IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, AHMEDABAD

BEFORE JUSTICE SHRI P. P. BHATT, PRESIDENT AND
SHRI WASEEM AHMED, ACCOUNTANT MEMBER

ITA Nos. 1003 to 1005/Ahd/2004
(Assessment Years: 1998-99 to 2000-01)

M/s. Atreya Petrochem Ltd. (Formerly known as Jal Hi Power Petro Ltd.) Nr. Sardar Patel Statue, Sayajigunj, Baroda.	Vs.	DCIT, Circle – 1, Baroda.

And

ITA Nos. 1065 to 1067/Ahd/2004
(Assessment Years :1998-99 to 2000-01)

DCIT, Circle – 1, Baroda	Vs.	Jal Hi-Power Petrochem Ltd, 9th Floor, Galav Chambers, Near Sardar Patel Estate, Sayajigunj, Baroda

[PAN No. AAACJ 4907 C]

(**Appellant**) .. (**Respondent**)

Assessee by :	Shri Sanjay R. Shah, A.R.
Revenue by :	Shri Ramesh Chandra Danday, CIT-D.R.

Date of Hearing	29/07/2019
Date of Pronouncement	24/10/2019

ORDER

PER SHRI WASEEM AHMED, ACCOUNTANT MEMBER :

These are six appeals filed by the assessee and Revenue against the separate orders of the Ld. Commissioner of Income Tax (Appeals)-I, Baroda, dated 28.01.2004 for the Assessment Years (AYs) 1998-99 to 2000-01.

2. First we take up assessee's appeal bearing ITA No.1003/AHD/2004 for the A.Y. 1998-99. The assessee has raised the following **concise** grounds of appeal:

> *"Your appellant being aggrieved by the order passed by the CIT(A)-I, Baroda [hereinafter referred to as Learned "CIT(A)"] u/s 250 of the Act, presents this appeal on the following amongst other grounds of the appeal. The grounds set out hereunder are independent of and without prejudice to each other.*
>
> *"1. The learned CIT(A) erred in law and on facts in upholding rejection of appellant's books u/s 145(2) and in retaining addition of Rs. 16,19,419/- in respect of alleged sale of appellant's solvent products at a price higher than the one at which they are recorded in the books particularly when the same was only on the basis of the estimation and also as observed by the learned CIT(A) herself is subject to recall/rectification based on the availability of further evidences.*
>
> *2. The learned CIT(A) erred in confirming and retaining addition of Rs. 16,19,419/- particularly when the order of District Magistrate implicating the appellant is challenged in further proceedings, whose outcome is yet not final and particularly when no petrol pump owner was ever examined by the A.O. to support his findings in particularly when the complaint with the District Magistrate did not cover financial year 1997-98 relevant to assessment year 1998-99.*
>
> *3. The learned CIT(A) erred in confirming and retaining the addition of Rs. 16,19,419/- in respect of alleged sale of solvent products to petrol pump owners ignoring some vital facts and giving incorrect findings contrary to the evidences and facts.*
>
> *4. The learned CIT(a) erred in confirming the addition of Rs. 23,68,584/- on account of discrepancy between the accounts of Reliance Industries Ltd. and HPCL in appellant's books and their contra accounts from their books.*
>
> *Without prejudice to above, if in any event, it is held that such addition is required to be made, the same should be telescoped against the addition of Rs. 16,19,419/- retained in respect of alleged solvent products.*
>
> *5. The learned CIT(A) erred in confirming the act of the A.O. to disallow the pre-operative expenses w/off Rs. 9,76,201/- during the year as a part of claim u/s. 35D of the I.T. Act.*
>
> *6. The learned CIT(A) erred in confirming disallowance of Rs. 1,67,606/- towards foreign travelling expenses of appellant's Managing Director. Your appellant submits that the same were for business purpose and hence additions confirmed be deleted.*

7. *The learned CIT(A) erred in confirming disallowance of Rs. 18,376/- in respect of Diwali, office and staff welfare expenses. It is submitted that it be so held now and additions confirmed be deleted.*

8. *The learned A.O. as well as CIT(A) erred in confirming charging of interest u/s. 234B and 234C of the Act."*

3. The 1st issue raised by the assessee in ground numbers 1 to 3 is that the Ld. CIT-A erred in confirming the addition in part amounting to Rs. 16,19,419.00 only representing the sale price higher than the price recorded in the books on account of unaccounted sale to the petrol pump owners/other industries and after rejecting the books of accounts.

4. The same issue was also raised in the AYs 1999-2000 and 2000-01, therefore we have clubbed all of them for the sake of brevity, convenience and adjudication.

5. The facts as culled out from the order of the authorities below are that the assessee in the present case is a limited company and engaged in the business of manufacturing of various petrochemical products like Naptha, spring oil, Ink oil, ginning oil, solvent etc. The items in which the assessee is dealing are governed and controlled by the PREVENTION OF BLACK MARKETING OF ESSENTIAL COMMODITIES ACT. The assessee was purchasing such products from various companies such as IOCL, HPCL, BPCL, IPCL, Reliance Industries etc. The assessee claimed that it has sold such products after carrying out manufacturing process to various companies for the industrial purposes. The list of the products sold with the quantity and the details of the companies/parties as claimed by the assessee is available on pages 5 to 8 of the assessment order.

6. Before coming to the specific issue, it is pertinent to note the back ground of the dispute involved in the case on hand which goes as under:

A. *Brief history of the case*

There was a search conducted by the sale tax department dated 16th February 2000 and thereafter there was an inspection carried out by the district supply team at the factory premises of the assessee dated 18 February 2000 including the raids of the police. Accordingly, the various statements of the parties, transporter, driver and other associated persons were recorded by the Sales Tax/ DSO/ Police Officer etc.

B. *Search by the sales tax department dated 16 February 2000*

The sale tax department in consequence to the search, vide order dated 31 August 2000 withdrew the benefit claimed by the assessee on the purchase of the goods and treated the entire amount of interstate sale as local sale and also increased the amount of sale on ad-hoc basis. Accordingly, the sales tax department raised demand of tax, charged interest and levied a penalty under the local and central sales tax Act for the previous year's 1997-98, 1998-99 and 1999-2000(up-to 15th February 2000). The department also seized all the books of accounts and other documents of the assessee in the search.

The assessee carried the matter to the higher forum but no success. The assessee further carried the matter to the Sales Tax Tribunal which restored the matter to the Commissioner of Sales Tax (Appeals) who in turn set aside the matter to the AO for further verification.

C. *Inspection by District supply department dated 18 February 2000*

As all the documents were seized by the sales tax department, the district supply team collected the necessary details from the Sales tax office about the parties to whom the assessee claimed to have sold the goods. The district supply team accordingly to verify the genuineness of the parties to whom the assessee sold the goods visited to the business

premises of one of the party of the assessee namely, Parshwa Industries on 01-03-2000 located at plot No. F/93, Ricco Industrial Estate, Swaroop Gang, Tal Pindwara, Distt. Sirohi, Rajasthan. But the team did not find any factory in existence at the given address. However, the owner of Parshwa Industries namely Shri Gopal Bhai Shah admitted in his statement dated 7th march 2000 that it used to purchase the products from the assessee. But later on, Shri Gopal Bhai Shah in his statement dated 22 March 2000 changed his stand and admitted that it used to provide bogus entries to the assessee on commission basis at the rate of Rs 0.40 per liter through the involvement of Shri Manoj Nayak a person close to the director of the assessee company.

There was also a raid at the residence of Shri Manoj Nayak dated 8th of March 2000. He admitted that he is having 3 tankers which were financed by the director of the assessee company namely Shri Jayesh Thakkar in his statement dated 12-03-2000. At the time of raid at the premises of shri Manoj Thakkar, a person related to the director of the assessee company namely Shri Navin Gandhi has confessed that he had blank bill book of Parshwa Industries and Hardik Industries.

The team also made the enquiry from the check post namely Rajasthan and Maharashtra and found that there was no record for the transfer of the goods outside the Gujarat as shown by the assessee.

It was also found that the tanker numbers mentioned in the bill book of the assessee were the registration number of other vehicles. (The details are available on page 238 of the paper book).

There was also an inspection at the premises of the assessee by DSO on 24 June 1997 wherein it was found that the assessee is involved in the issuing of fake bills. Accordingly the DSO seized the solvent worth of Rs. 42,293.00. Similarly, there was one

more inspection dated 18 November 1997 where the license of the assessee was cancelled after forfeiting the deposit of Rs. 25,000.00. However, the assessee obtained the stay against the cancellation of the license and continued his business activities.

In view of the above the district supply team alleged that the assessee is engaged in the business of dispatching the goods in Gujarat by preparing fake sale bills.

7. ***Now, turning to the present facts of the case***

The AO based on investigating agencies such as district administration, district civil supply authorities, sales tax authorities and newspaper, reports found that the assessee is engaged in diverting the sales of its product namely solvent and other products to various petrol pump owners but in books it is showing sales in the name of the parties as discussed above. As per the AO, the assessee was under the obligation to make the sale of its products only for the industrial purposes being prohibited / controlled products under the PREVENTION OF BLACK MARKETING OF ESSENTIAL COMMODITIES ACT.

Based on the above, the AO was of the view that the assessee was selling the products at a price higher than the price recorded in the books by diverting the sales to the patrol pump owners/ other industries in the manner as discussed above. The assessee was doing so in order to achieve high profit margin. As such the impugned products used to be mixed with the petrol by the petrol pump owners.

Accordingly, the AO to verify the veracity of the sales made by the assessee issued notices under section 133(6) of the Act to all the parties to whom the assessee claimed to have sold the products. However, all such notices except one remained un-served with the remarks “not existing/available at the given address”. One of the party,

namely Prime Chemicals has replied vide letter dated 16-03-2001 that it was engaged in bogus transaction with the assessee against the commission income of Rs. 0.50 per litre.

The AO also observed that there was substantial reduction in the manufacturing expenses incurred by the assessee in the year under consideration viz a viz in the immediate preceding assessment year despite the fact the turnover for the current year has become double. The assessee in the immediate preceding assessment year has claimed expenses for electricity power and fuel at Rs. 8,29,372.00 against the turnover of Rs. 2,05,45,425.00 whereas it claimed the same expenditure in the current year at Rs. 5,94,354.00 against the turnover of Rs. 4,24,44,325.00 only.

In view of the above, the AO concluded that the assessee is engaged in the business of diverting of its sales to the petrol pump owners in the AYs 1998-99, 1999-2000 and 2000-01 and accordingly held as under:

<u>For the AY 1998-99</u>

"12.8 From the above discussion, it is proved beyond doubt that the assessee has not made any sales of the various petroleum products as claimed to have been made to various industrial units for industrial purpose. But in fact the entire sales have been diverted to non-industrial purpose and are for that matter sold to various petrol pumps situated within Gujarat with a view to gain more profit. During the year under consideration, assessee has shown total sales of 40,56,714/- ltrs. of Solvent and other products to various parties as stated hereinabove. The average rate of this per litre comes to Rs. 10.46. However, in view of the fact that the entire sales was made to various petrol pumps, the rate prevailed at the relevant accounting year is adopted to work out the exact sale price. The consumer price of petrol during the relevant previous year was Rs. 26.13 paise. However, taking into consideration of the profit margin of petrol pump owner and the commission for accommodation of sales made to some bogus companies being the main lender as has been confirmed by M/s. Prime Chemicals, the average net sale price is taken at Rs. 24/- per liter. Thus, the total sales effected during the previous year and the suppressed sale consideration is worked out as under:-

Total quantity of the products sold 40,56,714 Ltrs.
Sale Price adopted as discussed above – Rs. 24/- per Liter

Thus, the total sales realisatio is + 40,56,714/- X 24 Rs. 9,73,61,136/-
Less: Sales realisation shown by the assessee <u>Rs. 4,24,44,325/-</u>

NET DIFFERENCE *Rs. 5,49,16,811/-.*"

For the A.Y. 1999-00

Total quantity of the product sold :	*1,15,18,960 litres*	
Sale Price @ Rs.24 per liter		*Rs.27,64,55,040/-*
Less: Sales shown by the assessee		*Rs.10,46,85,702/-*
		Rs.17,17,69,338/-

For the A.Y. 2000-01

Total quantity of the product sold :	
(13762155 x Rs.24)	*Rs.33,02,91,720/-*
Less: Sales shown by the assessee	*Rs.11,77,32,609/-*
	Rs.21,25,59,111/-

In view of the above, the AO made the addition of the amount stated above in the different assessment years to the total income of the assessee.

8. The aggrieved assessee preferred an appeal to the Ld. CIT(A).

9. The assessee before the Ld. CIT(A) submitted that the addition has been made by the AO after placing his reliance on the statement/ reply of the owner/proprietor of M/s Parshwa chemicals, prime chemicals, report of the district supply authority, tanker driver and the investigation carried out by the police authorities, district administration, sales tax department and newspaper report. But such details/informations/statements as relied by the AO were not supplied to the assessee for his rebuttal/comments.

10. The fact that the notices issued by the AO under section 133(6) of the Act to the parties of the assessee was brought to the notice of the assessee at the fag-end of the assessment in March 2001 just before few days of finalization of assessment which was completed by the AO on 30-03-2001.

11. In case of non-service of notice to the parties, the AO was to depute the inspector of the income tax to carry out the verification for the genuineness of the parties. The assessee also submitted that its case was very much highlighted in the newspaper, therefore it might be possible that the parties did not accept the notices issued under section 133(6) of the Act out of the fear of getting their name dragged by the district administrator and police authorities in criminal prosecution. The assessee further apprehended that it might be possible that the buyer after the purchase of the solvent from it sold to petrol pump owner/ other industries and accordingly avoided the notice of issued under section 133(6) of the Act.

12. The assessee also claimed to have filed the confirmation from the some parties for the sales made to them. The names of the parties stand as under:

"SR. No.	*Party's Name*	*Sales Made (Rs.)*
1.	*Shidimo Interqux (P) Ltd., Surat*	*8,43,300/-*
2.	*Mazda Chem, Daman*	*1,19,480/-*
3.	*Arihant Petrochemicals Sachin*	*4,88,400/-*
4.	*Mahavir Traders, Surat*	*1,50,000/-"*

13. The assessee also furnished the affidavits from the parties, namely M/s Sarvanabava Chemical Industries, M/s Arihant Industries, M/s South Petrochemical Corporation, M/s Arihant Chemicals and M/s Galaxy Plasto Chem-industries Limited wherein it was stated that they have purchased solvent from it.

Similarly, the assessee further claimed that there was no opportunity extended to it for the confrontation/cross-examination with the statements of the parties involved as elaborated above.

Nevertheless, none of the petrol pump owner was examined by the AO to whom the assessee was alleged to have diverted its products at a higher price which was not

recorded in the books in the guise of selling to the parties elaborated above/ recorded in its books.

14. The assessee further submitted that its sales policy was to deliver the goods to the buyer at its factory gate. Once, the buyer has taken the delivery from the assessee, the goods/products are not in its possession. Therefore, there is a possibility of misusing the products by the buyers for supplying the same to the petrol pump owners. Accordingly, the assessee cannot be penalized for the action of the buyers.

15. The assessee also submitted that the parties namely M/s Parshwa chemicals, prime chemical have not stated that the assessee was engaged in supplying the products to the petrol pump owners/ other non-industries.

16. The assessee also claimed that it used to collect the licenses, affidavits/undertakings and indemnity receipt from the parties before supplying the goods to them as its products were governed by the PREVENTION OF BLACK MARKETING OF ESSENTIAL COMMODITIES ACT.

17. The assessee also claimed that it has submitted copy of the licenses, affidavits/undertakings and indemnity receipt from the Parshwa Industries which were obtained by it before the goods sold to them as required by the PREVENTION OF BLACK MARKETING OF ESSENTIAL COMMODITIES ACT.

The owner of the Parshwa industries admitted in his statement admitted that he was involved in hawala entries but the AO did not conduct any inquiry to find out who are the beneficiaries of all these activities.

18. The assessee further submitted that some of the sale return from M/s Laksmi trading Co. and Tashkil Oil Co. Pvt. Ltd. were duly recorded in the books of account. Had the assessee been involved in issuance of bogus bill then the sale return was no possible. Accordingly, the assessee claimed that all the transactions were genuine.

19. The assessee further claimed to have furnished the details of all the quantities and values of the opening and closing stock, along with the raw material purchases, production details, dispatch of the finished goods and the closing stock of the raw materials and the finished goods. It has also furnished the manufacturing processing flowchart. As such all the movement of goods whether raw material or finished goods were duly recorded and accounted in the books of accounts.

20. The assessee further submitted that even in the complaint filed by the district administrator there is no specific allegation whether it was selling the goods either to the petrol pumps owner or in the black market for non-industrial purposes. Therefore, the AO erred in presuming that the assessee is engaged in supplying the products to the petrol pump owners in the garb of supplying to the parties as elaborated in the order of the AO. Moreover, the complaint filed by the district authorities has been challenged before the competent court which is pending. Therefore, such complaints cannot be treated as conclusive evidence that the assessee was involved in the transactions as alleged by the AO.

21. The assessee further submitted that in the notice of the Magistrate it was alleged that;

i. It (the assessee) was involved in diverting the products only in respect of few parties in whose name it (assessee) has shown sale as interstate sale amounting to Rs. 14,11,006/- only.

ii. Similarly, there was the mismatch in the tanker nos. shown in the invoice viz a viz report from the RTO with respect to the 16 sales invoices. However, it (the assessee) furnished the 5 certificate of RTO out of 17 that the vehicle no. mention on the bill was the tanker registered with RTO.

22. The assessee further submitted that as per the notice issued by the Magistrate, the offence was committed by the assessee during the FY 1999-2000 pertaining to AY 2000-01. Accordingly, the AO, based on the action taken by the district administrative team, cannot make addition in earlier year/s.

23. The assessee also claimed that its products cannot be mixed/ substituted with the patrol as alleged by the AO. The assessee in support of his contention filed the certificates of various authorities before the Ld.CIT (A).

24. The assessee also submitted that its directors and its employees in any proceeding have nowhere admitted that it was supplying the products to the petrol pump owners in the manner as alleged by the AO.

It was also claimed that had the assessee earned income outside the books of accounts as alleged by the AO, there should have been some kind of investment or the expenditure out of such income. But the AO has not pointed out any iota of evidence suggesting any investment was made or any expenditure incurred by the assessee/ its directors outside the books.

The AO made addition without any corroborative evidence and proving that the assessee sold its product to petrol pump owner. The AO has taken the price of the products sold at Rs. 24/- per litre which is not valid price. As such, no one can purchase solvent at petrol price. If it purchases solvent at petrol price then there is no benefit to the purchaser.

25. The assessee without prejudice to the above also submitted that if any addition needs to be made to the total income of the assessee then it should have been made with respect to the parties involved namely Parshwa Industries and prime chemicals if it is proved that the assessee has recovered any sum of money over and above the sale price declared in the return of income. As such the transaction with other parties without having any contrary evidence cannot be equated/ treated/ compared with the transactions with the aforesaid parties namely Parshwa Industries and prime chemicals.

26. The Ld.CIT (A) called for the remand report from the AO on the submission filed by the assessee.

27. The AO in his remand report submitted that he has made the addition as discussed above on the basis of the enquiries, statements recorded by the crime branch and civil supplies department which were explaining the modus of operandi adopted by the assessee for diverting the sale of the products to the petrol pump owners.

28. The AO issued summon to the director of the company on 30-06-2003 for cross examination of the various persons but he was not available in India at that time.

29. The AO in his remand report also submitted that there was no statement recorded of any petrol pump owner by any of the authority such as crime branch, civil supplies department etc.

30. The AO further admitted that Shri Jayes thakker, director of the company in his statement recorded on 21-03-2000 himself denied having involvement in any illegal sale of solvent. Therefore, no comment on the allegation that the statements were deposed under threat or pressure from the parties as discussed above.

31. The Ld.CIT (A) after considering the remand report and the submission of the assessee observed certain facts as enumerated below:

A. The assessee was engaged in diverting the sales of its product either to the petrol pump owners or other parties for the use of non-industrial purposes in the garb of selling to the parties for the use of industrial activity. The observation of the learned CIT (A) was based on the following:

   i. There was no industrial activity carried out by M/s Parshwa Industries as evident from the statement of the owner as well as the order of the District Magistrate. Moreover, there was a blank Bill book of M/s Parshwa Industries was found with a person related to the assessee.

   ii. There was no clearance report/clean chit furnished by the police authorities for the involvement of alleged transactions.

   iii. There were the statements recorded by the police authorities, district supply officers, drivers of the tankers and other related persons.

B. The assessee was engaged in the activity as described above for the period beginning from the financial year 1997-98, 1998-1999 and 1999-2000. The learned CIT (A) in confirming such finding of the AO has referred to the order of the district magistrate where it was clearly alleged that the assessee was 1st charged by the district supply team dated 24-06-1997 as well as the registration certificate of the assessee was also cancelled as a result of inspection of district supply department dated 18-11-1997. Accordingly, the learned CIT (A) held that the case of the assessee was rightly covered by the AO for the financial years as discussed above.

C. The Ld.CIT (A) also found that the issue regarding the sale to the petrol pump is limited to the solvent product only. As such there was no evidence about the fake sale of other products as alleged by the AO.

D. The Ld.CIT (A) also found that the allegation of unaccounted sales using the name of other parties as mentioned in the complaint were of the following parties:

      i. Parshwa Industries

ii. DA enterprises
iii. Aristo Adichem
iv. Excel organics
v. Avi enterprises

Further, there was the name of one of the party namely M/s prime chemicals which file negative response of the notice issued by the AO u/s 133(6) of the Act.

However, there was no sale made by the assessee of its products namely solvent to AVI Enterprises, therefore the Ld.CIT (A) did not consider the same for confirming the addition. As such, the Ld.CIT (A) was of the view that other parties should not be considered for addition because they have confirmed the transaction. As such all the evidences are available against the above mention parties only. These parties should be considered for hawala entries.

E. The Ld.CIT (A) also found that the basis adopted by the AO for working out the amount of profit in the form of unaccounted sale was not reasonable. As such he opined that it should be the average of sale price of Rs 10/- and 24/- per litre. Accordingly the Ld.CIT (A) determined the reasonable price at Rs.17/- per litre of solvent.

Accordingly, the Ld.CIT (A) confirmed the addition in part made by the AO by observing as under:

A.Y. 98-99

	Name of the company	***Kilolitres***	***Sale price shown (Rs.)***
1.	*Prime Chemicals*	*165*	*1904012*
2.	*Parshwa Inds.*	*121.60*	*1348769*
	Total	***286.60***	***3252781***
	Sales Realisation calculated At Rs. 17 per litre		*4872200*
	Sales Realisation as per books		*3252781*
	The Difference to be taxed		***1619419***

A.Y. 99-2000

1.	*M/s. Aristo Adechem P. Ltd.*	*246*	*2395174*
2.	*Parshwa Inds.*	*1492.66*	*14037494*
	Total	***1738.66***	***16432668***

Sales Realisation calculated At Rs. 17 per litre	*29557220*
Sales Realisation as per books	*16432668*
The Difference to be taxed	***13124552***

A.Y. 2000-01

1.	*M/s. Aristo Adechem P. Ltd.*	*874.5*	*10683517*
2.	*D A Enterprises*	*1571.0*	*18008174*
3.	*Excel Organics*	*274.0*	*3441377*
4.	*Parshwa Inds.*	*2242.5*	*24525025*
	Total	***4962.0***	***56658093***

Sales Realisation calculated At Rs. 17 per litre	*84354000*
Sales Realisation as per books	*56658093*
The Difference to be taxed	***27695907***

Being aggrieved by the order of the Ld. CIT (A), the assessee and the Revenue are in appeal before us. The assessee is in appeal against the confirmation of the addition for Rs. 16,19,419/- whereas the Revenue is in appeal against the deletion of the addition made by the AO for Rs. 5,32,97,392/- only. The relevant ground of appeal of the Revenue in ITA No. 1065/Ahd/2004 reads as under:

1. On the facts and in the circumstances of the case and in law, The learned CIT(A), Baroda has erred in
   (i) Deleting the addition made by the Assessing Officer on account of Bogus sales amounting to Rs.5,32,97,392/-

32. The Ld. AR before us submitted as under:

"No independent inquiry by learned AO. He only relies on the statements recorded and complaints made by District Supplies Authorities.

The case against the assessee made out by District Supplies Authorities itself is without any firm finding. Their case is based purely on assumption when we read the complaint which is mentioned in following words "you used to prepare false bills in the name of Parshwa Industries and above supply of solvent stated in bills was either used for adulteration in petrol pumps or sold to other parties in Gujarat".

No examination of any petrol pump owner. No evidence for the same except one statement of driver which too has not been cross examined for finding out its veracity. Therefore, it has evidential value.

Without prejudice to above, no evidence about the price at which the said solvent could have been sold to the petrol pump owners. The entire exercise done by the learned AO as well as confirmed by CIT(A) is purely on the basis of hypothetical price which cannot be done. The assessee is this regard relies on several decisions attached at paper book No. 3.

Amount involved in so called violation under essential commodities act mentioned in the complaint of Civil Supplies Authorities is only Rs.14 Lakhs, whereas on that basis addition of crores of rupees is made in three years by extra polating the figures, which cannot be sustained in view of several decisions in paper book-III.

The samples taken by the excise authorities for the products mentioned by the assessee show that they cannot be mixed with petrol as they do not have characteristics of motor spirit and hence also the theory of sale to petrol pump owners cannot be given credence to.

There are sales returns made by the parties which are shown in the accounts of these parties.
Similarly, sale confirmation from the parties also, copies of which are attached in the paper book.
Then how could such sales be considered to be made to petrol pump owners and accordingly addition made in the hands of the assessee ?

The actual sales price realized by the assessee by selling the goods is already recorded in the books. The learned AO's only allegation is that assessee has obtained more price by selling to petrol pump owners. There is no evidence for either the sale to petrol pump owners nor the price at which it is sold to petrol pump owners. The statement of driver at best tells that the goods were unloaded at petrol pump, but there is no mention of any evidence in any of the findings by the lower authorities as to whether there is any excess price realized over and above that recorded in the books.

The sale policy of the assessee is to sale goods to the intending purchaser at the factory gate. Before selling goods to the parties, the assessee ensures that proper documentation in the form of genuineness of buyer are procured. Thereafter what the purchaser does with the goods sold to them is not in control of the assessee. If learned AO and CIT(A) came to conclusion on the hypothesis that assessee could have sold goods

to petrol pump owners, that hypothesis equally apply to the proposition that the purchaser from the assessee also would have sold the same to the petrol pump owners.

The sales tax order for A.Y. 1999-00 referred to in para 3.7 of C1T(A) order is subsequently set-aside by the VAT Tribunal.

The statement recorded by Prime Chemicals also nowhere states that they were doing business at the behest of the management of the assessee.

Five samples of RTO certificates showing movement of goods out of Bardoa were produced to corroborate that the goods actually moved out of Baroda by tankers when sold by the assessee.

The GP percentage of assessment year 1 998-99 is better than the GP percentage of A.Y. 1997-98 (Assessment Order page 2, para 3). In A.Y. 1 997-98 there is no such allegations made nor addition made on account of suppression of sale. Since GP A.Y. 1998-99 is better than that of A.Y. 1997-98, such additions on the basis of hypothetical sale price cannot be sustained."

33. On the other hand the Ld. DR before us submitted that the assessee during the remand proceedings was granted the opportunity for the cross-examination. But the assessee failed to avail the same on the ground that its director namely Shri Jayesh Thakkar is outside India. As per the assessee Shri Jayesh Thakkar was the key person and therefore he was in a position to answer the questions of the Revenue.

34. The Ld. DR also alleged that the assessee did not approach to the AO for seeking any other date for the cross-examination as the key person was outside India during the relevant time. The Ld. DR in support of his contention drew attention on pages 205 where the copy of the remand report is placed.

35. The Ld. DR further submitted that the VAT tribunal at Gujarat has set aside the order to the file of the Commission of Sales Tax (Appeal) with the direction to decide the issue afresh on merit who in turn set aside to the sales tax officer for further verification. Therefore the demand of the VAT was deleted on technical reasons. Thus, no reliance can be placed on the order of the VAT tribunal.

36. Both the ld. AR and the DR before us relied on the order of authorities below to the extent favourable to them.

37. We have heard the rival contentions of both the parties and perused the materials available on record. There was a search and seizure operation carried out by the sales tax department at the premises of the assessee dated 16 February 2000. The sales tax department seized the books of accounts of the assessee. Subsequently, there was an inspection by the district supplies team at the premises of the assessee dated 18 February 2000. But the district supply team did not find any records as the same was seized by the sale tax department. Accordingly, the district supply team collected the requisite information from the office of the sales tax department to carry out necessary inspection. The main thrust of the district supply team was to investigate whether the assessee is diverting its sales of the product namely solvent to the petrol pump owners. The solvent being a controlled item under the essential commodities Act was to be used only for the industrial purposes, but as per the district supply team the assessee was engaged in diverting its sales to the petrol pump owners which is an offence under the law.

38. The district supply team to investigate the matter travelled to Rajasthan to one of the party namely Parshwa Industries located at plot No. F/93, Ricco Industrial Estate, Swaroop Gang, Tal Pindwara, Distt. Sirohi, Rajasthan, to whom the assessee claimed to have sold solvent for the industrial purposes. But the district supply team found that there was no manufacturing facility available at the premises of the party. Accordingly, the inspector of district supply team also recorded the statement of the owner of Parshwa Industries namely Shri Gopal Bhai Ramesh Chandra Shah on two different dates i.e. 7th March 2000 and 22nd March 2000. The party in his 1st statement accepted the transaction with the assessee but denied to have such transaction with the assessee in the later

statement. Thus it was concluded that Parshwa Industries was not engaged in any manufacturing activity.

39. The district supply team also recorded the statement of the parties involved with the assessee i.e. the director namely Jayesh Thakkar of the assessee company, the driver of the tanker, Manoj Nayak providing tankers to the assessee, confession of Shri Navin Gandhi a person related to the assessee that he is holding the blank bill book of Parshwa Industries.

40. The district supply department further noticed that the assessee has claimed to have sold its products to certain parties and delivered the goods to them through the tankers. But the district supply team on verification of those tankers registration numbers from the office of the RTO found that these were not actually tankers but they were the registration numbers of some other vehicles. The list of such parties along with Bill numbers & date & the product name with quantity & bill amount, so-called tankers numbers mention in the bill and information obtained from the RTO are available on page 18 of the ld. CIT-A order.

In view of the above, the district supply team held that the assessee was diverting the products to the petrol pump owners/ in the black market which is an offence under the law.

41. The AO on the basis of inspection report which was carried out by the district supply team dated 18 February 2000 in the financial year 1999-2000 alleged that the assessee was involved in diverting the petroleum products purchased by it to the petrol pump owners instead of parties shown in the books of accounts. As per the AO, the assessee was selling the goods without recording the same in the books of accounts to the

petrol pump owners at much higher price whereas it has shown sales in the books of accounts to certain industries as elaborated in the preceding paragraph.

42. The AO did not dispute the quantity of the product purchased and sold by the assessee. The allegation of the AO was that the assessee has sold the entire quantity of all the items purchased during the year by diverting the same to petrol pump owners in the manner as discussed above. Further, such petrol pump owners were mixing such petroleum products with the petrol and selling the same at a market price of petrol Rs. 26.13 per liter. Accordingly, the AO further reduced the margin of the petrol pump owners i.e. Rs. 2.13 per liter from the sale price of the petrol Rs. 26.13 per liter and computed the sale price charge by the assessee to the petrol pump owners at ₹ 24 per liter. Accordingly, the AO multiplied the quantity sold by the assessee with the sale price of the patrol to work out the suppressed sale of Rs. 5,49,16,811.00 which was treated as income of the assessee.

However, we find that the Ld.CIT (A) has concluded that the assessee has not diverted all products to the patrol pump owners but only the solvent. Therefore, the Ld.CIT (A) restricted the addition made by the AO with respect to the sale of the product solvent as diversion of sale to the patrol pump owners.

43. Now the controversy before us arises for our adjudication as detailed under:

I. Whether the assessee was engaged in the activity of diverting the sale of its products to the patrol pump owners in the garb of supplying the products to the parties as discussed above.

II. If yes, whether such activity was carried on by the assessee for the assessment years 1998-1999, 1999-2000 and 2000-01.

III. Whether the assessee has diverted only solvent product to the petrol pump owners in the manner as given above or all the products.

IV. Whether the assessee has diverted solvent product to the parties mentioned in the detention order of the district magistrate or all the parties to whom it had sold solvent products.

V. Whether the assessee has diverted its solvent product to the petrol pump owners/other black markets at the rate of ₹24 per litre being the purchase price of the petrol pump.

44. Now we proceed to adjudicate the above question one by one as detailed under:

Whether the assessee was engaged in the activity of diverting the sale of its products to the patrol pump owners/ for non-industrial use in the garb of supplying the products to the parties as discussed above.

45. In this regard we note that the entire thrust of the Revenue is that the assessee is charging higher amount of sale price over and above the price declared in the return of income based on the proceedings of district supply department which is pending in the court of law. In the proceeding it was alleged that the assessee is diverting its sales to the Patrol pump owners/ for non-industrial use in the garb of supplying the products to the parties as discussed above. Thus in our considered view, the outcome of the matter pending before the court of law is important to decide the issue on hand.

However, it was informed by the learned AR for the assessee that the matter is still pending before the competent court even after the lapse of 20 years (approx) and the same has not been yet listed for the hearing. The ld. DR has not brought anything contrary to the argument advanced by the ld. AR for the assessee.

46. We also note that recently the Hon'ble Delhi High Court in the case of Nokia Solutions and Networks Italia Spa vs. The Deputy Director of Income Tax reported in W.P.(C) 2477/2019 has directed this tribunal to expedite to decide the old matters. The relevant extract of the judgment is reproduced as under:

> *"The petitioner's grievance in this case is that the income tax appeals, pertaining to assessment years of about 20 years ago, filed by the petitioner, have been pending for 10 to 16 years (2003-2009). In the light of these averments, this court is of the opinion that the President or the Senior Vice President concerned of the Tribunal should take appropriate steps and expedite the hearing in these appeals, so as to ensure that final orders in all these appeals are announced at the earliest, preferably within four months from today.*
>
> *Although these directions dispose of the petitioner's grievance, however, this court is of the opinion that given the nature of the averments in this petition, the President of the Tribunal, through the Registrar, should inform this court as to the nature of the pendency with respect to the old cases – particularly, the number of appeals pending which are over 5 years, in each Bench. A tabular statement indicating the age of these appeals as well as an action plan of the ITAT with respect to the likely time for their disposal, having regard to the priorities that ITAT may set in this regard, shall also be filed in this court within 8 weeks."*

Keeping in mind the aforesaid direction of the Hon'ble Delhi High Court, we deemed it fit to decide the issue on merit based on the materials available on record and without waiting for the outcome of the competent court where the matter is pending.

47. We also note that the Government is also intending not to prolong the disputes where it is the party as applicant. Therefore, it appears that the focus of the Government is to reduce pendency. In this regard, we also find that there is a recent circular issued by CBDT bearing No. 17 of 2019 dated 8-8-2019 where the appeal is pending before the ITAT involving tax effect of ₹50 lakhs or less has been withdrawn. The relevant extract of the circular stands as under:

> *"2. As a step towards further management of litigation. it has been decided by the Board that monetary limits for filing of appeals in income-tax cases be enhanced further through amendment in Para 3 of the Circular mentioned above*

and accordingly. the table for monetary limits specified in Para 3 of the Circular shall read as follows:

S.No.	***Appeals/SLPs in Income-tax matters***	***Monetary Limit (Rs.)***
1	***Before Appellate Tribunal***	***50,00,000***
2	***Before High Court***	***1,00,00,000***
3	***Before Supreme Court***	***2,00,00,000***

48. There is also very old proverb that the delay in justice is equivalent to the denial of justice. In the case on hand, 20 years approximately have already been lapsed but there is no movement in the file before the competent court. Thus in view of the above, we are inclined to proceed to decide the issue based on materials available on record.

49. In the backdrop of the aforesaid facts and circumstances and considering the materials available on record such as the finding of the district magistrate, past history of the assessee, statements recorded by the police department and district supply department, sales tax search we are of the view that these evidences are reasonably sufficient enough to allege that the assessee was engaged in diverting the sale of its products for non-industrial use/to the patrol pump owners. But the fact that the matter is pending before the court of law cannot be ignored which will certainly have the crucial bearing on the issue on hand. Be that as it may be, we are not inclined to adjudicate the impugned question. Thus, we keep this question open as the same is pending before the Hon'ble Court.

Whether such activity was carried on by the assessee for the assessment year's 1998-1999, 1999-2000 and 2000-01

50. There was an inspection of the district supply team dated 18th February 2000 wherein it was alleged that the assessee is diverting its sales to the patrol pump owners/ for non industrial use. There was no specific mentioned about the period in the proceedings of district supply department but the district magistrate in its detention order has given a clear finding that there were two more inspections dated 24-06-1997 and 18-

11-1997 where the assessee was alleged to be engaged in the similar activity. The finding of the District Magistrate stands as under:

> *"(11) In earlier year during 24.6.97 an inspection at your factory was carried out by the D.S.O., it was found during such inspection that the name of parties to whom the material was sold and upon inquiry with such parties it was found that your own employees had prepared false Bills and supply of solvent was found to have been sold to some parties in Gujarat or might have been sent to Petrol pump for adulteration in petrol was clearly proved and accordingly by an order No. SP –Mfg./B/Case 2nd No. 97/97 Vashi/5414 to 2097 dt. 29.12.98 issued by D.S.O, Stock of Solvent Worth Rs. 42,293/- was seized. (page No. 301-313)*
>
> *(12) Your company was inspected on 18.11.97 by Gandhinagar Inspection team an in reference thereto the District Supply Office Vadodara by his order No. SP/ENFO/B/Case Register No. 15/97/Washi/5936 to 5940/98 dt. 25. .99 cancelled the Production and Wholesale Licence and the forfeiture of deposit of Rs. 25,000/- looking to the facts of the Case. Against this order you had gone in appeal before the collector Vadodara who by his order No. SP/ENFO/B/Appeal/17/98/Washi/3131 to 36."*

51. Similarly, it was also noticed by the District Magistrate that the assessee was involved in similar activity in earlier year also. Further the search conducted in FY 1999-2000 relates to the activity carried out by the assessee in the earlier years. Therefore, it appears that the assessee, if proved in the question no. 1 as above, was involved in such activity at least for the period stated in the current question. However, it is pertinent to note that our finding is subject to the question no. 1 as discussed above.

Whether the assessee has diverted only solvent product to the petrol pump owners/ for the non-industrial use in the manner as given above or all the products

52. In this regard, we find pertinent to refer the detention order of the District Magistrate which is the basis of the entire dispute on hand. The relevant extract of the order reads as under:

> *"(13) From the facts stated above it would appear you have indulged yourself into Serious irregularities, whereby the Industrial Solvent stock which can be easily mixed with petrol which liquid was appeared to have been sold in Gujarat by preparing bogus Bill of outside Gujarat parties, in collusion with the said parties by offering financial incentives and economic gain to them and it is reasonably believed to have been sold the solvent in Gujarat or mixed in petrol at Petrol Pump. Thus, you have indulged in*

> *spreading Pollution by adding low cost solvent with high cost petrol, thereby earning high financial gain by indulging in black Marketing of solvent stock is clearly proved. Thus you have violated the clause 23 & 24 of Gujarat Essential Commodities (Licence, Control and declaration of stock) order, 1981 and made breach of condition 4,6 & 12 of the said order, thereby violating section 3 of the essential Commodities Act, 1955."*

53. From the above, we note that the assessee is involved in only solvent product for diverting the same to the petrol pump owner/ non-industrial use. The Ld. DR at the time of hearing has not controverted the finding of the Ld.CIT (A). Therefore we are of the view that the dispute revolves to the extent of the sale of the product namely solvent. We concur with the finding of the Ld. CIT-A to this extent.

54. We also note that a specific question was raised by the CIT (A) to the AO at the time of appellate proceedings whether there is any allegation for the diversion about the sale of Naptha and other purchased item, he simply replied that no other evidence available beside the items already mentioned in recorded. The relevant finding of the CIT-A stands as under:

> *"The assessing officer was also directed to clarify whether there was any allegation specifically mentioning sale of naptha or other purchased items. the Assessing Officer during hearings clarified that there was no other evidence besides that already mentioned on record."*

55. At the time of hearing, the above finding of the ld. CIT-A has not been controverted by the ld. DR for the Revenue.

56. We also note that the learned CIT (A) has clearly given a finding after analyzing the technical report furnished by the assessee that the only product solvent can only be used for mixing with the petrol. The other products are not capable of mixing with the patrols. The finding of the learned CIT (A) is extracted below:

> *"On the contrary, in all the allegations made, the word constantly used is "solvent". Therefore, it has to presumed that out of all the products treated or manufactured by the appellant, it is the solvent item which are likely to have been sold to petrol pumps or*

other parties for non-industrial use. This is also verifiable from the chemical analysis of other items where the reports show that they cannot be mixed with the petrol."

57. The above finding has not been controverted by the ld. DR for the Revenue at the time of hearing. Therefore in the absence of any contrary information, we conclude that the assessee was engaged only in diverting the solvent products. However, it is pertinent to note that our finding is subject to the question no. 1 as discussed above.

Whether the assessee has diverted solvent product to the parties mentioned in the detention order of the District Magistrate or all the parties to whom it has sold solvent products.

58. Taking up the matter further, we note that the district supply department has alleged in its report that M/s Parshwa Industries was a bogus company.

59. Similarly, the district supply department also noticed the mismatch in the tankers Nos. furnished by the assessee and the details obtained from the office of the RTO. Such difference was noticed by the district supply with respect to five parties (including M/s Parshawa Industries) located outside Gujarat to whom the solvent was sold except one namely AVI Enterprise to whom the non-solvent product was sold. Therefore, it appears from the detention order that the assessee has used the name of 4 parties only for generating the fake bills in the garb of sales to the petrol pump owners or in the black market for the use of Non-Industrial purposes. The list of such parties as mentioned in the detention order stands as under:

i. Parshwa Industries
ii. DA enterprises
iii. Aristo Adichem
iv. Excel organics
v. Avi enterprises

However, the AO issued notices to all the parties under section 133(6) of the Act to confirm the sale transaction as claimed by the assessee. But there was no response

from any of the party except one, namely M/s Prime Chemical, which accepted to be involved in the bogus billing against the commission from the assessee. But the AO held that the assessee had used the name of all the parties for showing the sales of the petroleum products but in actuality the products were sold to the petrol pump owners without recording the same in the books of accounts.

However, the Ld. CIT(A) held that there were 6 parties involved in creating fake bills by the assessee as per the detention order and enquiry of the AO. But the Ld. CIT-A found that M/s AVI Enterprises purchased the non-solvent product from the assessee. Therefore, he excluded the name of such party. Accordingly, the Ld. CIT (A) restricted the addition with respect to only 5 parties.

Now the issue arises whether there were involved all the parties to whom the assessee has alleged to have made the sales as recorded in the books of accounts or only 5 parties as discussed above.

60. Admittedly, the notices issued under section 133(6) of the Act, to whom the assessee claimed to have made sales, were remained un-served. These parties are 25 in numbers for the AY 1998-99. However, we note that out of such number of parties, the assessee had filed the confirmation with respect to 4 parties pertaining to the AY 1998-99 as detailed under:

Sr. No.	Party name	Amount
1.	Sidimo Ineraux Pvt Ltd.	8,43,300/-
2.	Mazad Chem	1,19,480/-
3.	Arihant Petrochemicals	4,88,400/-
4.	Mahavir Traders	1,50,000/-

61. Besides there are also affidavits filed by the 4 parties pertaining to the AY 2000-01 in which it was admitted that they purchased industrial solvent from the assessee. Name of the parties are as under:

Sr. No.	Name
1.	Sarvanabava Chemicals
2.	South petrochemicals
3.	Arihant Chemicals
4.	Galaxy plastochem Industries Ltd

62. We further note that the District Magistrate in his order recorded that the assessee was involved in the preparation of bogus bills of solvent in the name of parties located outside Gujarat which were actually sold within Gujarat only in collusion with the said parties. The relevant finding stands as under:

> *"(13) From the facts stated above it would appear you have indulged yourself into Serious irregularities, whereby the Industrial Solvent stock which can be easily mixed with petrol which liquid was appeared to have been sold in Gujarat by preparing bogus Bill of outside Gujarat parties, in collusion with the said parties by offering financial incentives and economic gain to them and it is reasonably believed to have been sold the solvent in Gujarat or mixed in petrol at Petrol Pump."*

From the above it appears that the assessee was engaged in creating the fake bills in the name of the parties as discussed above for the solvent product only.

63. We further note from the statement of facts submitted by the assessee before the Sale tax tribunal that the sale tax department carried out search at the premises of the assessee as it was enjoying exemption certificate on sale and also got the benefit of low tax paid on purchases. The department doubted that the assessee sold the goods in Gujarat and issued the bills in the name of parties situated outside Gujarat. Accordingly the sales tax department treated the interstate sale made by the assessee as local sale. Therefore it is clear that all the matter related to bill issued to the parties outside the Gujarat only for the diversion of the sales.

64. We also note that the main thrust of the AO was based on the inspection carried out by the district supply department wherein the name of 5 parties are recorded as discussed in the preceding paragraph. Thus in our considered view, the AO if the was to involve all the parties to whom the assessee has made sales, then he has to bring

sufficient evidences justifying the diversion of the sale to the petrol pump owners. Indeed, the notices remained un-served but that cannot be conclusive evidence in the given facts and circumstances that the sales have been diverted. As such, if the sales had not been made to the concerned parties, then the onus shifts on the Revenue to prove based on cogent materials that the sales was made to the petrol pump owners/other industries. We also find that there was no mention of any petrol pump owner/other industry to which the sale was made. Even, there was not issued any notice to the petrol pump owners. Accordingly, we find no infirmity in the finding of the ld. CIT-A which has been reproduced in the preceding paragraph.

Therefore it is clear that the matter for the diversion of sales of solvent is restricted only to parties mention in the order of the District Magistrate and ld. CIT-A. However, it is pertinent to note that our finding is subject to the question no. 1 as discussed above.

Whether the assessee has diverted its solvent product to the petrol pump owners/other black markets at the rate of ₹24 per litre being the purchase price of the petrol pump

65. The Ld. CIT(A) rejected the sale price of Rs. 24 per litre adopted by the AO for finding out the suppressed sale made by the assessee to the petrol pump owners. The Ld. CIT(A) has adopted the average price of Rs. 17 per litre being the average amount of sale price the assessee claimed to have sold to is parties viz a viz the patrol price charged by the petrol pump owner. Accordingly, the Ld. CIT(A) restricted the addition to the amount of Rs. 16,19,419/- with respect to the limited number of parties and solvent product only. Therefore both the assessee and Revenue are in appeal before us.

66. Now the controversy arises, assuming the assessee is selling the solvent to the petrol pump owners in the garb of sales to the parties as discussed above, then what should be the sale price of the solvent to the petrol pump owners. In this regard, we note that there is no direct evidence available with the AO suggesting such price charged by

the assessee to the petrol pump owners/ other Industries. But the circumstantial evidences suggest that the assessee shall certainly sale the products at a higher price than the price charged by it from the actual parties. These circumstantial evidences cannot be ignored while deciding the issue on hand.

67. Taking up the matter further, we note that there can be 2 situations as described below:

Situation one: the assessee loses its case before the competent court of law.

68. In this situation, it will be established that the assessee was engaged in the diversion of its products to the petrol pump owners/for non-industrial use in the black-market in the garb of supplying the products to the parties as listed above. Thus, it can safely be inferred that the assessee to make higher amount of profit has done so. Accordingly, such higher amount of profit should certainly be subject to tax under the provisions of law. But again the dispute will remain unsettle to quantify the amount of profit/sale price charged by the assessee from the petrol pump owners and other industries.

Situation two: the assessee succeeds in its case before the competent court of law.

69. In case, the assessee succeeds before the competent court of law, then there will not be any question of making any addition to the total income of the assessee on account of diversion of sales to the patrol pump owners/other industries. Then it shall be inferred that the assessee has sold the goods to the parties at the price shown by it in the books of accounts.

70. Now coming to the issue on merit, we note that the allegation of the AO is that the assessee has sold the products at ₹24 per liter which was reduced by the learned CIT (A)

to ₹17 per liter as discussed above. In this regard we note that there is no right/ conclusive evidence available with the Revenue suggesting that the assessee has sold its products at ₹17 per liter. There are certain circumstantial evidences suggesting that the assessee is involved in making fake sales bills to the parties, but there is no information about the price that the assessee has charged the to the petrol pump owners. In our considered view these circumstantial evidences may create the suspicion in the mind but these cannot be conclusive evidence to decide the issue on hand. Therefore there cannot be any addition on account of suppressed sales based on the suspicion.

71. We are also conscious to the fact that there was no enquiry conducted by the AO from the petrol pump owners which was very necessary to hold that the assessee has diverted its products to the petrol pump owners. As such there is no whisper about such petrol pump owners/ other industries dealing with the assessee. There was the statement of the Driver, namely Shri V.M. Chauhan who admitted in his statement that he has diverted the product of the assessee to the Hindustan Petroleum petrol pump located at Borsad Jakatnaka. The relevant extract of the statement is reproduced as under:

> *"One day at noon, I do not remember the exact date and time. Shri Manojbhai asked me to attend the assignment at the Jal-Hi Power Company and he told me to contact Navinbhai Gandhi. I went there with the tanker and met there Shri Navinbhai Gandhi alongwith Bhaveshbhai. Bhaveshbhai got the tanker filled with solvent at Jal Hi Power. Shri Navinbhai accompanied me with a bill for Parshwa Industry, Swaropgunj, Shirohi, Rajshthan and a second bill for Bhavnagar. We passed the gate of the company of showing the bill for Parshwa Industry. After passing the gate, and reaching Dumod Chokdy, Navinbhai tore out the bills issued in the name of Parsha Industry and told me that we have the bill for Bhavnagar and directed me to drive towards Borsad. Near the Jakatnaka of Borsad, he asked me to drive the tanker towards a petrol pump at Borsad Jakatnaka and reaching the petrol pump after some conversation with the owner of the petrol pump, the goods was delivered/ the tank was emptied at the tank of the petrol pump at Borsad Jakatnaka. On way to Baroda, Navinbhai tore out the bill for Bhavnagar. I do not remember the name of the petrol pump at Borsad Jakatnaka, but it is a Hindustan Petroleum Petrol Pump."*

But yet there was no inquiry by the Revenue from such petrol pump owners despite the having some information about the petrol pump owners.

72. We also note that there was no information available from the authorities below that the assessee or its directors have made some unaccounted investments or has incurred some expenditure outside the books of accounts. The income of the assessee can be determined based on assets or the expenditure. There is no information about any undisclosed investments or unexplained expenditure. Thus, even if the real income theory test is applied in the case on hand, we note that the revenue has not brought anything on record about the investment made by the assessee/its directors or there was incurred any expenses by the assessee/its directors.

73. The AO in the assessment order recorded that the assessee might have incurred substantial expenses to sale the product to the petrol pump in this modus operandi of sale but these expenses are not recorded in the books of accounts. Therefore theses expenses were not allowable. The finding of the AO stands as under:

> *"it was also pointed out that in this type of business, substantial expenditure has to be incurred which is not accounted for in the books of accounts. However, as against these claims the assessee has failed to furnish any evidence, accordingly, the same stands rejected."*

74. On perusal of the reasoning given by the AO for rejecting the claim of the assessee for the expenses incurred against the sales diverted to the petrol pump owners/other industries, we note that the AO has taken contradictory stand. The AO on one hand is estimating the income which was not recorded in the books of accounts but on the other hand denied to allow the corresponding expenses on the ground that these expenses were not recorded in the books of accounts. In our considered view, the AO cannot adopt different stands for working out the income of the assessee viz a viz disallowing the expenses.

75. The Ld. CIT also admitted that there is no corroborative evidence to decide whether the assessee sold the solvent to the petrol pump or other parties. However the Ld. CIT(A) took the rate as taken by the AO for sale of solvent to the petrol pump owner to

decide the reasonable price and accordingly determined the average price. However, there was not conducted any inquiry itself about the allegation that the assessee sold the solvent to the petrol pump. This fact was duly admitted by the AO in his remand report by stating that he used the enquiry conducted by the other department as discussed above. The relevant extract of the remand report stands as under:

> *"The assessee's submission is considered. However, it may be stated that all the enquiries, recording of statements etc., were carried out by Crime Branch and Civil Supplies Departments, etc. and the Assessing Officer was using the statements as only to strengthen his findings regarding the modus operandi of the assessee company. In these circumstances, a summons was also issued to the Managing Director of the assessee, Shri Jayesh Thakkar to appear on 30.6.2003. However, the assessee vide letter dated 30.6.2003 stated that "he is the only Principal Officer, who can satisfactorily explain the matter. However, at present he is at U.S.A. (out of India) and, therefore, unable to attend personally".*
>
> *It is a fact that Shri Jayesh Thakkar was the , original accused in the Solvent Scam and he is not available in India. Though, it will be crucial to examine him to exactly find out the veracity of statements to ascertain the exact price at which he sold the solvent to petrol pumps.*
>
> *It is also a fact that though the Police Authorities r.ave recorded statements of persons residing as far as Chennai, Bangalore and Goa, to get the denial of solvent buyers, but not a single statement of petrol pump owners was recorded though indications were available to them. In the circumstances, the Assessing Officer was justified in adopting a reasonable price to estimate suppressed income. No comments can be made as to the allegation that the statements were deposed under threat or pressure. In fact, Shri Jayeoh Thakkar himself has denied of having involved himself in any illegal sale of solvent vide statement dated 21.3.2000 recorded by the District Civil Supplies Officer.*
>
> *The statements of various persons recorded by the Police/Civil Supplies Authorities are available and will be produced as and when desired by your kind Honour.*
>
> *As the matter is sub-judice, however, no comments regarding anticipated final outcome are being made in this regard."*

From the above remand report, we note that there was no exercise carried out by the revenue to arrive at the conclusion that the assessee has diverted its product to the petrol pump owners/other industries despite having the information in hand. As such the entire addition was based on the investigation carried out by the district supply team/crime branch etc.

76. It is also important to note that there was a search by the sales tax department dated 16 February 2000 wherein it was alleged that the assessee is making sales within the state of Gujarat in actuality but it was showing in the books of accounts as interstate sale in order to avoid the tax liability. As such the rate of tax for the interstate sale under CST Act is 2% on furnishing of form C by the party to the assessee whereas the rate of sales tax on local sale i.e. within the estate was ranging from 12 to 14% of the sale value. As such, we note that there was no allegation about the sale price charged by the assessee from the parties. Thus, the sale price declared by the assessee was accepted by the sales tax department except the ad hoc addition by the sales tax department for the assessment year 2000-01. Indeed, such ad hoc addition represents the enhanced value of sale price, but it was never compared with the price of the patrol.

77. We further note that such ad hoc addition by the sales tax department and the addition on account of treating the interstate sale as local sale was subsequently deleted by the sales tax department. In this regard we are inclined to refer the affidavit dated 10-04-2019 furnished by the assessee which reads as under:

"I, the undersigned, Mr. Jayeshbhai R. Thakkar, Director of M/s Kavit Industries Ltd. (formerly known as M/s Atreya Petrochem Ltd. and M/s Jal Hi Petrochem Ltd.], Baroda do hereby solemnly and on oath affirm that –

1. *I am aged about 53 years, working as a Director for M/s Kavit Industries Ltd. ["M/s Kavit"] for past 24 years. My office is at 9th Floor. Galav Chambers, Sayajigunj, Vadodara.*

2. *The Sales Tax officer had raised demand for the year 1997-98, 1998-99 and 1999-2000 making high pitched assessments on M/s Kavit, which were challenged in first appeal before Assistant Sales Tax Commissioner, Vadodara, who had decided the matters against M/s Kavit.*

3. *Against the said order of Assistant Sales Tax Commissioner, Vadodara, M/s Kavit had filed appeals before Gujarat Sales Tax Tribunal bearing No.36 to 41 of 2003, which were disposed off by the order of Gujarat Sales Tax Tribunal dated 11/2/2003 whereby the appeals were remanded to the file of Assistant Commissioner of Sales Tax with a direction to decide the same on merits.*

4. *The Assistant Commissioner of Sales Tax (Vadodara) then remanded case to Sales Tax Officer for further inquiry vide his orders dated 31.05.2003.*

5. *Thereafter, the Sales Tax Officer (Vadodara) satisfied with the case of M/s. Kavit did not pass any order and at present there are no demands outstanding for the above years from Sales Tax Department against M/s. Kavit.*

6. *Whatever is mentioned above is true and nothing but the truth and there are no salesjax liabilities outstanding against M/s Kavit for the above years out of the assessment orders and the consequential demands raised by the sales tax authorities.*

7. *The above Affidavit is field to put in proper perspective the status of the demands raised by the sales tax authorities for the above years against M/s Kavit.*

Solemnly affirmed on this 10th Day of April, 2019 at Baroda."

The contents of the above affidavit have not been controverted by the learned DR appearing for the revenue.

78. We also note that the assessee before the authorities below has claimed to have made sales to the parties at its factory gate which has not been disputed by them. Thus, there is a possibility that the parties to whom the assessee has sold the goods might have diverted the products to the petrol pump owners/other industries. If that be so, the assessee cannot be penalized for the act done by the other parties. However, the revenue has not brought anything on record contrary to the arguments of the assessee. Thus, in the facts and circumstances it cannot be concluded that the assessee was engaged in the diversion of its product as discussed above. However, it is pertinent to note that our finding is subject to the question no. 1 as discussed above.

79. We also note that, the assessing has furnished all the requisite documents about M/s Parshwa Industries such as copy of the license, allotment letter from Rajasthan estate industrial investment and development Corporation, undertaking for the end use of solvent. It appears that the assessee has discharged its onus before making the sales to the party. Accordingly, if on a later date it is discovered that the said party is not engaged in

the manufacturing/industrial activity but the assessee cannot be penalized for the fault of the party. The relevant documents about the party are placed on pages 157 to 186 of the paper book.

80. Even if the theory of preponderance of probability is applied in the given facts of the case, the issue goes against the revenue. It is because the probability in the case on hand is that the assessee has diverted its petroleum products to the petrol pump owners/other industries. But none of the authorities below has brought on record such details about the petrol pump owner/other industry where the assessee has diverted its products. Any allegation though very strong but it must be supported based on the tangible materials which is missing in the case on hand i.e. the parties to whom the assessee has diverted its products.

81. Similarly, there is decline in the manufacturing expenses in comparison to the earlier assessment year despite the turnover of the assessee has increased by hundred percent. Such information certainly creates suspicion to investigate the matter but the same cannot be the basis of making the addition until and unless other crucial evidences for diverting the sales are brought on record.

82. After considering the facts involved in the present case in totality, we are of the view that it was the question of fact before the revenue to find out that the assessee has diverted the sales to the petrol pump owners/other industries which is possible to decide on the basis of documentary evidence. But the revenue has not brought necessary tangible materials in support of his claim. Thus in our considered view, the addition made by the authorities below is not sustainable in the absence of sufficient documentary evidence. In this regard we find support and guidance from the judgment of Hon'ble Gujarat High Court in the case of CIT versus MK brothers reported in 163 ITR 249 wherein it was held as under:

*"**8.** On a perusal of the order of the Tribunal it clearly appears that whether the said transactions were bogus or not was a question of fact. The Tribunal has also pointed out that nothing is shown to indicate that any part of the fund given by the assessee to these parties came back to the assessee in any form. It is further observed by the Tribunal that there is no evidence anywhere that these concerns implicate vouchers to the assessee. Even the two statements do not implicate the transactions with the assessee in any way. With these observations the Tribunal ultimately has observed that there are certain doubtful features, but the evidence is not adequate to conclude that the purchases made by the assessee from these parties were bogus. It may be stated that the assessee was given credit facilities for a short duration and the payments were given by cheques. When that is so, it cannot be said that the entries for the purchases of the goods made, in the books of account were bogus entries. We, therefore, do not find that the conclusion arrived at by the Tribunal is against the weight of evidence. In that view of the matter we answer the question in the affirmative, that is, in favour of the assessee and against the revenue".*

In this regard, we note that there is no iota of evidence available with the revenue that the assessee has charged any amount over and above the invoice value. Thus we decide the issue in favour of the assessee and against the revenue. Hence the ground of appeal of the assessee is allowed whereas the ground of appeal of the revenue is dismissed.

83. The 2nd issue raised by the assessee in ground number 4 is that the Ld. CIT-A erred in confirming the addition in part made by the AO amounting to Rs. 23,68,584.00 on account of mismatch in the account of the parties (creditors).

84. The assessee in the year under consideration has shown purchases from reliance industries and HPCL for 62,000 Litres and 3,19,000 Litres for Rs. 7,06,413/- and 26,62,670/- respectively.

However, the AO on confirmation from the parties observed that these parties namely reliance industries and HPCL have shown sales in their books for 94,532 Litres and 9,39,300 Litres for Rs. 12,53,264/- and 85,54,884/- respectively leading a difference of Rs. 64,74,065/- in the amount of purchase shown by the assessee.

85. On question, the assessee submitted that the information furnished by HPCL is in summarized form and therefore it is difficult to reconcile the same. Accordingly, the assessee submits before the AO to obtain further details such as delivery order, transporters authority letter, delivery challans, detailed account statement, indent letter, invoice copies, payment details, copy of the journal voucher etc.

86. Similarly, the assessee agrees with the transaction shown by it with the reliance industries but requested to furnish the copy of journal voucher.

However the AO disagreed with the contention of the assessee by observing that it failed to reconcile the difference of the purchases with the confirmation received from the parties. The AO also observed that the assessee is already engaged in making/diverting it sales to the patrol pump owners/for non-industrial use at a higher price without recording the same in its books. Accordingly, the AO made the addition of Rs. 1,56,67,920/- after rejecting the books of accounts in the manner as detailed under:

"Net sale at the rate of Rs. 24/- per ltr. for unaccounted sales of 652.830 ltrs.	*Rs.*	*1,56,67,920/-*
Less: Purchase consideration as discussed above	*Rs.*	*64,74,065/-*
	Rs.	*91,93,835/-*
Add: Unaccounted investment as discussed above	*Rs.*	*64,74,065/-*
	Rs.	*1,56,67,920/-*
	==========	*"*

87. Aggrieved assessee preferred an appeal to the Ld. CIT(A).

88. The assessee before the Ld. CIT(A) submitted that addition has been made considering the sale price of the unaccounted quantity at Rs. 24/- per litre to the petrol pump owners which is quite unreasonable and without any evidence.

89. The AO has not furnished the details breakup as requested by the assessee such as delivery order, transporters authority letter, delivery challans, detailed account statement, indent letter, invoice copies, payment details, copy of the journal voucher etc. for making the reconciliation.

90. The assessee without prejudice to the above also claimed the deduction of Rs.64,74,065/- expenditure under section 37 of the Act. The assessee also claimed that such deduction/set off is available for the year under consideration as per section 69C of the Act.

91. The assessee further submitted that such the amount of purchases should be set off of against the amount of the addition made by the AO for Rs 5.49 crores as raised in the ground no. 1 to 3 with the memo appeal.

92. The assessee also claimed that the employees of the parties above were engaged in making the sales in the name of various bogus parties and some of them were also arrested.

93. The Ld. CIT (A) on the submission of the assessee called for the remand report from the AO.

94. The assessee during the remand proceedings before the AO submitted that the invoices raised by HPCL amounting to Rs. 26,92,006/- have been reversed or cancelled by the party.

95. The assessee similarly also submitted that the invoices amounting to Rs. 11,52,372/- pertains to the financial year 1996-97 and therefore the same cannot be included in the purchases of the current year under consideration.

96. The assessee also submitted that the name of the assessee has been used for showing the sale in its name but the goods have been sold to some other party. The assessee also submitted that there was no addition on account of bogus purchases in the assessment years 1999-2000 and 2000-2001.

97. The AO in his remand report submitted that there was no response from HPCL in response to the enquiries letters sent to it. The AO also submitted that even the version of the assessee is presumed correct, still there is the difference of Rs. 20,82,836/- with respect to the transactions with HPCL.

98. The AO regarding the purchases from the reliance industries Ltd submitted that the assessee failed to reconcile the purchases amounting to Rs. 2,85,748/- only.

99. The Ld. CIT (A) after considering the remand report and the submission of the assessee deleted the addition made by the AO in part by observing as under:

> *"6.9 After going through the entire details submitted from both sides, I find that the appellant have been able to reconcile most of the differences except as per the figures mentioned by the Assessing Officer in his remand report. There is also some substance in the appellant's claim that there may be some cause for mistake entries or other mal practices in the concerned oil companies which were also highlighted in the press at the same time as the allegations against the appellant company. Taking into account all the factors discussed into consideration, I hold that firstly, this is no case for making an addition of Rs.1,56,57,920/- when infact the unaccounted purchases should be deducted as expenditure. The case law cited on this point is very relevant. Secondly, most of the figures have been tallied then only the difference remaining should be the subject of taxation which is Rs.13,68,584/-.*
>
> *7. The next issue that arises is whether on these purchases, sales have to be estimated @ Rs.24. In my view, again, firstly as per reasoning given in the earlier … consider in respect of the main ground of appeal, the rate can never be taken at Rs.24 and infact it has been considered at an average rate of Rs.17. This also cannot be applied to the purchases as there is no proof that these items were either actually received and secondly, that they were actually sold to petrol pumps. In fact as discussed in ground no.1 above items like naptha, benzene and HSD as per chemical reports available are not capable of being mixed with petrol for use as motor spirit. The only possible thing is that*

the purchase themselves may have been diverted to outside parties without processing for any other nonindustrial use. However, in the absence of any proof of such sales, I find that the appellant's original argument that the first ground of appeal regarding unaccounted sales should also cover such addition in respect of unaccounted purchases. Therefore, I would uphold the addition only to the extent of Rs.23,68,584/-, which is the actual discrepancy found by the Assessing Officer in his remand report, and the profit of which would be deemed to be covered by the addition on account of sales in ground no.1."

100. Being aggrieved by the order of the learned CIT (A), the assessee is in appeal before us for confirmation of addition of Rs. 23,68,584/- and the Revenue for deletion of addition of Rs. 1,32,99,336/-.

101. Revenue has raised the following ground as under:

iv. Deleting the addition made by the AO on account of bogus purchases amounting to Rs. 1,32,99,336.00

102. The Ld. AR before us submitted that:

1. There is no request made by learned DR nor it is there in the application for admission of additional ground to admit the same in department ground. Hence, merely filing of additional ground with a presumption that the same would be admitted as a matter of right by department should not be accepted as fulfilling requirements for admission of additional ground.

2. On factual aspect of correctness of the addition made, learned A.O. in his remand report has already accepted that at the best addition could be sustained is for Rs.23,68,584/-only for following two parties:

		Rs.
i)	HPCL	20,82,836
ii)	Reliance Industries	2,85,748
	Total Rs.	23,68,584

3. Even above addition of Rs.23,68,584/- cannot be sustained as upto Asst. Year 1998-99 (before amendment in section 69C w.e.f. A.Y. 1999-00 by insertion of proviso) whatever addition is made u/s 69C will be allowed as deduction u/s 37 and net addition will be NIL. Assessee relies on following decisions which are also mentioned in CIT(A) order.
   a) S. F. Wadia v/s ITO 19 ITD 306 (Ahmedabad)
   b) Nishant Housing Dev. 52 ITD 103 (Patna)
   c) M.K. Mithi Vanthan v/s ITO 31 ITD 114 (Madras)

103. On the other hand, the learned DR vehemently supported the order of the authorities below.

104. Both the parties the ld. AR and the DR before us vehemently supported the order of the authorities below as favourable to them.

105. We have heard the rival contentions of both the parties and perused the materials available on record. The issue in the instant case relates to the difference in the amount of purchases shown by the assessee viz a viz the sales shown by the parties namely HPCL and the reliance industries Ltd. The difference was determined by the AO at Rs. 64,74,065/- which was reduced by the Ld. CIT (A) to Rs. 23,68,584/-.

106. The onus lies on the assessee to substantiate its claim for the purchases based on the documentary evidence. But the assessee failed to reconcile the difference in the amount of purchases despite sufficient opportunities were furnished to it. It was alleged by the authorities below that the assessee has purchased the goods outside the books of accounts which were also sold in the market without recording the same in its books of accounts.

107. The assessee in the case on hand failed to reconcile the amount of purchases amounting to Rs. 23,68,584/- which was added as income of the assessee as unexplained purchases under section 69C of the Act. However, we note that there was no evidence available with the authorities below that the assessee has made any investment in such purchases. In fact, we note that the Ld. CIT-A directed the AO to collect the details of the payment received by the parties from the assessee against such unaccounted purchases. But, the AO failed to collect any details from the parties listed above. Thus it can be inferred that there is no information available with the authorities below on account of investment in such unexplained expenditure for the purchases under section 69C of the Act.

108. In the absence of documentary evidence, we are of the view that the amount of gross profit will only be subject matter of addition with respect to such unaccounted transaction. It is undoubtedly a business transaction. In such facts and circumstances the Hon'ble Gujarat High Court in the case of CIT vs. President Industries reported in 258 ITR 654 has directed to make the addition only to the extent of gross profit. The relevant extract of the order is reproduced as under:

> *'The amount of sales by itself cannot represent the income of the assessee who has not disclosed the sales. The sales only represent the price received by the seller of the goods for the acquisition of which it has already incurred the cost. It is the realisation of excess over the cost incurred that only forms part of the profit included in the consideration of sales. Therefore, unless there is a finding to the effect that the investment by way of incurring cost in acquiring goods which have been sold has been made by the assessee and that has also not been disclosed, the question whether entire sum of undisclosed sales proceeds can be treated as income, answers by itself in the negative."*

In view of the above, we are of the view that the addition of the gross profit to the total income of the assessee on account of such purchases will meet the end of justice. However, in the case on hand, we note that the assessee has already been alleged by the district supply department to have made sales at a higher price by diverting to the petrol pump owners/for non-industrial use as discussed in the ground No. 1. The matter is still

pending before the competent court of law. Therefore we are of the view that, it will be difficult to find out the exact amount/date of gross profit embedded in such transaction of unaccounted purchase. However, to put a full stop on the ongoing dispute, we feel that an addition to the extent of 25% of such unaccounted purchases will meet the end of justice. In view of the above, we direct the AO to make the addition of the amount being 25% of such unaccounted purchases of Rs. 23,68,584/- to the total income of the assessee. Hence, the ground of appeal of the assessee is partly allowed and Ground of appeal of the Revenue dismissed.

109. The next issue raised by the assessee in ground No. 5 is that the Ld. CIT (A) erred in confirming the addition of Rs. 9,76,201/- on account of preoperative expenses under section 35D of the Act.

110. The assessee in the year under consideration has written off miscellaneous expenses amounting to Rs. Rs. 14,24,844/- in its profit and loss account under section 35D of the Act. The details of the expenses stand as under:

1) Preliminary expenses written off Rs. 10,560/-
2) Public issue expenses written off Rs. 4,38,083/-
3) Pre-operative expenses written off Rs. 9,76,201/-

However, the AO found that the assessee is eligible for deduction under section 35D to the extent of Rs. 1,10,671/- as decided by his predecessor in the assessment year 1996-97 vide order dated 26-2-1999 under section 143(3) of the Act. Accordingly, the AO disallowed the balance claimed by the assessee for Rs. 13,14,173/-and added to the total income of the assessee.

111. Aggrieved assessee preferred an appeal to the Ld. CIT(A).

112. The assessee before the Ld.CIT(A) submitted that if the preoperative expenses do not fall under section 35D of the Act, then the same should be capitalized to the fixed assets. Accordingly, the depreciation on such assess should be granted to the assessee.

However, the ld. CIT (A) disregarded the contention of the assessee by observing as under:

> *"8.2 I am not in agreement with the appellant on the above point. The issue of preliminary and preoperative expenses written of have already been dealt with in A.Y. 1996-97 and cannot be reconsidered now. The deduction as specified in that order have been correctly followed by the Assessing Officer, Hence, the disallowance of the excess claim is confirmed. However, the Assessing Officer is directed to take the figure, as finalized u/s 144 in the previous year's order dated 18.02.2002."*

113. Being aggrieved by the order of the Ld.CIT (A), the assessee is in appeal before us.

114. The Ld. AR before us submitted that the preoperative expenses to the extent of Rs. 3,64,917/- was amortized over a period of 10 years by the AO in the assessment framed under section 143(3) of the Act for the assessment AY 1996- 97. Accordingly the Ld. AR for the assessee prayed for the deduction of such amount.

115. On the other hand the Ld. DR vehemently supported the order of the authorities below.

116. We have heard the rival contentions of both the parties and perused the materials available on record. At the outset we note that the assessee has claimed preoperative expenses amounting to Rs. 36,49,179/-in the 1st year being 1996-97 in which the commercial production was commenced. The AO in that assessment was pleased to grant the deduction by amortizing such preoperative expenses over a period of 10 years. The relevant extract of the finding of the AO is tense as under:

> *"3. Further, during the course of assessment proceedings it is noted that it has claimed pre-operative/preliminary expenses amounting to Rs. 97,78,171/- till the date of*

commercial production of the business. Out of preliminary expenses of Rs.97,78,171/- a sum of Rs.60,28,992/- is considered as part of public issue expenses vide para-8 of the letter dated 22nd February, 1999, submitted by the assessee. Therefore, considering the same and further invoking the provisions of section 35D of the I. T. Act out of the total public issue expenses amounting to Rs.61,28,992/- net allowable deduction during the previous year relevant to current asstt. year works out to only RS. 1,10,671/-. The total Capital employed by the assessee till the end of Jal Hi Power Petrochem Ltd.

A.Y. 1996-97/Order u/s.143(3)

the current year is Rs.4,42,68,500/-. 2.5% of the sane comes to Rs.11,06,712/-. Therefore, 1/10th of the admissible amount comas to only Rs. 1,10,671/- u/s.35D of the I. T. Act.

4. The balance amount of Rs.36,49,179/- (97,78,171 - 61,28,992/-) is allowed to be write off over a period of 10 years considering the same as pro-operative/preliminary expenses since the assessee has not adjusted/capitalised the same as part of its assets as per the return of income filed. Therefore, on account of the same as against the write off of Rs.6,77,959/- as per schedule 9 to the balance-sheet, only a sum of Rs.3,64,917/- is allowed to be write off during the current year and the balance amount is to be adjusted in the later years as discussed above."

117. A plain reading of the above order shows that the AO as already allowed the claim of the assessee on account of preoperative expenses by amortizing over a period of 10 years. Thus, the amount to the extent of Rs. 3,64,917/- is arising from the earlier year as discussed above. Therefore, we grant the relief to the assessee to the extent of Rs. 3,64,917/- being the amount brought forward from the earlier year. Accordingly, we reject the claim of the assessee for the balance amount of Rs. 6,11,284/- only. Hence the ground of appeal of the assessee is allowed in part.

118. The issue raised by the assessee in ground No. 6 is that the Ld. CIT (A) erred in confirming the addition made by the AO for Rs. 1,67,606/- on account of foreign travelling expenses.

119. At the outset the Ld.AR for the assessee conceded that the impugned issue can be decided against the assessee. Therefore, we reject the ground of appeal of the assessee. Hence the ground of appeal of the assessee is dismissed.

120. The issue raised by the assessee in ground No. 7 is that the Ld. CIT (A) erred in confirming and expense of Rs. 18,376/- on account of personal expenses.

121. The assessee in the year under consideration has claimed certain expenses as detailed below:

1)	Gift expenses	53,558/-
2)	Diwali expenses	30,651/-
3)	Office expenses	18,736/-
4)	Staff walfare expenses	80,814/-
	Total	1,83,759/-

122. The assessee during the assessment proceedings failed to furnish the supporting evidences with respect to the aforesaid expenses. Accordingly, the AO in the absence of documentary evidence and considering the fact that such expenditures were incurred in cash, has disallowed 1/10th of such expenses, holding them as personal.

123. Aggrieved assessee preferred an appeal to the Ld.CIT(A) who has also upheld the order of the AO in the absence of documentary evidence.

124. Being aggrieved by the order of the Ld. CIT (A) the assessee is in appeal before us.

125. The Ld. AR before us submitted that the assessee being our body corporate cannot incur any expense which is personal in nature.

126. On the other hand, the Ld. DR vehemently supported the order of the authorities below.

127. We have heard the rival contentions of both the parties and perused the materials available on record. There is ambiguity to the fact that the onus lies on the assessee for claiming the deduction of any expense under section 37(1) of the Act. However, the assessee failed to furnish the supporting evidence for the expenses incurred by it. Therefore we decline to interfere in the finding of the authorities below. Hence the ground of appeal of the assessee is dismissed.

In the result the appeal filed by the assessee is partly allowed.

Coming to the Revenue's appeal bearing ITA number 1065/Ahd/2004 for the assessment 1998-99

128. The revenue has raised the following revised grounds of appeal:

"1. On the facts and in the circumstances of the case and in law. The learned CIT(A), Baroda has erred in

i) Deleting the addition made by the AO on account of bogus sales amounting to Rs. 5,32,97,392/-.

ii) Disallowing the addition made of Rs. 91,416/- made on account non inclusion of excise duty on finished goods while valuing closing stock. The excise duty payable on finished goods should be included in the cost. The view is also accepted by the institution on C.As and as per instruction no. 1389 dated 24.3.1981 issued by the CBDT. The Hon. Supreme Court in the case of Mc. Dowell & Co. Ltd. vs. CIT (154 ITR 146) has also opined that it is a part of manufacturing cost.

iii) Deleting the addition made by the AO on account of bogus purchases amounting to ₹1,32,99,336/-

2. On the facts and circumstances of the case and in law the learned CIT(A) ought to have uphold the order passed by the Assessing Officer.

3. It is therefore, prayed that the order of the CIT(A) be set aside and that of Assessing Officer be restored."

129. The issue raised by the Revenue in ground No. 1 (a) has already been adjudicated along with the appeal of the assessee bearing ITA No. 1003/Ahd/2004 which we have decided in favour of the assessee. For the detailed discussion, please refer the relevant

paragraph bearing number 37 to 82 of this order. Respectfully following the same we, the ground of appeal of the Revenue is dismissed.

130. The 2nd issue raised by the assessee in ground No. 1(b) has already been adjudicated along with the appeal of the assessee bearing ITA number 1003/AHD/2004 which we have decided in favour of the assessee in part. For the detailed discussion, please refer the relevant paragraph bearing No. 105 to 108 of this order. Respectfully following the same, we allow the ground of appeal raised by the Revenue in part.

131. The 3rd issue raised by the Revenue in ground No. 1(ii) is that the Ld. CIT(A) erred in deleting the addition made by the AO for Rs. 91,416/- on account of non-inclusion of excise duty in the closing stock of finished goods.

132. The assessee in the year under consideration has valued the closing stock of finished goods as on 31 March 1998 amounting to Rs. 8,11,984/- without including the excise duty element of Rs. 91,416/-. The assessee claimed during the assessment proceedings that it has collected the amount of excise duty and paid in the subsequent assessment Year 1999-2000.

However, the AO rejected the contention of the assessee by observing that the liability of the excise duty has accrued on the finished goods shown as on 31 March 1998. Therefore the same is liable to be added to the value of the closing stock. Accordingly the AO added the same to the total income of the assessee.

133. Aggrieved assessee preferred an appeal to the Ld. CIT(A).

134. The assessee before the Ld. CIT (A) submitted that it has paid the amount of excise duty before filing the return of income. Therefore the same should be allowed as deduction under section 43B of the Act.

135. The assessee also submitted that the similar addition was made by the AO in the assessment year 1997-98. Accordingly, he claimed for the deduction of such amount of excise duty embedded in the opening stock of the finished goods.

136. The Ld. CIT(A) after considering the submission of the assessee deleted the addition made by the AO by observing that the assessee is entitled for the deduction by virtue of the provisions of section 43B of the Act as the amount of excise duty liability was paid before filing the return of income.

137. Being aggrieved by the order of the Ld. CIT (A), the Revenue is in appeal before us.

138. The Ld. DR and the AR before us relied on the order of the authorities below as favourable to them.

139. We have heard the rival contentions of both the parties and perused the materials available on record. Indeed the provision of section 145A of the Act requires the assessee to include the amount of excise duty while valuing the closing stock of the finished goods as on 31st March 1998. However, the deduction for the same is allowed if such excise duty was paid by the assessee on or before filing the income tax return before the due date as specified under section 139(1) of the Act. The Ld. CIT(A) has given very clear finding that the amount of excise duty was paid on or before the due date of filing the income tax return. Thus in other words even the amount of excise duty not included in the value of closing stock, then also the assessee was entitled for the deduction of such

payment of excise duty under the provisions of section 43B of the Act. Accordingly there was no impact on the taxable income of the assessee. Accordingly we do not find any reason to interfere in the order of the Ld. CIT (A). Hence the ground of appeal of the Revenue is dismissed.

In the result, the appeal filed by the revenue is allowed in part.

Coming to the assessee's appeal bearing ITA N. 1004/AHD/2004 for the assessment 1999-2000

140. The assessee has raised the following concise grounds of appeal:

"Your appellant being aggrieved by the order passed by the Learned CIT(A)-I, Baroda (hereinafter referred to as learned CIT(A)) u/s 250 of the Act, presents this appeal on the following amongst other grounds of appeal. The grounds set out hereunder are independent of and without prejudice to each other.

1. *The Learned CIT(A) erred in law and on facts in upholding rejection of appellant's books u/s 145(2) and in retaining addition of Rs.1,31,24,552/- in respect of alleged sale of appellant's solvent products at the price higher than the one at which they are recorded in the books particularly when the same was only on the basis of the estimation and also as observed by the Learned CIT(A) herself is subject to recall/rectification based on the availability of further evidence.*
2. *The Learned CIT(A) erred in confirming and retaining addition of Rs.1,31,24,552/- particularly when the order of District Magistrate implicating the appellant is challenged in further proceedings, whose outcome is yet not final and particularly when no petrol pump owner was ever examined by the AO to support his findings in particularly when the complaint with the District Magistrate did not cover financial year 1998-99 relevant to assessment year 1999-00.*
3. *The learned CIT(A) erred in confirming and retaining addition of Rs.1,31,24,552/- in respect of alleged sale of solvent product to petrol pump owners ignoring some vital facts and giving incorrect findings contrary to the evidences and facts.*

4. *The learned CIT(A) erred in law and on facts in upholding the disallowance of Rs.73,447/- as prior year expenses. It is submitted that since the liability to pay this amount crystallized during the year and that some of the expenses were to be allowed u/s 43B, the same should not have been considered for disallowance u/s 37. It is submitted that it be so held now and disallowance made be deleted.*

5. *The Learned AO as well as CIT(A) erred in confirming charging of interest u/s 243A, 234B and 234C of the Act.*

Your appellant prays for leave to add, alter, amend, drop or substitute all or any of the aforesaid grounds before this appeal is disposed off."

141. The 1st issue raised by the assessee is that the learned CIT (A) erred in confirming the addition made by the AO for Rs. 1,31,24,552.00.

142. The identical issue has already been decided by us in the appeal of the assessee bearing No. 1003/AHD/2004 pertaining to the assessment year 1998-99 vide paragraph number 37 to 82 of this order which we have decided in favour of the assessee. Respectfully following the same we allow the ground of appeal of the assessee.

143. The next issue raised by the assessee is that the Ld. CIT (A) erred in confirming the disallowance made by the AO for Rs. 73,447/- on account of prior period expenses.

144. The assessee in the year under consideration claimed certain prior period expenses related to salary, freight charges etc. However the AO was of the view that the assessee is maintaining its books of accounts based on mercantile system of accounting. Therefore the same cannot be allowed in the year under consideration. Therefore the AO added the same to the total income of the assessee.

145. Aggrieved assessee preferred an appeal to the Ld.CIT (A) and submitted that some of the expenses are allowable as deduction under section 43B of the Act. The assessee submitted the breakup of the expenses as detailed under:

1	*Amount (Rs.)* *120*	*Narration Difference of Jan 98 paid to staff*
2 3	*2,010* *1,009*	*Cargo Motors- Repairs and Maintenance* *East Africa Motors- Repairs and Maintenance*
4	*17,500*	*Listing fees to Vadodara Stock Exchange to be claimed u/s. 43B in the year of payment*
5	*1,250*	*Professional tax also u/s. 43B to be allowed in the year of*

		payment.
6	*42,108.24*	*Difference of Excise Modvat – opening difference adjusted to be considered u/s. 43B in the year of adjustment*
7	*7,500*	*Sagar Transport freight charges – Bill settled during the year.*
	71,497.24	

However the Ld. CIT (A), rejected the contention of the assessee by observing that there is no submission from the side of the assessee justifying that such expenses were crystallized in the year under consideration. Similarly there was no detail furnished by the assessee suggesting that the expenses covered under section 43B of the Act were paid before filing the return of income.

146. Being aggrieved by the order of the Ld. CIT(A), the assessee is in appeal before us.

147. The Ld. AR before us reiterated the submission made before the authorities below.

148. On the other hand the Ld. DR vehemently supported the order of the authorities below.

149. We have heard the rival contentions of both the parties and perused the materials available on record. At the outset we note that the impugned issue is covered in favour of the assessee by the order of Bombay High Court in the case of *CIT v. Nagri Mills Co. Ltd.<u>[1958] 33 ITR 681</u>* wherein it was held as under:

> *"3. We have often wondered why the Income-tax authorities, in a matter such as this where the deduction is obviously a permissible deduction under the Income-tax Act, raise disputes as to the year in which the deduction should be allowed. The question as to the year in which a deduction is allowable may be material when the rate of tax chargeable on the assessee in two different years is different; but in the case of income of a company, tax is attracted at a uniform rate, and whether the deduction in respect of bonus was granted in the assessment year 1952-53 or in the assessment year corresponding to the accounting year 1952, that is in the assessment year 1953-54, should be a matter of no consequence to the Department; and one should have thought that the Department would*

not fritter away its energies in fighting matters of this kind. But, obviously, judging from the references that come up to us every now and then, the Department appears to delight in raising points of this character which do not affect the taxability of the assessee or the tax that the Department is likely to collect from him whether in one year or the other.

150. There is no ambiguity that such expenses were incurred for the purpose of the business. Therefore in our considered view, applying the principles of Bombay High Court as discussed above, we set aside the order of the Ld. CIT(A) and direct the AO to delete the addition made by him. Hence the ground of appeal of the assessee is allowed.

In the result the appeal of the assessee is allowed.

Coming to the Revenue's appeal bearing ITA N. 1066/Ahd/2004 for the assessment 1999-2000

151. The Revenue has raised the following ground of appeal:

"1. On the facts and in teh circumstances of the case and in law, The learned CIT(A), Baroda has erred in

(i) deleting the addition made by the Assessing Officer on account bogus sales amounting to Rs. 15,86,44,786/-

2. On the facts and circumstances of the case and in law the learned CIT(A) ought to have upheld the order passed by the Assessing Officer.

3. It is, therefore, prayed that the order of the CIT(A) be set aside and that of the Assessing Officer be restored."

152. The only ground raised by the Revenue is that the Ld. CIT(A) erred in deleting the addition made by the AO for Rs. 15,86,44,786/- on account of bogus sale.

153. The identical issue has already been decided by us in the appeal of the assessee bearing No. 1003/AHD/2004 in ground no 1-3 pertaining to the assessment year 1998-99 vide paragraph number 37 to 82 of this order which we have decided in favour of the

assessee. Respectfully following the same, we dismiss the ground of appeal of the Revenue.

In the result, the appeal filed by the revenue is dismissed.

Coming to the Assessee's appeal bearing ITA N. 1005/Ahd/2004 for the assessment 2000-01

154. The assessee has raised the following ground of appeal:

"Your appellant being aggrieved by the order passed by the Learned CIT(A)-I, Baroda (hereinafter referred to as learned CIT(A)) u/s 250 of the Act, presents this appeal on the following amongst other grounds of appeal. The grounds set out hereunder are independent of and without prejudice to each other.

1. *The Learned CIT(A) erred in law and on facts in upholding rejection of appellant's books u/s 145(2) and in retaining addition of Rs.2,76,95,907/- in respect of alleged sale of appellant's solvent products at the price higher than the one at which they are recorded in the books particularly when the same was only on the basis of the estimation and also as observed by the Learned CIT(A) herself is subject to recall/rectification based on the availability of further evidences.*
2. *The Learned CIT(A) erred in confirming and retaining addition of Rs.2,76,95,907/- particularly when the order of District Magistrate implicating the appellant is challenged in further proceedings, whose outcome is yet not final and particularly when no petrol pump owner was ever examined by the AO to support his findings.*
3. *The learned CIT(A) erred in confirming and retaining addition of Rs.2,76,95,907/- in respect of alleged sale of solvent products to petrol pump owners ignoring some vital facts and giving incorrect findings contrary to the evidences and facts.*
4. *The learned CIT(A) erred in law and on facts in upholding the disallowance of Rs.2,61,942/- as prior year expenses. It is submitted that since the liability to pay this amount crystallized during the year and that some of the expenses were to be allowed u/s 43B, the same should not have been considered for disallowance u/s 37. It is submitted that it be so held now and disallowance made be deleted.*
5. *The learned AO as well as CIT(A) erred in confirming charging of interest u/s 243A, 234B and 234C of the Act.*

Your appellant prays for leave to add, alter, amend, drop or substitute all or any of the aforesaid grounds before this appeal is disposed off."

155. The 1st issue raised by the assessee in ground 1 to 3 is that the learned CIT (A) erred in confirming the addition made by the AO for Rs. 2,76,95,907/-.

156. The identical issue has already been decided by us in the appeal of the assessee bearing No. 1003/AHD/2004 in ground no. 1 to 3 pertaining to the assessment year 1998-99 vide paragraph number 37 to 82 of this order which we have decided in favour of the assessee. Respectfully following the same, we allow the ground of appeal of the assessee.

157. The 2ndissue raised by the assessee in ground is that the Ld. CIT(A) erred in confirming the addition made by the AO for Rs. 2,61,042/- on account of prior period expenses.

158. The identical issue has already been decided by us in the appeal of the assessee bearing No. 1004/AHD/2004 in ground no 4 pertaining to the assessment year 1990-00 vide paragraph number 149 to 150 of this order which we have decided in favour of the assessee. Respectfully following the same, we allow the ground of appeal of the assessee.

In the result, the appeal filed by the assessee is allowed.

Coming to the Revenue's appeal bearing ITA N. 1067/Ahd/2004 for the assessment 2000-01

160. The Revenue has raised the following ground of appeal:

"1. On the facts and in the circumstances of the case and in law, The learned CIT(A), Baroda has erred in

(i) deleting the addition made by the Assessing Officer on account Bogus sales amounting to Rs. 18,48,63,204/-

(ii)

2. On the facts and circumstances of the case and in law the learned CIT(A) ought to have upheld the order passed by the Assessing Officer.

3. It is, therefore, prayed that the order of the CIT(A) be set aside and that of the Assessing Officer be restored."

161. The only ground raised by the Revenue is that the Ld. CIT(A) erred in deleting the addition made by the AO for Rs. 18,48,63,204/- on account of bogus sale.

162. The identical issue has already been decided by us in the appeal of the assessee bearing No. 1003/AHD/2004 in ground no 1-3 pertaining to the assessment year 1998-99 vide paragraph number 37 to 82 of this order which we have decided in favour of the assessee. Respectfully following the same, we dismiss the ground of appeal of the Revenue.

In the result, the appeal filed by the Revenue is dismissed.

163 In the combined result, assessee's appeal bearing ITA No.1003/Ahd/2004 is partly allowed and bearing ITA Nos.1004 & 1005/Ahd/2004 are allowed and revenue's appeal bearing ITA No.1065/Ahd/2004 is partly allowed and bearing ITA Nos.1066 & 1067/Ahd/2004 are dismissed.

This Order pronounced in Open Court on 24/10/2019

Sd/-	Sd/-
(JUSTICE P. P. BHATT)	(WASEEM AHMED)
PRESIDENT	**ACCOUNTANT MEMBER**

Ahmedabad; Dated 24 /10/2019
Priti Yadav, Sr.PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-I, Baroda.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad