□य अ□धकरण, "बी" □यायपीठ, चे□नई
PELLATE TRIBUNAL 'B' BENCH, CHENNAI

□ी चं□ पूजारी, लेखा सद□य एवं □ी धु□वु□ आर.एल रे□डी, □याि□यक सद□य के सम□
Before Shri Chandra Poojari, Accountant Member &
Shri Duvvuru RL Reddy, Judicial Member

I.T.A. Nos.2711, 2712 & 2713/Mds/2016
Assessment Years : 2011-12, 2012-13 & 2013-14

The Assistant Commissioner of Income Tax, Central Circle 2(1), Investigation Wing, 46, Nungambakkam High Road, Chennai 600 034.	Vs.	M/s. Kaycee Distilleries, Chengalur, Pudukkad, Thirussur District, Thirussur 680 312. **[PAN:AADFK0631N]**
(अपीलाथ□ /Appellant)		**(□□यथ□/Respondent)**

अपीलाथ□ क□ ओर से / Appellant by	:	Shri V. Vivekanandan, CIT
□□यथ□ क□ ओर से/Respondent by	:	None
सुनवाई क□ ता□ख/ Date of hearing	:	08.06.2017
घोषणा क□ ता□ख /Date of Pronouncement	:	28.07.2017

आदेश /O R D E R

PER DUVVURU RL REDDY, JUDICIAL MEMBER:

These three appeals of the Department pertaining to the same assessee, are directed against the common order passed by the ld. Commissioner of Income Tax (Appeals) 18, Chennai dated 30.06.2016 relevant to the assessment years 2011-12, 2012-13 and 2013-14, whereby the Department has challenged in annulling the assessment made under section 143(3) r.w.s. 153A of the Income Tax Act, 1961 [ñActò in short] for the assessment years 2011-12 and 2012-13.

are that the assessee is engaged in the business of distillation of spirit/Blending & Bottling of IMFL. The assessee has filed its return admitting total loss of ضي76,32,315/-. The return filed by the assessee was processed under section 143(1) of the Act. Thereafter, a search was conducted in the office premises of the assessee at No.99, Canal Bank Road, C.I.T. Nagar, Nandanam, Chennai 35 on 15.5.2012 as evidenced by the warrant issued in the assessee's case. Subsequently, notice under section 153A of the Act was issued for the assessment years 2011-12 and 2012-13 and no notice under section 153A of the Act was issued for the assessment year 2013-14 and only notice under section 143(2) of the Act was issued. In response to notice under section 153(A) of the Act, the assessee filed its return of income for the assessment year 2011-12 admitting total loss of ضي76,32,315/- on 10.10.2014. During the course of assessment proceedings, the assessee filed a letter questioning jurisdiction under section 153A of the Act without any incriminating material found during the course of search conducted under section 132 of the Act, the Department has stated that initiation of search under section 132 of the Act is enough to assume jurisdiction under section 153A of the Act. After considering the details filed by the assessee, the assessment under section 143(3) r.w.s. 153A of the Act was completed on 30.03.2015 by assessing total loss at ضي22,91,773/- after making various additions.

3. The assessee carried the matter in appeal before the ld. CIT(A). After considering the submissions of the assessee and following the decisions, the ld. CIT(A) allowed the ground raised by the assessee with regard to jurisdiction for the assessment years 2011-12 and 2012-13, whereas, the appeal filed for the assessment year 2013-14 was allowed for statistical purposes.

4. On being aggrieved, the Revenue is in appeal before the Tribunal for all the above assessment years. With regard to assumption of jurisdiction for the assessment years 2011-12 & 2012-13, the ld. DR has submitted that service of notice under section 153A of the Act followed by the search conducted under section 132 of the Act, the Assessing Officer has validly assumed jurisdiction to complete the assessment under section 143(3) r.w.s. 153A of the Act and pleaded that the orders of the ld. CIT(A) should be set aside for the assessment years 2011-12 & 2012-13.

5. Despite service of notice, none appeared on behalf of the assessee. Hence, we proceeded to decide the appeal by considering materials available on record and the arguments of the ld. DR.

6. We have heard the ld. DR, perused the materials available on record

f authorities below. The assessee has filed its return of income for the assessment years 2011-12 & 2012-13 as per the provisions of section 139 of the Act. For both the above assessment years, notice under section 153A of the Act was issued on 18.08.2014, which was followed by the search conducted under section 132 of the Act on the premises of the assessee. However, no incriminating material was found during the course of search. Therefore, it was the submission of the assessee that since no incriminating material was found during the course of search, the assessment completed under section 143(3) r.w.s. 153A of the Act is not valid. However, it was the submission of the ld. DR that once search operation was conducted under section 132 of the Act, the Assessing Officer got valid jurisdiction over the assessee under section 153A of the Act. On appeal, while following various decisions including recent decision of the Tribunal in the case of Smt.Geetha Jayamurugan v. DCIT (supra), the ld. CIT(A) allowed the ground raised by the assessee by observing as under:

> *"5. I have gone through the assessment orders, the grounds raised, submissions made by AR and materials available on record. During appellate proceedings, the AR further submitted as under:*
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> > *"You find that, the assessee firm was searched under section 132 of the Act on 15.05.2012, simultaneously with other group companies of SNJ and its Directors. The first issue arising out of the appeal is whether, the assessment under section 153A of the Act, which are not based on any incriminating material, is valid or not. You find that this issue is already covered by the Judgment of the Honorable Chennai ITAT in the case of Smt. Geetha Jayamurugan in ITA No.2262 and others dated 4th March 2016, in favour of the assessee. It was held that, the assessments of 2007-08 to 2011-12, which are not based on any incriminating and therefore the assessment framed under section*

ot be stand on its own leg, which are not framed criminating material found during the course of search operation and they do not conform the mandate of section 153A of the Act. Accordingly, the assessments framed under section 153A r.w.s 143(3) for the assessment years 2007-08 to 2011-12[five assessment years] are quashed. Therefore, we request your good self to appeal to allow this ground of appeal."

As can be seen from the assessment order for AY 2011-12 and 2012-13 as pointed out by the appellant, the AO made the addition for each of the AY without referring to any incriminating documents found/seized during the search, thereby making one to come to the conclusion that the addition was not based on seized document. In the circumstances, inasmuch as the additions were made without any back up of materials or incriminating documents seized, the assessments for AY 2011-12 & 2012-13 are hereby annulled. Hence the ground relating to jurisdiction raised by the appellant is allowed for AY 2011-12 & 2012-13. While deciding the issue in favour of the appellant, the following decisions were also relied upon.

Various High Courts and ITAT have followed the decision of the Special Bench of the ITAT Mumbai in the case of All Cargo Global Logistics Ltd. vs. CIT [2012] 137 ITD 287 (Mumbai) (SB) in which, it was held that no additions or disallowances can be made to the income returned in case of assessments which have been completed and in case where no incriminating materials have been found during the course of search in respect of the said addition or disallowance. In this regard reliance was also placed on the following judgments:

i) ABS Sanjjay vs. ACIT ITA No.1691 to 1693/Mds/2013
ii) Jai Steel (India) vs. ACIT [2013] 88 DTR 1 (Raj.)
iii) Marigold Merchandise Pvt. Ltd. vs. DCIT ITA No.2666 & 2667/Del/2013
iv) AB Sudarsanam vs. ACIT ITA No.1694 & 1695/Mds/2013
v) MGF Automobiles Ltd. vs. ACIT ITA No.42l2 & 4213/Mds/2014
vi) Gurinder Singh Bawa vs. DCIT ITA Nos.2075 & 2669 (Mum) of 2010
vii) Rm.K. Viswanatha Pillai & Sons vs. DCIT ITA No. 1065, 1066 & 1067/Mds/2014
viii) AR Murugadoss vs. ACIT ITA No. 559, 560, 561, 562, 563 & 564/Mds/20l4
ix) Joseph Prince and Others vs. ACIT ITA No.2739, 2740 & 2741/Mds/2014
x) Jignesh P. Shah vs. DCIT ITA No. 1 553 & 3173/Mum/2010

In all the above judgments, invariable decision is that no additions or disallowances can be made to the income returned in case of assessments

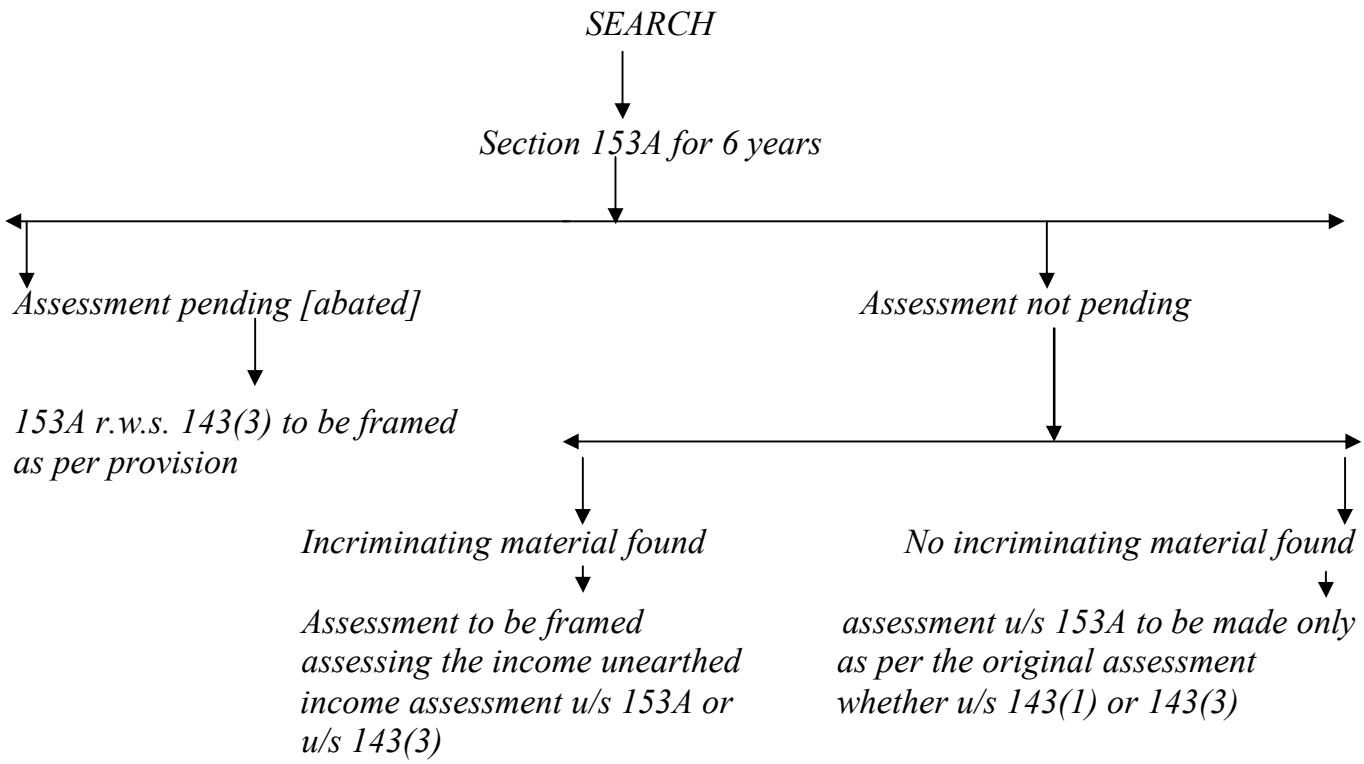
and in case where no incriminating materials *ourse of search.*

As regards the other grounds, since the assessments themselves have become farce on the ground of jurisdiction, these grounds have become infructuous and hence are dismissed".

7. The assessee has mainly relied on the recent decision of the Tribunal in the case of Smt.Geetha Jayamurugan v. DCIT (supra), wherein the Coordinate Benches of the Tribunal has observed and held as under:

"6. We have heard both sides, perused the materials on record and gone through the orders of authorities below. In this case, there was a search at the assessee's premises on 15.05.2012. Consequent to this, notice under section 153A of the Act was issued on 15.03.2013. For the assessment years 2007-08 to 2011-12, the assessee has stated that the returns already filed were to be treated as return filed against the notice under section 153A of the act. Accordingly, the assessment was completed for the assessment years 2007-08. In the course of assessment, the Assessing Officer made addition, prima facie, disallowing certain agricultural income as non-agricultural income and also disallowance under section 40(a)(iii) of the Act. Now, the contention of the ld. Counsel for the assessee is that the assessment for the assessment years 2007-08 and 2008-09 already completed either under section 143(1) or 143(3) and there is no pendency of assessment so as to abate the assessment. Further, where, there is no seized material found during the course of search, the assessment under section 153A be framed only on the basis of original assessment, which is under section 143(1) or 143(3) of the Act. Admittedly, in these assessment years, the search took place on 15.05.2012. As on this day, the assessee has already filed return of income for the assessment years 2007-08 and 2008-09. It is also on record that the assessment for the assessment year 2008-09 and 2009-10 was completed under section 143(3) and the Assessing Officer accepted agricultural income in these assessment years. The time limit for issuing notice for other assessment years has already expired by this time and thereby, the assessments stated to be reached finality by operation of law for the assessment years 2007-08 to 2011-12 as on the date of search as the time limit to issue notice for these assessment years is already over. Being so, no assessment or reassessment or pending assessment at the time of search carried out on 15.05.2012. In respect of these assessment years, section

ing Officer to complete the assessment for 6 rs consequent to search action under section 132 or requisition under section 132A of the Act. It is also to be noted that the assessment as well as reassessment are possible in the case of pending assessment. Further, when the assessments are already completed and no assessments are pending at the time of issue of notice under section 153A, reassessment can be made only if any incriminating material found during the course of search and item concluded in earlier assessment cannot be considered in the reassessment under section 153A of the Act. In other words, the scope of assessment under section 153A can be summarized diagrammatically as under:



7. Thus, as seen from the above chart, when nothing incriminating is found in the course of search or requisition, then the question of reassessment of already completed assessment does not arise. The underline purpose of making assessment of a total income under section 153A of the Act is therefore, to assess the income, which was not disclosed or would not have been disclosed. The second proviso to section 153A of the Act provides for abatement of assessment or reassessment only for the reason that there cannot be two assessments for a single assessment year. The reassessment is permitted in an assessment under section 153A of the Act when incriminating materials

of search. In the present case, for the to 2010-11, there is no reference of any incriminating material found during the course of search to frame assessment under section 153A of the Act. The Assessing Officer considered the original return already filed in normal course and reassessing the income of the assessee and observing that the assessed agricultural income is excess over there is no incriminating material to suggest that the agricultural income declared by the assessee is excess. Further, it is already concluded by the Assessing Officer for the assessment year 2008-09 and 2009-10 while framing assessment under section 143(3) of the Act and accepted the agricultural income declared by the assessee.

8. At this stage, it is appropriate to mention the ratio laid down by the order of the Mumbai Special Bench decision of the Tribunal in All Cargo Global Logistic Ltd. v/s DCIT, [2012] 137 ITR 287 (SB) (Mum.), after analyzing the relevant provisions of the Act, came to the following conclusion and ratio:–

> *"(a) In assessment that are abated, the Assessing Officer retains the original jurisdiction as well as jurisdiction conferred on him under section 153A for which assessments shall be made for each of the six assessment years separately.*
>
> *(b) In other cases, in addition to the income that has already been assessed, the assessment under section 153A will be made on the basis of incriminating material which in the context of relevant provisions means books of account, other documents, found in the course of search but not produced in the course of original assessment and undisclosed income or property discovered in the course of search."*

9. In this case, the question answered in clause (b) would be applicable as the addition in the assessment order passed under section 153A, can be made only on the basis of incriminating material found in the course of search in case where the assessment has already been finalized. Thus, in this case, no addition can be made over and above the returned income which has become final prior to the date of search and there is no material found at the time of search. The aforesaid Mumbai Special Bench decision of the Tribunal in All Cargo Global Logistic Ltd. (supra) has also been reaffirmed and applied by the Mumbai Benches of the Tribunal in the case of Gurinder Singh Bawa v.

om 328 (Mum.). The relevant observation of herein below:–

"6. We have perused the records and considered the rival contentions carefully. The dispute raised is regarding legal validity of addition made by AO under section 153A of the Act. Under the provisions of section 153A, in all cases, where search is conducted under section 132 of the Act, AO is empowered to assess or reassess total income of six assessment years preceding the assessment year in which search was conducted. The section also provides that assessment or reassessment relating to any assessment year falling within period of six assessment year if pending on the date of initiation of search shall abate. There have been divergent views regarding scope of application of section 153A in cases where no incriminating material was found indicating any undisclosed income. Some of the Tribunal Benches had taken the view that in case no incriminating material was found AO had no jurisdiction to make assessment or reassessment under section 153A while some other Benches held that jurisdiction under section 153A was automatic to reassess six immediate preceding assessment years irrespective of the fact whether any incriminating material was found or not. Another aspect on which there had been divergent views was whether even if AO had jurisdiction under section 153A, addition can be made in assessment/ reassessment only when some incriminating material has been found. All these aspects had been referred to the Special Bench of the Tribunal in case of All cargo Global Logistics Ltd. and order of Special Bench dated 6.7.2012 has been referred.

6.1 The Special bench in the case of All Cargo Global Logistics Ltd. (supra), has held that provisions of section 153A come into operation if a search or requisition is initiated after 31.5.2003 and on satisfaction of this condition, the AO is under obligation to issue notice to the person requiring him to furnish the return of income for six years immediately preceding the year of search. The Special Bench further held that in case assessment has abated, the AO retains the original jurisdiction as well as jurisdiction under section 153A for which assessment shall be made for each assessment year separately. Thus in case where assessment has abated the AO can make additions in the assessment, even if no incriminating material has been found. But in other cases the Special Bench held that the assessment under M/s. Govind Agarwal (HUF) 6 section 153A can be made on the basis of incriminating material which in the context of relevant provisions means books of account and other documents found in the course of search but not produced in the course of original assessment and undisclosed income or property disclosed during the course of search. In the present case, the assessment had been completed under

der section 143(1) and time limit for issue of 143(2) had expired on the date of search. Therefore, there was no assessment pending in this case and in such a case there was no question of abatement. Therefore, addition could be made only on the basis of incriminating material found during search."

10. Further, the Coordinate Benches of the Tribunal in the case of Sree Gopalakrishna Fabrics v. DCIT in I.T.A. Nos. 788 to 794/Mds/2015 vide order dated 27.11.2015 has taken similar view.

11. Moreover, in the case of Jai Steel (India) v. ACIT [2013] 259 CTR 281, the Hon'ble Rajasthan High Court has held that in case nothing incriminating material is found on account of search of search or requisition then the question of reassessment of concluded assessment does not arise. If any books of account or other documents relevant to the assessment has not been produced in the course of original assessment and found in the course of search, such books of account or other documents are to be taken into consideration while assessing or reassessing the total income under the provision of section 153A of the Act. The requirement of assessment or reassessment under section 153A had to be read in the context of section 132 or under section 132A of the Act in as much as, in case nothing incriminating is found on account of such search or requisition, then the question of reassessment of concluded assessment does not arise, which would require more reiteration and it is only in the context of abated assessment under second proviso, which is required to be assessed. Thus, it is apparent from the above that (a) the assessment or reassessments, which stand abated in terms of second proviso to section 153A of the Act, the Assessing Officer acts under his original jurisdiction for which assessments, have to be made; (b) regarding other cases, the addition to the income that has already been assessed, the assessment will be made on the basis of incriminating material and (c) in the absence of any incriminating material, the completed assessment can be reiterated and the abated assessment and reassessment can be made.

12. Thus, in our opinion, the assessments of 2007-08 to 2011-12, which are not based on any incriminating and therefore the assessment framed under section 153A of the Act cannot be stand on its own leg, which are not framed on the basis of any incriminating material found during the course of search operation and they do not conform the mandate of section 153A of the Act. Accordingly, the assessments

r.w.s. 143(3) for the assessment years 2007-
ment years] are quashed".

8. In the present case, admittedly for the assessment years 2011-12 and 2012-13, no assessment under section 143(3) of the Act was completed and moreover, even though no incriminating materials were found during the course of search, the decisions relied on by the ld. CIT(A) are not applicable. However, in similar facts and circumstances, in the case of CIT v. Dr. P. Sasikumar 387 ITR 8 (Kerala), the Hon'ble Kerala High Court has observed and held as under:

> *"On a plain reading of section 153A, it is clear that once search is initiated under section 132 or a requisition is made under section 132A after the 31st day of May 2003, the Assessing Officer is empowered to issue notice to such person requiring him to furnish return of income in respect of each assessment year following within six assessment years referred to in clause (b). It further treats the returns so filed as if such return were a return required to be furnished under section 139. So that on a reading of section 153A(1) it is categorical and clear that once a notice is issued and the Assessing Officer has required the assessee to furnish return for a period of six assessment years as contemplated under clause (b) then the assessee has to furnish all details with respect to each assessment year since the same is treated as a return filed under section 139. It is true that as per the first proviso, the Assessing Officer is bound to assess or reassess the total income with respect to each assessment year following the six assessment years specified in sub-clauses (a) and (b) of section 153A. However, even if no documents are unearthed or any statement made by the assessee during the course of search under section 132 and no materials are received for the afore specified period of six years, the assessee is bound to file a return, is the scheme of the pro vision. Even though the second proviso to section 153A speaks of abatement of assessment or reassessment pending on the date of the initiation of search within the period of six assessment years specified under the provision that will also not absolve the assessee from his liability to submit returns as provided under section 153A(1)(a). This being the scheme of the provisions of the Act, the Appellate Tribunal ought to have considered the issue with specific reference to the facts involved in the case and as provided under section 153A."*
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> *In the light of the judgment of this court, the aforesaid conclusion of the Tribunal cannot be sustained."*

e above decision of the Hon'ble Kerala High Court, we set aside the order of the ld. CIT(A) and direct him to adjudicate the grounds raised by the assessee on merits in accordance with law after allowing sufficient opportunities of being heard to the assessee. Accordingly, the appeals filed by the Revenue for the assessment years2011-12 & 2012-13 are allowed for statistical purposes.

10. In the appeal for the assessment year 2013-14, the only effective ground raised by the Revenue is that the ld. CIT(A) has erred in restricting the disallowance to the extent of 10% towards sales promotion expenditure. In the assessment order, the Assessing Officer has disallowed the sales promotion expenses of ضي38,01,403/- on the ground that the assessee could not produce relevant bills, vouchers, etc. for the above claim. On appeal, the ld. CIT(A) has observed and held as under:

> *"5.1. As regards ground relating to disallowance of "sales promotion expenses" the AO disallowed the amount due to non-production of bills. The appellant could not produce the relevant documentary proof and further, as per the admission of the appellant, the addition was made on agreed basis.*
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> *Against the above addition, the AR submitted that in the group case (S.N.J. Distillers (P) Ltd.) when this issue was raised the Hon'ble ITAT in ITA Nos.300 to 303/Mds/2016 dated 27.5.2016 has decided the issue observing as under:*
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> > *"We have heard both the parties and perused the material on record. In our opinion, the very assessment has to be made as per law. The consent given by the assessee cannot give the right to the AO to make addition, as held by the judgment in the case*

CA IT (104 ITR 381), the consent cannot be the addition .... In our opinion, the assessee is having the right of appeal even it is agreed to addition before the AO. Due to paucity of time, the assessee could not produce the material. Now the evidence is available regarding this expenditure before the assessee and it requires to be examined by the AO.

It is to be noted that the revenue authorities have not doubted the incurring of expenditure for sales promotion. However, they doubted the quantum of expenditure incurred. The business cannot be carried on without incurring sales promotion expenditure. The Id. AR pleaded before us, that most of these payments were passed through banking channels. In such circumstances, the disallowance of entire sales promotion expenditure is not proper. If the expenditure are not supported by proper bills or vouchers or receipts and payments have been made only by cash, then there are chances of inflating of such cash expenditure. Even if it is so, the entire expenditure cannot be disallowed. Since, there is possibility of inflating of cash expenditure, disallowance of certain percentage of the expenditure to be made. From this point of view, if the expenditure is not fully vouched, the AO is directed to disallow only 10% of the unsupported cash expenditure out of this and he shall not disallow 100% of such expenditure. Accordingly we remit this issue to the file of the AO for fresh consideration. It is needless to say that the AO shall not be prejudiced by earlier action of the assessee that it agreed for the addition. He shall re-examine the materials to be produced before him and decide the issue afresh, in the light of our observation herein above. This ground is allowed for statistical purposes."

Respectfully following the above order of the Hon'ble ITAT, the AO is accordingly directed disallow 10% of the expenditure, if it is not fully vouched, after examination of the materials to be produced by the appellant. This ground is allowed for statistical purposes.

11. As held by the Coordinate Benches of the Tribunal that the business cannot be carried out without incurring sales promotion expenses, the ld. CIT(A) has rightly directed the Assessing Officer to disallow 10% of the

not fully vouched after examining the materials to be produced by the assessee, since inflated expenditure cannot be ruled out in the absence of vouchers, bills, etc. Thus, we find no infirmity in the order passed by the ld. CIT(A) on this issue and accordingly, the ground raised by the Revenue is dismissed.

12. In the result, the appeals of the Revenue in I.T.A. Nos. 2711 & 2712/Mds/2016 are allowed for statistical purposes and I.T.A. No. 2713/Mds/2016 is dismissed.

Order pronounced on the 28th July, 2017 at Chennai.

Sd/-	Sd/-
(CHANDRA POOJARI)	(DUVVURU RL REDDY)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Chennai, Dated, the 28.07.2017

Vm/-

आदेश क□ □□त□ल□प अ□ेषित/Copy to: 1. अपीलाथ□/Appellant, 2.□□यथ□/Respondent, 3. आयकर आयु□त (अपील)/CIT(A), 4. आयकर आयु□त/CIT, 5. □वभागीय □□त□न□ध/DR & 6. गाड□फाईल/GF.