  
 Janak Puri, New Delhi- 110058.

**THIS IS TO CERTIFY that the person (s) named in this Certificate is / are the Registered Holder (s) of the within-mentioned share (s) bearing the distinctive number (s) herein specified in the above Company subject to the Memorandum and Articles of Association of the Company and that the amount endorsed hereon has been paid up on each such share.**

EQUITY	SHARES	EACH	OF	RUPEES
AMOUNT	PAID UP	PER	SHARE	RUPEES
Regd. Folio No. <b>078</b> Certificate No. <b>082</b> Name(s) of Holder(s) <b>ARTILENENCE BIO-INNOVATIONS LTD</b> No. of Share(s) Held <b>13750</b> Distinctive No. (s) <b>1706301-1715050</b>				

Given under the Common Seal of the Company this **2<sup>ND</sup>** DAY OF **DECEMBER**, **2010**

Secretary / Authorized Signatory **[Signature]** Director **[Signature]**

Note: No Transfer of any of the Shares comprised in this certificate will be registered unless accompanied by the

G.D. Foods Manufacturing (India) Pvt. Ltd Vs. ACIT  
 ( By Assessee) 1182/Del/2018,1189/Del/2018,1190/Del/2018,1185/Del/2018,1186/Del/2018,1180/Del/2018  
 1181/Del/2018  
 ( By Revenue) 1464/Del/2018, 1465/Del/2018, 1466/Del/2018, 1467/Del/2018, 1468/Del/2018,  
 1469/Del/2018, 1470/Del/2018  
 Assessment Year  
 2009-10 to 2015-16

**SHARE CERTIFICATE**

C. D. FOODS MFG. (I) PVT. LTD.  
 Plot No.: 14, B-Block, Community Centre,  
 Janak Puri, New Delhi-110058.  
 (Incorporated under the Companies Act, 1956)

No. of Shares **6500**

Certificate No. **086** Share Ledger Folio **077**

No. of Shares **6500** from **1694801**  
 to **1701300** (both inclusive)

Name **EXCEL INFOTECH LTD**

Father/Husband's Name **N.A.**

Occupation **BUSINESS**

Address **910, ANSOL, BHAWAN, 16 KINROSS  
 GRANDHI MARG, NEW DELHI- 01**

Given under the Common Seal of the Company  
 This **2ND** day of **DECEMBER** **2010**.

Secretary / Authorized Signatory **Director PVT.** Director

MEMORANDUM OF CALLS PAID			
Date of Receipt	Particulars	Per - Shares	Amount
	Application		
	Assessment		
	1st Call		
	2nd Call		
	3rd Call		

**SHARE CERTIFICATE**

C. D. FOODS MFG. (I) PVT. LTD.  
 Plot No.: 14, B-Block, Community Centre,  
 Janak Puri, New Delhi-110058.

**SHARE CERTIFICATE**

THIS IS TO CERTIFY that the person (s) named in this Certificate is / are the Registered Holder (s) of the within-mentioned share (s) bearing the distinctive number (s) herein specified in the above Company subject to the Memorandum and Articles of Association of the Company and that the amount endorsed hereon has been paid up on each such share.

EQUITY AMOUNT	SHARES PAID UP	EACH PER	OF SHARE	RUPEES

Field Folio No. **077** Certificate No. **086**

Name(s) of Holder(s) **EXCEL INFOTECH LTD**

No. of Share(s) Held **6500 (SIX THOUSAND FIVE HUNDRED)**

Distinctive No.(s) **1694801-1701300**

Given under the Common Seal of the Company this **2ND** DAY OF **DECEMBER**, **2010**.

Director PVT. Director

4.1 During the course of search query were rased to Sh. Nitin Seth the director of me company to explain the transactions with Artilgence Bio-Innovation Pvt. Ltd. and Excel Infotech Pvt. Ltd. it was noticed that at the time of search when query was raised to B.M Seth and Sh Nitin Seth (quoted below), it becomes clear that they don't even know the party, they could not explain the manner in which they approached the company. It is further important to note that the statement of Sh. Nitin Seth dated 22/12/2014, he stated that Sh. S.K. Saxena, VP (Finance) knew the party and brought the deal while in a statement recorded u/s 131 of Sh. S.K. Saxena on 18/10/2016 he stated that the decision was made by Sh. Seth.

- Statement of Shri Nitin Seth 22.12.2014

Q.30 Do you know M/s Excel Infotech Ltd. & M/s Artilgence B10-Innovations?
A.30 Yes I know these two companies which have shareholders of M/s G.D. Food.
Q.31 Please state the nature of Business of M/s Excel Infotech Ltd. & M/s Artilgence B10-Innovation Ltd.? Please mention their addresses?
A.31 I am not sure of the business affairs of these two companies and I do not know their addresses.
Q.32 It is seem from data available at the website of ROC, MCA that in December, 2010. M/s G.D. Foods has allotted 6500 shares to M/s Excel Infotech Ltd. to & 13750 shares to M/s Artilgence B10-Innovation Ltd. at a premium of Rs. 790 per share. Thus, raising premium of Rs. 1.62 crores. Please state the contact person of these two companies and how did they approach you for allotment of shares?
A.32 I do not know the contact person and other details is regarding these companies as the finance & H.R. are supervised by my father Shri Brij Mohan Seth in consultation with Mr. Saxsena & Shri Shashi Garg. Therefore, my father would be aware of these details.

- Statement of Shri Brij Mohan Seth recorded on 22.12.2014 during search

*Q.25 On perusal of ITD data and MCA data it has been gather that M/s GDFMPL has*

	<i>issued 6500 shares, 13750 share to M/s Excel infotech Ltd. and M/s Artillegence Bio-innovations Ltd. at premium of Rs. 790 per share. Please state how do you know the above two company and what was the basis of valuation of shares for allotment to these two companies ?</i>
A.25	<i>I know there two companies through our CA Shri Shashi Garg. He introduce me to the promoters of these two companies in the meeting they showed interest for making investment in Agro-based food industry. As the Agro-base industry is a growing sector and it in demand after negotiations, they agreed to invest in M/s GDFMPL @ Rs. 800 per share.</i>

*4.2 When this fact was confronted to Sh. Nitin Seth in his statement dated 20/10/2016, he stated that Sh. Saxena was involved in the decision making, it becomes clear from the above that evasive replies were submitted all the time.*

*4.3 Further, in this regard to verify the genuineness of party and credit worthiness of party, Notice u/s 133(6) were issued at address 242/1, Netaji Subhash Road, 1st Floor, Flat No. 102, Howrah, West Bengal-711101 and Suit No. 5, P-6, Danesh Sekh Lane, Nityanand Nagar, Bakultolia Makhua, West Bengal. Both notices remained unserved. Further, to serve notices and to collect information, an inspector was deputed. He submitted the inspector report which is enclosed as annexure -1 page no. 61 to 68 in this order. On perusal of report it becomes clear that at both the addresses the company is non-existent.*

*4.4 Vide this office letter dated 13.12.2016 all these fact were brought to the notice of the assessee and he was provided with an opportunity to produce the party in this office.*

*4.5 As the company was non-existing and the director could not even explain how they manage to get investment at such high share premium. It pointed out that the company had secured capital through non-existing or paper companies. How it is possible that after making such huge investment the share holder is not even in contact of the company. Further, it was noticed that share*

*certificate are also lying in the assessee company only which clearly points out that the share allotment was done only on paper to introduce capital in the company. The reliance is placed on judgments of j'on'ble Delhi High Court in case of "Commissioner of Income Tax vs Nova Promoters and Finlease Pvt. Ltd. ITA No. 342 of 201 & "Commissioner of Income tax vs NR Portfolio Pvt. Ltd. ITA No. 1019/2011 dated Nov. 2013 has explained.*

*"Evasive and transient approach before the Assessing Officer is limpid and perspicuous. Identity, creditworthiness or genuineness of the transaction is not established by merely showing that the transaction was through banking channels or by account payee instrument. It may, as in the present case required entail a deeper scrutiny. It would be incorrect to state that the onus to prove the genuineness of the transaction and creditworthiness of the creditor stands discharged in all cases if payment is made through banking channels. Whether or not onus is discharge depends upon facts of each case. It depend on whether the two parties are related or known to each; the manner or mode by which the parties approached each other, whether the transaction was entered into through written documentation to protect the investment, whether the investor professes and was an angel investor, the quantum of money, creditworthiness of the recipient, the object the purpose for which payment/investment was made etc. These facts are basically and primarily in knowledge of the assessee and it is difficult for revenue to prove and establish the negative. Certificate of incorporation of company, payment by banking channel, etc. Cannot in all cases tantamount to satisfactory discharge of onus. The facts of the present case noticed above speak and are obvious. What is unmistakably visible and apparent, cannot be spurred by formal but unreliable pale evidence ignoring the patent and what is plain and writ large. "*

*4.6 Similarly in the case of Excel Infotech Pvt. Ltd., notice u/s 133(6) of I.T. Act were v/ issued and further summon u/s 131 issued. Both were served but no compliance was made. It was only after the issuance of show cause that a confirmation was submitted in the dak of this office. But it is important here to refer to the reply submitted by the assessee.*

To

Date:

20-12-2016

*The Assistant Commissioner of Income Tax,  
Central Circle-26, E-2 Room No-323,  
ARA Centre, Jhandewalan Extn.,  
New Delhi-110055.*

*Sub: Assessment proceedings u/s 153A of the I.T. Act, 1961,  
requisition of information u/s 142(1) of the Income Tax Act,  
1961 of G.D. Foods Manufacturing (India) Pvt. Ltd. for A.Ys.  
2009-10 to 2015-16.*

*Respected Madam,*

*i. A regarding share premium.*

*Before adverting to specific replies in respect of share capital/ premium received from M/s Artilligence Bio-Innovations Ltd. and Excel Infotech Ltd, it is apposite to explain the circumstances in which the share capital was taken vis-a-vis the business of the assessee company.*

*1.1 At the very outset, it is submitted that section 68 of the Act should not be applied in respect of any and every share capital received where notice cannot be served or the shareholder chooses not to comply with the summons. The business exigencies and vagaries have to be appreciated and understood before invoking section 68 of the Act.*

*1.2 Your Honour, we seek to bring to your kind attention the provisions of section 68 where the word 'may' has been specifically used, meaning thereby that it is not necessary that every credit in respect of which the strict standards of proof are not complied with, can be added to income.*

*1.3 We are a company which was a market leader In the years 2008-09 to 2012-13 as far as the domestic FMCG industry was concerned. We were on a very high growth trajectory and were adding products almost on a daily basis. Tops' was a name to be reckoned with and we used to get a large number of proposals by investors and businessmen wanting to invest in our company. We*

*had great plans of attaining a high turnover and eventually coming out with a*

*public issue for access to cheap funds so that further expansion of production and projects could take place.*

*1.4 In the year 2011-12, we decided to part with a very small fraction of the share capital and acquire funds at a large premium. Since we were a very well known company with great prospects, we were in position to command as much premium as we wanted. These two companies agreed to pay a premium of Rs. 3\*9 on a share of Rs. 10/- each. Hence, by parting with only with 20,250 numbers of shares of Rs. 10/- each, we were able to raise a capital of Rs. 1,62,00,000/-*

*1.5 Your Honour will appreciate that this was a great business decision where with a fraction of equity, huge funds were raised. The two investors agreed to invest in the company as they were convinced that we would be able to come with a public issue very soon and that there investment would multiply many folds. In fact, there was a stage when we were contemplating issuing share in the market at a premium of close to Rs. 2,000/-.*

*1.6 Your Honour will agree that share market move on fundamentals and perceptions. Our fundamentals were strong, we were on a high growth path and perception in the market was very very promising. Hence, to reiterate, we were able to raise the share capital of Rs. 1,62,0,000/- which indude a premium of Rs. 1,59,97,500/- and core share capital of Rs. 2,02,500/-.*

*1.7 It may further be mentioned that there was a bee line of investors offering to invest at a premium In the company. We naturally wanted to part with as few shares as possible and, therefore, would entertain only those who could give the highest premium. It may further be appreciated that investors seldom approach directly and are generally introduced through friends, relatives, business associates and brokers.*

*1.8 Besides, the parting of share capital was so insignificant that the promoters did not think it necessary to do any major due diligence in respect of the investors. Funds at zero cost were being made available without parting with any stake.*

*1.9 One would be naive to refuse accepting such funds when there was no risk involved whatsoever. It may also be appreciated that in a private limited company, minority share*

*holders cannot transfer the shares to an outsider without the approval of the other shareholders.*

*1.10 Hence, for all practical purposes, the investor had hardly any right and would only benefit if the company came out with public issue. These two investors were willing to take chances with us on the assurances and promises made by our associates who introduced them to the company.*

*B. Now coming to the specifics, in respect of M/s Artillegence Bio-Innovations Ltd., we*

*distinctly remember that, one Shri Deepak Sharma introduced the shareholder to the CFO of the company. Since the CFO is akin to the Board of Directors, he was entitled to take decisions on behalf of the company and was a man of trust. After doing his due diligence, he intimated to the promoters who without going into much details approved the receipt of the share capital.*

*1.1 The usual Balance Sheet, Profit and Loss Account and other financials were taken and the shares were issued to shareholders.*

*The said shareholder is in existence and is filing its return of income. The investment made in our company sits in the asset side of the audited report and, therefore, factually the transactions stand fully vouched.*

*1.2 Your Honour, we may mention here that the company which was doing so well suddenly went through rough times because of the general depression in the market and melt down of the global economy and*

*not even a fraction of the projected growth could be achieved over a period of four years beginning 2011-12. The sales were almost flat. The public issue had to be deferred indefinitely. The company was, as Your Honour knows, making losses.*

*1.3 Under these circumstances, there was no exact option for the minority shareholders who through the company Secretary made a large number of requests. Subsequently, the company secretary left the company and since he was our only contact to the shareholders, no further correspondence was obtained.*

*1.4 We are unable to understand why the notice at the address has remained un-served. The company exists at the ROC site and has a permanent account number and ward.*

*1.5 In view of the aforesaid circumstances, the provisions of section 68 would not apply and ours is one case, where looking at the overall circumstances, the share capital is genuine and credible.*

*1.6 Without prejudice to the aforesaid, we request Your Honour to use the machinery available in the Act to seek confirmation from the company which, needless to add, is live and existing.*

*As far as M/s Excel Infotech Ltd. is concerned, the said shareholder was also introduced to us under similar circumstances. Your good self has mentioned that notice has been served but no compliance has been made. Service of notice goes to prove the existence and the identity of the shareholders which is what is the mandate of law.*

*The Hon'ble Supreme Court in the case of OT v. Lovely Exports (P.) Ltd. [2008] 216 CTR 195 (SC) has held as under.-*

*"If share application money is received by assessee-company from alleged bogus shareholders, whose names are given to Assessing Officer, then Department is free to*

*proceed to reopen their individual assessments in accordance with law but this amount of share money cannot be regarded as undisclosed income under section 68 of assessee-company'.*

*2.1 Since the identity of the shareholders is established, the same share capital deserves to be accepted.*

*2.2 Your Honour, it is common knowledge that share capital is a capital receipt for the company and the shareholder is the last entity to be repaid and that too happens only when the company is wound up.*

*2.3 We request you to kindly appreciate our predicament and not compel us to take any step which could be detrimental to the interest of our business.*

*In view of the aforesaid, since the overall genuineness of the share capital received is established, the same may kindly be accepted.*

*Finally we wish to state that these two shareholders represent only 1.17% of the share capital issued.*

*4.7 The reply filed by assessee was duly considered but found not acceptable as Assessee has failed to explain why the original share certificates are kept with the /company when it should be given to the party? Further, how they manage to sell their share such high share premium. Further, the reply filed by assessee is evasive they could not even explained how the company came in contact with these parties. Who introduced them with each other? Further, in case of Artiligence Bio-Innovation Pvt. Ltd. the enquiry proves that the company is non-existent.*

*4.8 Based on the above discussion it is clear that the transactions even though has taken place through banking channel but are non genuine transactions. So, the share capital introduced through above parties is added to the income of the assessee u/s 68 of the Act.*

*(Addition of Rs.1,62,00,000/-)"*

63. The assessee aggrieved preferred appeal before the Id CIT(A), who dealt with the issue as under:-

"8. Ground no.7 relates to addition of Rs.1,62,00,000/- made by the AO under section 68 of the IT Act. The fact of the case is that during the course of search action from the premise of the appellant original share certificates and original application letters were seized in the name of M/s Excel Infotech P. Ltd. and M/s Artiligence Bio Innovation P. Ltd. On perusal of the fact, it was found that the appellant had allotted shares at face value of Rs.10 and share premium of Rs.790 each. Total 6500 and 13750 shares were allotted in the name of M/s Excel Infotech P. Ltd. and M/s Artiligence Bio Innovation P. Ltd. from whom payments of Rs.52,00,000/- and Rs.1,10,00,000/- respectively was shown to have been received. To verify the genuineness of the transactions, notices under section 133(6) were issued but the notices received back underserved. An inspector was also deputed to verify the whereabouts of these companies but at the given addresses both the companies were found to be non existed. Therefore, the AO made addition of the impugned amount under section 68 of the IT Act.

8.1 The appellant has submitted that:-

"..... List of shareholders with address & percentage of holding was filed before the Ld. AO.

i. Appellant further submitted, Form no.2, return of allotment with the bank account where the share application money had been received.

ii. A copy of the balance sheet along with share allotment form duly filed with the ROC was filed before the Ld. AO.

Reliance is placed on the following decisions: (Copy of decisions is attached)

- a) CIT v. Lovely Exports (P) Ltd. [2008] 216 CTR 195 (SC);
- b) CIT v. Steller Investment Ltd. [2001] 115 taxman 99 (SC);

- c) *CIT v. Dwarkadhish Investment (P.) Ltd. [2011] 239 CTR 478 (Delhi HC);*
- d) *CIT v. Kamdhenu Steel & Alloys Ltd. [2012] 248 CTR 33 (DelhiHC);*
- e) *CIT v. Oasis Hospitalities (P.) Ltd. [2011] 238 CTR 402 (Delhi HC);*
- f) *CIT v. Value Capital Services (P.) Ltd. [2008] 307 ITR 334 (DELHI);*
- g) *Bhav Shakti Steel Mines (P) Ltd v. CIT (2009) 18 DTR (Del) 194;*
- h) *CIT v. Sameer Biotech (P) Ltd (2009) 17 DTR 224 (Del);*
- i) *Orient Trading Co [1963] 49 ITR 723 (BOM HC)*

*Copy of statement recorded was not confronted to the appellant*

*iii. Even though the same has been used against the appellant.*

*iv. The AO is duty bound to suo moto furnish the statement / evidence etc he seeks to rely upon against the appellant.*

*v. Following decision are relied upon (Copy of decisions is attached)*

- a) *Kishinchand Chellaram v. Commissioner of Income-tax (1980) 125 ITR 713 (SC);*
- b) *Dhakeswari Cotton Mills Ltd v. Commissioner of Income-tax (1954) 26 ITR 775 (SC);*
- c) *Commissioner of Income-tax v. JMD Computers & Communications (P.) Ltd. [2009] 180 Taxman 485 (Delhi);*
- d) *Commissioner of Income-tax v. G.C.B. Capital Finance (P.) Ltd [2009] 2 axmann.com 23 (Delhi);*
- e) *Additional Income-tax Officer v. Ponkunnam Traders [1976] 102 ITR 366 (Kerala);*

f) *Cheil India (P.) Ltd v. Assistant Commissioner of Income-tax [2012] 146 TTJ 17 (Delhi -Trib.);*

g) *Income-tax Officer v. Puneet Chugh [2005] 2 SOT 101 (Delhi trib);*

h) *Babcock Power (Overseas Projects) Ltd v. Deputy Commissioner of Income- tax [2003] 131 TAXMAN 86 (DELHI) (MAG.) ITA No. 1388 and 1389 (Delhi) of 1993;*

*Smt. Surjeet Kaur v. Income-tax Officer [2001] 119 TAXMAN 33 (HYD.) (MAG.) ITA No. 354 (HYD.) OF 1996.*

8.2 *I have considered the facts and circumstances of the case, submission of the appellant and perused the assessment order. I find that the fact remains that the appellant could not get verified the identity and creditworthiness of both the companies by filing the relevant documents and by making available those parties for verification. Thereby, the transactions could not be proved to be genuine.*

8.3 *Onus was on the appellant to prove genuineness of the transactions shown by them but they failed to do so. The abovementioned companies appear to be only paper companies who had no business activities and they were engaged in giving accommodation entries. In this regard, judgements of Hon'ble Delhi High Court in the cases of CIT Vs. Nova Promoters and Finlease (P) Ltd. (2012) 342 ITR 169 (Del) and CIT Vs. N.R.portfolio Pvt. Ltd.(2014) 264 CTR 258 (Del) are relied upon. Further, the judgement of Hon'ble Kolkata High Court in the case of Rajmandir Estate Pvt. Ltd. (2016) reported in 70 Taxmann.com 124 (Cat) and the judgement of ITAT, 'D' Bench, Mumbai in ITA no.1835/Mum/2014 dated 24.8.2016 in the case of Royal Rich Developers Pvt. Ltd. are also relied upon. In view of the facts of the case, I am of the considered view that this is not sufficient to discharge the onus cast on the appellant as contemplated u/s.68 of the Act just giving addresses and PAN of the persons concerned when the AO has doubted the credit worthiness/capacity of the share holders. The genuineness of the transaction was also doubted by the AO wherein the share applicants did not have any business/project in hand and is merely a paper company. Section 68 of the Act cast onus on the appellant to satisfy the ingredients of Section 68 to establish the identity and creditworthiness of the creditors and to establish the genuineness of the transactions. Once appellant filed the basic details such as name and address of creditor, PAN, income tax return,*

*confirmation and bank statement, the initial onus gets discharged but since, the AO has doubted the creditworthiness of the share subscribers and genuineness of the transaction as per the reasons cited and set out above, the onus shifts back to the appellant company to offer an explanation to the satisfaction of the AO as contemplated u/s 68 of the Act which could have been discharged by producing the shareholders before the AO so that truth behind the smokescreen could have been unraveled by the AO by interrogating them. The burden/onus is cast on the appellant and the appellant is required to explain to the satisfaction of the AO cumulatively about the identity and capacity/creditworthiness of the creditors along with the genuineness of the transaction. All the constituents are required to be cumulatively satisfied. If one or more of them is absent, then the AO can make the additions u/s 68 of the Act as an income. The fact remains that the company is private company in which public are not substantially interested these type of companies are mostly family controlled companies for which the onus as required u/s 68 of the Act is very heavy to prove identity and capacity of the shareholders and genuineness of the transaction. In view of the above discussion, I am of the considered view that merely submission of the name and address of the share subscriber, income tax returns, Balance Sheet/statement of affairs of the share subscriber and bank statement is not sufficient as the AO is to be satisfied as to their identity and creditworthiness as well as to the genuineness of the transaction entered into. The alleged share holders were not found to be in existence and thus, the onus shifts back to the appellant to produce the shareholders before the AO and if the appellant falters, the additions can be made u/s 68 of the Act. Section 68 of the Act has been amended by Finance Act, 2012 w.e.f. 01- 04-2013 whereby the onus is cast upon the appellant company to justify the sources of share subscription, to explain the source of the source of raising the share subscription which has been held to be clarificatory in nature. In the present case, the appellant company is a private company who could not prove the identity and credit worthiness of the alleged share subscribers and the genuineness of the share subscriptions. Being private limited company wherein no public issue has been floated to raise the share capital, it was therefore, viable and proper and duty on the part of the appellant to prove genuineness of the transactions but the fact remains that the appellant could not prove the same. They were not found to be in existence on the given address. Though the appellant company was obliged to prove:-*

- (a) *The identity of the alleged share holders.*
- (b) *The credit worthiness of the share holders.*
- (c) *The genuineness of the transactions.*

*But it is clear from the facts as discussed above that the appellant could not prove the same, therefore, in the light of above facts and case laws as discussed above, I am of the considered view that the AO was justified to make addition u/s 68 of the IT Act.*

64. The Id Authorised Representative submitted that during the course of assessment proceedings the assessee has submitted complete details of these parties in the form of company master data, the address of the companies, their permanent account no, their confirmation, the copy of the bank account along with return of income and explanation regarding the share premium. It also submitted the balance sheet and profit and loss account of those companies. He further referred to the balance sheet of the Excel Infotech Ltd which has the fixed asset of Rs. 47.32 crores, investment of Rs. 306 crores and loans and advances of Rs. 323/- crores. He further submitted that investor has earned profits of Rs. 29 lacs and paid tax of Rs. 19 lacs. He further submitted that investment made by the above company is only Rs. 52 lacs. He therefore, submitted as the company has invested in the shares and there is no information adverse available with the Id Assessing Officer, amount is wrongly added. With respect to Artlligence Bio Innovations Ltd, he referred to the confirmation, balance sheets, bank accounts of the assessee company and submitted that the net worth of the above company was Rs. 26.62 crores and turn over of that company was Rs. 12 crores. He further submitted that it remains merely an allegation of the Id AO that these are accommodation entries or paper companies. It was further stated that when these companies have such a huge capital base, fixed assets, income tax records, it cannot be said that these are the paper companies. He further

submitted that the original share certificate were to be handed over to these companies and therefore, they were found with the assessee. He further submitted that if these original share certificates along with the blank signed share transfer form of these shares would have been found then the allegation of the Id Assessing Officer would have some credence. He submitted that all these companies are regularly assessed with income tax department and their return of income is shown to the Assessing Officer. There is no reason to show that these are the paper companies. He further submitted that assessee has given the complete last known address of these share holders and shares are still in the name of these companies. He further submitted that the original share certificate cannot be considered as an incriminating material found during the search. He further submitted that for the AY the original return was filed on 28.09.2011, where the total income declared is Rs. 1.87 crores. He further stated that original share certificate were to be handed over to the share holders and therefore, were found with the assessee and furthermore the share application forms are to be addressed to the assessee company by those companies and therefore, they should have been found with the assessee company only. Therefore, he submitted that these are not incriminating material which can disturb the concluded assessment. He submitted that the due date for issue of notice u/s 143(2) of that Act against original return filed on 28.09.2011, has already passed on 30.09.2012, therefore, it is a concluded assessment. He therefore, submitted that vide ground No. 1.1 read with ground No. 5 this issue needs to be considered in view of the decision of the Hon'ble Delhi High Court in case of CIT Vs. Kabul Chawla. He further referred to the decision of the Id CIT(A) and submitted that vide para No. 5 he has brushed aside this argument.

65. The Id Departmental Representative vehemently relied upon the orders of the lower authorities.
66. We have carefully considered the rival contentions and perused the orders of the lower authorities. Admittedly, assessee has filed original return of income on 28.09.2011 declaring total income of Rs. 18719600/- . The date of search is 22.12.2014. Therefore, undisputedly, up to the date of search no notice u/ 143(2) of the Act was issued to the assessee, therefore, the impugned assessment year was a concluded assessment year and could have been disturbed only on the basis of incriminating material found during the course of search. Such is the mandate of the decision of the Hon'ble Delhi High Court in CIT Vs. Kabul Chawla 380 ITR 573. The Hon'ble Delhi High Court has held so in para No. 37 of the decision. In series of decision there after Hon'ble Delhi High Court has upheld the above view. Same is also supported by the decision of the Hon'ble Bombay, Karnataka and Gujarat High Court. Therefore, in view of this we have to examine whether there are any incriminating material found during the course of search or not. During the course of search the documents were found in the form of
- a. Original share certificate in the name of Excel Infotech Ltd and Attillegence Bio Innovations Ltd
  - b. The original share application letters
67. The two share certificate were found showing the registered folio NO. 77 and 78 vide Certificate No. 86 and 87 of 6500 and 13750 shares issued to the above two companies on 2<sup>nd</sup> Day of December 2010. As the companies whose name is appearing in the share holders register registered and to whom the shares were issued are same at the most, it can be said that share certificate were not handed over to the holder of those shares. Merely holding a share certificate without duly signed blank

transfer forms, they do not become incriminating documents. It is also not the case of the revenue that later on these shares were transferred to the promoters at substantially reduced prices or they have been sold to somebody else. At the most, it can be said that a document belonging to the third person was found which does not have any marketability in absence of duly signed transfer forms. Therefore, we are of the opinion that original share certificate found cannot be held to be an incriminating material which can change the income of the assessee.

68. Further, with respect to the original share application letters issued to the assessee company by those share holders is definitely to be found with the assessee only. Those share application letter found in original with the assessee is not an incriminating material.
69. In view of this and respectfully following the decisions of the various High Court including the jurisdictional High Court, we hold that above addition of Rs. 1.62 crores made by the Id Assessing Officer and confirmed by the Id CIT(A) is without any incriminating material found during the course of search and hence, the orders of the lower authorities are reversed to that extent. Accordingly, ground No.5 of the appeal read with ground No. 1 of the appeal are allowed.
70. Accordingly, ITA No. 1190/Del/2018 filed by the assessee is partly allowed.
71. The revenue has raised the following grounds of appeal in ITA NO. 1466/Del/2018 for the Assessment Year 2011-12:-
- “1. *That on the facts and in the circumstances of the case, the Id CIT(A) has erred in law and on facts in deleting the addition of Rs. 10,75,28,810/- on account of undisclosed sales, which was arrived at by the AO on the basis of matching of data retrieved from seized server and disclosed sales.*”

72. The ground No. 1 of the appeal of the revenue is with respect to deletion of addition of ₹ 107528810/- on account of undisclosed sales. Identical issue has been decided by us in appeal of the revenue for assessment year 2014 – 15 in ground number 1 of the appeal where we have upheld the order of the learned CIT(A) as the amount involved was only on account of stock transferred from head office to branch and branch to head office or other branches and not the sales. Accordingly we also decide ground No. 1 of the appeal of the revenue against the learned assessing officer and direct him to delete the addition of ₹ 107528810/- on account of undisclosed sales. Accordingly, ground No. 1 of the appeal is dismissed.
73. Accordingly appeal of the revenue for AY 2011-12 is dismissed.
74. Accordingly, for AY 2011-12 appeal of the assessee is partly allowed and appeal of the revenue is dismissed.

### **AY 2012-13**

75. The assessee has raised the following grounds of appeal in 1185/Del/2018 for the Assessment Year 2012-13:-
- "1. *That the order of the Ld. CIT (A) dated 26.12.2017 is bad in law and on facts.*
- 1.1 *That the Ld. CIT(A) has erred on facts and in law in ignoring the settled legal proposition that admittedly there was no incriminating material found as a result of search, assessment order passed u/s 153A of the Act was bad in law and void ab initio.*
- 1.2 *That the Id. CIT(A) failed to consider the fact that documents found and seized were essentially the actual profit & loss account which depicted losses only and there was no unexplained assets or wealth found during the course of search.*
- 2 *That the Id. CIT(A) has erred in not adjudicating the ground that neither the copy of statements recorded during the course of search were provided nor an opportunity of cross examination was accorded to the assessee.*

3. *That the Id. CIT (A) has erred in not considering the contemporary and conclusive evidence in the form of excel sheet recordings and monthly profitability statements giving the real/actual profitability found in the computers seized during course of search.*
- 3.1 *That the Id. CIT (A) has ignored the settled principles of taxing real income as laid down by the Hon'ble Supreme Court in various decisions.*
- 3.2 *That the Id. CIT(A) has erred in not considering the fact that the actual profitability statement and other critical data seized during the course of search for the impugned assessment year was not provided to the assessee company in spite of repeated requests made by the assessee company in this regard.*
- 3.3 *That the Id. CIT (A) has erred in considering only selective part of actual profitability statements as true and correct and ignoring the rest i.e. Income shown in actual profitability has been added into the hands of assessee without allowing the claim of expenses made in this regard.*
- 3.4 *That the Ld. CIT (A) has erred in not adjudicating the grounds 3 to 3.4 (supra) which were the grounds 4 to 4.3 raised before Id. CIT(A).*
- 4 *That the Id. CIT(A) has erred in sustaining the addition of Rs. 4,69,73,173/- on account of bogus purchase.*
- 4.1 *That Ld. CIT(A) further erred in stating that no supporting detail regarding expenses incurred in cash was filed therefore no cash expense was incurred despite the fact that he himself accepted the seized excel sheets showing unaccounted cash expenses as true.*
- 4.2 *That without prejudice to the above, the Id. CIT(A) has failed to consider the fact that if assessee had recorded and accounted for the alleged bogus purchases in its audited accounts then equivalent amount of stock would also have inflated which negated the effect on profitability.*
5. *That the Id CIT(A) has erred in sustaining the addition of Rs. 30,36,913/- as unexplained credit u/s 68 of the Act despite the fact that assessee has sufficiently discharged the onus of proving identity, genuineness and creditworthiness by filing detailed submission supported with contemporary and conclusive evidences."*

76. Only issue involved in this appeal of the assessee with respect to ground Nos. 1 to 5 are with respect to the addition on account of bogus purchases of Rs. 46973173/- and sale of scrap of Rs. 30,36,913/- made by the learned assessing officer and confirmed by the learned CIT(A). We have already decided the above issue in appeal of the assessee for assessment year 2014 – 15 wherein we have held that the whole addition on account of bogus purchases and estimated sale of scrap cannot be made. For the similar reasons, the addition made by the learned assessing officer and confirmed by the learned CIT(A) of ₹ 46973173/- on account of Bogus purchases and Rs. 3036913/- on account of estimated sale of scrap cannot be sustained but appropriate percentage of unaccounted expenditure for which we have held that 8% is the appropriate percentage to sustain the addition. Accordingly, we direct the learned assessing officer to sustain the addition to that extent only. Accordingly, Ground Nos. 1 to 5 of the appeal of the assessee is partly allowed.
77. Appeal of the assessee is partly allowed.
78. The revenue has raised the following grounds of appeal in ITA NO. 1467/Del/2018 for the Assessment Year 2012-13:-
- "1. That on the facts and in the circumstances of the case, the ld CIT(A) has erred in law and on facts in deleting the addition of Rs. 15,40,00,267/- on account of undisclosed sales, which was arrived at by the AO on the basis of matching of data retrieved from seized server and disclosed sales."*
79. The ground number 1 of the appeal of the revenue is with respect to deletion of addition of ₹ 154000267/- was made on account of undisclosed sales. Identical issue has been decided by us in appeal of the revenue for assessment year 2014 – 15 in ground No. 1 of the appeal where we have upheld the order of the learned CIT(A) as the amount

involved was only on account of stock transferred from head office to branch and branch to head office or other branches and not the sales. Accordingly, we also decide ground No. 1 of the appeal of the revenue against the learned assessing officer and direct him to delete the addition of ₹ 154000267/- on account of undisclosed sales. Accordingly, ground number 1 of the appeal is dismissed.

80. Accordingly appeal of the revenue for AY 2012-13 is dismissed.
81. Accordingly, for AY 2012-13 appeal of the assessee is partly allowed and appeal of the revenue is dismissed.

### **AY 2013-14**

82. The assessee has raised the following grounds of appeal in 1186/Del/2018 for the Assessment Year 2013-14:-
- "1. *That the order of the Ld. CIT (A) dated 26.12.2017 is bad in law and on facts.*
- 1.1 *That the Ld. CIT(A) has erred on facts and in law in ignoring the settled legal proposition that admittedly there was no incriminating material found as a result of search, assessment order passed u/s 153A of the Act was bad in law and void ab initio.*
- 1.2 *That the Id. CIT.(A) failed to consider the fact that documents found and seized were essentially the actual profit & loss account which depicted losses only and there was no unexplained assets or wealth found during the course of search.*
- 2 *That the Id. CIT(A) has erred in not adjudicating the ground that neither the copy of statements recorded during the course of search were provided nor an opportunity of cross examination was accorded to the assessee.*
3. *That the Id. CIT (A) has erred in not considering the contemporary and conclusive evidence in the form of excel sheet recordings and monthly profitability statements giving the real/actual profitability found in the computers seized during course of search.*

- 3.1 *That the Id. CIT (A) has ignored the settled principles of taxing real income as laid down by the Hon'ble Supreme Court in various decisions.*
  - 3.2 *That the Id. CIT(A) has erred in not considering the fact that the actual profitability statement and other critical data seized during the course of search for the impugned assessment year was not provided to the assessee company in spite of repeated requests made by the assessee company in this regard.*
  - 3.3 *That the Id. CIT(A) has overlooked the presumption laid down u/s 132(4A) of the Act which say that documents/material found during the course of search are supposed to be true and correct and same are to be considered for the purpose of assessment for the relevant assessment year.*
  - 3.4 *That the Ld. CIT (A) has erred in not adjudicating the grounds 3 to 3.4 (supra) which were the grounds 4 to 4.3 raised before Id. CIT(A).*
  - 4 *That the Id. CIT(A) has erred in sustaining the addition of Rs. 4,10,20,635/- on account of bogus purchase.*
    - 4.1 *That Ld. CIT(A) further erred in stating that no supporting detail regarding expenses incurred in cash was filed therefore no cash expense was incurred despite the fact that he himself accepted the seized excel sheets showing unaccounted cash expenses as true.*
    - 4.2 *That without prejudice to the above, the Id. CIT(A) has failed to consider the fact that if assessee had recorded and accounted for the alleged bogus purchases in its audited accounts then equivalent amount of stock would also have inflated which negated the effect on profitability.*
  5. *That the Id CIT(A) has erred in sustaining the addition of Rs. 7573380/- as unexplained credit u/s 68 of the Act despite the fact that assessee has sufficiently discharged the onus of proving identity, genuineness and creditworthiness by filing detailed submission supported with contemporary and conclusive evidences."*
83. Only issue involved in this appeal of the assessee with respect to ground Nos. 1 to 5 are with respect to the addition on account of bogus purchases of Rs. 41020635/- and sale of scrap of Rs. 7573380/- made by the learned assessing officer and confirmed by the learned CIT(A). We have already decided the above issue in appeal of the assessee for

assessment year 2014 – 15 wherein we have held that the whole addition on account of bogus purchases and estimated sale of scrap cannot be made. For the similar reasons the addition made by the learned assessing officer and confirmed by the learned CIT(A) of ₹ 41020635/- on account of Bogus purchases and Rs. 7573380/- on account of estimated sale of scrap cannot be sustained but appropriate percentage of unaccounted expenditure for which we have held that 8% is the appropriate percentage to sustain the addition. Accordingly, we direct the learned assessing officer to sustain the addition to that extent only. Accordingly, Ground no. 1 to 5 of the appeal of the assessee is partly allowed.

84. Accordingly, appeal of the assessee for AY 2013-14 is partly allowed.
85. The revenue has raised the following grounds of appeal in ITA NO. 1468/Del/2018 for the Assessment Year 2013-14:-
- “1. *That on the facts and in the circumstances of the case, the Id CIT(A) has erred in law and on facts in deleting the addition of Rs. 18,59,00,772/- on account of undisclosed sales, which was arrived at by the AO on the basis of matching of data retrieved from seized server and disclosed sales.*”
86. The ground number 1 of the appeal of the revenue is with respect to deletion of addition of ₹ 185900772/- on account of undisclosed sales. Identical issue has been decided by us in appeal of the revenue for assessment year 2014 – 15 in ground number 1 of the appeal where we have upheld the order of the learned CIT – A as the amount involved was only on account of stock transferred from head office to branch and branch to head office or other branches and not the sales. Accordingly we also decide ground No. 1 of the appeal of the revenue against the learned assessing officer and direct him to delete the addition of ₹ 185900772/- on account of undisclosed sales. Accordingly, ground number 1 of the appeal is dismissed.

87. Accordingly, appeal of the revenue for AY 2013-14 is dismissed.
88. Accordingly, for AY 2013-14 appeal of the assessee is partly allowed and appeal of the revenue is dismissed.

### **AY 2015-16**

89. The assessee has raised the following grounds of appeal in 1181/Del/2018 for the Assessment Year 2015-16:-
- "1. *That the order of the Ld. CIT (A) dated 26.12.2017 is bad in law and on facts.*
  - 2 *That the Id. CIT.(A) failed to consider the fact that documents found and seized were essentially the actual profit & loss account which depicted losses only and there was no unexplained assets or wealth found during the course of search.*
  - 3 *That the Id. CIT(A) has erred in not adjudicating the ground that neither the copy of statements recorded during the course of search were provided nor an opportunity of cross examination was accorded to the assessee.*
  4. *That the Id. CIT (A) has erred in not considering the contemporary and conclusive evidence in the form of excel sheet recordings and monthly profitability statements giving the real/actual profitability found in the computers seized during course of search.*
    - 4.1 *That the Id. CIT (A) has ignored the settled principles of taxing real income as laid down by the Hon'ble Supreme Court in various decisions.*
    - 4.2 *That the Id. CIT(A) has erred in not considering the fact that the actual profitability statement and other critical data seized during the course of search for the impugned assessment year was not provided to the assessee company in spite of repeated requests made by the assessee company in this regard.*
    - 4.3 *That the Id. CIT(A) has overlooked the presumption laid down u/s 132(4A) of the Act which say that documents/material found during the course of search are supposed to be true and correct and same are to be considered for the purpose of assessment for the relevant assessment year.*

- 4.4 *That the Ld. CIT (A) has erred in not adjudicating the grounds 3 to 3.4 (supra) which were the grounds 4 to 4.3 raised before Id. CIT(A).*
  5. *That the Id. CIT(A) has erred in sustaining the addition of Rs. 3,34,60,835/- on account of bogus purchase.*
    - 5.1 *That Ld. CIT(A) further erred in stating that no supporting detail regarding expenses incurred in cash was filed therefore no cash expense was incurred despite the fact that he himself accepted the seized excel sheets showing unaccounted cash expenses as true.*
    - 5.2 *That without prejudice to the above, the Id. CIT(A) has failed to consider the fact that if assessee had recorded and accounted for the alleged bogus purchases in its audited accounts then equivalent amount of stock would also have inflated which negated the effect on profitability.*
  6. *That the Id CIT(A) has erred in sustaining the addition of Rs. 44,75,974/- on account of undisclosed income from scrap sales despite the fact the same was considered and disclosed by the assessee in actual profitability statement filed by the assessee during the assessment as well as CIT(A) proceedings.*
  7. *That the Id CIT(A) has erred in sustain the addition of Rs. 6,86,482/- on account of undisclosed investment in excess stock."*
90. One issue involved in this appeal of the assessee with respect to ground Nos. 1 to 6 are with respect to the addition on account of bogus purchases of Rs. 33460836/- and sale of scrap of Rs. 4475974/- made by the learned assessing officer and confirmed by the learned CIT(A). We have already decided the above issue in appeal of the assessee for assessment year 2014 – 15 wherein we have held that the whole addition on account of bogus purchases and estimated sale of scrap cannot be made. For the similar reasons, the addition made by the learned assessing officer and confirmed by the learned CIT(A) of ₹ 41020635/- on account of Bogus purchases and Rs. 7573380/- on account of estimated sale of scrap cannot be sustained but appropriate percentage of unaccounted expenditure for which we have held that 8 % is the

appropriate percentage to sustain the addition. Accordingly, we direct the learned assessing officer to sustain the addition to that extent only. Accordingly, Ground no. 1 to 6 of the appeal of the assessee is partly allowed.

91. Ground no 7 of the appeal of the assessee is against the sustenance of addition of Rs 686482/-.

92. Brief facts of the issue is that the Id Assessing Officer has found that there is shortage/ excess of stock with respect to several items at respective plants of the assessee. He worked out the excess stock of Rs. 686482/- which was added to the income of the assessee. The assessee challenged the same before the Id CIT(A), who vide para No. 8 of his order confirmed the same as under:-

*"8. Ground no.8 relates to addition of Rs.6,86,482/- made by the AO on account of undisclosed investment in stock. The fact of the case is that during the course of search action excess stock of the impugned amount was found, however, no explanation was offered by the appellant, therefore, the AO made addition of the same.*

*8.1 I have considered the facts and circumstances of the case, submission of the appellant and perused the assessment order. I find that though the appellant has submitted that they were dealing in numbers of items, therefore, it was not practically feasible to update each item of stock in the books of accounts on day basis. Further, they have also submitted that the AO has not given any cause on this issue. However, I find that even before me the appellant has given any reconciliation or cogent explanation with regard to excess stock found. Under these circumstances, I do not find any infirmity in the AO's order, therefore, appeal on this ground is dismissed."*

93. The Id Authorised Representative submitted that there are several discrepancies during the course of physical verification and further assessee is dealing in number of items, therefore, such small excess stock cannot be added.

94. The Id Departmental Representative supported the orders of the lower authorities.
95. We have carefully considered the rival contentions and perused the orders of the lower authorities. The Id Assessing Officer found excess stock with respect to certain items which could not be explained by the assessee. The appellant could not also show any reconciliation before us. In view of this, we do not find any infirmity in the order of lower authorities in confirming the above addition. Accordingly, ground No. 7 of the appeal of the assessee is dismissed.
96. In the result ITA No. 1181/Del/2017 filed by the assessee for the AY 2015-16 is partly allowed.
97. The revenue has raised the following grounds of appeal in ITA NO. 1470/Del/2018 for the Assessment Year 2015-16:-
1. *That on the facts and in the circumstances of the case the Id CIT(A) has erred in law and on facts in deleting the addition of Rs. 24,24,26,858/- on account of undisclosed sales, which was arrived at by the AO on the basis of matching of data retrieved from seized server and disclosed sales.*
  2. *That on the facts and in the circumstances of the case, the LD CIT (A) has erred in law and on facts in deleting the addition of Rs. 5,51,68,843/- on account of short stock and undisclosed sales.*
  3. *That the grounds of appeal are without prejudice to each other."*
98. The ground number 1 of the appeal of the revenue is with respect to deletion of addition of ₹ 242426858/- was made on account of undisclosed sales. Identical issue has been decided by us in appeal of the revenue for assessment year 2014-15 in ground number 1 of the appeal. There we have upheld the order of the learned CIT(A) as the amount involved was only on account of stock transferred from head office to branch and branch to head office or other branches and not the sales. Accordingly we also decide ground number 1 of the appeal of the revenue

against the learned assessing officer and direct him to delete the addition on account of ₹ 242426858/- on account of undisclosed sales. Accordingly, ground number 1 of the appeal is dismissed.

99. Ground no 2 of the appeal is against the addition of Rs. 551568843/- deleted by the Id CIT(A).
100. Brief facts of the case is that the Id Assessing Officer made an addition of above amount holding that as on the date of search stock was found short by Rs. 213915638/- which means assessee has sold such stock out of books and therefore, gross profit @25.79% calculated thereon was charged to tax amounting to Rs. 55168843/-. The assessee challenged it before the Id CIT(A), who dealt the same as under:-

*"9. Ground No.9 relates to addition of Rs.5,51,68,843/- made by the AO on account of GP on the short stock of Rs.21,39,15,638/- found which was sold out of books of account. The fact of the case is that during the course of search action shortage of stock of the impugned amount was found, however, no explanation was offered by the appellant, therefore, the AO made addition of the same on account of GP assuming that the stock of the impugned amount was sold out of books.*

*9.1 The appellant has submitted that:-*

*Basis of determining the undisclosed sales is ad hoc, absurd and bereft of any basis of precedent*

- i. Addition on account of undisclosed sales can be made only when there is some corroborative material / evidence found during the course of search. It is undisputed fact that the stock found during the course of search was Rs. 28,89,38,712/-*
- ii. It devoid any logic how addition on account of undisclosed sales can be made that too on guess work, presumption and surmises in the absence of any material found during the course of search.*
- iii. The Id. AO has ignored the fact that the since admittedly the purchases totaling to Rs 23,48,19,023/- from FY 2008-09 to 2014-15 against which cash was*

*received back were accounted for in the audited accounts, the purchases and equivalent amount of stock in the said audited accounts are in excess to that extent,*

- i. Since these purchases were never made, this stock was never received. In the closing stock appearing in the audited accounts, the value of stock would be higher to the extent of the purchases against which cash has been received back.*
- iv. Due to the aforesaid fact, the amount of closing stock inflated in the audited books was almost equal to the amount of bogus purchases and hence nullifying the effect on the profitability of the company.*
- v. Without prejudice to the aforesaid, it is submitted that this is a case of search u/s 132(1) of the Act. The Hon'ble Delhi High Court in the case of Commissioner of Income-tax (Central)-III v. Kabul Chawla [2016] 380 ITR 573 (Delhi) has very clearly held that the addition shall be confined to the evidence of undisclosed income / investment found during the course of search. Indubitably, there is no evidence to even remotely suggest that undisclosed sales of such an amount was existent as on the date of search.*
- vi. The above decision is ratified by the co-ordinate bench of Hon'ble Delhi High Court in the case of Pr. Commissioner of Income-tax Central-2 v. Meeta Gutgutia IT A No. 306, 307, 308, 309 & 310 of 2017. (Copy of decision is enclosed)*
- vii. There are a plethora of case laws decided by the various other High Courts across the country on the said issue wherein and have ratified the above decision of Hon'ble Delhi High Court, such addition cannot be made unless there is clear evidence of undisclosed income found during the course of search.*

*Following are the decisions (Copies of decision is enclosed):*

- *Commissioner of Income-tax-II, Thane v. Continental Warehousing Corporation (Nhava Sheva) Ltd [2015] 374 ITR 645 (Bombay);*
- *Commissioner of Income-tax, Bangalore v. Lancy Constructions [2016] 66 taxmann.com 264 (Karnataka);*
- *Principal Commissioner of Income-tax-4 v. Saumya Construction (P.) Ltd. 387 ITR 529 (Gujarat)*

*viii. In search related matters guess work and that too based on absurdity is impermissible. There is plethora of decisions which supports the fact that estimation of income on account of undisclosed sales in the absence of corroborative material found during the course of search is not permitted.*

*Reliance is placed on following (Copy of the same is enclosed)*

- a) *Commissioner of Income-tax v. H.C. Chandna (P.) Ltd. [2008] 299 ITR 429 (Delhi);*
- b) *Commissioner of Income-tax v. Dr. M.K.E. Memon [2001] 248 ITR 310 (Bombay);*
- c) *Commissioner of Income-tax v. Lachman Das Bhatia [2012] 26 taxmann.com 167 (Delhi);*
- d) *Commissioner of Income-tax v. Pradeep Goel [2008] 174 TAXMAN 421 (DELHI);*
- e) *Deputy Commissioner of Income-tax v. Royal Marwar Tobacco Product (P.) Ltd. [2009] 120 TTJ 387 (Ahmedabad)*

*In view of the aforesaid, it is prayed that the addition is totally devoid of facts and deserves to be deleted "*

*9.2 I have considered the facts and circumstances of the case, submission of the appellant and perused the assessment order. I find that the appellant has submitted that they were dealing in numbers of items, therefore, it was not practically feasible to update each item of stock in the books of accounts on day to day basis. I find that the appellant has booked bogus purchases in the books of accounts by which the purchases vis-a-vis stock was*

*inflated. Under these circumstances, I find merit in the argument of the appellant that as such there was no shortage of stock. Since, there was no evidence found towards sale of stock out of books of accounts, therefore, in view of the judgement of Delhi High court in the case of Kabul Chawla as relied upon by the appellant, the appeal on this ground is allowed"*

101. The Id Departmental Representative submitted that when the stock recorded in the books of accounts was not found the only assumption could be that same has been sold out of the books and appropriate gross profit is charged to tax. He therefore, submitted that there is no infirmity in the order of the Id Assessing Officer.
102. The Id Authorised Representative vehemently supported the order of the Id CIT(A). He submitted that when assessee has booked purchases amounting to Rs. 23.48 crores for which the goods have never been received then addition on account of shortage cannot be made.
103. We have carefully considered the rival contentions and also perused the orders of the lower authorities. As it is apparent that assessee has booked bogus purchases in the books of accounts and corresponding stock was inflated, it is but natural that assessee does not have stock equivalent to that amount. While deciding the issue of taxation of bogus purchases we have discussed this issue at length. We have also held that assessee has debited the purchases without actual receipt of goods and cash was taken back from the various suppliers for incurring various business expenditure. All these evidences were found during the course of search. In view of this, the above addition made by the Id Assessing Officer without finding any evidence of holding such stock, sale of such stock and receipt of money for such sale, addition cannot be upheld. In view of this ground No. 2 of the appeal of the revenue is dismissed.
104. Accordingly appeal of the revenue for AY 2015-16 is dismissed.

G.D. Foods Manufacturing (India) Pvt. Ltd Vs. ACIT  
( By Assessee) 1182/Del/2018,1189/Del/2018,1190/Del/2018,1185/Del/2018,1186/Del/2018,1180/Del/2018  
1181/Del/2018  
( By Revenue) 1464/Del/2018, 1465/Del/2018, 1466/Del/2018, 1467/Del/2018, 1468/Del/2018,  
1469/Del/2018, 1470/Del/2018  
Assessment Year  
2009-10 to 2015-16

105. Accordingly, for AY 2015-16 appeal of the assessee is partly allowed and appeal of the revenue is dismissed.

Order pronounced in the open court on 06/09/2018.

-Sd/-  
(K. N. CHARY)  
JUDICIAL MEMBER

Sd/-  
(PRASHANT MAHARISHI)  
ACCOUNTANT MEMBER

Dated: 06/09/2018

A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR  
ITAT, New Delhi