

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "F", NEW DELHI
BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER
AND
SHRI L.P. SAHU, ACCOUNTANT MEMBER

ITA Nos. 729 & 730/DEL/2016
A.Yrs. 2008-09 & 2009-10

DCIT, Central Circle-18,
NEW DELHI
ROOM NO. 102, ARA Centre,
E-2, Jhandewalan Extn.,
New Delhi
(APPELLANT)

VS. M/s Gupta & Co. Pvt. Ltd.
68, Scindia House,
Connaught Place, New Delhi-1
(PAN AAACG1978N)
(RESPONDENT)

AND

CROSS OBJECTION NOS. 150 & 151/DEL/2016
(IN ITA Nos. 729 & 730/DEL/2016)
A.Yrs. 2008-09 & 2009-10

M/s Gupta & Co. Pvt. Ltd.
68, Scindia House,
Connaught Place, New Delhi-1
(PAN AAACG1978N)
(Appellant)

VS. DCIT, Central Circle-18,
NEW DELHI
i
(Respondent)

Department by : Smt. Sulekha Verma, CIT(DR)
Assessee by : Sh. Arvind Kumar, Adv.

ORDER

PER H.S. SIDHU, JM :

These appeals by the Revenue and Cross Objections filed by the Assessee are directed against the respective Orders of the Ld. Commissioner of Income Tax (Appeals-35), New Delhi pertaining to Assessment Years 2008-09 & 2009-10. Since the issues involved in these appeals and cross

objections are identical, hence, the same are being disposed of by this common order for the sake of convenience, by first dealing with ITA No. 729/Del/2016 (AY 2008-09) wherein the following grounds have been raised :-

1. *That the Commissioner of Income Tax Appeals has erred in law and on facts of the case in restricting the additions of Rs. 7,45,501/- and giving a relief of Rs. 76,10,799/- to the applicant out of the total addition of Rs. 83,56,300/- which was made to the income of the assessee on account of undisclosed income.*
2. *That the Commissioner of Income Tax Appeals has erred in law and on facts by restricting the addition made only to the amounts mentioned in the seized documents and ignoring that these documents acted as a base for rejecting the books of accounts and doing further estimation of unaccounted income.*

2. The facts of the case are that there was search operations conducted against the assessee and its Directors on 10.02.2009. During the course of search, certain papers were seized from the residence of Mr. Virendra Kumar Gupta (VK Gupta), one of the Directors of Assessee Company. Subsequently, proceedings were initiated u/s 153A of the Income Tax Act, 1961 for the A.Y. 2003-04 to 2008-09 and normal assessment proceedings u/s 143(3) for A.Y. 2009-10. The department used the notings on papers marked as A3, A6 seized from the residence of Sh. V.K. Gupta, the director, A-11 seized from the corporate office of the Assessee and Annexure A-5 from the factory premises of the Assessee. The notings in these papers allegedly contained details about sales and receivables, from which the Assessing Officer could cull out unaccounted sales. Post search the assessee's stand was that these notings pertain to sister concern M/s Gupta Perfumers P. Ltd. and not to the assessee company. While the search assessments were pending, the sister concern M/s Gupta Perfumers P. Ltd. decided to approach Settlement Commission on 25/05/2009, wherein the declaration of income was made pertaining to assessment years 2005-06 to 2009-10. The Settlement Commission admitted M/s Gupta Perfumers P.

Ltd. application u/s 254 D(2C) for all the assessment years except for A.Y. 2006-07 on the ground of there being no pendency of proceedings for that year. Thereafter, after hearing both the parties and on the facts of the case, Settlement Commission passed an order u/s 245D(4) wherein it refused to accept that the papers in question belong to M/s Gupta Perfumers P. Ltd., however it decided to accept the declaration made by that party, on the ground that an application once made cannot be withdrawn u/s 254C(3). It, meanwhile, left the question of ownership of documents open. The relevant portions of the orders are reproduced below:

"89) From the above discussion, we come to the irresistible conclusion that the seized papers do not belong to the applicant.

90) We are, therefore, unable to accept the applicant's contention that the seized papers belong to it. Without entering in to the correctness or otherwise of the income offered on the basis of these papers, we hold that the department will be free to take appropriate action in appropriate hands for taxing the income contained in the seized papers referred to in the SOF. We also add that the department will be free to work out the correct income contained in these documents "

The order further goes on to say

"91) Section 245C(3) states that an application made, under sub- section (i) shall not be allowed to be withdrawn by the applicant. Thus, the settlement application filed cannot be allowed to be withdrawn even when it is held that the seized papers on which the applicant has based its computation of income do not belong to it."

2.1 The matter thereafter travelled to Hon'ble Delhi High Court, mainly on the ground that the order of the Settlement Commission is inconclusive and contradictory, particularly as per observation contained in the paras reproduced earlier. However, the Hon'ble Delhi High Court in its decision dated 18/05/2012 upheld the decision of Commission in entirety. It observed that the assessee should not have any grievance if the Commission holds that the paper in question can be used against third party because the Commission's order cannot become a shield to any third person (para17 of the order). It also held that the order was complete and conclusive as far as the petitioner was concerned. The third person was not before the Commission. The Commission's Order needed to be conclusive as far as the Petitioner is concerned and it need not go in to the question of undisclosed income earned by the third parties. (Para 18 of the Hon'ble High Court Order)

2.2 On the issue of M/S GUPTA PERFUMERS P. LTD's. grievance that the Commission should have rejected its application in such circumstances, the court held that the argument needs to be rejected on the principle of approbate and reprobate. It held that Settlement Commission has accepted the full disclosure made by the assessee, though there was dispute between the ways it has been earned. Since the assessee is insisting that he has made full and true disclosure, it cannot turn around and ask for rejection of its application on the ground of a specific finding of the Commission with respect to the papers. The court also referred to the facts that the Revenue has also accepted the order (Para 19 and 20 of the High Court Order).

2.3 M/S GUPTA PERFUMERS P. LTD. has filed Special Leave Petition dated 23/08/2012 to the Hon'ble Supreme Court challenging the order of the High Court. The matter is pending.

2.4 Meanwhile on the present assessee's front, the Assessing Officer completed the assessments for A.Y. 2003-04 to 2009-10. While doing so he had the benefit of the aforesaid order of the Settlement Commission and The Hon'ble Delhi High Court, and therefore utilized the findings of the Commission as supported by Delhi High Court to reject the assessee's claim of the papers not belonging to the assessee but to M/s Gupta Perfumers P. Ltd., since the papers had been found from assessee's premises and has ostensible correlation with entries in the regular books of accounts. The Assessing Officer decided to make additions arising out of these papers in assessee's hands only. The year wise additions were as follows:-

S.No.	A.Y	Additions of account of undisclosed income
1	03-04	52,42,750
2	04-05	47,28,000
3	05-06	45,94,700
4	06-07	42,70,900
5	07-08	53,50,300
6	08-09	83,56,300
7	09-10	1,12,14,300
	Total	4,37,57,250

2.5 The CIT(A) while adjudicating on the issue of income arising out of the unaccounted sales/ excess stock gave relief to the assessee. The unaccounted income worked out by CIT(A) for various years were as follows:

A.Y	Income Rs.
2003-04	Nil
2004-05	Nil

2005-06	98,014
2006-07	95,977
2007-08	45,466
2008-09	7,45,501
2009-10	54,85,091

2.6 It is in the above background that the department has filed appeal for A.Y. 2003-04 to 2009-10, while the assessee came up in Cross Objections for the assessment years 2005-06 to 2009-10.

2.7 Prior to hearing of these appeals, the departmental appeals for the A.Y. 2003-04 to 2007-08 got dismissed on the ground of low tax effects keeping in view the Circular no.3 of 2018 dated 11.07.2018 issued by CBDT under section 268A of the I.T. Act. The Assessee's cross objections were also dismissed in these years as being related to the main appeals . However we were informed that the assessee has moved for restoration of those cross objection. The issue raised being independent of the main appeals. The matter is apparently pending. For the years under our consideration, the tax effect of the departmental appeals being above the threshold level, the same have been taken up to decide on merits.

2.8 Reading of the assessment order reveals that the addition in context of undeclared sales and consequently undeclared income is primarily based on Annexure A-3, A-5, A-6 and A-11. Rejecting the Assessee's contention that the papers belong to M/s Gupta Perfumers P. Ltd., the assessing Officer went about verifying the notings on the papers of above referred Annexures. He found that while there were certain sales recorded which do not at all feature in regular books of accounts and there were also some other sales which were partially reflected in regular books of accounts. He came to hold that this is a modus operandi used by the company regularly, not only in the search years concerned but in other years as well. Thereafter in order to

compute the quantum of undisclosed sales, he worked out ratio of such undeclared portions to declared portion of sales, which came out to be 2.96:1. He then applied it to the total sales declared and took such extrapolated sales as the true sales. To compute profits, he took the G.P. rate as declared by the tax audit report of the respective years, except for A.Y. 2009-10 (which is discussed when that year is taken up). For the current year under consideration, the G.P. rate adopted was 30.59% and the total unaccounted sales estimated at Rs. 2,37,17,000/- and the consequently unaccounted income at Rs. 83,56,300/-. The Ld. CIT(A) while deciding this ground, held as follows:-

" 6.3.4 I have considered the additions made by the Assessing Officer in this regard as well as arguments of the Appellant. In my considered view, documents found in the search clearly show accounted as well as unaccounted sales and unaccounted sales matched with accounted sales recorded in the books. There appears to be no reason to doubt the invoiced sales as recorded in the seized documents as they matched with the invoice sales in the books. On the same analogy, there is no reason to doubt that unaccounted sales are understated. The Ld. Assessing Officer ought to have given a finding by thoroughly examining the invoiced part of sales and comparing it with the books of accounts to show that accounted/invoiced sales are understated therefore a presumption could be raised that unaccounted/uninvoiced sales are also understated. But once having come to the conclusion that accounted sales recorded in the seized documents matched with books of accounts and there is no understatement, then no presumption can be made that unaccounted sales are recorded in the seized documents are

understated. A document found in the search has to be read as whole and it should be accented as correct unless contrary is proved. For this, reliance is placed on the following judgments:

- ***Dhanvarsha Builders and Developers (P.) Ltd .v. DCIT, SR-2, Aurangabad [2006]102ITD 375 (PUNE)*** : Seized document should be read as a whole if it has to be relied upon for computing undisclosed income of assessee in a proceeding under section 1588C. They cannot be read in bits and parts to suit the convenience of one party or the other.
- ***Assistant Commissioner of income-tax v Omprakash and Co. [2004] 2 SOT (MUM.)***: Papers seized during search have to be read as a whole and each figure mentioned therein has to be given interpretation by adopting same standards. While deciding documents, found during search, departmental authorities cannot pick up certain figures from one document and tally them with other documents.
- ***Vivek Kumar Kathotia v. Deputy Commissioner of income-tax [2013] 32 taxmann.com 331 (Kolkata - Trib.)*** . It is a settled legal position that the seized documents are required to be read as a whole i.e. accepted or rejected as a whole.
- ***CIT v. D.D. Gears Ltd, [2012] 25 taxmann.com 562 (Delhi)*** : The seized material is to be considered as a

whole and not selectively. Therefore both income part and expenditure part reflected in seized material has to be taken note of.

6.3.5 The Hon'ble Gujarat High Court in CIT v. Standard Tea Processing Co. Ltd [2013] 34 taxmann.com 31 (Guj.) on which Ld. A.R. has relied, has held that it is not correct to extrapolate the income on the basis of Modus Operandi without there being any evidence of material on record.

6.3.6 In the present case since the seized Diary A-5 is complete in itself as a record of both accounted as well as unaccounted sales and there is no material on record to suggest that appellant has further made sales over and above the sales recorded in the seized documents, I do not consider it justified to extrapolate the sales and infer that appellant has made sales over and above the sales found recorded in the seized documents. Accordingly, addition must be confined only on income arising from unaccounted sales recorded in the seized documents and the extrapolation so made by the Ld. AO, is hereby dismissed.

6.3.7 I also observe that the Ld. A.O has adopted G.P. rate on the basis of audit report of respective years. No specific argument has been taken by Ld. A.R. as to how the application of G.P. rate on the basis of Audit report is incorrect except submitting that N.P. rate should be applied in place of G.P. rate. In absence of any cogent reason or material submitted by the Appellant, I do not find any justification to interfere with the

application of GP rate on the unaccounted sales for working out undisclosed income. This action of the A.O is partly upheld.

6.3.8 On the basis of above discussion and adjudication, the unaccounted income calculated on the basis of unaccounted sales recorded in the seized documents and after applying G.P rate as per Audit report is worked out as under:

A.Y	Unaccounted sales as Per seized documents	GP rate %	Income Rs.
<i>1</i>	<i>2</i>	<i>3</i>	<i>4</i>
2003-04	NIL		NIL
2004-05	NIL		NIL
2005-06	4,05,519/-	24.17	98,014/-
2006-07	4,11,035/-	23.35	95,977/-
2007-08	1,44,983/-	31.36	45,466/-
2008-09	24,37,076/-	30.59	7,45,501/-
2009-10	2,11,82,627/-	25.88	54,82,064/-
TOTAL	2,45,81,240/-		

Applying GP rate of 30.59% on unaccounted sales of Rs. 24,37,076/-undisclosed income is worked out at Rs7,45,501/- in the AY 2008-09 The appellant get a relief of Rs. 76,10,799/-".

3. Against the decision of the Ld. CIT(A), Revenue is in appeal before us. The Ld. DR relied upon the order of the assessment order and emphasised on the issue that the notings on the papers seized showed the modus operandi being followed by the assessee. Part of the notings gets reflected in the regular books of accounts and therefore in all probability the non disclosure of sales is spread over the entire sales in a regular manner. He also drew attention to the fact that such notings have been found in more than one year.

4. On the other hand, the Ld. AR of the assessee strongly relied on the order of the Ld. CIT(A). According to him, the assessee still holds that these papers do not belong to the assessee and notings thereon do not pertain to it. He reiterated that these papers belong to M/s Gupta Perfumers P. Ltd. However in the eventuality of the papers and the notings on these papers being held to be belonging to the assessee, he stated that there were a large number of decisions, holding the Ld. CIT(A)'s stand, that on the basis of mere notings on the papers seized, one cannot lead to the presumption that entire sale is understated, unless there is other documentary evidence.

5. We have heard both the parties and perused the records, especially the impugned order of the Ld. CIT(A). We note that the judicial position on this issue is quite clear. It is the seized material which gives rise to quantification of unaccounted sales and consequently unaccounted income. The seized material in the instant case contains notings in respect to certain unaccounted sales, namely with respect to 59 parties. The assessment order does not bring on record any such seized material which shows sales out of the books corresponding to each and every sale. Since section 153A of the Act gets invoked only with respect to the incriminating material found during the course of the search, clearly extrapolation without any incriminating material would be contrary to the spirit of the section. There are a large number of judicial decision on the issue, including the ones quoted by the Ld. C.I.T(A) which support this view. The objections of the AR with respect to the ownership of the document, the present position of litigation and its consequences in our context, are being discussed later in the Cross Objections of the assessee. But clearly these will not be material for the grounds raised by the department. Hence in the facts and circumstances of the case, we do not find any infirmity in the order of the Ld. CIT(A) on this issue, therefore, we uphold the order of the Ld. CIT(A) and confirm the relief

granted by him. Accordingly, the appeal filed by the Revenue for the assessment year 2008-09 stands dismissed.

ASSESSEE'S CROSS OBJECTION NO. 150/Del/2016 for A.Y 2008-09

6. Ground No. 1 and 2A of cross objections are taken up together, being inter connected. These are as follows:-

1. On the facts and in the circumstances of the case, the learned C.I.T. (Appeals) erred in confirming addition in respect of the alleged unaccounted income calculated on the basis of unaccounted sales allegedly recorded in the seized documents, to the extent of Rs.7,45,501.
- 2.(a) On the facts and in the circumstances of the case, the learned C.I.T. (Appeals) erred in holding that the relevant seized documents including Annexures A-3, -A5, A-6 and A-11 and the transactions recorded therein belong to the Respondent-company by rejecting the submissions made before him that the said documents actually belong to M/s. Gupta Perfumers Pvt. Ltd.

6.1 The stand of both the parties with respect to the above referred grounds of appeal stand summarized in the earlier paragraph pertaining to department appeal for the A.Y. 2008-09. The same were reiterated while discussing the present Cross Objections as well. The Ld. AR led us through the facts of the case which we have discussed in the initial part of the order. To reiterate while the assessee is holding that the papers seized in question belong to M/s Gupta Perfumers P. Ltd. and the income arising out of that has been offered to tax before the Settlement Commission. The same has not been accepted by the Settlement Commission. The order of the Settlement Commission stands upheld by the Delhi High Court and the matter is pending before Hon'ble Supreme Court. As per the A/R the tribunal can take the decision on the issue of ownership of the documents because the order of the Settlement Commission, as supported by that of the High Court, only

gives a finding with respect to the papers not belonging to M/s Gupta Perfumers P. Ltd. It was stated that in fact the question has specifically been kept open by Settlement Commission for the assessing authority to determine as per para 90 of its order. According to him the explanation given by the assessee before Settlement Commission holds good, namely that the assessee and M/s Gupta Perfumers P. Ltd. being involved in same business and with almost same set of customers, the notings in the papers pertains to M/s Gupta Perfumers P. Ltd. on the basis of the assertion of the concerned Director. Therefore he insisted for a finding on the issue.

6.2 The Ld. DR on the other hand referred to the order of the Settlement Commission and Hon'ble Delhi High Court to argue that the assessee group's stand is untenable as the papers have been found from the assessee's premises and do not bear any indications of pertaining to M/s Gupta Perfumers P. Ltd.

6.3 We have heard both the parties and perused the records. The papers in question do not belong to M/s Gupta Perfumers P. Ltd. The assertion of M/s Gupta Perfumers P. Ltd. has not been found to be acceptable by the Settlement Commission and Hon'ble Delhi High Court. The papers were found from the assessee's business premises as well as its Director's residence. Neither any other party other than M/s Gupta Perfumers P. Ltd. has owned up these papers nor any such reference has been found in the narrations. Therefore the undisclosed sales and consequently the undisclosed income attributable to the assessee appears to be a reasonable decision in the circumstances. Hence the addition of Rs. 7,45,501/- is upheld and assessee's Cross objections 1 and 2A is rejected.

6.4 Ground No. 2(b) of the cross objection is as follows:-

2(b) Without prejudice to the foregoing ground No.2(a), it is submitted that if the seized documents are held as belonging to the Respondent-company and not to M/s. Gupta Perfumers Pvt. Ltd., then the income-tax paid by M/s. Gupta Perfumers Pvt. Ltd. on any unaccounted income determined on the basis of such seized documents, should be treated as income-tax paid by the Respondent-company and credit thereof should be allowed in the case of the Respondent-company."

6.5 Similar issue was raised before Ld. CIT(A) and he decided the issue in the following manner:-

"6.4.12 It is submitted that the concept of protective and substantive assessment springs up from the dispute between the assessee and the department as to the ownership over an income. If an assessee considers that a particular income belongs to it, then he may declare such income in its return and pay the taxes thereon. On the other hand the assessing authority may find that such income does not belong to the assessee by to "other person" than he will make a protective assessment in the hands of assessee and a substantive assessment in the hands of the " other person", which the assessing authority thinks is the real owner of the income and he should be taxed thereon. When it is finally held that such income belongsto one person, either assessee or the "other person", then assessment made in the hands of other party will become non-est or a paper assessment. So long as finality to the issue of ownership over the income is not settled, both the assessment will survive but no recovery can be made from the person in whose hands a protective assessment is made. From the AO's point of view, the assessment made in the hands of M/s Gupta

perfumes should be considered as a protective assessment (as he does not agree that disputed income belongs to M/s Gupta Perfumes) and assessment in the hands of M/s Gupta & company should be considered as substantive assessment (as AO thinks that disputed income belongs to M/s Gupta & Company). However, this categorization is not sacrosanct and whenever finality is achieved, say protective assessment is held as final, there cannot be a valid existence of other assessment which is initially claimed as substantive assessment. In the present case, incidentally the assessment of the income arising from the seized documents has attained finality in the hands of M/s Gupta Perfumes by virtue of section 245 I as result of order of Hon'ble Settlement Commission passed under section 245 D(4). This finality has been confirmed by Hon'ble Delhi High Court as this order has neither been reversed, set-aside nor declared void. Even though there are comments and observations in the order passed u/s 245 D(4) or by Hon'ble Delhi High Court thereafter, as to who would be the owner of the income reflected from the seized documents (indicating indirectly that appellant M/s Gupta & Company would be the owner and such income should have been assessed in its hands, still leaving the issue of ownership of such unaccounted income) but they have not disturbed the finality if the order made in hands of M/s Gupta Perfumes. Therefore, unless there is an option with the appellant company, M/s Gupta Perfumes or the department to unsettle the finality of the order which is apparently protective as the department has not accepted the ownership of the unaccounted income in the hands of M/s Gupta Perfumes but in absence of any chance of disturbing the finality of the order U/s

245 D(4) then the assessment framed as a consequence to order u/s 245 D(4) in the hands of Gupta Perfumes becomes substantive and taxes are recovered from it. Therefore assessment framed in the hands of the appellant is merely a protective assessment. There cannot be two substantive assessments of the same income in the hands of two persons. One assessment has to be void. Income Tax Act nowhere provides that same income can be assessed in the hands of two persons. It is one thing to say that AO can make two assessments one substantive and other protective and it is another thing to say that they could not only make the assessment in respect of one set of dues but proceeds to realize both. (Refer: Lalji Haridas v. ITO (1961) 43 ITR 387 (SC): Banarsi Das v. CWT (1970) 76 ITR 104 (All)). It is further held that until there is a final assessment in existence, the raising of alternative assessment by the revenue cannot be prevented. But where a final assessment is in existence (order u/s 245 D(4) in the case of M/s Gupta Perfumes) is it legal to proceed to make an alternative assessment in the hands of appellant company it is for authorities to clearly decide which is substantive assessment is and which protective assessment.”

6.6 Before us, the Ld. A/R argued that if the decision in Ground No. 1 and 2A is in favor of the department i.e. the Tribunal were to hold that the papers belong to M/s Gupta Perfumers P. Ltd. and the addition was to be sustained in its hands, this will tantamount to taxing the same income twice, once in the hands of M/s Gupta and Co. P. Ltd., once as per present proceedings emanating from the orders of the Assessing Officer u/s 153A and another in the hands of M/s Gupta Perfumers P. Ltd. as per Settlement Commission's order dated 10/05/2012. It was stated that the income offered

by M/s Gupta Perfumers P. Ltd. before the Settlement Commission was computed out of the notings of the papers seized during the course of the search on assessee's group, the same on which the Assessing Officer has relied. The fact that Commission decided to tax it because it was offered by M/s. Gupta Perfumers P. Ltd. and still holding that the papers do not belong to M/s Gupta Perfumers P. Ltd., would make it in the nature of a protective assessment. On the other hand the present assessment having given a finding that the papers belong to assessee company would make it a substantive assessment. As per him in such a scenario of protective vs. substantive assessment, only one assessment can survive and taxes can be recovered only against one of the assessment. Therefore the taxes already paid before the Settlement Commission need to be adjusted against the income assessed in the present assessee's hands. Following case laws were quoted to support the concept of liability being limited to one entity in the protective vs. substantive assessment.

1. Banyan and Berry Vs. C.I.T. (1996) 222 ITR 831 (GUJ)
2. C.I.T. vs. Smt. Durgawati Singh (1998) 234 ITR 249 (ALL)
3. Ram Lal Ganpat Rai vs. C.I.T. (1978) 462 (BOM)
4. CWT v. Begum Zahoor Qasim (2001) 248 ITR 482(Del.)

6.6.1 The Ld. AR also highlighted the issue of tax travels with income relying on rule 37BA for the credit of the tax paid on such income i.e. the credit should be given to the person in whose hands the income finally gets taxed and not in whose hands. He cited:-

1. Naresh Bhavani Shah(HUF) vs. Commissioner of Income Tax (2017) 84 taxmann.com53(Gujarat)
2. Parmanad Tiwari Vs. ITO (Kol.) (Trib.) [2015]54 taxmann.com 25 (Kolkatta-Trib.)

3. Commissioner of Income Tax , Delhi Iiv. Malibu Estate – [2007]
164 Taxman 518 (Delhi)

6.7 The Ld. DR relied on the order of the Settlement Commission argued that present assessed income is different from the one that has offered by M/s Gupta Perfumers P. Ltd. before the Settlement Commission. As the papers which were claimed as theirs has been held as not belonging to them.

6.8 We have heard both the parties and perused the records. It is a trite law that the same income cannot be taxed twice. There can also not be any dispute that what was offered to Settlement Commission and what has been taxed by Assessing Officer in the present Assessment Order before us pertain to the same transactions emanating from the seized documents from the assessee's premises. Clearly as the matter stands the Assessing Officer has held that the papers belong to the assessee company and hence the undisclosed income arising out of that belongs to assessee's company on the basis of order of Settlement Commission as upheld by Honable Delhi High Court. We have upheld this position. Nevertheless the fact of the matter is that the issue has not reached finality. The decision of the Hon'ble Supreme Court , as and when it comes , will finally decide the ownership of the documents and hence will take the assessment of the income, so upheld in this order to finality. The ground is therefore disposed of, with the directions to the Assessing Officer to review the status of the income arising out of seized documents, as upheld, once the decision of the Hon'ble Supreme Court is available and realize taxes with respect to the additions upheld, only when the finality of ownership of the documents is put to rest by the decision of the Hon'ble Supreme Court.

7. Ground of Cross Objection No. 3.:-

"3. On the facts and in the circumstances of the case, the learned C.I.T. (Appeals) erred in rejecting the relevant ground of appeal raised by the Respondent-company

against rejection of the regular books of account maintained by the Respondent-company."

8. Since we have upheld the decision of the Ld. CIT(A) with respect to the unaccounted sales as computed on the basis of the notings on seized material, as aforesaid, this ground does not survive. The assessee seems to have kept it open because of its stand that the papers do not belong to it, but as already held, the decision of the Ld. CIT(A), in the facts and circumstances of the case, is reasonably justified, therefore, this ground is rejected.

9. Ground of Cross Objection No. 4.:-

"4.On the facts and in the circumstances of the case, the learned C.I.T. (Appeals) erred in rejecting the relevant ground of appeal raised by the Respondent-company to the effect that instead of applying the gross profit rate for working the profit of the company , only net profit rate should be applied."

10. We note that the issue of taking N.P. rate instead of G.P. rate has not seriously been persuaded either before Ld. CIT (A) or before us. Under normal circumstances, it is a standard practice to use G.P rate of the unaccounted sales as a measure of unaccounted profit, unless circumstances warrant otherwise. Therefore in the facts and circumstances of the case the action of Assessing Officer is confirmed and the ground is rejected.

11. In the result, the Revenue's Appeal ITA No. 729/Del/2016 (AY 2008-09) is dismissed and the Assessee's Cross Objection No. 150/Del/2016 (AY 2008-09) of the assessee is partly allowed.

Departmental Appeal No. 730/Del/2016 for A.Y. 2009-10

12. The following three grounds of appeal have been raised:-

1. *That the commissioner of Income Tax (Appeals) has erred in law and on facts of the case in restricting the addition to Rs. 61,42,176/- and giving a relief of Rs. 50,72,124/- to the applicant out of total addition of Rs. 1,12,14,300/- which was made to the income of the assessee on account of undisclosed income.*
2. *That the commissioner of Income Tax (Appeals) has erred in law and on facts by restricting the addition made only to the amounts mentioned in the seized documents and ignoring that these documents acted as a base for rejecting the books of accounts and doing further estimation of unaccounted income.*
3. *That the commissioner of Income Tax (Appeals) has erred in law and facts by deleting the addition of Rs. 3,71,60,520/- which was made to the income of the assessee on account of investment in excess stock.*

13. As brought out in the initial portion of the order, the facts of the case are practically same over the various years concerned. On the same basis as discussed above, in the Departmental Appeal of assessment year 2008-09, the assessing officer had made addition of Rs. 1,12,14,300/- on account of income arising out of undisclosed sales by extrapolating over the entire sales. However, as distinct from other years, in this year the assessing officer did not take the G.P. rate as available in the tax audit report for the year, instead he took the rate of 33.10% being the maximum rate as per the tax audit report for the period from the A.Y. 2003-04 to A.Y. 2009-10. Thereby he made an addition of Rs. 1,12,14,300/- on this account.

14. The Ld.CIT(A) holding, as in other assessment years that the addition has to be restricted to the income reflected in the seized papers worked out the unaccounted sales at Rs. 2,11,82,627/-. He has further did not agree with the assessing officer's method of not adopting the G.P. rate of tax audit report as the assessing officer had done in another years, by holding that no

reason has been given by him to take such a step. The Ld. CIT(A), therefore adopted the G.P. rate of 25.88%. He also applied the same G.P. rate of 25.88% on "other receipts" amounting to Rs. 25,38,969/-. Consequently, the total addition sustained by the Ld. CIT(A) was Rs. 61,42,176/- and the assessee got a relief of Rs. 50,72,124/-, which does not any interference. Therefore, in consonance with the decision of A.Y. 2008-09, as aforesaid, we find the Ld. CIT(A)'s decision is quite reasonable and in line with the present judicial position. Following the same, we uphold his order and reject the departmental appeal on issue no. 1 & 2.

15. As regards issue no. 3 which is relating to unaccounted stock is obviously relevant to the search year only. On perusing of the assessment order reveals that the search teams valued the stock in hand. On the date of search the closing stock was valued at 17,80,75,800/-. Apparently another sum of Rs. 9,95,600/- lying at factory at Uttam Nagar stood omitted and was also considered by the assessing officer. During the course of statement u/s 132(4) of the Act, Sh. V.K. Gupta, director admitted the difference of physical stock over the closing stock as per books of accounts was Rs. 7,63,95,003/-. However no income was declared in the return filed with respect to this discrepancy. During the assessment proceedings, when confronted the assessee denied that there was any difference between the two values. It was contended that the same was due to the way the stock inventory has been prepared. There was duplication of item No. 1 to 387 and non accounting of excise duty etc. The assessing officer after due verification of the issues raised by the assessee and giving benefit for them, still held the value of unaccounted stock at Rs. 3,71,60,520/-. Before Ld. CIT(A) the assessee contended that although effect to the duplication of items was given by the assessing officer, yet he has not attended to the other mistakes committed while preparing the inventory. It was stated that both the quantity of items and value of items was inflated, so as to extract the

declaration of about Rs. 8 to 9 crores from the assessee. It was strongly argued before the Ld. CIT(A) that given the nature of item assessee is manufacturing, keeping such large number of items in inventory is neither possible nor prudent. The assessee also asserted that no cross verification from any seller was undertaken. The Ld. CIT (A) finally disposed of the issue as follows:-

"7.10.8 After considering the material on record, I tend to agree with the argument of the Ld. A.R. There is a prima -facie substantial force in the arguments of the A.R that inventory is not correctly prepared. It is evident from the fact that Ld. Assessing Officer has himself accepted in the order dated 31/12/2010 that there is repetition of items from Sl.No. 388 to 774 which are already recorded at Sl.No.1 to 387 of the inventory. Thus once inventory is defective, no addition on such defective inventory can be made Further, no evidence of such huge purchases have been found recorded during the search. Thirdly, the appellant being in the business of manufacturing perfumes, would require fresh raw material and if it is presumed that the appellant had so much of stock as mentioned in items from Sl.No.775 to 813, then it would manufacture for 100 of years without fresh purchases which is impossibility. The Ld. AO ought to have considered these aspects and given adequate margin/relief in the way he has given for repetition made in items 388 to 774.

7.10.9 Further, I also agree with Ld. AR. That once AO has rejected the books of accounts, it is not possible to compute stock as per books. The Ld. Assessing Officer has himself accepted that there are unaccounted purchases and seized documents reflect that there are unaccounted sales, then without considering these

accounted sales, and if appellant is engaged in unaccounted business in earlier years also then it's impossible to work out the exact opening stock. Thus, the exact quantities of opening stock, purchases and sales up to the date of the search are not known or are indeterminate. In view of rejection of the books of accounts, the stock as per books cannot be calculated and therefore excess stock cannot be worked out. The appellant has rightly relied on the decision of the Hon'ble Apex Court in B.C. Srinivas Shetty's Case (Supra) where it has been held that if cost of acquisition for calculating capital gains is Nil or cannot be worked out, the charge of capital gain would fail. Similarly in the present case, if stock as per books cannot be worked out as books are rejected, then excess stock also cannot be worked out and therefore charge under Section 69A would fail.

7.10.10 In view of this, I delete the addition of Rs. 3, 71, 60,520/- made on account of excess stock and consequently there is no requirement of telescoping or set off. However, as no separate addition is proposed by Ld. AO on this account, the appellant gets a technical relief.

16. Ld. DR relied on the order of the Assessing Officer. However, assessee's counsel supported the finding of the Ld. CIT (A).

17. We have heard both the parties and perused the records, especially the impugned order, we are inclined to go with the order of the Ld. CIT(A) primarily on the ground that once an inventory is found to be defective, its reliability for estimating the income becomes doubtful. The assessment order does not counter in anyway the assessee's grievance/objections that there is misreporting /inflation of the quantity and price of various items particularly

raw material. This could have been easily done on the basis of books of accounts available with him. He could have made an attempt to support his valuations, which he did not. Similarly, neither before Ld. CIT(A) nor before us any claim, resubmission or working has been submitted following the assessee's objections. That being the situation the view taken by the Ld. CIT(A) appears to be reasonable and therefore, the same is upheld and accordingly, the ground no. 3 is rejected.

18. In the result, the Revenue's Appeal for the assessment year 2009-10 stand dismissed.

ASSESSEE'S CROSS OBJECTION NO. 151/DEL/2016 for A.Y 2009-10

The following grounds of Cross-Objections deal with the additions made with respect to the suppressed sales and associated issues which have been discussed in the proceeding paragraphs in detail.

1. *On the facts and in the circumstances of the case, the learned C.I.T. (Appeals) erred in confirming addition in respect of the alleged unaccounted income calculated on the basis of unaccounted sales allegedly recorded in the seized documents, to the extent of Rs.61,42,176/-*
- 2.(a) *On the facts and in the circumstances of the case, the learned C.I.T. (Appeals) erred in holding that the relevant seized documents including Annexures A-3, -A5, A-6 and A-11 and the transactions recorded therein belong to the Respondent-company by rejecting the submissions made before him that the said documents actually belong to M/s. Gupta Perfumers Pvt. Ltd.*
3. *On the facts and in the circumstances of the case, the learned C.I.T. (Appeals) erred in rejecting the relevant ground of appeal raised by the Respondent-company against rejection of the regular books of account maintained by the Respondent-company.*
4. *On the facts and in the circumstances of the case, the learned C.I.T. (Appeals) erred in rejecting the relevant ground of appeal raised by the Respondent-company to the effect that instead of applying the gross*

profit rate for working the profit of the company , only net profit rate should be applied.

19. As held for A.Y 2008-09 the addition sustained by Ld. CIT(A) is reasonable and justified being based on the narrations on the seized documents. Insistence that the papers do not belong to it but to M/s Gupta Perfumers Pvt. Ltd. is not accepted in view of the decision as upheld by Hon'ble Settlement Commission and by Hon'ble Delhi High Court. Since the paper seized are held to be containing incriminating information, the assessing officer's action in rejecting books of account is upheld as also the manner of computation by applying G.P rate instead of N.P rate. Accordingly, the ground no. 1 & 2(a) are rejected.

20. Cross objection No. 2(b) is having different issue which is reproduced below:-

2(b) Without prejudice to the foregoing ground No. 2(a), it is submitted that if the seized documents are held as belonging to the Respondent-company and not to M/s Gupta Perfumers Pvt. Ltd., then the income-tax paid by M/s Gupta perfumers Pvt. Ltd. On any unaccounted income determined on the basis of such seized documents, should be treated as income-tax paid by the Respondent-company and credit thereof should be allowed on the case of the Respondent- company.

21. The matter has been discussed in detail for A.Y 2008-09 also, as aforesaid. We reiterate our position here again that the same income cannot be taxed twice. The income as upheld by us in earlier paragraphs for year under consideration in the hands of the assessee is same which has been offered for taxation by M/s Gupta Perfumers Pvt. Ltd. before the Settlement Commission. The matter has yet to attain finality as M/s Gupta Perfumers Pvt. Ltd. is before Hon'ble Supreme Court. Therefore the ground is disposed

of with similar directions as for A.Y 2008-09, as aforesaid. As a result, the Cross Objection is partly allowed.

22. In the result, both the Revenue's Appeals stand dismissed and both the Assessee's Cross Objections stand partly allowed in the aforesaid manner.

Order pronounced on 14/02/2019.

Sd/-

**(L.P. SAHU)
ACCOUNTANT MEMBER**

Sd/-

**(H.S. SIDHU)
JUDICIAL MEMBER**

Date:14/02/2019

"SRBHATNAGAR"

Copy forwarded to:-

1. Appellant -
2. Respondent -
3. CIT
4. CIT (A)
5. DR, ITAT

TRUE COPY
By Order,

Assistant Registrar,
ITAT, Delhi Benches