

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "F": NEW DELHI**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER**

ITA No.:- 3756/Del /2011
Assessment Year: 2006-07

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| Asstt. Commissioner of Income Tax, Central Circle-19, Room No. 319, ARA Centre, E-2, Jhandelwala Extn. New Delhi. | Vs. | M/s. Rimjhim Ispat Ltd. 123/355, Fazal Ganj, Kanpur (UP) |
| (Appellant) | | (Respondent) |

CO No. 320/Del/2011
Arising appeal No. 3756/Del/2011
Assessment year: 2006-07

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| Rimjhim Ispat Ltd. 123/355, Fazal Ganj Kanpur PAN AAACR6582K | Vs. | ACIT, Central Circle-19, Room No. 319, E-2, ARA Centre, Jhandewala Extn. New Delhi. |
| (Appellant) | | (Respondent) |

ITA Nos.:- 640 & 641/Del /2013
Assessment Years: 2004-05, 2005-06

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| Dy. Commissioner of Income Tax, Central Circle-19, Room No. 319, ARA Centre, E-2, Jhandelwala Extn. New Delhi. | Vs. | M/s. Rimjhim Ispat Ltd. 123/355, Fazal Ganj, Kanpur (UP) PAN AAACR6582K |
| (Appellant) | | (Respondent) |

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| Department by: | Smt. Paramita Tripathy, CIT(DR) |
| Assessee by : | Shri Ashish Jaiswal, Advocate |
| Date of Hearing | 06/11/2017 |
| Date of pronouncement | 05/12/2017 |

ORDER

PER AMIT SHUKLA, J.M.

The appeal for the assessment year 2006-07 has been filed by the Revenue and Cross objection by the assessee against order dated 23.5.2011 passed by Ld. CIT (Appeals) III New Delhi; and appeal for the assessment years 2004-05 and 2005-06 has been filed by the Revenue against separate impugned order of even date 26.11.2012 passed by the Ld. CIT (Appeals) XXXIII New Delhi. All the appeals are against the quantum of assessment passed u/s 143(3)/148.

2. Since the issues involved in all the three years are common arising out of identical set of facts, therefore, they were heard together and are being disposed of by way of this consolidated order. We will first take up the revenue's appeal for the assessment year 2006-07 and Cross objection filed by the assessee. In the grounds of appeal, the revenue has raised following grounds:-

1. *“On the facts and in the circumstances of the case, the CIT (A) has erred on facts and in law in holding that the reopening of assessment on the basis of the report of Assessing Officer of Sh. Kamlesh Gupta was not justified as the name of the assessee was not mentioned anywhere in the documents impounded during the survey despite the facts that in his statement recorded during survey under section. 133A on 22.09.2005, Sh. Kamlesh Gupta had categorically stated that he was working as consignment agent of M/s Rim Jhim Ispat Ltd. on commission basis and had no other source of income.*

2. *On the facts and in the circumstances of the case, the CIT (A) has erred on facts and in law in holding that the transactions mentioned at page number 3,4,5,9 and 10 of Annexure 2 do not belong to the assessee company despite the fact that Sh. Kamlesh Gupta had admitted during the survey that he had no other source of income from consignment work of M/s Rim Jhim Ispat Ltd.*
3. *On the facts and in the circumstances of the case, the CIT(A) has erred on facts and in law in holding that the assessee was not involved in under billing of SS flats ignoring the evidence in the form of documents as per annexure A-2 and A- 7 found during survey u/s 133A at the business premises of M/s Rahul Ispat (Proprietor Kamlesh Gupta), Jodhpur.*
4. *The order of the CIT (A) is erroneous and is not tenable on facts and in law.”*

3. The facts in brief as culled out from the assessment order are that, the assessee is a limited company engaged in the business of manufacturing of iron and steel of SS Flat. Regular return of income was filed on 29.5.2006 declaring income of Rs.4,62,22,340/- which was duly processed u/s 143(1). A survey action u/s 133A was conducted on 22.5.2009 by ADI (Inv.) Jodhpur at the business premises of a third party, Shri Kamlesh Gupta, proprietor, M/s. Rahul Ispat and M/s. Namrata Metals, situated in Jodhpur and Jhansi. In wake of information gathered in such survey action, a letter dated 7.7.2008 was received from I.T.O. 6(3) Jhansi informing that certain loose incriminating papers and other documents were found seized by the survey party which are against the assessee. The entire information as received by the AO has been incorporated in the assessment order from pages 1 to 3. Based on this information,

assessee's case was reopened u/s 147 by issuance of notice u/s 148 dated, 13.10.2008. Assessee had filed its objection against the notice u/s 148, but it appears that it was not disposed of and neither has it been dealt with in the impugned assessment order. During the course of the reassessment proceedings, the AO required the assessee company to explain as to why a sum of Rs. 5,14,88,000/- allegedly on account under billing done through Shri Kamlesh Gupta should not be made or be treated as undisclosed income of the assessee based on the survey information and incriminating material found from the possession of one of the employee of Shri Kamlesh Gupta. In response, the assessee submitted that books of accounts/ documents found in the course of survey in the case of Shri Kamlesh Gupta did not relate to the assessee at all. It was also pointed out that the employee of Shri Kamlesh Gupta has owned up the entire transaction reflected in impounded annexure marked as 'A-2' found from his possession. The entire transaction as discussed in the said annexure A-2 on the basis of which adverse inference has been sought to be drawn by the AO against the assessee, now cannot be adversely viewed and it was also brought on record that a sworn affidavit on behalf of Shri Kamlesh Gupta owning up the entire transaction in his hand has been filed before his AO at Jhansi in the assessment proceedings in his case i.e., of Shri Kamalesh Gupta; and there was no nexus directly or indirectly of any transaction related to the assessee company. It was submitted that the entire books of accounts alongwith the bills and vouchers were produced during the course of the assessment proceedings which was examined by the AO. However the Ld. AO made the addition after observing and holding as under:-

“5. That after examination of explanation and information received on account of survey conducted u/s 133A on 22.9.2005 at Jhansi. There is clear finding that the assessee company transaction pertaining to on the nature of under billing of sale of SS flat were found. Therefore it is a clear case of concealment of income. The replies filed by the assessee from time to time are not able to justify the claim for not treating the same as undisclosed income. The contention of assessee that Shri Sanjay Khandelwal, an employee of Kamlesh Gupta, has owned the transaction cannot be a basis to shift the taxability of the assessee company to a third person. Accordingly, as discussed in details in foregoing paras, income as discussed above is being treated as undisclosed income of the assessee.”

Accordingly addition of Rs. 5,14,88,000/- was made.

4. Before the Ld. CIT(A), the assessee had challenged the validity of reassessment proceedings u/s 148 on various counts ; *firstly*, there was no proper service of notice u/s 148 upon the assessee and assessee has clearly denied the service of notice before the AO; *secondly*, AO has failed to dispose of the objections raised by the assessee in response to the notice u/s 148 and after complying with the provisions laid down by the Hon’ble Supreme Court in the case of G K N Drive Shafts (India) Ltd. vs. ITO 259 ITR 19; and *lastly*, the entire addition of Rs. 5,14,88,000/- is based on information received from ITO Jhansi without correlating the documents/ incriminating papers with the assessee or applying his own mind independently. He has simply relied upon the version of the ITO Jhansi and without

verifying the veracity of the papers relating to Rahul Ispat and Namrata Metals, or correlating with that of bills and invoices issued by the assessee. No such papers linking the bills and invoices of the assessee company with the entities of Shri Kamlesh Gupta has been found and seized. In absence of such documentary proof AO could not have proceeded on such information. In support reliance was placed on various decisions. Apart from that it was also brought to the notice of the Ld. CIT (A) that the first appellate authority in the case of Shri Kamlesh Gupta for the assessment year 2006-07, vide order dated 28.1.2010, after examining the annexure A-2 (which is the subject matter of adverse inference against the assessee) has clearly held that it does not contain the name of M/s. Rimjim Ispat Ltd. i.e., the assessee company. The entire transaction has been added in the hands of Shri Kamlesh Gupta. It was further explained that Shri Kamlesh Gupta was simply a consignee / agent of the company as per the agreement for which he has been paid commission on the basis of goods sent to him and sold. Besides this he is also doing similar business on his own. The assessee company has maintained complete record of movement of books sold through concerns of Shri Kamlesh Gupta and TDS has been deducted on total commission paid to him and there is relationship with Shri Kamlesh Gupta was only that he was the agent. The main addition is based on certain pages of annexure 2 which is a pocket diary found from the possession of Shri Sanjay Khandelwal who was the employee of Shri Kamlesh Gupta during the course of survey and in the reassessment proceedings the said employee of Shri Kamlesh Gupta, has filed an affidavit confirming that transactions noted therein and has categorically said that it did

not belong to the assessee company and nowhere he has stated that transaction of this diary belong to Rimjim Ispat Limited and he was never cross examined by the AO in the course of reassessment proceedings. The department even has not made inquiry of cross examination to Shri Kamlesh Gupta also. The assessee's detail submission in this regard have been dealt and incorporated by the Ld. CIT (A) in the impugned order from pages 3 to 16 of the appellate order.

5. Ld. CIT (A) after taking note of the entire material facts on record and also the incriminating papers found during the course of survey, first of all held that entire reopening u/s 148 is invalid. His relevant finding quashing the entire proceedings u/s 148 is reproduced herein below:-

"I have carefully gone through the above submissions made by the appellant as well as the seized documents at Annexure A-2 namely pages 3,4,5,9, and 10 which were found during the course of survey from possession of Sh. Sanjay Khandelwal an employee of Sh. Kamlesh Gupta at Jodhpur. I have also gone through the notings made on the pages of the pocket diary namely 3,4,5,9, & 10 found from the person of Sanjay Khandelwal. From the same it is seen that these are nothing but details of amount shown to be receivable / received from parties whose names are Rama , Acme, RK, SRM, JM, Trivedi, Bhagat, Raju Madan, J. Ent., TU, Kothari, Anshul, Kash, Shri Ram, Brajit. Certain mobile numbers have also been mentioned against the name of these parties. Moreover admittedly these jotting have been written in codified form. Therefore merely on the basis of these jottings in which the name

of M/s Rimjhim Ispat does not figure and without any further preliminary verification thereof as to whether these jottings in any manner prima-facie indicate unaccounted transaction on part of the appellant company and that too without giving an opportunity to the appellant to explain his case and solely relying on the report of the AO of Sh. Kamlesh Gupta (the proprietor of M/s Rahul Ispat) who is a consignment agent of the appellant, it was not appropriate to have issued notice U/S 148 to the AO as these facts & information cannot be the basis for reason to believe that income of the assessee for Rs. 5,14,88,0001- has escaped assessment. In this connection reliance is also placed on the ratio of the decision in case of Sarthak Securities Company P. Limited vs. ITO 329 I~R 110 wherein while quashing the notice for reopening issued U/S 148 the Hon'ble Jurisdictional High Court has inter alia held in the concluding para as under:-

"In the case at hand, as is evincible, the Assessing Officer was aware of the existence of four companies with whom the assessee had entered into transaction. Both the orders clearly exposit that the Assessing Officer was made aware of the situation by the investigation wing and there is no mention that these companies are fictitious companies. In the Initial notice nor communication providing reasons remotely indicate independent application of mind. True it is, at that stage, it is not necessary to have the established fact of escapement of income but what is necessary is that there is relevant material on which a reasonable person could have formed the requisite belief. To elaborate, the conclusive

proof is not germane at this stage but the formation of belief must be on the base or foundation or platform of prudence which a reasonable person is required to. Resultantly, the initiation of proceedings under section 147 and issuance of notice under section 148 of the Act are hereby quashed. "

Applying the above principles as initiated by the Hon'ble Court, it is apparent that there has been no independent application of mind by the AO and had some care been shown in pursuing the pages at 3,4,5, 9 & 10 of Annexure A-2 and an explanation been obtained from the appellant relating to these pages, the AO would have been in a better position to appreciate the facts of the case and take a prima facie considered legal view as to whether there has indeed been escapement of income in appellant's case based on documents found from the possession of an employee (located at Jodhpur) of the consignment agent of Sh. Kamlesh Gupta (located at Jhansi), It is also noticed that the AO has not disposed off the objection raised by the appellant even in the assessment order and therefore there has been non observance of the directions of Hon'ble Supreme Court in M/s GKN Driveshafts (Supra). Accordingly, in view of the above discussion the Ground No. 3, 4 & 6 which are essentially against the reopening u/s 148 is allowed in favour of the appellant. However the appeal is also decided on merits in the succeeding paras."

6. Thereafter on merits he noted that Ld. CIT (A) II – Agra vide his order dated 28.1.2010, first of all has corrected the amount of Rs. 5,14,88,000/- to Rs. 1,19,68,500/- as this was the actual figure

worked from Annexure A-2 and held that the income from all these annexures shall be assessed in the hands of Shri Kamlesh Gupta in assessment year 2006-07. The relevant observation and finding of Ld. CIT(A) II Agra and also the observation and finding of the Ld. CIT(A) while deleting the addition of the merits reads as under :-

XXX The relevant part of CIT(A)-II, Agra finding while deciding the case of Sh. Kamlesh Gupta for AY 06-07 has been cited by the appellant in his submission and which is reproduced as under.-

"The Ld. CIT(A) thoroughly elaborated the matter of Annexure A-2 to A-I 0 particularly pages of 3,4,5,6,7,8,9,10 of Annexure A-2 on page 14,15,16 & 17 and observed that:-

"I am of the opinion that transaction as per annexure A -2 is nothing but outside books transaction related to Mr. Kamlesh Gupta because Sh. Kamlesh Gupta himself accepted the transaction of page no. 6,7 & 8 of Annexure A -2"

In the last page, the Ld. CIT (A) further observed and directed as under:

"Since, I hold the ownership of the seized papers particularly A -2 and others annexures in the hands of the assessee instead of M/s Rim-Jhim Ispat Ltd., therefore, this resulted into enhancement of income. The AO is directed to modify the assessment accordingly after and assessment order dated 08-12-208 is modified in view of the decision given by me hereinabove.

In view of the above facts the AO is directed to modify the assessment and work out the gross profit on the sales as per

above annexure which has been treated as commission income. The quantum of sale value as per annexure A-2 work out to Rs. 1,19,68,5001- on this quantum of sale as per annexure A-2, GP rate as per assessment order shall be applied by AD instead of commission income worked out at Rs. 81,0001-. The figure of annexure A-2 is also directed to be modified accordingly, thus, appeal is allowed in part.

The appellant has inter alia also submitted that Sh. Kamlesh Gupta has never admitted before the survey party that these transactions noted in Annexure belonged to any other party including the principal supplier like Rimjhim Ispat Ltd. That the transactions as per the copy of account of the company were not cross tallied, date wise, amount wise , quantity wise and rate wise found in Annexure A-2 from Sh. Sanjay Khandelwal . That there is no corroborative evidence found from the possession of Sh. Kamlesh Gupta and Sh. Sanjay Khandelwal on which the AO has supported the department's theory of under billing by the appellant. The appellant has also 'relied on the affidavit of Sh. Sanjay Khandelwal regarding the ownership of the seized diary and regarding the contents of the diary. That on a perusal of the Annexure A-2, it no where shows the name of Rimjhim Ispat Ltd. and that the theory of codification is also imaginary. In fact this Annexure is a dumb document not written in the hand writing of Rimjhim Ispat Ltd. but an employee of Sh. Kamlesh Gupta. That there is no direct and indirect evidence of unaccounted sale in the form of under billing by Rimjhim Ispat Ltd rather it is out of assessee's own

business which he is doing independently in addition to consignment sale of Rimjhim Ispat Ltd., Therefore, all the transactions as per Annexure - A-2 to A-10 have been held to be belonging to Rahul Ispat's own business and not that of others like Rim Jhim Ispat Ltd. The Ld. CIT (A) further held that transaction as per annexure A2 mentioned at Sl. No. 1,2,3,4,5,6,7,8,9 & 10 and other annexures belongs to him.”

I have carefully gone through the above submissions made by the appellant as also the order of CIT (A)-II, Agra in case of Sh. Kamlesh Gupta wherein he has held that the seized Annexure A-2 is outside books transactions of Mr. Kamlesh Gupta. The Learned CIT has also got re worked the quantum of sale value as per Annexure A-2 which works out to Rs. 1,19,68,5001-. I have also carefully perused the notings on pages 3 ,4,5,9 & 10 of Annexure A-2 and have not noticed the name of the appellant on these pages.

Further the appellant has submitted on 12.05.11 that even if for argument sake it is presumed that the notings on these pages relate to the assessee company then also the alleged receipt works out only to Rs. 1,19,68,5001- while the total consignment sale by the assessee to Sh. Kamlesh Gupta during AY 06-07 is for an amount of Rs. 56.42 Crores which is a much higher amount than that of the coded figures in above pages which total only to Rs. 1.19 Crores. Now as there are no dates written on these seized documents it cannot be said that these figures represent any unaccounted sales on part of the assessee to M/s Rahul Ispat Ltd. It is also noted that the total turnover of the appellant for AY

06- 07 is to the tune of Rs. 257.19 Crores. Taking all the above factors and submissions into consideration and also going through the assessment order which does not point out to any evidence so as to substantiate the fact that there has been an undisclosed sales by the assessee to the tune of Rs. 5,14,88,0001-, the addition made for this amount is directed to be deleted and Ground of Appeal Nos. 1,2 & 5 are allowed in favour of the appellant. “

7. We have heard both the parties at length and also perused the relevant finding given in the impugned order as well as the material referred to before us. Ld. CIT (DR) has mainly relied upon the information as has been incorporated in the assessment order which was received from ITO Jhansi and submitted that during the course of survey, it revealed that the assessee company was indulged in under billing of sales and simply because the addition has been confirmed in the hands of Shri Kamlesh Gupta that does not absolve the assessee company to explain its state of affairs and how the under billing has not been done. On the other hand contention of the Ld. Counsel for the assessee was that, *firstly*, the assessee right from the stage of the AO has denied such transactions and proved that the transactions which have been noted in annexure A-2 does not pertain to the assessee; *secondly*, in the case of Shri Kamlesh Gupta the addition on the same transaction has been confirmed which has attained finality; and *lastly*, he informed that no appeal has been filed by Shri Kamlesh Gupta before the Tribunal. Thus, no addition can be made in the hands of the assessee company at all.

8. First of all, we find that the Ld. CIT (A) has quashed the entire proceedings u/s 148 and held that the proceedings are not valid, which is evident from the relevant portion of the Ld. CIT(A) incorporated above. Before us though the revenue has challenged the observation and finding of the Ld. CIT(A) that reopening is valid vide ground No.1, however nothing has been brought on record to controvert the finding of the Ld. CIT (A) that there was any document found that the assessee was doing any under billing especially when the transaction has been owned by the employee of Shri Kamlesh Gupta and further what was the information and material after correlating the documents found during the survey with that of the assessee, on the basis of which AO has applied his mind that it is a fit case for reopening the case u/s 147. The material and the information on the basis of which assessment is sought to be reopened should not only be relevant but also should have live-link nexus with the income chargeable to tax escaping assessment. There is no iota of material against the assessee *qua* the papers which was found from the possession of the third person or there is any reference of the assessee doing any clandestine activity in connivance with Shri Kamlesh Gupta especially when the said person has owned up the entire transaction. Without any cross examination of Shri Kamlesh Gupta, the information and material does not have any relevant bearing to draw any adverse inference against the assessee. Accordingly, we uphold the order of the Ld. CIT (A) in allowing the validity of reopening u/s 148 in favour of the assessee.

8. When the issue of validity of reopening under section 148 has been held in favour of the assessee, then the issue on merits becomes

academic, however for the sake of convenience and looking to the fact that similar addition has been made in the assessment year 2004-05 and 2005-06 also, we would like to deal the addition on merits. First of all, it is noticed that during the course of survey 133A in the case of proprietorship concerns of Shri Kamlesh Gupta, a pocket diary was found from the possession of his employee, Shri Sanjay Khandelwal. The said diary contains certain transactions carried out by M/s. Rahul Ispat to various parties outside Jodhpur on behalf of M/s. Rimjhim Ispat Ltd. i.e., the assessee company. The quoted figure on pages 3,4,5,9,10 of said annexure-A2 comes to Rs. 5,14,88/-, which after multiplying with 1000 will result into the figure 5,14,88,000/-. This is the exact amount which has been added by the AO in the impugned order. Now in the case of Shri Kamlesh Gupta from the assessment stage to first appellate stage it has been found that these transactions relate to Shri Kamlesh Gupta only and the amount of Rs.5,14,88,000/ is only Rs. 1,19,68,500/- and the entire amount has been added in the case of Shri Kamlesh Gupta as noted above. Apart from that, there is also a finding of fact that Shri Kamlesh Gupta never admitted either before the survey party or before the AO during the course of his assessment proceedings that the transaction noted in the annexure A-2 belong to any other party including the assessee. There was no corroborative evidence *qua* the assessee that assessee has been resorting to any kind of under billing. After appreciation of the facts and material on record the addition has been deleted by the Ld. CIT(A) in the hands of the assessee and therefore, we do not find any infirmity in such an order of the Ld. CIT(A) and accordingly, same is affirmed and consequently the revenue's appeal is dismissed.

9. In the cross objection it has been submitted that it has been filed in support of the order of the Ld. CIT(A) and hence no adjudication is required, therefore, same is dismissed as infructuous.

10. Now coming to the appeal to the assessment year 2004-05 and 2005-06, we find that similar grounds have been raised in both the years and for the sake of ready reference the grounds of appeal raised by the revenue for the assessment year 2004-05 reads as under:-

1. *“On the facts and in the circumstances of the case, the CIT(A) has erred on facts and in law in holding that the reopening of assessment on the basis of the report of Assessing Officer of sh. Kamlesh Gupta was not justified as the name of the assessee was not mentioned anywhere in the documents impounded during the survey despite the facts that in his statement recorded during survey under section 133A on 22.09.2005, Sh. Kamlesh Gupta had categorically stated that he was working as consignment agent of M/s Rim Jhim Ispat Ltd. on commission basis and had no other source of income.*
2. *On the facts and in the circumstances of the case, the CIT (A) has erred on facts and in law in holding that the transactions mentioned at page number 3,4,5,9 and 10 of Annexure 2 do not belong to the assessee company despite the fact that Sh. Kamlesh Gupta had admitted during the survey that he had no other source of income from consignment work of M/s Rim Jhim Ispat Ltd.*
3. *On the facts and in the circumstances of the case, the CIT (A) has erred on facts and in law in holding that the assessee was not involved in under billing of SS flats ignoring the evidence in the form of documents as per annexure A-2 and A-7 found during survey u/s 133A at the business premises of M/s Rahul Ispat (Proprietor Kamlesh Gupta), Jodhpur.*

11. Exactly same grounds have been raised in assessment year 2005-06 also. The common finding given by the Ld. CIT (A) is again based on the appellate order of the Ld. CIT(A) Agra in the case of Shri Kamlesh Gupta. The relevant observation and finding of the Ld. CIT(A) in this regard reads as under :-

“Findings: - I have perused the Assessment order, written submission & argument of Ld. AR before me. Ld. AR filed copy of all impounded material from the proprietorship business namely Rahul Ispat of Sh. Kamlesh Gupta and contended that these paper does not contain the name of appellant company M/s Rim Jhim Ispat Ltd. On these documents, CIT (A)-II, Agra while deciding the case of Sh. Kamlash Gupta for A.Y. 06-07 cited supra has given categorical finding that the Annexure A2 & other annexure belongs to Sh. Kamlesh Gupta & has estimated Income in his hands. The Department has not filed any appeal against the order of CIT(A)-II Agra. Therefore, the finding of CIT (A)-II, Agra has become final. Following the decision of CIT (A)-II Agra, CIT(A)-III, New Delhi in appellant's own case for A.Y. 06-07 has held that these papers belong to Sh. Kamlesh Gupta proprietor of M/s Rahul Ispat & deleted the addition on merits.

I have perused the appellate order passed by CIT(A)-II, Agra in the case of Sh. Kamlesh Gupta For A.Y. 06-07., relevant portion of CIT(A)'s order is reproduced as under:-

“I have considered the submission of the AR, assessment order, remand report & position of law, in my opinion, the appellant deserves to succeed partly. The contention of the appellant in

connection with transaction as per Annexure A-2 appearing at page no. 1, 2, 3, 4, 5 & 9 as well as 6,7 & 8 are not acceptable because of the following grounds:-

- A. The papers containing the transaction on the basis of commission income has been alleged to be earned is found from the possession of Sh. Kamlesh Gupta and his employees. It is admitted fact that the assessee was doing consignment sales as well as his own business of same nature. This fact is clear from the assessment order where the issue of gross profit rate is discussed. There is a good turnover of his own. The Assessing Officer has failed to confront the consignee namely M/s Rimjhim Ispat Ltd. and Juhi Alloys Ltd. regarding this annexure A-2. It is also admitted fact that all the consignment sales as per copy of account of M/s Rimjhim Ispat Ltd. and Juhi Alloys Ltd. were cross verified from the assessee's books of account. TDS has been deducted by the consignee.*
- B. In the assessment proceedings it has not been asserted by the assessee or any corroborative evidence were found to suggest that the alleged transaction as per annexure A-2 were related to Rimjhim Ispat Ltd. and Juhi Alloys Ltd.*
- C. That the Assessing Officer has made assumption to assess only commission income over and above the transaction recorded as per annexure A-2. He has not brought any evidence on record except simply relying upon the Investigation Report that the transaction as per annexure A-2 related to M/s Rimjhim Ispat Ltd. and not to the assessee. Unless he decides the ownership of the transaction and papers found, the assessee cannot*

escape to be treated as owner of the transaction and papers found,

The assessee cannot escape to be treated as owner of the transaction as per annexure A-2 instead of M/s Juhi Alloys Ltd is supplying the goods on consignment, this company cannot be held to be owner of unrecorded transaction unless there is some valid nexus. The assessee has no relationship with the M/s Rimjhim Ispat Ltd or his directors, he himself was doing business independently dealing in the same trade. Therefore, he cannot escape himself to be the owner of the transaction as per annexure A-2.

I am of the opinion that transaction as per annexure A-2 is nothing but outside book transaction related to Mr Kamlesh Gupta because Sh. Kamlesh Gupta himself accepted the transaction of page no. 6, 7 & 8 of annexure A-2. Thus, the Assessing Officer should have assessed all the transaction of A-2 and other as undisclosed sales and gross profit should have been applied instead of commission income in his hand The A.O. has also wrongly allowed expenses on commission expenses which are on higher side and not allowable. It can be allowed only in the hands of assessee after ascertaining the gross profit of undisclosed turnover. Since this was a case of enhancement of income, the assessee was given a show cause notice to explain as to why the content of transaction of A-2 and another annexures of the same type of transactions shall not be treated as exclusively belonging to him instead of M/s Rimjhim Ispat Ltd and also why gross profit rate shall not be applied as per trading results as per assessee's

own business results. The assessee has filed a reply dated 21-07-2009 and has relied upon only explanation as per written submission filed earlier and, has not challenged or rebutted my above show cause. In absence of clear evidence that the transaction as per A-2 and other similar annexures belongs to M/s Rimjhim Ispat Ltd and not to the assessee. I hold that transaction as-per annexure A-2 mentioned at SI. No. 1, 2, 3, 4, 5, 6, 7, 8, 9 & 10 and other annexures belongs to assessee himself. This shall be considered assessee's own business transaction and, hence, not recorded in his regular books of account. The sales as per the annexure shall be considered for quantification of sales and GP rate as per assessee's trading rate accepted by the Department shall be applied and expenses may be allowed at the ratio while considering commission shall be adjusted.

Since, I hold the ownership of the seized paper particularly A-2 and others annexures in the hands of assessee instead of M/s. Rimjhim Ispat Ltd., therefore, this resulted into enhancement of income. The AO is directed to modify the assessment accordingly after and assessment order dated 08-12-2008 is modified in view of the decision given by me hereinabove.

Facts of case are same. In fact in the Assessment order the Assessing Officer has mentioned that unaccounted sales in appellant's case is for A. Y. 06-07 as quoted supra & has not specified & correlated even any material found & impounded in the case of M/s Rahul Ispat to appellant company for unaccounted income for A.Y. 05-06. Therefore, I have no reason to differ from the findings of Ld. CIT(A)- H, Agra in the case of Sh. Kamlesh Gupta for

A.Y. 06-07 & CIT(A)-II, New Delhi order for A.Y. 06-07 in assessee's own case that the paper found in the case of M/s Rahul Ispat does not relate to appellant's company. Accordingly following the decision of CIT (A) - III in assessee's own cases for A. Y. 06-07. I direct AO to delete the addition made on unaccounted sale of Rs. 21,12,20,680/”

12. Since similar facts are permitting in this year also, we like in the appeal for the AY 2006-07 find that, *firstly*, no evidence whatsoever was found from the department suggesting that assessee was indulged in any kind of under invoicing of sales for the year under consideration; *secondly*, assessee's name does not found place in the documents found and seized from the possession of Shri Kamlesh Gupta; *thirdly*, no confrontation or documents from the possession of employee Shri Kamlesh Gupta has been found nor any cross examination of Shri Kamlesh Gupta has been done; and *lastly*, in the case of Shri Kamlesh Gupta it has been found that these documents pertain to him and is unrelated to the assessee and adverse inference has already been drawn there against him in the appellate order which has been stated to be final. In the light of these facts on record and in view of our finding given above the aforesaid findings of the Ld. CIT (A) on the issue of quashing the notice u/s 148 and on merits cannot be tinkered with and the same is affirmed.

13. Thus, the all the grounds raised by the Revenue are dismissed both for the assessment year 2004-05 and 2005-06. In the result all the appeals of the revenue are dismissed and also the assessee's cross objection.

ITA No.3756/Del/2011
Co No. 320/Del/2011
ITA Nos. 640,641/Del/2013
ACIT vs. M/s. Rimjhim Ispat Ltd.
M/s. Rimjhim Ispat Ltd. vs. ACIT
DCIT vs. M/s. Rimjhim Ispat Ltd.

Order pronounced in the open court on 5th December, 2017.

Sd/-

**(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER**

sd/-

**(AMIT SHUKLA)
JUDICIAL MEMBER**

Dated: 5th December, 2017

Veena

Copy forwarded to

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

ASSISTANT REGISTRAR
ITAT, New Delhi