

**IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI BENCHES,  
DELHI 'D' BENCH**

**BEFORE SHRI N.K.SAINI, ACCOUNTANT MEMBER, AND  
SHRI C.M. GARG, JUDICIAL MEMBER**

**ITA Nos. 31 to 35/DEL/2015  
[Assessment Years: 2005-06 to 2009-10]**

Kundan Rice Mills Ltd                      Vs.                      The ACIT  
D-16 & 17, Central Market                      Central Circle  
Prashant Vihar, Delhi                      Karnal

PAN No. AAACK 7098 P

(Appellant)

(Respondent)

**ITA Nos. 773 to 777/DEL/2015  
Assessment Years: 2005-06 to 2009-10]**

The ACIT                      Vs.                      Kundan Rice Mills Ltd  
Central Circle                      D-16 & 17, Central Market  
Karnal                      Prashant Vihar, Delhi

PAN No. AAACK 7098 P

(Appellant)

(Respondent)

Assessee by: Shri Ved Jain, CA  
Shri Ashish Goel, CA  
Shri Pranjal Srivatava

Department by: Shri Gajanand Meena, CIT-DR

Date of Hearing                      : 20.08.2015  
Date of Pronouncement                      : 30.11.2015

## ORDER

### PER BENCH:-

These cross appeals filed by the department and the assessee are directed against the common order dated 8.12.2014 of the Id. CIT(A)-III, Gurgaon. Since the issues involved in these appeals are similar and the appeals were heard together, so these are being disposed off by this consolidated order for the sake of convenience.

2. We will first deal with the cross appeals for A.Y 2005-06. In the assessee's appeal, the grounds raised read as under:

1. *On the facts and circumstances of the case, the order passed by the learned CIT(A) is bad both in the eye of law and on facts.*

2. *On the facts and circumstances of the case, Id. CIT(A) has erred both on facts and In law in rejecting the contention of the assessee that the proceedings initiated under Section 153A against the appellant and the assessment framed under Section 153A/143(3) are in violation of the statutory conditions of the Act and the procedure prescribed under the law and as such the same is bad in the eye of law and liable to be quashed.*

3(i). *On the facts and circumstances of the case, Id. CIT(A) has erred both on facts and In law in rejecting the contention of the assessee that the learned AO has erred both on facts and in law in framing the assessment under section 153A and in making the additions despite the fact that no incriminating material was found during the course of the search.*

(ii) *On the facts and circumstances of the case, the assessment framed by the AO is against the spirit of section 153A of the Act whereby the reassessment has to be confined to the additions and disallowances consequent to the material found during the course of the search and does not give power to the AO to reappraise and review the already settled issues and assessments.*

4. *On the facts and circumstances of the case, Id. CIT(A) has erred both on facts and In law in rejecting the contention of the assessee that the learned AO has erred both on facts and in law in drawing adverse inference and making addition in the hands of the appellant company on the basis of an enquiry report in a survey proceeding under section 133A of the Income Tax Act of M/s Dee Kay Trade Centre, that too with reference to Kundan Edible Products (P) Ltd. and M/s Swastik Vegetable Oil Mills Pvt. Ltd. and not with reference to the appellant.*

5. *On the facts and circumstances of the case, the learned CIT(A) has erred, both on facts and in law, in confirming the action of A.O. in rejecting the books of Accounts of the assessee under section 145 of the Act, despite the assessee maintaining proper books of account as per law.*

6. *On the facts and circumstances of the case, the learned CIT(A) has erred, both on facts and in law, in confirming the addition of Rs.2,09,02,000/- by enhancing the gross profit by 2% over and above the gross profit declared by the assessee on total turnover of chemicals and polymer of Rs. 104.51 crores.*

(ii) *That the enhancement of gross profit rate has been done arbitrarily by adhoc 2% rejecting the explanation and evidences given by the assessee.*

(iii) *That the addition of adhoc gross profit rate of 2% has been made merely on the basis of doubt by indulging into surmises and conjectures without there being any material to support such addition.*

7. *On the facts and circumstances of the case, Id. CIT(A) has erred both on facts and In law in rejecting the contention of the assessee that the addition made by the AO on account of the enhanced gross profit is untenable in the absence of any material or evidences brought on record by the AO that the appellant company has received any amount over and above the amount stated in the books of account.*

8. *That the additions confirmed by the learned CIT(A) are untenable in the absence of any finding or evidence that sales made to these parties, namely Dee Kay Trade Centre and J.S. Enterprises are at a value less than the market value.*

9(i) *On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in applying the enhanced gross profit rate in respect of the total turnover of chemicals and polymers of Rs. 104.51 Crores despite the fact that the allegation of the AO was limited to the sales made to M/s Dee Kay Trade Centre and J.S. Enterprises of Rs.5.97 Crores only.*

(ii) *On the facts and circumstances of the case, the learned CIT(A) has erred, both on facts and in law, in confirming the action of A.O. in disturbing the sales consideration in respect of the sales to other identified parties without there being any adverse material or information on record.*

10. *On the facts and circumstances of the case, the learned CIT(A) has erred, both on facts and in law, in confirming the action of A.O. in making the addition on the basis of analysis of certain comparables ignoring the fact that the provisions of Transfer Pricing Regulations are not applicable to the domestic transactions during the year.*

11 (i) *In the alternative and without prejudice to the above, the learned CIT(A) has erred, both on facts and in law, in ignoring the contention of the assessee that the comparables taken by the AO are functionally different from the assessee and therefore are not the correct comparables.*

(ii) *On the facts and circumstances of the case, the learned CIT(A) has erred, both on facts and in law, in ignoring the contention of the appellant that sales of the same products having been made to unrelated party,(being internal comparables) at the same price at which sales have been made to M/s Dee Kay Trade Centre and J.S. Enterprises, there is no justification for making any adjustment in the gross profit.*

12. *On the facts and circumstances of the case, the learned CIT(A) has erred, both on facts and in law, in ignoring the contention of the appellant that original assessment having been framed under Section 143(3) after detailed examination, the AO was not justified in reviewing the same.*

13. *The appellant craves leave to add, amend or alter any of the grounds of appeal.*

3. *In the revenue's appeals, the grounds raised read as under:*

*"1. That on the fact and circumstances of the case and in law, the Ld. GIT(A) erred in holding the application of G.P. of a flat 6.75% should be curtailed to an increase of 2% to the G.P. shown by the assessee in the respective years.*

*2. That the Ld. CIT(A) has erred in granting relief to the assessee, which is contrary to the fact that in the entire order, she has upheld the action of the AO on all issues and she has not accepted the arguments given by the assessee on various points.*

*3. That the Ld. CIT(A) have erred in granting relief to assessee which is contrary to the fact that the Ld. CIT(A) has herself held that the AO opted for most appropriate and reliable means available in the public domain for drawing the necessary inferences for adopting the G.P. rate of 6.75%.*

*4. That the Ld. CIT(A) has erred in granting relief to assessee in reducing the G.P. rate arbitrarily without assigning any reasons in arriving the conclusion on the G.P. rate, which is contrary to her own finding given in the order.*

*5. That the Ld. CIT(A) has erred in not accepting the submission of the AO given in the remand report that the G.P. rate of 13.83% should be applied instead of 6.75% inadvertently adopted by the AO.*

*6. That the appellant craves leave to add, alter or amend any/all the ground of appeal before or during the course of hearing of the appeal.”*

4. Vide Ground Nos. 1 to 5, the assessee has raised the legal issue relating to the validity of the assessment framed u/s 153A/143(3) of the Income tax Act, 1961 [hereinafter referred to as ‘the Act’].

5. Facts related to this case, in brief, are that the assessee was engaged in the export and import of precious stones, import and trading of pulses, pharma, polymer dyes and chemicals and manufacturing & trading of rice. The assessee filed its original return of income u/s 139(1) of the Act on 31.10.2005 declaring total income of Rs.2,55,76,260/-. However, regular assessment u/s 143(3) of the Act was completed on 24.12.2007 at an income of Rs. 2,60,05,520/-. Subsequently, a search and seizure operation was conducted at the business premises of the assessee

company on 16.03.2011. During the course of search, survey authorization was also issued in the name of M/s Dee Kay Trade Centre but the said party was not found in existence at the given address. According to the AO, a huge cash was deposited in the various bank accounts of M/s Dee Kay Trade Centre and M/s J.S. Enterprises and the same or equal amount was transferred on the same day or next day in the account of the assessee company. The AO issued a notice u/s 153A of the Act requiring the assessee to file its return of income in respect of A.Y 2005-06 and the six A.Ys immediately preceding to A.Y relevant to the previous year in which search was conducted. The assessee, in response to the aforesaid notice, furnished a letter dated 16.2.2012 stating therein that the return filed by it on 31.10.2005 be treated as a return in response to the notice u/s 153A of the Act. The AO mentioned that the books of accounts of the assessee were not found for the period 2004-05 to 2007-08 at the business premises of the assessee during the course of search and that the assessee did not produce the books of account for this period before the Investigation Wing during the post search enquiries. The AO framed assessment at an income of Rs. 6,09,11,520/- by making addition of Rs. 3,49,06,000/-. The assessee challenged the validity of the assessment u/s 153A/143(3) of the Act

before the Id. CIT(A) and made detailed submissions which have been incorporated by the Id. CIT(A) in para 5.1 at pages 3 to 20 of the impugned order. For the cost of repetition and brevity, the same is not reproduced herein.

6. The Id. CIT(A) after considering the submissions of the assessee, did not find merit in the legal issue raised by the assessee relating to the validity of the assessment framed u/s 153A r.w.s 143(3) of the Act by observing in para 5.2 of the impugned order as under:

*5.2 I have considered the assessee's submissions wherein objections have been raised on issue of jurisdiction holding that the provisions of sec 153A were invoked mechanically without reference to any incriminating material found in the course of search. It was also stated that the assessments were framed hastily in all the five assessment years.*

*These objections are however found to be baseless. As per provisions of Section 153A(1), once the assessee is subjected to the process of Section 132(1), the AO automatically assumes the jurisdiction over the assessee. The AO has to assess the 'total income' of the assessee and while determining the same, he has to consider both the disclosed and the undisclosed income. There is also no condition*

*in Sec 153A that the additions should be made only on the basis of evidence found in the course of search. In fact in the case at hand, the AO was in possession of evidence that the sales ostensibly made by the assessee company to two parties were found to be non-existent. Clearly, the AO has assumed the jurisdiction correctly and consequently the impugned assessment order is held to be valid. On a perusal of the impugned order, it is also evident that the AO has completed the assessments after following due procedure of law and having given adequate time and opportunity to the assessee to represent its case.*

*Therefore, these grounds of appeal are dismissed.”*

Now the assessee is in appeal.

7. The Id. Counsel for the assessee reiterated the submissions made before the authorities below and further submitted that during the course of search, nothing incriminating was found. Therefore, in the absence of any incriminating material, no addition could have been made u/s 153A of the Act. Reliance was placed on the following case laws:

1. PR. CIT Vs. Kurele Paper Mills Ltd.  
ITA No. 369/2015 dated 6.7.2015
2. CIT-II Thane Vs. Continental Warehousing Corporation

[NhavaSheva] Ltd All Cargo Global Logistics Ltd  
[2015] 374 ITR 645 [Bom]

Reliance was also placed on the following judgments of the Delhi Bench of the ITAT:-

- i) **Jakson Engineering Ltd vs ACIT [ITA No. 349-350/Del/2013 dated 11-04-2014]**
- ii) **Parsvnath Developers Ltd. vs DCIT [ ITA No. 5188/Del/2013 dated 31-10-2014]**
- iii) **Sanjay Aggarwal vs DCIT [ITA No.3184/Del/2013 dated 16-06- 2014]**
- iv) **Kusum Gupta vs. DCIT ITA No.4873/Del/2009 dated 28.3.2013**
- v) **ACIT vs. AshaKataria ITA No. 3105/Del/2011 dated 20<sup>th</sup> May, 2013**
- vi) **ACIT vs Prithvi Sound Products Co. Pvt Ltd ITA no. 3422-6/Del/2011 dated 17-4-2014 (Delhi Tri)**

8. It was further submitted that the proceedings u/s 153A can be initiated only for the years to which any seized documents found during the course of search belong to the assessee and not for the years to which seized documents did not belong. Reliance was placed on the following case law:

DCIT VS. M/s Devi Dayal Petro Chemicals P. Ltd  
ITA Nos. 5430 to 5436/Del/2013 CO Nos. 83 to 88/Del/2014  
dated 10.09.2014]

It was accordingly submitted that the assessment framed u/s 153A was not valid, particularly when no incriminating material was found during the course of search.

9. In his rival submissions, the ld. D.R. strongly supported the orders of the authorities below and further submitted that the assessment framed u/s 153A was valid since the incriminating documents relating to the transactions with M/s Dee Kay Trade Centre and M/s J.S. Enterprises were found which revealed that huge cash was deposited in the various bank accounts belonging to those firms and the same or equal amount was transferred on the same day or next day in the account of the assessee company. Therefore, the ld. CIT(A) rightly confirmed the action of the AO in completing assessment u/s 153A of the Act by following due procedure of law.

10. After considering the rival submissions and material on record, it is noticed that the assessee furnished the detailed

submissions before the ld. CIT(A) which are reproduced at page Nos. 3 to 20 of the impugned order. The ld. CIT(A) although reproduced the submissions of the assessee, but had not adjudicated the issue by considering the submissions made before him. He simply stated that there is no condition u/s 153A that the addition should be made only on the basis of evidence found in the course of search, but he did not deal with this objection of the assessee that no incriminating material was found during the course of search and the regular assessment was already framed u/s 143(3) of the Act. He also did not adjudicate the issue raised by the assessee relating to the assessment order passed by the AO without jurisdiction. The ld. CIT(A) simply stated that the AO had completed assessment after following due procedure of law and having given adequate opportunity to the assessee to represent its case. On the contrary, the contention of the assessee before the ld. CIT(A), was that a due and reasonable opportunity of being heard was not given by the AO while framing the assessment u/s 153A r.w.s 143(3) of the Act. In this regard, a specific ground was raised by the assessee vide Ground No. 7 before the ld. CIT(A). We, therefore,

considering the totality of the facts as discussed hereinabove, deem it appropriate to set aside this issue back to the file of the Id. CIT(A) to be adjudicated afresh in accordance with law after providing due and reasonable opportunity of being heard to the assessee.

11. Next issue agitated by the assessee, vide Ground Nos. 6 to 13 and the only issue raised by the department relates to the sustenance/deletion of trading addition made by the AO by applying the G.P. rate.

12. Facts related to this issue, in brief, are that the AO, during the course of assessment proceedings noted that huge cash was deposited in various bank accounts of M/s Dee Kay Trade Centre and M/s J.S. Enterprises and the same or equal amount was being transferred on the same day or next day in the account of the assessee company. The AO asked information u/s 133(6) of the Act for the bank account of M/s Dee Kay Trade Centre and M/s J.S. Enterprises. The said information obtained by the AO had been reproduced at pages 4 to 11 of the assessment order dated 30.3.2013. For

the cost of repetition, the same is not being reproduced herein. The AO on the basis of examination of the bank account and the bank account opening form of M/s Dee Kay Trade Centre and M/s J.S. Enterprises observed as under:

*a) Both M/s J.S. Enterprises and M/s Dee Kay Trade Centre are proprietary concern of Sh. Ram Kishan S/o Sh. Risal Singh. Sh. Ram Kishan has opened his account by providing address as H.No. 2C-36, Near Sanatan Dharam Mandir, NIT, Faridabad at ICICI Bank Ltd., Sector-16, Faridabad (Bank A/c No. 008305002548), at HDFC Bank Ltd. (Bank A/c No. 03132320000413), Gali No. 3, Mujesar, Faridabd at IDIBI Bank A/c No. 057102000009423 in the case of M/s J.S. Enterprises and Shop No. 7, Block-C, NH-2, Panchkuiya Road, Old Janta Colony, NIT, Faridabad at ICICI Bank Ltd. (Bank A/c No. 008305005405) and R-8, Ganpati Plaza, Bhiwadi, Alwar at Kotak Mahindra Bank A/c No. 01792000003816 in the case of M/s Dee Kay Trade Centre which are bogus and non-existent as for as the real address of Sh. Ram Kishan is concerned.*

*b) Signature made by Sh. Ram Kishan may carefully be seen at the bank opening form. Needless to say, he has been used in the process.*

*c) The photograph of Sh. Ram Kishan is also attached and by no stretch of imagination he can be categorized into a*

*businessman turnover of more than 70 Crores.*

*Before cheque is issued to M/s Kundan Rice Mills, an equivalent/approximate amount of cash is deposited into accounts as shown in the bank a/c of M/s J.S. Enterprises & M/s Dee Kay Trade. For example HDFC Bank A/c No. 00932560000515 [Connaught Place, Delhi] of M/s Dee Kay Trade Centre:*

Sr. No.	Date of cash deposited	Amount	Date of transfer to M/s Kundan Rice Mills	Amount
1	25.02.2005	3,00,000/-	25.02.2005	3,00,000/-
2	01.03.2005	4,00,000/-	01.03.2005	4,00,000/-
3	02.03.2005	5,90,000/-	02.03.2005	5,90,000/-
4	03.03.2005	7,00,000/-	03.03.2005	7,00,000/-
5	04.03.2005	4,80,000/-	04.03.2005	4,80,000/-

Kotak Mahindra Bank A/c No. 01792000003816 of M/s Dee Kay Trade Centre:-

Sr. No.	Date of cash deposited	Amount	Date of transfer to M/s Kundan Rice Mills A/c	Amount
1	02.04.2007	2,80,000/-	—	—
2	09.04.2007	4,70,000/-	09.04.2007	7,90,000/-
3	11.04.2007	3,20,000/-		
4	12.04.2007	25,000/-	12.04.2007	3,45,000/-
5	12.04.2007	3,55,000/-	13.04.2007	3,55,000/-
6	13.04.2007	3,55,000/-	—	—
7	16.04.2007	3,20,000/-	16.04.2007	6,75,000/-

ICICI Bank Ltd. A/c No. 008305002548 of M/s J.S. Enterprises:

Sr. No.	Date of cash deposited	Amount	Date of transfer to M/s Kundan Rice Mills	Amount
1	21.06.2005	6,00,000/-	21.06.2005	6,00,000/-
2.	25.07.2006	7,72,000/-	25.07.2006	7,72,000/-
3.	06.04.2006	9,45,000/-	06.04.2006	9,45,000/-
4.	07.04.2006	9,25,000/-	07.04.2006	9,25,000/-
5.	08.04.2006	9,00,000/-	08.04.2006	9,00,000/-
6.	18.04.2006	4,00,000/-	18.04.2006	4,00,000/-
7.	10.05.2006	9,35,000/-	10.05.2006	9,35,000/-
8.	20.05.2006	6,00,000/-	20.05.2006	6,00,000/-
9.	10.07.2006	9,10,000/-	10.07.2006	9,10,000/-

HDFC Bank Ltd. A/c No. 03132320000413 in the name of M/s J.S. Enterprises

Sr. No.	Date of cash	Amount	Date of transfer to M/s Kundan Rice Mills A/c	Amount
1	12.01.2005	8,00,000/-	12.01.2005	8,00,000
2.	13.01.2005	4,50,000/-	13.01.2005	4,50,000
3.	16.04.2005	5,50,000/-	16.04.2005	5,50,000

IDBI Bank A/c No. 05710200009423 in the name of M/s J.S. Enterprises:-

Sr. No.	Date of cash	Amount	Date of transfer to M/s Kundan	Amount
1.	02.11.2004	3,00,000/	02.11.2004	3,00,000/-
2.	29.11.2004	2,00,000/	29.11.2004	2,00,000/-
3.	30.11.2004	1,00,000/	30.11.2004	1,00,000/-
4.	07.12.2004	1,16,500/	07.12.2004	1,10,000/-

13. The AO mentioned that in the assessee's case it was totally a unique phenomenon as far as the alleged sales made by the assessee were concerned and that the cash was deposited in the bank account of the buyer on the previous day and cheque was issued on the subsequent day. He also mentioned that the proprietor of the firms M/s Dee Kay Trade Centre and M/s J.S. Enterprises was Shri Ram Kisan S/o Shri Rishal Singh and summons issued to him were received back undelivered. He also mentioned that on enquiry from the concerned ITO, Ward 1(3) at Panipat which had the jurisdiction on the basis of PAN of Shri Ram Kishan, it was found that he had not filed its return of income except for A.Y 2007-08 in which he had shown gross sales/turnover of Rs 29,83,100/- and returned income of Rs. 2,42,810/-. The AO, during the course of assessment proceedings and post search enquiry, asked the assessee to explain the source of the huge amount transferred in its account from the above said two parties, namely M/s Dee Kay Trade Centre and M/s J.S. Enterprises. The assessee was also asked to explain as to how those transactions had been shown in the regular books of accounts which were not found during the course of search

for the period 2004-05 to 2007-08. The AO also observed that the assessee was asked to explain as to why the entire deposits in the bank account of the assessee company received from those two parties, may not be treated as unexplained cash credits u/s 68 of the Act. In response, the explanation of the assessee was that since the sales made to those two parties were also credited in the books of accounts, therefore, no addition should have been made on account of cash credits. The AO although accepted the above contention of the assessee but held that the sales which had been made to non-existent parties were always questionable as far as trading results and books of account of the assessee were concerned. The AO also mentioned that the assessee produced the books of accounts which included ledger, cash book, bank account, photo copies of bills/sales vouchers and print outs of stock register on 18.01.2013, but those books of accounts were not found at the time of search and were also not produced before the Investigation Wing. The AO mentioned that the details relating to vouchers/ invoices, purchase vouchers and the quantitative, month wise, amount wise sales and purchases of the item sold to these parties and the other parties were not complete

information as the same were not furnished with evidence. The AO noticed the following discrepancies in the submissions of the assessee company:

*1. The sale invoices issued to M/s Dee Kay Trade Centre & M/s J.S. Enterprises did not bear vehicle number; GR number, date of dispatch whereas the sale invoices issued to the other parties were having all the details.*

*2. No gate pass were produced.*

*3. The parties M/s Dee Kay Trade Centre & M/s J.S. Enterprises did not produce by the assessee company for verification.*

*4. No complete details i.e. bill wise payment received were furnished except for A.Y, 2005-06 that too was not supported by evidence and the payment received were adjusted as per their convenience in the submission made to justify the claim. Even, the payment were received from M/s Dee Kay Trade Centre in the bank account no 1582320001389 of the assessee company prior to October, 2004 in respect of which no detail has been given while furnishing the reply.*

12. The AO observed that the amount was received from the bank account of the aforesaid two parties and that the assessee has

booked income in its books of accounts from the alleged sale made to those parties. The AO pointed out that no books of account alongwith vouchers were produced before the Investigation Wing and the plea of the assessee was that the sales have been credited but whether it was direct sales or sales on consignor and consignee basis kept changing from time to time. The AO therefore, rejected the books of account u/s 145(3) of the Act and asked the assessee to furnish total turnover of chemicals, polymers and gross profit and gross profit ratio of those products. The AO also asked the assessee to identify sales made to non- existent parties, namely, D.K. Enterprises and J.S. Enterprises every year. The financial results furnished by the assessee has been reproduced by the AO at pages 16 to 18 of the assessment order dated 30.3.2013. For the cost of repetition, the same are not reproduced herein. On the basis of financial results furnished by the assessee, the AO observed that substantial sales had been made to the aforesaid two parties. The AO discussed the facts in the tabular form as under:

A.Y	Gross turnover	Gross profit	G.P. rate	Deekay & J.S.	Rs. (In lakhs % to gross turnover
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2005-06	24,165	919	3.80	598	2.47
2006-07	20,008	746	3.73	2,616	13.07
2007-08	22,529	1,237	5.49	1,807	8.02
2008-09	39,451	1,521	3.86	1,803	4.57
2009-10	2,20,387	4,651	2.11	553	0.25

13. Thereafter, the AO discussed the prevailing g.p. rate of similar products of the comparable cases at pages 19 and 20 of the assessment order and came to the conclusion that the aggregate g.p. rate was at 6.75% in the case of traders and 13.83% in the case of manufacturer cum traders. The AO asked the assessee to furnish g.p. rate of chemicals, polymers and others, for A.Ys 2005-06 to 2009-10. In response, the assessee furnished the g.p. chart which reads as under:

*(Rs. In lacs)*

	A.Y 2005-06	AY 2006-07	A.Y 2007-08	A.Y 2008-09	A.Y 2009-10
<i>SALES of Chemicals, Polymers etc.</i>	<i>22662</i>	<i>18878</i>	<i>20417</i>	<i>32567</i>	<i>22727</i>
<i>G. P.</i>	<i>774</i>	<i>488</i>	<i>836</i>	<i>1206</i>	<i>779</i>
<i>G.P.RATE %</i>	<i>3.41</i>	<i>2.59</i>	<i>4.09</i>	<i>3.70</i>	<i>3.43</i>

On the basis of the above chart, the AO came to the conclusion that the average weighted G.P. rate shown by the assessee was at 3.48%. The AO asked the assessee to show cause as to why the same GP rate be not adopted in his case and books of accounts may not be rejected u/s 145 of the Act.

14. In response, the assessee has submitted as under:

*“The company is in the business of import of various products i.e. Chemicals, Polymers, Wax, Edible Oil, Pulses, Precious Metals, Pharma j products and export of agri products and precious metals etc. Besides this, the company is involved in milling of rice. The turnover varies from year-to-year due to various factors like demand and supply and ultimate parity of imported products. The parity of import of products are cumulative effect of costing of different products, time of import, market condition of product in India and overseas, government policy on that product, exchange rates etc which ultimately decides our product mix of import resulting in fluctuating turnover. The opportunities play a big part in deciding the quantum of the sale.”*

15. The AO, after considering the submissions of the assessee, came to the conclusion that the said submissions could not be accepted for

the following reasons:

1. *EVA is a primary product and has a flourishing market.*
2. *The books of accounts are unreliable as most of the expenses relating to sales are unmatched.*
3. *You have not been able to produce the books of accounts at the time of search proceedings.*
4. *Sale invoices cannot be relied upon because no vehicle number, GIR number, Date of dispatch is mentioned on the vouchers in respect of the alleged sales made to M/s Dee Kay Trade Centre & M/s J.S. Enterprises. No sales vouchers/invoices produced for the A.Y 2008-09 & A.Y. 2009-10.*
5. *Buyers like M/s Dee Kay Trade Centre & M/s J.S. Enterprises were not produced for verification.*
6. *M/s Dee Kay Trade Centre & M/s J.S. Enterprises has not filed its return of income except for the A.Y, 2007-08.*
7. *You have been changing your submission before the IT authorities at the time of search and during the assessment proceedings.*
8. *Management of both these two concerns by the same person i.e. Sh. Ram Kishan.*

9. *Nominal income of Sh. Ram Kishan Prop. M/s Dee Kay Trade Centre & M/s J.S. Enterprises i.e. income declared for A.Y. 2007-08 at Rs. 2,42,810/-.*

10. *Analysis of various bank accounts of M/s Dee Kay Trade Centre & M/s J.S. Enterprises reveals cash deposit in their account and subsequently transferred to your account.*

The AO accordingly rejected the books of account u/s 145(3) of the Act by relying on the following case laws:

1. *Arihant Builders, Developers & Investors (P) Ltd. Vs ACIT (ITAT, SB-Ind) 106 ITD 10*
2. *Dwarka Prasad Bajaj Vs CIT (Cal) 181 ITR 277*
3. *Ram Chandra Sinsh Ramnik Lal Vs CIT (Pat) 42 ITR 780*
4. *Bhai Sunder Dass Sardar Singh (P) Ltd Vs CIT (Del) 84 ITR 106*
5. *G.K. Padmaraju Vs. CIT 37 ITR 365 [AP]*
6. *Wall Street Construction Ltd. Vs. DCIT 87 ITD 47 [Mum-TM]*

17. After rejecting the books of account, the AO opined that it would be reasonable if the g.p. rate in respect of trading commission shown at 6.75% was applied in the case of the assessee.

18. In response, the assessee submitted as under:

“4.18 *The gross profit declared by the assessee in the*

*period A.Y. 2005-06 to A.Y. 2009-10 has been discussed in para 3.9 above, the G.P. declared by the manufacturing and trading concerns as per data collected from the capitaline data base comes to 13.83% and in respect of trading concerns only in chemicals, the G.P. rate is 6.75%. Thus, it will be reasonable if the same G.P. rate of 6.75% is applied in the case of the assessee company also. In response to this, the assessee company has filed consolidated reply dated 26.03.2013 stating therein that the chart given are not applicable at all to the assessee company, hence no reference be made relying on the figure tabulated in the chart giving various reasons. The relevant portion of the reply filed by the assessee is as under:-*

*“In this regard we would like to submit and clarify certain facts as below:*

- 1. The Chart provided for the reference is a summary of the results i.e. of some fourteen companies without any details even it is not mentioned that whether the amount is in lacs or crores or what. We request your goodself to provide details of these companies, their audited Balance sheet and Profit & loss account, audit reports and quantitative details etc. so. as to enable us to compare them with the audited results of our company for reaching on any conclusion. The information in the chart is very limited and cannot be compared unless other relevant details are made available to us.*

2. *You shall appreciate that the time provided to understand, analyze and reply back on 'The Chart' is too short and is not justified considering the stake involved.*

D. *Without prejudice, on simple reading of the chart, it is understood that these companies are manufacturing companies and a very small part of their turnover is from Trading business' where as the assessee company's main business is of import and trading. Even one of the company referred in 'The Chart' namely Guljag Industries Ltd is distributors of 'Gujarat Alkali and Chemicals Limited' and TATA Chemicals Ltd' the leading manufacturers of chemicals. The assessee company is engaged in metals, besides having a Rice Sheller. The name of the few products sold during the last 6-7 years are Phenol, Methanol, Acetone, Butyl Acetate, Butyle Acrylate Monomer, Methyl Ethyl Ketone (MEK), Normal Butanol, Solvent C-9, Toluene, PVC Resin, Ethylene Vinyl Acetate (EVA), Vinyl Acetate Monomer, CPO, S.B.O, Cyclohexanone, Methylene Chloride, Ethylene Dichloride, Paraffin Wax- Semi & Fully Refined, Melamine etc. It is observed that none of the items mentioned above are traded by the companies mentioned in 'The Chart'. The products traded by the companies mentioned in 'The Chart' are not sold by us, meaning thereby there cannot be any meaningful comparisons. Hence the GP of these companies is not comparable.*

4. *It is also evident from 'The Chart' that the GP varies from company to company and also from product to product. Even under chemicals it varies from one chemical to another chemical. The products traded by these companies itself differ and cannot be compared. Therefore GP of these companies cannot be relied upon in the case of the assessee company.*

5. *As the companies' mentioned in 'The Chart' are companies whose trading turnover is far below the turnover of the assessee, the comparison of the assessee company's G.P with these companies is not reasonable.*

6. *It is also apparent from 'The Chart' that the range of G.P of these companies itself is too large and needs to be examined, in details before any reference can be drawn. So the average G.P of these companies can't be applied as it is.*

7. *It is not clear from 'The Chart' whether these companies import the chemical products or buy the same from domestic market where as the assessee company import these products and sell in the domestic market. Therefore, it is not advisable to draw any adverse reference without understanding the nature of business. .*

8. *It is also to be noted that as per "The Chart' the data made available is only for the financial year 2007-08, it shall not be justified to apply the same in all the assessment years under*

*assessment i. e from A.Y 2005-06 to 2009-10. It is imperative to first analyze the GP ratio of different years of the companies mentioned in 'The Chart' and then come to any conclusion.*

*9. It is also pointed out that there is no mention of the net profit and the N.P percentage in 'The Chart'. You will appreciate that these details are important to analysis; hence in the absence of these details any reference drawn is not logical and against the law.*

*10. All the companies mentioned in 'The Chart' are mainly manufacturers of various industrial chemicals as apparent from the relevant extracts taken from the official sites of some of these companies. The copies of the same are enclosed herewith for your kind and ready reference.*

*11. We have already submitted that most of these companies are leading manufacturers of different types of chemicals. They are doing trading of very small amount. We have calculated percentage of trading Turnover with the total turnover of the companies referred in 'The Chart' and are enclosing the same as part of our reply (Annexure 2) for your kind reference. On perusal of this calculation your Honour can make out that out of 14 companies, the trading turnover of 11 companies is less than 10% of their total turnover and even 8 companies have less than 5% as trading turnover.*

*Further it is submitted that out of balance three companies, the trading turnover of M/s Guljag Indus tries Ltd is more than 50% of its turnover, but when we have visited their official site we came to know that they are the authorized distributor of 'M/s Gujarat Alkali and Chemical Ltd' and 'Tata Chemcials Ltd', both the companies are leading manufacturers of chemicals. The nature of business of Guljag is nowhere comparable with the nature of business of assessee Company. We hereby are enclosing the relevant documents as per annexure 3.*

*The other company having turnover more than 10% is Fineotex Chemical Ltd a leading manufacturers of chemicals for textiles, construction, water-treatment, fertiliser, leather and paint industry. In this chart the product of trading turnover is not mentioned, hence without identifying the products no comparison can be done. However the products manufactured by Fineotex is different from the products traded by the assessee company. ”*

*The company 'Smartchem Tech' mentioned at sr. no.7 of 'The Chart' is manufacturer of Ammonium Nitrate, which is nowhere connected with chemicals traded by the assessee company.*

*Even if the products are similar, you cannot compare the G.P of two companies as various other factors affects the profitability of the concern, like Promoters competency their experience in the field, location advantage, timing of purchase, timing of sales, hedging tendencies, marketing*

*skills/experience, storage capacity, financial strengths etc. All these and various other factors affect the profitability which ultimately decides the G.P factor. Hence the G.P of any company cannot be applied arbitrarily.*

*We have already explained during last hearing that there are various factors in our trade which affect the G.P ratio and we have elaborated some of these factors in details in that submission filed on 22.03.2013. We hereby are again enclosing the same for your kind and ready reference.*

*It is humbly submitted that the contents of 'The Chart' given are not at all applicable to the assessee company, hence no reference be made relying on the figures tabulated in the Chart.*

17. The AO was not satisfied with the submissions of the assessee and observed as under:

*“1. The chart prepared is compilation of data from **Capital Line Data Base** and it is for both industries which are engaged in manufacturing and trading of chemicals and for perusal, they have been reproduced in this assessment order. Needless to mention that these figures are in crores and **what is important in the GP rate of those industries in similar line of trade.** As far*

*as the year 2008 is concerned, it was chosen as it represents the mid year of all the years in question. The assessee had downloaded their Annual Returns as well of those companies and even for other years are concerned, GP % for trading of chemicals of similar Industries remain in the range of 6.75% to 8% and hence, the figure taken is based on some empirical evidences.*

*2. As far as the time provided is as regard to the show-cause notice issued, but the fact of the matter is no one can influence the GP rate at the end of the year. The chemical that has been sold to Dee Kay Enterprises and J.S. Enterprises is called EVA that commands Premium Price in the market. EVA is generally used in making shoes / slipper and because of its value in the market; it was used in premium market where even a layman would buy machines worth 5-10 lakhs and would prepare this product and sell at higher price. This was something that the assessee company had encashed in and earned abnormal profits but failed to show them in the Books of account.*

*3. For the benefit of the assessee, the benchmark of industries has been taken for both manufacturers and traders. If we had just taken the GP rate of manufacturers it was simply very high at 13.83% but we knew that this was a trading company and selected similar lines of business and arrived a GP rate of 6.75% which is quite reasonable as far as this line of trade was concerned. We have arrived at the value of estimation based on empirical results and benchmark that industries have achieved. How can an assessee company sell a product to non-existent,*

*bogus enterprise and follow a regular pattern of cash deposits followed by cheque transfers. Isn't this made revealing than objections raised by the assessee company.*

*4. The guiding principles regarding maintenance of proper and acceptable books of accounts are envisaged by section 145 of the Income Tax Act, 1961. Section 145 of the Income Tax Act, 1961, casts triple onus on the assessee to maintain books of accounts in such manner as to meet*

- a) Satisfaction about the correctness of the accounts.*
- b) Satisfaction about the completeness of the accounts.*
- c) Regularity in the following the method of accounting provided in sub section (1) of section 145 or accounting standards as notified under sub-section (2) of section 145.*

*Thus, section 145 of the Income Tax Act puts the triple onus on the assessee to provide for and maintain the correctness, completeness and regularity of the method of accounting strictly to the satisfaction of the Assessing Officer, in order to meet the provisions of section 145 of the Income Tax Act, 1961. The failure to meet even one of the requirements of section 145 of the Income Tax Act, 1961, renders the books maintained by the assessee liable to rejection on account of incorrectness or incompleteness or irregularity.*

*On account of the above observations and facts on record, the books of account squarely fall in regards to the twin tests of*

*completeness and correctness. Thus results of the book of accounts are thus rejected u/s 145(3) of the Income Tax Act, 1961. Further, in this regard, reliance is placed upon following judicial pronouncements:*

*Arihant Builders, Developers and Investors (P) Ltd. Vs ACIT (ITAT, SB - Ind) 106 ITD 10*

*Dwarka Prasad Bajaj Vs CIT (Cal) 181 ITR 277*

*Ram Chandra Singh Ramnik Lal Vs CIT (Pat) 42 ITR 780*

*Bhai Sunder Dass Sardar Singh (P) Ltd Vs CIT (Del) 84 ITR 106*

*Besides the above, the entries in the books of accounts impounded under section 131 of the I.T. Act were examined with vouchers of sales produced and several discrepancies, alterations and omissions have been found in the books, which per se is a fatal defect. In this regard, reliance is also placed on **G.K. Padmaraju V. CIT 37 ITR 365 (AP); Wall Street Construction Ltd. Vs DCIT (ITAT, Mum-TM) 87 ITD 47.**”*

18. Finally, the AO applied g.p. rate of 6.75% and worked out the calculation for making the addition in different years as under:

Sl. No	A.Y	GP of other concern in in similar trade	GP already shown by the assessee company	Difference in G.P. Rate	Turnover of assessee company in chemical/ polymers only	Addition made (in lacs)
1	2005-06	6.75 %	3.41%	3.34%	10451	349.06
2	2006-07	6.75 %	2.59%	4.16%	14138	588.14
3	2007-08	6.75 %	4.09%	2.66%	14307	380.57
4	2008-09	6.75 %	3.70%	3.05%	19962	608.84
5	2009-10	6.75 %	3.43%	3.32%	15761	532.26
	Total				74619	2458.87

Accordingly addition of Rs. 3,49,06,000/- was made for the A.Y under consideration.

19. Being aggrieved, the assessee carried the matter to the ld. CIT(A), the submissions of the assessee has been incorporated by the ld. CIT(A) in pages 21 to 24 of the impugned order which are reproduced verbatim as under:

*“7.1 Ground nos. 9 to 11 are regarding addition of Rs.3,49,06,000/- made by the AO. The said addition has been made as explained hereinabove by rejecting the books of account of the assessee and by applying an arbitrary gross profit rate of 6.75%.*

*7.2 The first issue for consideration is whether the AO is correct in rejecting the books of account of the assessee. In this regard it may be relevant to refer to the facts of the case,*

*assessment order and the observation made by the AO regarding the books of account.*

*7.3 The assessee is a Limited Company. It has been maintaining regular books of account. These books of accounts are being subjected to audit under the Companies Act. These books of accounts have been subjected to audit under Section 44AB of the Income Tax Act. The audited Balance Sheet and Profit and Loss Account was submitted with the return of income filed as way back on 31<sup>st</sup> October, 2005.*

*7.4 Thereafter the return was taken up for scrutiny by the AO under Section 143(2). In response thereto, the assessee has submitted various details and has also produced the books of accounts. No deficiency or shortcoming was found in the books of account. This fact is clearly stated in the original assessment order as can be seen from the paper book pages 28-33 whereby the AO has stated that "the books of accounts were produced and examined on test check basis. The requisite information/details have been furnished, scrutinized and placed on record."*

*7.5 The above statement made by the AO in the original assessment order clearly confirms the fact that the assessee has been maintaining books of account and these were produced before the AO at that time. As against this the AO has given reason for rejection of the books of account in para 4.9 on page 15 as under:*

*"4.9 Further, it is pertinent to note that:-*

a) *No books of account along with vouchers were produced before the Investigation Wing.*

b) *The plea of the assessee was that sales have been credited but whether it was direct sales or sales on consignor and consignee basis kept changing from time to time. It was direct sales before the Investigation Wing and consignment sales before Assessing Officer. Hence, the books of accounts produced by the assessee were not reliable and are being rejected u/s 145(3) of the IT. Act."*

7.6 *The AO surprisingly after making the above observation in para 4.9 has made further observation to contradict his own stand in para on page 16 of the assessment order as under:-*

*"From the detailed discussion above it was observed that the books were not produced before the investigation wing but now the books were produced by the assessee company during the assessment proceedings and some of which as discussed above have been impounded by me u/s 131(3) of the IT Act, 1961."*

7.7 *The above statement of the AO clearly demonstrate that the books of accounts were also produced before him during the reassessment proceedings under Section 153A of the Act. He has even impounded these books of account by invoking powers under Section 131(3) of the I.T. Act. Despite having produced the books by the assessee and having verified the same, the AO still wants to reject the books of accounts*

*merely on the ground that books of account were not produced before the Investigation Wing. In this regard, firstly he has ignored the explanation given by the assessee vide its letter dated 21.2.2013, para 15, paper book page onwards. In this letter it was explained that the assessee has been maintaining complete books of account and during the course of the search the entire premises was with the control of the search party and the entire record were messed up by the search party and that is why they could not locate the books of account. Thereafter the assessee has gone with the books of account before the Investigation Wing. It was further pointed out that the books of account were produced in the original assessment proceedings and the books of account were also produced before the AO on 18<sup>th</sup> January, 2013 in response to a specific query from the AO dated 11.1.2013. It was also confirmed that these books of account are the same books of account which were produced in the original assessment proceedings. A request was also made to the AO to examine these books of account and the assessee has also offered to provide all evidences to support that these books of account give a true and fair view.*

*7.8 In para 20, it was further stated that the bank accounts alongwith all vouchers forming part of the records were also produced. The AO has conveniently ignored all these contentions and merely on the basis of an unsubstantiated allegation that the books of account were not produced before the Investigation Wing has rejected the books of account.*

*7.9 Further, in the alternative and without prejudice to the above, no adverse inference can be drawn so as to reject the books of account merely on the ground that these were not produced before the Investigation Wing. Assessment is being made by the AO. It is his duty to examine the books of account. It is his duty to find out any defect or discrepancy in the books of account. In the absence of any defect or discrepancy being found in the books of account he cannot reject the same merely on the ground that before some other party these books were not produced.*

*7.10. The AO being an adjudicating authority he has to take a view on the evidences filed before him. There is no rule, no law which prohibits producing the books of account if you have not produced the same before the Investigation Wing. Thus the rejection of the books of account by the AO on this ground is not justified.*

*7.11 The second ground for rejecting the books of account stated by the AO is that the assessee has changed its stand whether the sales to these two parties were direct sales or consignment sales. This allegation of the AO is factually incorrect and in any case cannot be a ground for rejection of the books of account. There is no denial to the fact that the assessee has made sales to these parties. This fact was confirmed to the Investigation Wing and this fact has been*

*confirmed to the AO supported by the books of account and other evidences. It is only when the AO asked for further details that the assessee clarified that these two parties have purchased the goods on consignment basis and these sales are considered consignment sales. Thus there is no difference in the amount of the sale there is no contradiction to any of the facts. The amount, the facts and the figures are exactly the same. Accordingly in the absence of any discrepancy in the facts and the figures the AO cannot reject the books of account.*

*7.12 Your honour will appreciate that for rejection of books of account there has to be substantive material on the basis of which the AO on reaching satisfaction that it is difficult for him to compute the income of the assesses. In this regard reliance is being placed on the following judgments:-*

- (i) COMMISSIONER OF INCOME TAX vs. BUILDERS UNION (1978)  
111 ITR309 (ORI)*
- (ii) COMMISSIONER OF INCOME TAX vs. AMERICAN CONSUL TING CORPORATION  
(1980) 14 CTR (ORI) 193: (1980) 123 ITR 513 (ORI)*
- iii) Commissioner of Income Tax II Versus Mapin Publishing Pvt.  
Ltd. Tax Appeal No. 902 of 2013  
Dated: 22/10/2013, GUJARAT HIGH COURT*
- (iv) The Dy. Commissioner of Income-tax Versus M/s.  
Kabir Jewels Pvt. L td. ITA T AHMEDABAD*

IT A No. 3054/Ahd/2009 Dated: 04/10/2013

(v) *In case of M/s. Dhami Brothers 1/5. ACIT [2010 [8 TM1 817 - ITAT AHMEDABAD], that there is no requirement of law to maintain qualitative details of each peace of diamond for computing the income.*

(vi) *ACIT Vs. Hanuman Sugar [Khandsari] Mills P. Ltd 2013 (9) TMI 765 - [ALLAHABAD HIGH COURT]*

7.13 *In view of the above it is submitted that the rejection of books of account is untenable. In this regard it may be further of relevance that the assessee has a regular bank account, the assessee has been importing goods. The assessee has been maintaining complete stock records, there is no allegation of any unaccounted purchases, there was no allegation of inflating prices, there is no allegation of any unaccounted sales. Most important aspect is that despite a search having been carried out on the assessee, no incriminating material was found so as to suggest that the books of account do not give a true and fair view that assessee has been incurring any expenditure or earning any income outside the books of account. This fact is so apparent as can be seen that in all these assessment years only addition made by the AO is substantive assessment on enhancing the gross profit rate by using data which has nothing to do with the search. The addition made has absolutely no linkage or relevance, material found during the course of the search. Thus in the absence of any allegation of unaccounted sale or purchase, the rejection of the books of account is not justified.*

7.14 *The next issue is addition of Rs.3,49,06,000/-. In this regard it is interesting to note from the assessment order that the said*

*addition has been made by applying gross profit rate of the four companies and that too of the financial year ending March, 2008. It is an admitted position that the provision of transfer pricing are not applicable to the assessee. The assessee is a resident and has made sale to a resident only. It does not have any associated enterprise. The AO by using the data of the 14 companies picked up from Capital Line Database is trying to make out a case of transfer pricing. The first issue is under which section he wants to use this data. As we understand the case of the assessee does not fall within the international transaction and hence provision of Section 92C cannot be applied. The assessee does not have transactions with the related parties. Further under even under Section 40A(2) the dispute, if any, can be made only in respect of the expenditure incurred. No addition can be made in respect of the income/sales. Thus the AO was not correct in applying and using this data of Capital Line.*

*7.15 Further the trading result of the assessee can be disturbed only when there an allegation of any unaccounted purchases or unaccounted sales. On going through the assessment order your honour will notice that there is no such allegation of any unaccounted purchases or unaccounted sales. In the entire assessment order there is not a single adverse observation about the purchases made by the assessee and the expenses incurred by the assessee. In the entire assessment order there is no adverse observation in respect of any sales made by the assessee other than the following sales made to the two parties viz., Dee Kay Trade Centre and J.S. Enterprises:-*

<i>Sr. No.</i>	<i>A.Y.</i>	<i>Amt. fin</i>
1	2005-06	597.55
2	2006-07	2615.30
3	2007-08	1807.07
4	2008-09	1803.03
5	2009-10	553.21
	<i>Total</i>	<i>7376.16</i>

7.16 *On going through the above your honour will notice that during the year under consideration the total turnover of the assessee was Rs.226.62 Crores as against which the sales to two of these parties was only Rs.5.97 Crores. Thus there is no adverse finding or observation in respect of the balance sales of Rs.220.64 Crores. /Is regards these sales of Rs.5.97 Crores also there is no allegation, no material that the assessee has received any amount over and above what has been stated in the books of account. The AO on the contrary in para 4.10 on page 16 of the assessment order has given a finding that "it was further observed that the assessee has already booked the income in its books of account against the alleged sales made to these two parties."*

7.17 *The above finding clearly demonstrate that there is no allegation that assessee has received anything over and above from these parties. The AO had an access to the bank account of these two parties. The AO had access to the books of account of the assessee. Nowhere any material could be found or noticed which could state that the assessee has received any amount in cash beyond the cheques which have not been accounted for in the books of account. There is no statement recorded of any person making any allegation or even to raise any*

*doubt about assessee receiving any money beyond what is accounted for in the books of account. No material was found during the course of the search that assessee had received some more money from these parties other than what has been accounted for in the books of account.*

*7.18 In view of these facts, how can the AO draw adverse inference and arbitrarily ignoring the gross profit rate declared by the assessee. It is not the case of the AO that the rate at which the products have been sold is less than the market value of the rate on that date or the rate at which these products have been sold to the other parties. In this regard we will invite your honour's attention to the assessment*

*order whereby no such observation or findings have been given by the AO. Accordingly the AO was not correct in tinkering with the C.P. rate offered by the assessee.*

*7.19 The next issue which arises for consideration, without prejudice to the above, is the computation of the G.P. rate of 6.75%. Surprisingly the AO has picked up 14 companies which are ail manufacturing companies. None of these parties are trading in the items in which the assessee has been trading. It is also evident from the chart used by the AO that the gross profit rate varies a lot from company to company and also from product to product, even in chemicals it varies from one chemical to another chemical. It is also evident from the chart that the G.P. rate computed is of the financial year 2007-08 i.e. assessment year 2008-09 and how the same is being*

*made applicable to the assessment year other than the assessment year 2008-09. It is a settled law even under transfer pricing that while carrying out a comparison the comparable data of the same assessment year is to be used. Further FAR analysis needs to be carried out to ensure that the comparables are correct. FAR will mean Functions performed Assets deployed and risk assumed. No where the AO has tried to find out the functions, terms and conditions of the sales, working capital adjustment, risk adjustment which is normal in the case of transfer pricing regulations. In this regard we have carried out a thorough analysis of these companies and the annual reports which have been made basis by the AO. In this regard a detailed reply was submitted vide letter dated 26.3.2013 pointing out the following errors:-*

*"11. We have already submitted that most of these companies are leading manufacturers of different types of chemicals. They are doing trading of very small amount. We have calculated the percentage of trading Turnover with the total turnover of the*

*companies referred in 'The Chart' and are enclosing the same as part of our reply (Annexure 2) for your kind reference. On perusal of this calculation your Honour can make out that out of 14 companies, the trading turnover of 11 companies is less than 10% of their total turnover and even 8 companies have less than 5% as trading turnover.*

*Further it is submitted that out of balance three companies, the trading turnover of M/s Guljag Industries Ltd is more than 50% of its turnover but when we have visited their official site we came to know that they are the authorized distributor of 'M/s Gujarat Alkali and Chemical Ltd.' and 'Tata Chemicals Ltd.', both the companies are leading manufacturers of chemicals. The nature of business of Guljag is nowhere comparable with the nature of business of assessee Company. We hereby are enclosing the relevant documents as per annexure 3.*

*The other company having turnover more than 10% is Finotex Chemicals Ltd. a leading manufacturers of chemicals for textiles, construe water-treatment, fertilizer, leather and paint industry. In this chart the product of trading turnover is not mentioned. hence without identifying the products no comparison can be cere. However the products manufactured by Fineotex is different from the products traded by the assessee company.*

*The company Smartchem Tech' mentioned at sr. no.7 of 'The Chart' is manufacturer of Ammonium Nitrate, which is nowhere connecter with chemicals traded by the assessee company.*

- 12. Even if the products are similar, you cannot compare the G.P. of two companies as various other factors affects the profitability of the concerned Promoters competency their experience in the field, location advantage, timing of purchase, timing of sales, hedging tendencies, marketing skills/experience, storage capacity, financial strengths etc. All these and various other factors affect the profitability which ultimately decides the G.P. factor. Hence the G.P. of any company cannot be applied arbitrarily.*
- 13. We have already explained during last hearing that there are various factors in our trade which affect the G.P. ratio and we have elaborated some of these factors in details in that submission fled on*

22.03.2013. We hereby are again enclosing the same for your kind and ready reference.

*It is humbly submitted that the contents of 'The Chart' given are not at all applicable to the assessee company, hence no reference be made relying on the figures tabulated in the Chart."*

7.20 *It may also be mentioned that the AO in fact has not rejected the books of account as can be seen from the assessment order. He has accepted the trading results in respect of the turnover except the turnover mentioned by him on page 29 of the assessment order as under:*

Sr. No.	A.Y.	G.P. of other concern in similar trade	G.P. already shown by the assessee company	Difference in G.P. Rate	Turnover of assessee company	Addition made (in lacs)
1.	2005-06	6.75%	3.41%	3.41%	10451	349.06
2.	2006-07	6.75%	2.59%	4.16%	14138	588.14
3.	2007-08	6.75%	4.09%	2.66%	14307	380.57
4.	2008-09	6.75%	3.70%	3.05%	19962	608.84
5.	2009-10	6.75%	3.43%	3.32%	15761	532.26
	<i>Total</i>				74619	2458.87

*Though the computation done by him of the turnover is factually incorrect as explained hereinafter in ground no.12*

*the AO has enhanced the G.P.rate in respect of above stated turnover only on the presumption that the assessee would have earned higher G.P. rate in respect of such sales without there being an iota of evidence or bring any material to support such allegation. Your honour will appreciate that it is an allegation of the AD and it is for him to bring material and evidences to substantiate the allegation. It is also important to note that the AD is also not disputing the quantum of the sales including quantum sales made to these two parties viz. Dee Kay Trade Centre and j.5. Enterprises. Thus the AD himself is accepting the fact that the sales have been made by the appellant company and amount of sales stated by the appellant company is correct amount. However, the AD despite accepting the sales has made addition by enhancing the G.P.Rate for the respective years to 6.75%. The enhanced G.P.rate adopted by the AD will mean that assessee on the turnover declared by it has earned more than what has been declared in the books of account. This enhanced profit can come only when assessee has overstated the purchases or understated the sales. This is not the case of the AD that assessee has overstated the purchases. It is also not the case of the AD that the assessee has understated the sales as is evident from the fact that the total turnover has not been disturbed. It is also not the case of the AD that there is any inaccuracy in the quantum of purchases and sold. Assessee has been maintaining complete stock record of opening stock, purchases, sales and closing stock for each of the*

*item trade by it.*

*In these circumstances and the facts, from where the enhanced gross profit will come? The AD has failed to realise. Your honour will appreciate that the AD should take the allegation to the logical end. The AD cannot make one allegation and make addition which is absolute de hors. the allegation being made by him. There has to be a correlation between the allegation being made and the addition being proposed. The present case is one where the addition proposed is absolutely de hors the allegation of the AD and accordingly the addition made by him is unsustainable.*

*7.21 It is not out of place to mention here that the assessment under section 143(3) has been completed by the same AD in the case of Dee Kay Trade Centre and J S Enterprises and no adverse inference has been drawn as against the purchases recorded.*

*7.22 In view of the above the computation and application of G.P.rate of 6.75% by the AD is unjustified and the additions made on this account need to be deleted.”*

20. The assessee also stated that there were arithmetical inaccuracies committed by the AO in applying gross profit rate and made the following submissions:

*“ Ground nos. 12 and 16 are regarding the arithmetical inaccuracies committed by the AO in applying gross profit rate of 6.75% across the board on the turnover of chemicals, polymers ignoring the fact that the issue before him was limited to sales made to the two parties viz. Dee Kay Trade Centre and J.S. Enterprises for each of the year as under:-*

<i>Sl. No.</i>	<i>A.Y.</i>	<i>(in lacs)</i>
<i>1</i>	<i>2005-06</i>	<i>597.55</i>
<i>2</i>	<i>2006-07</i>	<i>2615.30</i>
<i>3</i>	<i>2007-08</i>	<i>1807.07</i>
<i>4</i>	<i>2008-09</i>	<i>1803.03</i>
	<i>2009-10</i>	<i>553.21</i>
	<i>Total</i>	<i>7376.16</i>

*8.1 On going through the same your honour will notice that the total turnover during the year under consideration to these two parties were Rs.5.97 Crores. As against this the AO has applied the G.P. rate of 6.75% on entire turnover of Rs. 104.51 Crores. It is an admitted fact and the position that all the sales are fully vouched and identified. There is no adverse*

*observation or evidence in respect of other sales. Even for the sake of argument, without considering the same for the G.P. rate of 6.75% is to be applied the same has to be restricted to the sales made to these two parties viz. Dee Kay Trade Centre and J.S. Enterprises of Rs.5.97 Crore and in this regard the addition on this account will be just Rs.19,95,817/- as against addition of Rs.3,49,06,000/- made by the AO in the year under consideration. The AO was not justified in making addition in respect of the other sales which are duly identified and for which there is no adverse finding in the assessment order as well as no incriminating material found during the course of the search.*

*Error in the basis of turnover while applying enhanced GP rate*

*8.2 It is an undisputed fact and even not controverted by the AO that the purchases booked by the assessee are fully vouched. No doubts have been raised by the AO regarding the purchases made during the year. Further the AO has not raised any issue about the sales made to various parties other than the two parties i.e. Dee Kay Trade Centre and J.S. Enterprises. It is also an admitted position that the AO has accepted the trading results of the assessee company except enhancing gross profit rate in respect of those items which have been sold to these two parties i.e. Dee Kay Trade Centre and J.S. Enterprises. However, while carrying out this exercise of segregating the transactions in respect*

*of the items which have been sold to these enterprises, the AO has committed error by taking the turnover at page 29 of the asstt. order for each of the years as under:-*

<b>A.Y</b>	<b>Chemicals, Polymers &amp; Others</b>	<b>Chemicals</b>	<b>Polymer</b>	<b>Total of Chemical &amp; Polymer only.</b>
2005-06	22,662.00	9,862	589	10,451
2006-07	18,878.48	10,225	3,913	14,138
2007-08	20,416.88	7,531	6,776	14,307
2008-09	32,566.82	8,565	11,397	19,962
2009-10	22,726.81	10,109	5,652	15,761
<b>Total</b>	<b>117,250.99</b>	<b>46,292</b>	<b>28,327</b>	<b>74,619</b>

*On the above turnover he has applied the G.P. rate computed by him of 6.75%. This action of the AO is factually incorrect. The total turnover of the items which have been sold to two parties i.e. Dee Kay Trade Centre and J.S. Enterprises in each of the year was as under:-*

A.Y 2005-06	597.55 lakhs
A.Y 2006-07	2615.30 lakhs
A.Y 2007-08	1807.07 lakhs
A.Y 2008-09	1803.03 lakhs
A.Y 2009-10	553.21 lakhs

*For the year under consideration i.e asstt. year 2005-06 the total turnover as per the audited balance sheet was Rs.24,165 Lakh. After deducting turnover of rice and precious metals of Rs. 1503 lakhs the balance turnover was Rs.22,662 Lakh which has been stated by the AO on page 16 of the assessment order.*

*The turnover of other purchases excluded by the AO is Rs.12,211 Lakh and balance turnover of Rs. 10,451 Lakh at page 29 of the assessment order has been taken into consideration and on which this enhanced G.P. rate of 6.75% has been applied making an addition of Rs.349.06 Lakh. The calculation done by the AO is factually incorrect as can be seen from chart enclosed herewith. The AO has not deducted the turnover of the products not sold to M/s Dee Kay Trade Centre and M/s J.S. Enterprises to the extent of Rs.5,652.46 Lakh. After deducting this figure the balance turnover comes to Rs.4,798.54 Lakh out of which turnover of Rs.4200.99 Lakh was to other parties other than these two parties i.e. Dee Kay Trade Centre and J.S. Enterprises i.e. unrelated', undisputed parties and sales made to Dee Kay Trade Centre and J.S. Enterprises was Rs. 597.55 only. Thus, the AO was not justified in drawing adverse inference and applying enhanced gross profit on turnover of Rs. 10451 lacs as against sale of Rs. 597.55 lacs to these two parties. It is a matter of record that there is no dispute or even doubt about sales made to other parties. In this regard, right from the beginning till end of the assessment order AO has not commented adversely about these sales. It is also a matter of fact that every detail with evidence were produced before the AO as is evident from letter dated 21/02/2013 placed in paper book relevant para 15 to 23 which reads as under:*

*"15. In this regard it is clarified that, as stated hereinabove, the assessee company have been maintaining complete books of*

*accounts which was audited under the provisions of the Income Tax Act and the Companies Act.*

*16. The search and survey operation was carried out by the Income Tax department and during the search, the entire premises was within the control of the search party. The search was carried out continuously and the entire records were messed up during the course of the search and that is why the search party could not locate the books of accounts for these years during the search.*

*17. Thereafter the assessee went with the books of accounts before the Investigation Wing and there was no non-compliance to produce the books of accounts. The assessee has produced the books of account in the original assessment proceedings of the relevant years under Section 143(2) of the Act as is evident from the assessment orders passed under Section 143(3). The assessee has also produced the books of accounts on 18.01.2013 before your honour in response to your letter dated 11.01.2013. The assessee hereby confirms that the books produced before your honour are the same books of accounts which were produced in the original assessment proceedings. Accordingly no adverse inference needs be drawn against the assessee merely on the basis of an allegation that these books of account were not available at the time of the search.*

18. *We will request your honour to examine these books of accounts. We are ready to provide all evidences to support that these books of accounts give a true and fair view. You may however also tally the accounts of these two parties viz., Dee Kay Trade Centre and M/s J.S. Enterprises with the bank accounts of the said parties.*

19. *As regards the discrepancies pointed out in the books of accounts, we clarify that all the original sales and purchase vouchers are available. All original purchase vouchers pertaining to the sales made to these two parties have already been produced before your honour on 05.02.2013. All computer generated Performa Invoices/ sale bills pertaining to these two parties have already been produced on 15<sup>th</sup> February, 2013 along with some of the Performa Invoices/ sale bills of similar products sold through other parties.*

20. *The requisite books of accounts and relevant records have been produced on 18.01.2013 and the same have since been impounded. The bank statements of all major accounts as requisitioned have been furnished during the course of assessment proceedings. All other vouchers as stated in your show cause notice and forming part of the records are being produced herewith.*

21. *It is further submitted that the assessee company has been maintaining accounts on the computer in computer*

*accounting software and all information is duly stored in the system.*

*22. As regards the issue that the details/no proof of Sales Tax /VAT returns furnished, it is clarified that sales tax assessment orders for all the three years have already been submitted on 18.01.2013. These assessment orders contain summarized details of all sales made during the year. The Sales tax assessment have been framed after considering quarterly / monthly sales tax /VAT returns filed during the relevant year and after examining the books of accounts. In addition to our earlier submissions, we further submit summary of Sales / VAT/ Sales Tax along with copies of Sales Tax / VAT returns which duly matches with the books of accounts /sales register/sales tax assessment orders.*

*23. In view of the above facts it is submitted that there is no reason for assuming that the books of accounts have not been maintained in the normal course of business and accordingly there is no justification for the rejection of the books of accounts."*

*In fact the AO was satisfied with this reply as is evident from the asstt. order Para 4.6 Pg. 13 where AO has stated:*

*"This plea of the assessee was found to be in order but sales had been made to non-existent parties were always questionable."*

*Thus, the AO's allegation and doubt were limited to sales made to these parties. Accordingly, AO while making addition on page no. 29 of the assessment order has gone wrong in taking the basis of turnover at Rs. 10451 lacs as against Rs. 597.55 lacs being turnover made to these two parties.*

### ***8.3 Computation and application of enhanced GP rate of 6.75% is factually incorrect***

*The application of GP rate of 6.75% and to computation thereof is factually incorrect. The AO has applied GP rate of 6.75%<sub>0</sub> across the board for all the asstt. years on the basis of some comparative analysis carried out by him of 14 companies. The first issue is whether AO is justified in adopting this basis. It is a fact that assessee has sold the same products to other identified parties and there is no dispute/ doubt about the price charged and GP earned from these identified parties. Thus when AO was having doubts about the sales to these two parties, he should have compared the price at which sale have been made to these parties and compared the same with price at which sales have been made to these parties and compared the same with price at which sales have been made to other indentified parties and in case of a price charged form these two parties was understated then addition could have been made of the difference.*

8.4 All the sale invoices of sales made to these parties were produced before the AO. On these sales invoices the item sold, the quantity and the rate at which the products have been sold are mentioned. The AO despite extensive verification of these sales vis-a-vis sales to other parties could not find out any instance where the price charged to these two parties namely Dee Kay Trade Centre/JS Enterprises is less than the price charged to other parties. Thus, there was no justification for AO to apply enhanced GP rate. Further the rate charged by the appellant company from these unrelated, undisputed parties is not higher than the rate charged from the Dee Kay Trade Centre and J.S. Enterprises. These being independent internal comparables for which there is no dispute and there was no reason for the AO to ignore these comparables and pick up external comparables which, as explained hereinabove, do not meet the requirement of the comparable as envisaged even in Transfer Pricing Regulations while carrying out the FAR analysis.

8.5 Your honour will appreciate that it is a settled law that when internal comparables are available they are to be preferred as against the external comparables. The reason being obvious that FAR of internal comparables are more closure as compared to external comparables. It is important to mention that sales made to these parties are fully identifiable and there is no dispute or doubt raised by the AO about the sales made to these parties.

We may further submit that under the Income Tax Act there is no bar

*or restriction on making cash sales or sales to parties whose identity is not established. In the present case, as explained hereinabove, assessee has made sales to these parties and has provided complete details thereof. The AO's allegation is that the sales made to these parties are not identifiable in view of the fact that these parties are not traceable. In such circumstances the AO at best can draw an adverse inference against assessee these sales only to the extent of difference if any as compared to sales made to other identified parties.*

*The assessee having made sales and including such realization of the sales in its income the only doubt which can be raised is the price at which such sales were made to these parties. For verification of this the AO has to make a comparison of the sales made on the dates with the rates prevalent on that day. In the present case the assessee has made sales of these items to other parties which are identifiable. The rates being charged of the sales made to these parties i.e. Dee Kay Trade Centre and J.S. Enterprises being better than the sales made to other identified parties no adverse inference can be drawn against the assessee.*

*It is also a matter of record that there is no allegation whatsoever nor there is any evidence whatsoever despite a search being carried out on the appellant company that assessee has received any amount over and above what has been recorded in the books of account. In such circumstances the AO cannot indulge into surmises and conjecture so as to make such huge addition in the hands of the assessee.*

*In view of the above facts it is submitted that the action of the AO*

*in making the above addition is unsustainable.”*

The Id. CIT(A) asked the remand report from the AO and again asked the assessee to furnish the rejoinder to the remand report submitted by the AO. In response, the assessee furnished the rejoinder which have been reproduced by the Id. CIT(A) in para 7 at pages 40 to 72 of the impugned order. For the cost of repetition and brevity, the same is not being reproduced herein. The Id. CIT(A), after considering the submissions of the assessee and remand report of the AO, held that it will be reasonable if an increase of 2% is made to the g.p. rate shown by the assessee instead of flat 6.75% rate applied by the AO by observing in para 8 of the impugned order which reads as under:

*8. I have considered the submissions of the assessee and the impugned order. I have also carefully perused the comments and counter-comments of the remand proceedings. It is observed that in the relevant five assessment years, the following additions have been made by the AO by rejecting the books of accounts and by applying a flat gross profit rate of 6.75%.*

*AY 2005-06: Addition Rs. 3,49,06,000/-*

*A.Y 2006-07: Addition Rs. 5,88,14,000/-*

*A.Y 2007-08: Addition Rs. 3,80,57,000/-*

A.Y 2008-09: Addition Rs. 6,08,84,000/-

A.Y 2009-10: Addition Rs. 5,32,26,000/-

*The catalyst being detection of sales made to two non-existent concerns. It is also undisputed that these two concerns, M/s Dee Kay Trade and M/s J.S Enterprises to whom sales had been made, could neither be located nor could the proprietor Shri Ram Kishan be found at the known address.*

*While making the addition, it has been stated that during the survey operations the two concerns were found non-existent. It is also undisputed that the books of account were also not found (and thus not seized) during the search operation. The books of accounts were produced for the first time during the assessment proceedings. It has been articulated that the books of accounts were mixed up during the search operation and thus could not be found by the search party which is an argument rather difficult to believe. It is also undisputed that the account holder of the two concerns Shri Ram Kishan, could not be located at the specified address. Nor was he found to be filing returns at the address given in the PAN. Efforts made by the AO to locate the companies also came to a naught. Even the Inspectors Report also suggests that the two concerns do not exist. Thus there is no doubt that the two concerns, M/s Dee Kay Trade and M/s J.S Enterprises did not exist.*

*Having done the basic exercise, the AO proceeded to draw a chart on available comparables, and accordingly, made an addition based on the same. The source is data from CAPITAL Line. This chart comprising of 14 companies, of both trading and trading cum manufacturing, is part of the impugned order. The AO also observed that the aggregate GP rate is 13.83% i.r.o both manufacturer cum trader while for traders it was 6.75%. Thus, the AO applied 6.75% as the GP Rate, by drawing inference from the chart which shows that the Gross Profit i.r.o M/s NOCIL, M/s Transpek Inds, M/s Inda Glycols, M/s Kilburn Chemicals, M/s Dai-Chi Karkari, Archit Organosys, Samrt Chemtech, Guljag Industries, Rayala Hypo, Camlin Fine, Nav Bharat Metal, Finotex Chem, Surfactant Speci and Omkar Spl. Chem are ranging between (-)2.32 to 19.64 percent.*

*In this backdrop, the assessee has objected vehemently against the rejection of books despite maintaining regularly audited books, stating inter alia that the books of accounts were produced during the original assessment proceedings and were in fact also impounded under section 131(3) during the 153A proceedings. It was also contended that the issue of direct or consignment sales (which AO held were contradictory stands taken by the assessee i.r.o the nature of transaction of the two parties in question), was inconsequential in as much the same has been credited to the account. Reliance has been placed on various case laws. It was argued that there was no*

*substantive material on basis of which AO could have drawn satisfaction that it was difficult to compute the income of the assessee. It was also stated that there was no allegation of unaccounted/under-invoiced sales or unaccounted/inflated purchases. The assessee also challenged the adoption of the Transfer Pricing Method. It has been submitted that most of the cases picked up for comparison were mainly manufacturers of different products and their trading turnover was meagre. On the other hand the assessee was importer of various petro-chemicals most of which were not even manufactured in India. In other words the business of the assessee was different. Assessee also stated that rate computed by the AO i.r.o. M/s NOCIL, M/s Transpek Inds, Archit Organosys, Guljag Industries, Camlin Fine, and Finotex Chem were not correct. It was also stated that M/s Inda Glycols, M/s Kilburn Chemicals, Smart Chemtech and Finotex Chem were functionally different. It was further stated that the financial results of Nav Bharat Metals, Okar Spl. Chem and Surfactant Speci were not available in the public domain. The company M/s Shree Rayalaseema is stated to be wholly manufacturing entity with export sales of approx. 50%. Furthermore the assessee also contended that the application of G.P. rate of 6.75% across the board for all the assessment year on analysis of 2008-09 data of 14 companies was inappropriate. Lastly, the assessee has contended that the AO also adopted incorrect turnover for applying the G.P rate as the same could at most be limited to the two concerns only as there was*

*nothing adverse in respect of sales to the other parties.*

*At the very outset, let me take up the issue of rejection of books of accounts. While it may not be possible to independently ascertain whether the contention of the assessee is correct or incorrect that the books of accounts had been produced before the AO during the original assessment proceedings (due to passage of time), the books of accounts were however produced before the AO during proceedings under section 153A. The same had been impounded under section 131 (3) of the Act. Significantly, as noted by the AO, the books had not been produced before the search team.*

*Nonetheless, the fact of the matter is that sales were made in all these five assessment years under appeal to these two concerns in question, which were found to be non-existent. The proprietor common to both, is untraceable at the address as per PAN. The bank accounts of these two concerns revealed deposits of huge amounts in cash which were transferred in assessee's account subsequently. The sales invoices produced i.r.o these two concerns were found lacking in details and none were produced for AY 2008-09 and AY 2009-10. No doubt the argument of the assessee is that fault was found in only these two cases out of several other customers and that even on this aspect the sales have also been stated as recorded in the books of accounts by the AO. But one cannot ignore or deny the fact that the assessee has been recording sales to these bogus parties in the books over the*

*years. In other words all was not well with the books maintained by the assessee. So even if the books of accounts had been vetted earlier, considering this evidence, the AO had every right to reject the books of accounts as unreliable in the present proceedings u/s 153A. In such circumstances, I uphold the action of the AO in rejecting the books of accounts.*

*Now coming to the merits of the addition, I am in sync with the AO in availing of the data of Capital Line TP. Surely there is no bar in utilising the exhaustive and reliable corporate database even though the portal was developed for aiding transfer pricings. Needless to say, what is important is that the comparables are done with similarly placed companies. The comparables chosen by the AO have GP rate varying between (-} 2.32 to 19.64 percent. Many of them are listed companies. Further, it is true that they are mainly manufacturing companies. The assessee has also made several objections in the selection of these comparables and the application of a flat rate in all the years.*

*The AO has contended that the assessee failed to substantiate the genuineness of the sales made to the other parties too, apart from the fact that the assessee was showing profit less than the normal profit declared by other companies of the industry. In fact the AO in his remand report has urged the adoption of GP rate of 13.83% instead of 6.75% applied inadvertent*

*in the impugned Order. The relied cases including that of M/s Hanuman Sugar (Khandsari) Mills Pvt. Ltd stands differentiated by the AO too.*

*I find from the impugned order that the AO, aware of the assessee being basically a trading company applied the GP rate of 6.75% in all the years as the GP for trading in chemicals as per the chart of similar companies for the other years were found to be in the range of 6.75% to 8%.. Undoubtedly the comparables selected for determining the GP rate cannot be said to be companies which are actually similarly placed. In reality no two companies in similar lines of business can be identically placed in all respects. In this case, the trading results have been rejected so the job of estimating the gross profits falls on the AO and he opted for the most appropriate and reliable means available in the public domain for drawing the necessary inferences. He has also fittingly taken the total turnover from chemicals and polymers instead of limiting to the two parties as urged by the assessee. Hence, considering all aspects of the case and also appreciating the reservations of the assessee, I would think that the application of GP of a flat 6.75% should be curtailed to an increase of 2,% to the GP shown by the assessee in the respective years, as under:*

Sl. No.	A.Y	G.P. already shown by the assessee company	G.P. Rate to be adopted	Turnover of assessee company in chemical/ polymers only (in lacs)
1.	<b>2005-06</b>	<b>3.41%</b>	<b>5.41%</b>	<b>10451</b>
2.	<b>2006-07</b>	<b>2.59%</b>	<b>4.59%</b>	<b>14138</b>
3.	<b>2007-08</b>	<b>4.09%</b>	<b>6.09%</b>	<b>14307</b>
4.	<b>2008-09</b>	<b>3.70%</b>	<b>5.70%</b>	<b>19962</b>
5.	<b>2009-10</b>	<b>3.43%</b>	<b>5.43%</b>	<b>15761</b>

*The AO is directed to re-compute the additions to be sustained by adopting the gross profit rate on the turnover as given above. These grounds of appeal are partly allowed.”*

Now both the parties are in appeal.

21. The Id. Counsel for the assessee reiterated the submissions made before the authorities below and further submitted that during the course of search, nothing incriminating was found indicating any sales or purchase outside the books of account. Therefore, the order of the Id. CIT(A) is not correct for the following reasons:

- “i) *as the CIT(A) has confirmed the addition in total disregard to the facts of the case and the explanation and evidences submitted by the assessee company.*
- (ii) *the assessee company has submitted complete*

*details of the sales and purchases both quantity-wise and value-wise.*

- (iii) *there is no allegation whatsoever regarding the purchases made by the assessee company.*
- (iv) *there is no allegation whatsoever regarding the sales made to parties other than M/s Dee Kay Traders and J.S. Enterprises.*
- (v) *there is no material or evidence whatsoever that the assessee has received any amount over and above the sales amount stated in respect of these parties.*
- (vi) *the assessee on the contrary has provided complete details quantitative analysis and also comparative analysis evidencing that the sale prices charged from these parties is comparable to the sale price charged to other unrelated parties.*
- (vii) *the addition confirmed by the learned CIT(A) by enhancing the gross profit by arbitrary rate of 2% on the entire turnover of the chemicals and polymers of the assessee company in chemicals and polymers is without any basis*

The Id. Counsel for the assessee submitted that there was no material whatsoever even to doubt that assessee has received any consideration over and above the sale consideration stated in the books of account and there was no prohibition or restriction in making cash sales.

However, there is a restriction in making cash purchases u/s 40A(3) of the Act beyond a particular amount. So there was no obligation on the assessee to prove the identity of the buyer and thus no adverse inference can be drawn against the assessee merely on the ground that the parties to whom it had made sales were not available. In this regard reliance was placed on the following judgments:-

- i) R.B. Jessaram Fatehchand (Sugar Dept.) V. Commissioner of Income-Tax 75 ITR 33 (Bom)
- ii) Kishore Jeram Bhai Khaniya, New ... Vs Department Of Income Tax On 13 May, 2014 ITA No. 1220/D/2011
- iii) The CIT-II Versus Jindal Dyechem Industries Pvt Ltd (ITA 283/2011 & ITA 343/2011) Dated - 18 April 2012 (Delhi High Court)
- iv) Income Tax Officer Versus Surana Traders. ITD 092, 212, TTJ 093
- v) Kishore Jeram Bhai Khaniya, Prop. Poonam Enterprises MP - 83 Vs. Income tax Officer ITAT, Delhi ITA No. 1220/Del/2011 CO No. 89/Del/2011 ITA No. 980/Del/2011- Dated 13 May 2014

The ld. Counsel for the assessee further submitted that the addition sustained by the ld. CIT(A) was not justified, particularly when there was no discrepancy in the books of accounts which were maintained by the assessee in the regular course of his business and that the assessee made sales to other parties as well and it was not the case

of the Revenue that the sales made to two parties were at a lower rate than the rate at which sales had been made to other parties. It was further submitted that even if the provisions of transfer pricing [TP] are not applicable in the present case, no adjustment can be made in view of the fact that the sales made to the unrelated parties is not at a rate better than the rate at which sales have been made to the two parties namely, M/s Dee Kay Trade Centre and M/s J.S. Enterprises. It was further submitted that in a transfer pricing, it is well settled law that where internal comparables are available, the same have to be preferred as compared to the external comparables, and in the present case, the internal comparables being available, therefore, the AO and the Id. CIT(A) were not justified in ignoring the same and making adjustments. It was contended that the Id. CIT(A) arbitrarily enhanced the g.p rate by 2% on the entire turnover i.e. turnover other than the sales to the two parties, particularly when it was not the case of the Revenue that the sales made to other parties were not identifiable. It was further contended that after the assessment of the assessee, the department had concluded the assessment of the person who is the proprietor of the two concerns whereby it was accepted that the assessee had sold goods to the proprietary concerns on consignment basis and the

addition on account of commission income earned by those two proprietary concerns were made in the hands of the proprietor after giving relief of the expenses on estimate basis. Reference was made to the assessment order of the proprietor, copy of which is placed at pages 730 to 740 of assessee's paper book. It was accordingly submitted that the enhanced g.p. rate of 2% on the entire turnover on chemicals and polymer applied by the ld. CIT(A) was not justified.

22. Reliance was placed on the following case laws:

S.NO.	NAME OF CASE	CITATION
1	CIT V/S CHADHA AUTOMOBILES (INDIA)	202 TAXMAN 268 (DELHI)
2	ZAMINDARA TIMBER TRADERS V/S ITO WARD-1 KARNAL	55 TAXMANN. COM 80(DELHI -TRIB)
3	CIT V/S LAKSHMI SUGAR MILLS COMPANY LTD	50 TAXMANN. COM 182 (DELHI)
4	PROMOD KUMAR, PROPRIETER LAJJA RICE & OIL MILLS V/S CIT	58 TAXMAN.COM 41 (PANJAB & HARYANA)
5	GEO TECH CONSTRUCTIONS V/S DCIT	155 TAXMANN 86 (KERLA)
6	ACIT V/S PARAS BUILD (P) LTD	57 TAXMANN. COM 112 (DELHI-TRIB)
7	TRILOKCHAND GIRDHARI LAE & PARTY V/S ITO	226 TAXMANN 30 (RAJESTHAN)

23. In his rival submissions, the ld. DR strongly supported the order of the AO and further submitted that the two parties to whom the assessee claimed to have sold the goods through consignment were

not identifiable. Therefore, the AO rightly enhanced the turnover. It was further submitted that the g.p. rate declared by the assessee was on lower side as compared to the other parties. Therefore, the AO was justified in applying the average g.p. rate on the basis of the G.P. rates shown by the comparable cases. It was further submitted that the assessee did not produce the books of accounts during the course of search and that the proprietor of the firm M/s Dee Kay Trade Centre and M/s J.S. Enterprises, namely Shri Ram Kishan was not traceable. Therefore, the sales made through those two proprietorship concerns was in fact, the sales made by the assessee and it was to be added in the turnover of the assessee. It was contended that in respect of the sales made to above said two parties, the assessee neither mentioned any GIR No. Vehicle No. through which the goods were sent to those parties and even the sales bills were also not produced before the AO. Therefore, the books were rightly rejected and the g.p rate of 6.75% was rightly applied by the AO. It was contended that the ld. CIT(A), without assigning any cogent reason wrongly reduced the addition made by the AO. He, therefore, prayed to restore the addition made by the AO.

24. We have considered the rival submissions and perused the entire material available on record. In the present case, it is an admitted fact that the assessee did not produce the books of accounts during the course of search proceedings and the two parties namely M/s Dee Kay Trade Centre and M/s J.S. Enterprises to whom sales had been claimed to be made on consignment basis were not traceable and even the proprietor of those two concerns, namely, Shri Ram Kishan was not found at the address which created the doubt. At the same time, the contention of the Id. Counsel for the assessee that the assessment of the said two parties was framed by the department and copies of which are placed at pages 730 to 740 of the assessee's paper book cannot be brushed aside. In the instant case, the AO applied g.p. rate of 6.75% by taking the average g.p. rate of certain traders. It was not brought on record as to how and in what manner there were similarities in the business of the assessee with those traders. However, it was also not brought on record that the turnover of the assessee, the products sold and the circumstances in which sales were made were same in the case of the assessee as well as the comparable cases cited by the AO. It is therefore not clear that on what basis the AO applied the g.p. rate of 6.75% when he himself admitted that the g.p. rate was found in the range of

6.75% to 8% in respect of the other parties who were trading in chemicals. In the instant case, the ld. CIT(A) also without assigning any cogent reason directed the AO to enhance the uniform g.p. rate of 2% in all the A.Ys even when there were variations in the g.p. rate in every year disclosed by the assessee. In other words, the g.p. rate declared by the assessee was not constant in all the years which is very much clear from the chart furnished by the assessee and considered by the AO as well as the ld. CIT(A) which has been reproduced in the former part of this order, however, a consistent increase of 2% in the g.p. rate was directed to be made by the ld. CIT(A). We, therefore, by considering the totality of the facts of the present case, are of the confirmed view that the g.p. rate adopted by the ld. CIT(A) was without any basis so the same cannot be sustained. In that view of the matter, we deem it appropriate to set aside the impugned order and remand the case back to the file of the ld. CIT(A) for fresh adjudication in accordance with law after providing due and reasonable opportunity of being heard to the assessee.

25. The facts in all the other A.Ys i.e AYs. 2006-07 to 2009-10 are similar to the facts involved in A.Y 2005-06. Therefore, our findings

given in respect of this A.Y 2005-06 shall apply mutatis mutandis for all the other A.Ys.

26. In the result, all the appeals of the department as well as the cross objections of the assessee are allowed for statistical purposes.

[Order Pronounced in the Court on 30.11.2015]

Sd/-

(C.M. GARG)  
JUDICIAL MEMBER

Sd/-

(N.K.SAINI)  
ACCOUNTANT MEMER

Dated : 30<sup>th</sup> November, 2015.  
VL/-

*Copy to:*

1. *The Appellant*
2. *The Respondent*
3. *The CIT*
4. *The CIT(A)*
5. *The DR*

By Order

Assistant Registrar  
ITAT, New Delhi