आयकर अपीलीय अधिकरण न्यायपीठ रायपुर में ।
IN THE INCOME TAX APPELLATE TRIBUNAL,
RAIPUR BENCH, RAIPUR

BEFORE SHRI ANIL CHATURVEDI, AM AND
SHRI PARTHA SARATHI CHAUDHURY, JM

आयकर अपील सं. / **ITA Nos.232 to 235/RPR/2014**
निर्धारण वर्ष / **Assessment Years : 2009-10 to 2012-13**

Deputy Commissioner of Income-tax,
Central Circle, Raipur (C.G.)

.....अपीलार्थी / Appellant

बनाम / V/s.

M/s. Mahamaya Steel Industries Ltd.,
Mahamaya Tower, 3rd & 4th Floor,
In front of Anupam Nagar,
Near Varun Honda, G.E. Road,
Raipur (C.G.)

PAN: AABCR0695Q .....प्रत्यर्थी / Respondent

CO Nos.32 to 35/RPR/2015
Assessment Years : 2009-10 to 2012-13

M/s. Mahamaya Steel Industries Ltd.,
Mahamaya Tower, 3rd & 4th Floor,
In front of Anupam Nagar,
Near Varun Honda, G.E. Road,
Raipur (C.G.)

PAN: AABCR0695Q

..... Cross Objector

बनाम / V/s.

Deputy Commissioner of Income-tax,
Central Circle, Raipur (C.G.) ..... Respondent

Assessee by : Shri Veekaas S. Sharma
Revenue by : Shri Santosh Kumar

सुनवाई की तारीख / Date of Hearing : 06.11.2019
घोषणा की तारीख / Date of Pronouncement : 07.11.2019

आदेश / ORDER

PER PARTHA SARATHI CHAUDHURY, JM :

These appeals preferred by the Revenue and the corresponding cross objections preferred by the assessee emanates from the common order of the Ld. CIT(Appeals), Raipur (C.G) dated 17.07.2014 for the assessment years 2009-10 to 2012-13 as per the grounds of appeal on record.

2. These cases were heard together. Since issues common and facts are similar, these cases are being disposed of vide this consolidated order.

3. At the very outset, the Ld. DR apprised the Bench that in all these appeals of the Revenue and cross objections of the assessee broadly pertains to two issues viz. "**issue of the lower yield declared by the assessee".** This ground is common for all the assessment years. That apart, for assessment year 2012-13, there is another ground which leads to "**give credit of cash Rs.13,00,000/- seized during the course of search operation u/s.132 of the Income Tax Act, 1961 (hereinafter**

referred to as 'the Act') as prepaid taxes while computing tax liability of the assessee."

First, we would adjudicate the ground relating to **"issue of the lower yield declared by the assessee".**

ITA Nos.232 to 235/RPR/2014 (By Revenue)
A.Ys. 2009-10 to 2012-13

4. The facts on this issue are that the Assessing Officer observed that the assessee company is engaged in the manufacturing of rerolled products such as heavy steel structural, joist, girder. It has two divisions namely Steel Melting Shop (SMS) and Rolling Mill Division (RMD). SMS division uses sponge iron, pig iron and melting scrap as raw material to manufacture billets and blooms and RMD uses these billets and blooms to produce further re-rolled products such as heavy steel, structural etc. It is the case of the Assessing Officer that at times billets and blooms produced by the assessee are also sold in open market. The Assessing Officer noticed that evidences of unaccounted production by the assessee company by suppressing its yield were found during search. Elaborating further, the Assessing Officer stated in his order various mathematical calculation trying to bring forth suppression of yield by the assessee. The Assessing Officer also noted in his order identifying the usage of power an furnace oil consumption vis-à-vis the yield of the assessee and has held that there is

wide variation in consumption of electricity, furnace oil vis-à-vis production of finished goods in different months of the year. The Assessing Officer while recording his findings at Page 20, Para 7.5 of his order was therefore of the opinion that figures of production and consumption of SMS division shown in the books of account of the assessee company did not reflect true state of affairs. Therefore, the Assessing Officer rejected the books of accounts of the assessee. The Assessing Officer has held that in the SMS division, average yield in the industry is merely 89% and as on that basis, he worked out on the suppression of production and made various additions/disallowances as appearing in his order.

5. The assessee being aggrieved preferred appeal before the Ld. CIT(A) and made detail written submissions before the Ld. CIT(A) which is on record. The Ld. CIT(A) after considering the detailed written submissions furnished by the assessee, facts of the case and assessment order has held and observed as under:

> *"7.1 I have carefully gone through the assessment order and submissions of the appellant. The search operation u/s.132 had taken place in the premises of the appellant including residential premises of the directions. The AO had issued show cause notice cum query letter inter alia asking the appellant to show cause why addition should not be made as the yield declared by the appellant was less than 89% from Steel Melting Shop (SMS) Division.*
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> *7.2 The AO has made the addition on account of alleged unaccounted sales based on unaccounted production by estimating the production at 89% in SMS Division. I find that from Page No. 7 to Page No.11 of*

the assessment order, the AO has made discussion on his mathematical calculation pertaining to Rolling Mill Division, however, it is seen from the assessment order that the AO has not drawn any adverse inference as regards Rolling Mill Division nor did the AO find yield of Rolling Mill Division to be lower, the AO has not substantiated the relevance and significance of these mathematical calculations pertaining to Rolling Mill Division. The AO has reproduced various mathematical calculations and tables containing data consumptions of power, sponge iron, production, average consumption, highest and lowest consumption etc. The AO ultimately zeroed down to the issue of yield declared by the appellant in SMS Division. The AO has not substantiated the nexus between the mathematical calculations of highest and lowest consumption of power, raw material etc. with yield of 89% adopted by the AO. The AO has merely stated that the SMS division shows yield in the vicinity of 84% which is quite low as compared to the yield being shown by other manufacturers of CG, however, wherefrom the AO derived this figure of 89% is best known to the AO only. The undersigned made an attempt to work out the average yield in the industry based on data available from the Department itself.

7.3 The appellant has submitted that despite repeated requests made before the AO, the basis of adopting yield in the case of SMS Division at 89% was not provided. With a view to make the comparison of yield declared by other assesses engaged in similar line of business, information regarding yield was sought from the office of DCIT-1(2), Raipur vide letter dated 22.04.2014. The information was received from the office of DCIT-1(2)- Raipur vide letter dated 25.04.2014."

5.1 The yield declared by the assessee and information regarding yield declared by other assesses, as received from the DCIT-1(2), Raipur was compared with reference to the uniform and standard yield adopted by the Assessing Officer and the result of the comparison so made are on record. As per comparison to the table which is on record, the following inferences are drawn:

"*(a) The yield declared by the different assessees in the same year is not uniform, conversely every assessee declared different yield.*

(b) The yield declared by same assessee in different assessment years is also not uniform, for instance yield achieved by Sadguru Ispat Pvt. Ltd. in A.Y.2009-10 and 2010-11 was 81.35% and 77.01% respectively.

(c) Not even a single comparable instance was found declaring yield of 89%.

(d) The arithmetical mean of yield declared by other assesses was computed on the basis of data available within the department. However, the yield declared by the appellant in different years was found to be more than the arithmetical mean of the yield declared by the other assessees.

(e) From the *table above, wherein average yield of the industry has been computed based on data received from DCIT-1(2), Raipur, it is seen that the yield achieved by the appellant in Financial Year 2008-09, 2009-10 and 2010-11 is more than the average industry yield.*

In view of the aforesaid findings, the action of the AO in adopting uniform and standard yield of 89% appeared to be unreasonable.

7.5 Thereafter, with a view to make comparison of financial results of the appellant with other assesses engaged in similar line of business, letter was issued to DCIT-1(2), Raipur vide letter dated 26th May, 2014.

7.6 I have carefully gone through the Tax Audit Reports, audited financial statements and assessment orders passed by the DCIT-1(2), Raipur in the case of other assesses referred (supra). From the perusal of said assessment orders, it was gathered that no adverse inference was drawn in the case of those assessees that were assessed in the past in the office of DCIT-1(2), Raipur on the issue of lower yield, and in fact declared less yield than that declared by the appellant. In none of the comparable case received from DCIT-1(2), Raipur, such standard yield of 89% was adopted despite of the fact that all the comparable cases declared yield much less than 89% and even less than that declared by the appellant."

5.2 The Ld. CIT(A) analyzed the financial results of the appellant and a comparison of GP and NP rate which was drawn between GP and NP rate declared by the appellant and the comparable cases received from DCIT-

1(2), Raipur which is on record and thereafter, the Ld. CIT(A) observed as under:

> "*7.8 I have carefully compared the financial results of the appellant company with the financial results of other comparable cases as received from DCIT-1(2), Raipur. As is self-explanatory from the details tabulated above, in my considered view, the financial results declared by the appellant are found to be better in comparison to most of the comparable instances in terms of GP rate as well as NP rate and even in terms of yield. It is also observed that there is no direct co-relation between GP rate and yield, for instance, the yield declared by Super Iron and Steel Private Limited in financial year 2008-09 is 84.65% which is marginally higher than the yield declared by the appellant at 84.01% however, the GP rate and NP rate of the appellant are found to be much better i.e. 6.85% and 3.21% respectively in comparison to 1.98% and 1.42% respectively declared by Super Iron and Steel Private Limited. Similarly it is observed that the GP rate declared by Southern Ispat & Energy Limited was 25.36% (barring the fact that the said company is engaged in the business of manufacturing of Ingots, Runner riser, trading of goods and commission) as against 5.80% declared by the appellant company, however, at the same time it is also seen that apart from net loss of 14.55% declared by Southern Ispat & Energy Limited, the yield declared by Southern Ispat & Energy Limited at 77.38% is much lower than the yield declared by the appellant at 85.82%.*
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> *I am in agreement with the submissions of the appellant that the variation in consumption/yield is found to take place as raw material of SMS Division is sponge iron, which in turn is produced from iron ore, coal and dolomite and iron ore which is essentially a mineral differs in Iron content as obtained from the mines, conversely, being mineral, the quality of ore and coal cannot be expected to be uniform. I do find considerable force in the submissions of the appellant that the quality/grade of sponge iron is referred in terms of metallization rate and spo0nge iron of different metallization rate cannot be expected to give uniform yield, furthermore, it is a matter of common knowledge that the quality and quantity of output varies with the quality and composition of inputs. It needs no reiteration that at a given point of time, rate of sponge iron will vary depending upon the metallization rate and similarly, rate of iron ore will vary with the variation in iron content in iron ore. Therefore, in my considered view, yield cannot be said to be sole decisive factor while assessing the reliability of books of account. In other words, merely low yield cannot lead to an irrevocable presumption that the books of accounts of the appellant are unreliable and reasonable profit cannot be deduced therefrom. In my considered view, if a person uses low grade of raw material which will give low yield, yet he may make handsome profit if he is able to buy raw material at competition rates,*

in such a situation, it cannot be said that the books of accounts are not reliable merely due to low yield.

7.9 It is a matter on record that the appellant has maintained quantitative records of raw material consumed and finished product produced. The books of accounts were subjected to tax audit as well as audit under Company Law which were produced before the AO together with bills and vouchers and the same were examined by test check. The appellant has furnished the copies of excise returns filed by the appellant on monthly basis in Form-ER-1 for finished goods and in Form ER-6 for raw materials, the same are placed in paper book. I had carefully analyzed various columns and details furnished by the appellant on monthly basis to the Central Excise Department. It is gathered that in Form ER-1, the appellant has given the details on monthly basis viz. Chapter heading, Description of goods, Units of quantity, Opening balance, quantity manufactured, quantity cleared, closing stock, Assessable value, Type of clearance, Excise duty payable etc. In Form ER-6, the appellant furnished the details on monthly basis viz. Description of principal inputs, Quantity code, Opening Balance, Receipt, taken for use in the manufacture of dutiable and exempted finished goods, removed as such for export or for home consumption, closing balance, finished goods manufactured out of input, quantity code of finished goods quantity of finished goods manufactured.

7.10. It is seen that the excise returns in Form ER-1 and ER-6 filed by the appellant on monthly basis are duly acknowledged and bears the seal and signature of the central Excise Authority. The appellant was asked to produce the excise records maintained on daily basis. The appellant did produce the excise records in Form-IV and RG-1 for raw material and finished goods respectively for all the years under consideration. On test check of excise records maintained on daily basis with the figures of production, consumption of raw material and closing stock of finished goods and raw material shown in Form ER-1 and ER-6, it was found that the same are tallying and thus, were found to be satisfactory. The entries in the excise records for material inwards was cross checked with reference to purchase bills and on test check, the same was found to be satisfactory and no infirmity was observed. The quantity of finished goods cleared was also verified with the sales invoice/challan issued by the appellant and the same was found to be satisfactory. From the details furnished by the appellant in Form ER-6, the data for calculation of percentage of yield and burning loss is readily available.

7.11 The appellant was asked to submit copies of seized documents and reply/explanation of the appellant thereon. The explanation given by the appellant on seized documents during the course of assessment proceedings before the AO was cross checked with reference to the seized documents, excise records, books of account and bill and vouchers and the same was found to be satisfactory.

7.12. On page No.14 of the assessment order, the AO has referred to the difference in inventory, however, it is seen that the AO has not made any addition to the total income on account of difference of inventory. If the appellant was actually suppressing the yield as alleged by the AO, in all probabilities, the difference in stock of blooms and billets must have been very wide and it cannot be just a sheer coincidence that the search team did not come across any incriminating document; that no striking discrepancy was observed in stock/inventory; that the appellant got into this notorious practice of earning undisclosed income only commencement of production in SMS division and was not doing such thing till it had Rolling Mill.

7.13 The findings of the AO at Para 1.2 on Page No.14 of the assessment order are discussed hereunder:

(1) Regarding stock, as stated supra, the AO has not drawn any adverse inference as regards difference in inventory.

(2) Regarding capacity utilization, the allegation of the AO that the actual production is much less than the installed capacity has been negated by the appellant by placing on record actual production data i.e. quantitative information with reference to weighted installed capacity based on actual number of days during which the production process is going on. On the matter of capacity utilization, I do find that the assumption of the AO that the factory will remain in operation for 365 days is quite hypothetical as the AO has completely ignored the fact that there would be weekly offs/holidays apart from national holidays and routine maintenance. I am convinced with the explanation tendered by the appellant regarding capacity utilization and in view thereof, I am of the considered opinion that the capacity utilization cannot be said to be lower as presumed by the AO on the basis of incorrect interpretation of facts.

(3) Regarding uniform methodology for measurement inputs, in my considered view the same is not fatal and that per se is not sufficient to reject the books of accounts and this fact cannot be given undue significance in isolation while ignoring the yield, GP and NP rate declared by the appellant based on audited account. This issue regarding "estimation" has been discussed in detail in the subsequent paras.

(4) Regarding variation in consumption of sponge iron, power in the SMS Division, in my considered view, the same may lay foundation for raising suspicion, however, at the same time, it is settled principle of law that suspicion, howsoever grave it may be, cannot take place of the evidence. On an independent appreciation of reasons explained by the appellant for variation in yield i.e. for variation in consumption of sponge iron and

power in SMS Division, Ii find the explanation of the appellant to be convincing, particularly when the appellant has brought on record certificate from registered valuer which is placed in the paper book at page No.261 of Volume 8 of the paper book in the case of Abhishek Steel Industries Limited which is also part of the Mahamaya Group of Companies.

The AO has not brought on record any evidence to disbelieve the certificate of registered valuer who is duly approved u/s.34AB of the Wealth Tax Act, 1957 vide order dated 06.07.2011. As per the said certificate of the registered valuer, the average yield in SMS Division for manufacturing of blooms and billets using sponge iron as raw material may vary from 80 to 86% and the power consumption for production of Blooms and Billets in SMS Division may vary from 800 to 1500 KW for production of each MT of blooms and Billets. The quantitative details of consumption of sponge iron and power were found to be within the reasonable rage as certified by the registered valuer.

7.14 The recoding of 'reason' by the AO is a condition precedent for any belief of the AO however, in the instant case, the AO has not stated any reason for his inference regarding standardized yield of 89% in the SMS Division. Reason must be recorded by the AO that any undisclosed income belongs to the appellant. The Material itself should not be vague, indefinite, distinct or remote. If there is no rational or intangible nexus between the material and the satisfaction that a person has 'undisclosed income', the conclusion would not deserve acceptation. Then the satisfaction is vitiated.

7.15 In the instant case, the AO has completely failed to record the reasons based on material available as the AO has not referred to even a single seized document which could be regarded as incriminating document and used as an evidence to even remotely support the conclusion of the AO. The AO seems to have blown out of proportion merely on the basis of mathematical and mechanical calculations. The AO has laid too much emphasis on statistics, those statistics which cannot be said to have been gathered as a result of search only. The statistics relied upon by the AO are those which are quite routinely called for even during the regular assessment proceedings u/s.143(3). The AO has not stated what according to him should have been the average consumption of power, sponge iron etc. Another fact noticed is that the case of the appellant was under scrutiny assessment for three consecutive years i.e. in AY.2006-07, 2007-08 and 2008-09 where regular assessments were made under scrutiny and the yield was shown by the appellant was not disputed. I find that the same AO had completed the assessment u/s. 143(3) in the case of Satguru Ispat Private Limited for assessment year 2008-09 vide order dated

28.12.2010. According to the information received from DCIT-1(2), Raipur, the said assessee company namely Satguru Ispat Private Limited had declared/achieved yield of 77.01% and the said company is engaged in the business of manufacturing of Ingots. The said yield percentage was cross checked with reference to the Tax Audit Report and financial statements of the said assessee company. Even if due consideration is given for difference in yield owning to difference in products i.e. Ingots and Blooms/billets, steel there is a sea gap between yield percentage of 77.01% accepted by the same AO as against yield of 89% applied by the AO in the instant case.

7.16. Finished goods are structural items and blooms/billets are intermediary products which are consumed indigenously. Even if for the time being contention of the AO that the appellant has suppressed the yield of SMS division and indulged into unaccounted sales is accepted, preponderance of probabilities do not suggest this for the reason that the finished product of the appellant is not blooms/billets, if the appellant starts to sell its intermediary product, it may have to buy same for its Rolling Mill Division and the idea of backward integration in the form of SMS division gets defeated, the business sense is also not suggesting what has been suspected and inferred by the AO.

7.17. I find that the total quantity of blooms/billets indigenously consumed by the appellant in its Rolling Mill Division was much more than its own production of blooms and billets in its SMS Division, in other words, the appellant had to purchase blooms/billets from the open market, including from its sister concern namely Abhishek Steel Industries limited so as to cater to the raw material requirement in its Rolling Mill Division. The preponderance of probabilities suggests that the appellant was always short of blooms and billets and therefore, the allegation of the AO that the appellant has sold blooms and billets appears to be unreasonable and without any substance in as much as why would a person go for backward integration (SMS Division) and then sell its own intermediary product and at the same time buy the same product from the open market. It is a matter of common knowledge that the businessman goes for backward integration when he is able to produce goods indigenously at a cost lower than the purchase cost from market. The AO has duly accepted the purchase of blooms and billets that are recorded in the books of accounts of the appellant and consumed in its Rolling Mill Division therefore, it is hard to believe that the appellant must have sold its intermediary product when its own production was not sufficient to meet its domestic requirement.

7.18. From page No.11 to Page No.13 of the assessment order, the AO has reproduced the extract of the statement recorded during the course of search of the following persons:

(a) Shri Murari Singh
(b) Shri Anil Singh
(c) Shri D Satyanarayan

From the aforesaid statements, the AO has made an attempt to emphasize that there is absence of uniform/scientific methodology for measurement of input of raw material.

7.19 I have carefully perused the statement of Shri Murari Singh, General Manager (Steel Melting Shop) recorded during the course of proceedings u/s.132 on 22.06.2011. In the said statement, in answer of question No.3, Mr. Murari Singyh had categorically stated that the actual average production in SMS Division varies from 350MT to 380 MT although installed capacity is 480 MT per day. I find that the AO has in page No.4 of the assessment order stated that total production from four furnaces will be 480 MT per day and after multiplying the same with 365 days, the AO has stated that the total production will be 1,75,200 MT. In my considered view, the AO ought to have taken in to consideration the said assertion of Mr. Murari Singh, General Manager. It is also seen that Mr. Murari Singh had stated about the composition of raw material, as per the statement an inference can be drawn that the composition of raw material does not remain static and keeps on changing in this background in my considered view, it would be unreasonable and impractical to assume uniform yield. It is also seen that in response to question No.8, Mr. Murari Singh, General Manager had stated that the burning loss in SMS Division is approximately 15 to 20% as a corollary it would mean that the yield in SMS division would be 80 to 85%. In my considered view, the AO ought to have given due consideration even to this assertion and being General Manager of SMS division, the probability of incorrect/fabricated statement being given that too during the course of search proceedings, in my considered view is quite less and it cannot be said to be an afterthought. Furthermore, as the AO has relied upon and referred to the statement of Mr. Murari Singh in the assessment order, in my considered view, he ought to have read the statement in its entirety rather than being selective and follow the pick and chose policy.

7.20 I have carefully perused the statement of Shri Vinod Puri Goswami, Senior Manager, recorded during the course of proceedings u/s.132 on 21.06.2011. I find that in response to question No.8, the said Senior Manager had duly explained the procedure of purchase and recording of quantity inward through the computerized weigh bridge and trail of documents prepared at the time of purchase by the appellant company. I also find that the said Senior Manager duly explained the procedure followed by the appellant company for recording the quantity of production of finished goods, it is seen that the said Senior Manager has stated in his statement that the appellant company engages the Foreman who is responsible for section sitting and for keeping track of quantity of

finished goods being produced. It has also been explained in the said statement that the Site In charge gives the details of quantity produced in slip to the Senior Manager and then the same is passed on to the Accounts Section for passing entries in the computer system and only thereafter such slips are destroyed. From the perusal of the said statement, I do not find any infirmity in the procedure/system adopted by the appellant company in as much as the search team did not find any irregularity in the production quantity mentioned in the slip vis-à-vis production quantity entered in the regular books of accounts of the appellant company in the computer system. It is also seen that in response to Question No.10, the said Senior Manager has elaborately given statement on the system followed by the appellant company on receipt of any sales order. In response to question No.15, the said Senior Manager has categorically stated that the production team of the appellant company carried out physical inspection/verification of stock for determining the yield and burning loss, he has also stated that the production team carried out physical inspection every 1 to 2 months and based on the report of the production team, yield and burning loss is adjusted. In my considered view, though the appellant company is initially recording the quantity issued for consumption and finished goods produced on estimate basis, however, the fact that the appellant company has computerized weigh bridge and computerized system in place for recording the inward and outward of raw material and finished goods respectively and also the fact that production team of the appellant company carried out physical verification/inspection and based on that yield and burning loss is determined/adjusted and also the fact that the Central Excise Department has not raised any unreasonable to hold a view that merely because initially recording of consumption and production is on estimate basis, the books of accounts of the appellant not reliable, conversely the books of accounts of the company cannot be said to be unreliable from which reasonable profits cannot be deduced merely on the ground that the initial recording of consumption and production is on estimate basis.

7.21 Had there been scientific methodology in place for measurement of inputs, in my considered view it is only the accuracy level of statistics which will increase however it is hard to believe that merely due to scientific methodology for measurement of inputs, the yield of the appellant will also increase, the imagination of the AO is too far-fetched and devoid of logic. I find no merit in the allegation of the AO that absence of scientific methodology for measurement of inputs is leading to an inference that the appellant had suppressed the yield. I have also carefully perused the statmenet of Shri Eishikesh Dixit recorded on 21.06.2011 as regards common allegation in case of all the four manufacturing companies i.e. sister concerns of the Mahamaya Group that the group is following the system of destroying the initial document i.e. the loose slip in which quantity of production and consumption is

recorded. From the statement of Shri Rishikesh Dixit, it is gathered that it was stated in clear terms that the quantity recorded in the loose slips tallies with the quantity recorded in the regular books of accounts, excise records and excise returns; that as the Excise returns is being filed on monthly basis, therefore, after filing of Exercise Return such loose papers become redundant and that is the reasons said loose papers are destroyed, at this juncture, I find that neither in the show cause notice nor in the assessment order there is any whisper of any such loose paper which bears the figure of production and which the appellant failed to reconcile with the entries in the regular books of accounts and Excise records/returns. In the absence of any specific instance having been brought on record by the AO, I am constrained to construe the allegation of the AO as mere bald statement.

7.22 In the case of the ACIT Vs. M/s. Balajee Structural (I) Pvt. Ltd. (supra), the Jurisdictional Bench Hon'ble ITAT had an occasion to decide identical issue and the Hon'ble Tribunal has observed as under:

> *" .....We find the assessee in his submissions before the AO had explained the reasons for variation in the yield. However, the AO has not considered the same and merely mentioned that the explanation given by the assessee is not found to be acceptable. We find merit in the submission of the ld. Counsel for the assessee that when the production results are closely monitored by the Excise Department who had accepted the same and when the Department has no other material to prove that the assessee during the impugned assessment year has indulged in unaccounted sales and since the assessee has already disclosed an amount of Rs.396.60 lacs on account of stock and debtors for the assessment year 2008-09, therefore, in view of the office note by the AO reproduced earlier, no addition, in our opinion is called for."*

In the instant case, the assessment year involved was 2005-06 and the assessee had offered additional income in assessment year 2008-09. However, ratio of the principle decided that when the AO has not considered the assessee's explanation by merely mentioning that it is not found to be acceptable and (ii) when Excise Department has accepted the yield and when the department has no other material to prove that the assesse has indulged in unaccounted sales no addition is called for, are squarely applicable in this case.

7.23. Similarly in the case of ACIT Vs. M/s. Super Iron & Steel Pvt. Ltd. which is one of the comparable cases cited above in ITA No.139 to 141/BLPR/2010, the jurisdictional Bench of the Hon'ble ITAT had an occasion to decide the similar issue and the Hon'ble Tribunal has observed as under:

"6. After hearing the rival submissions and perusing the material on record we find that the assesse is engaged in the business of manufacturing Ingots with sponge iron as the main raw material. According to the AO there was no basic document regarding consumption of raw material and production of finished goods were maintained by the assessee in the factory premises. The AO found that there is no system in place for keeping record of consumption of raw material and production of finished goods, it is apparent that the unaccounted production is evidenced from variation in units of electricity consumed per MT of finished goods so AO made the addition in question. The stand of the assessee was that it is maintain regular books of account along with all the supporting bills and vouchers. The assessee submitted that the variation in consumption of electricity has been explained during the course of assessment proceedings and the AO has not made any adverse comment on the same. According to the assessee the yield in this AY is better in comparison to the preceding assessment year which was also covered by scrutiny assessment under section 143(3) of the Act. The addition in question is not based on such material and the addition has been made only on presumptions and surmises and is not justified. The AO has also not made out any comparable cases. In such situation the addition in question made by the AO is not justified same were rightly deleted by reasoned findings, we uphold the same."

The low yield in comparison to the bench mark adopted by the Assessing Officer basis whereof is still in the dark and has not come on the surface, in the absence of any cogent reasons could not, by itself have been a ground to hold that proper income of the assessee cannot be deduced from the accounts maintained by it and consequently, could not have been a ground to reject the accounts invoking section 145(3) of the Act. The variation in yield and consumption of power etc. could be for various reasons. There is no finding by the Assessing Officer that actual quantity of finished goods sold by the assessee was more than what it was shown in the accounts books on the strength of documentary evidence.

7.24 It is seen that the AO has not pointed out any suppression of production based on any cogent and incriminating material against the assessee. Material showing financial nexus can only be a valid basis for holding suspicion or making the addition. Unfortunately, not a single document showing any financial dealing by the assessee has been referred to either in the assessment order or even during the course of hearing, despite the liberty granted vide this office letter on 28.04.2014 and 16.05.2014. The facts and circumstances of the present case reveal that the Assessing Officer just brushed aside the objections/submissions and contentions raised by the assessee and evidences placed on record. The Assessing Officer made mechanical addition of the difference between the unaccounted production/sales worked out on the basis of

89% yield suspected by the Assessing Officer that must been achieved by the assessee.

7.25 The AO has merely referred to variations based on mathematical calculations viz. variation in power, sponge iron (raw material of SMS division for manufacturing of blooms and billets) variation in consumption of furnace oil in Rolling Mill Division, this may well be the basis of suspicion, however, these cannot per se constitute the basis of the addition though it can very well be a starting point for further investigation. In Lalchand Bhagat Ambica Ram Vs. CIT (1959) 37 ITR 288, the Supreme Court disapproved the practice of making additions in the assessment on mere suspicion and surmises or by taking note of the 'notorious practice' prevailing in trade circles."

7.26 The significance of 'tangible evidence' has been emphasized in various judicial pronouncements. Having test checked the seized documents with reference to submissions of the appellant and books of accounts along with bills and vouchers, having gone through all the statements recorded during the search proceedings, having analyzed the result of enquiry conducted regarding yield, I am convinced that there was no tangible material before the AO nor has the AO brought any such evidence on record to corroborate his suspicion. The case of the appellant finds support from the decision in Income Tax Officer Vs. W.D. Estate P Ltd. (1993) 46 TTJ (Bom.) 143 : 45 ITD 473.

7.27 Similar ratio was laid down by the Hon'ble High Court of Delhi in Commissioner of Income Tax Vs. Discovery Estates Pvt. Ltd. vide order dated 18th February 2013 356 ITR 159 (Delhi). I do find considerable force in the submission of the appellant that no unrecorded asset/investment was found during the course of search. The significance of tangible disproportionate asset having been found as a result of search was emphasized in Mangilal Rameshwarlal Soni (HUF) Vs. Assistant Commissioner of Income Tax, (2004) 83 TTJ (jd) 770 : (2004) 4 SOT 680 (jd)

7.28 I find no unrecorded asset or investment was found during the course of search with which undisclosed income of such magnitude could be correlated i.e. deployment of undisclosed income. This factor was given due cognizance in Bansal Strips (P) Ltd. & Ors. Vs. Commissioner of Income Tax (2006) 100 TTJ (Del) 665 : (2006) 99 ITD 177 (Del) by the Hon'ble ITAT, Delhi A Bench as circumstantial evidence.

7.29. The Hon'ble Supreme Court had put an embargo on the leeway i.e. flexibility of Assessing Officers in Dhakeswari Cotton Mills Ltd. Vs. Commissioner of Income Tax (1954) 26 ITR 775 (SC). The significance of considering the evidences in favour and against the assessee was

emphasized by the Hon'ble Supreme Court in Omar Salay Mohamed Sait Vs. Commissioner of Income Tax (1959) 37 ITR 151 (SC)

7.30 Undisputedly the appellant did furnish explanation on all the documents seized during the course of search, the explanation of the appellant was test checked with reference to the seized material, books of accounts , bills/invoices and other evidences placed on record and the explanation was found to be satisfactory and it is also a matter on record that the AO has also not pointed out any infirmity in the explanation of the appellant nor did the AO bring on record any documentary evidence or reasoning to negate the submissions/explanation of the appellant. It is also an undisputed fact that in the case of the appellant neither any diary or loose paper was found which indicates that the appellant did indulge into unaccounted sales and earned such hefty amount of income. The facts in the case of the appellant are much better than the facts before the Hon'ble High Court of Gujarat in Commissioner of Income Tax Vs. Maulikumar K. Shah (2008) 307 ITR 137 (Guj.)

7.31 I find that even non maintenance of stock register is not fatal as held in Commissioner of Income Tax Vs. Jacksons House (2010) 39 DTR (Del) 212 : (2011) 198 TAXMAN 385.11.35. Similar view was taken in M. Durai Raj Vs. Commissioner of Income Tax (1972) 83 ITR 484 (KER.) bills/vouchers or that the quantitative details have not been maintained properly.

7.32 On the matter of recording the consumption of raw material going into furnace and quantity of production coming out from furnace, in my considered opinion, the mere fact of estimation cannot be made the basis of rejection of rejection of books of accounts so long as the financial results are not strikingly lower than the industry average or that the results are not supported by bills/vouchers or that the quantitative details have not been maintained properly. In Polisetti Subbaraidu & Co. Vs. Commissioner Of Income Tax SOURCE: (1968) 69 ITR 738 (AP). Another decision wherein it was held that non maintenance of daily stock register per se is not sufficient to reject the books of accounts as it is not mandated by law is the decision of the Hon'ble High Court of Delhi in Commissioner of Income Tax Vs. Smt. Poonam Rani (2010) 326 ITR 223. From the ratio of the aforesaid decision, it is also quite clear that the Courts have taken judicial note of the "estimation" i.e. recording of financial transactions with certain degree of estimation in the books of accounts. Drawing reference from the aforesaid decision, in my considered view, merely because certain transactions are recorded on the basis of estimation will not make the accounts liable for rejection u/s. 145, particularly when the estimation is not strikingly high or low either in comparison to past trend or comparable cases, incidentally, none of these facts are prevailing in the case of the appellant.

7.33 The Hon'ble High Court of Delhi laid stress upon the material and evidences and brushed aside adversities held merely on the basis of suspicion and conjectures in Commissioner of Income Tax Vs, Ram Pistons & Rings Ltd. vide order dated 16th February 2012 (2012) 80 CCH 055 Del HC.

7.34 It is settled principle of law that the A.O has to bring on record specific defect in the books of accounts of the appellant as a result of which reasonable profits cannot be deduced. The A.O examined the audited books of account but had not pointed out any specific discrepancy nor has he detected any suppression in sales or inflation in purchases/expenses. No evidence whatsoever was brought on record to prove that, the appellant, in fact, earned more than that returned as per the books of account kept in the regular course of business. The assessment order is evidence to the fact that there was no specific finding given by the A.O to tile effect that the method employed by the appellant was such that correct profits could not be deduced there from. The AO has not come across any material defected in accounts so as to hold that any profit has been suppressed. It is also not the case of the AO that the appellant has not followed the mercantile systems of accounting. It is also not the case of the AO that the appellant has not followed any particular accounting standard which are notified by the Central Government. It is also not in dispute that the appellant has maintained books of account regularly and these are duly audited u/s.44AB of the IT. Act and the quantitative details were prepared and were duly audited. If the stock register was not maintained by the appellant, that may put the A.O on guard against the falsity of the return made by the appellant and persuade him to carefully scrutinize the account books of the appellant. The low yield in comparison to the benchmark adopted by the AO, in the absence of any material pointing towards false hood of the account books, could not by itself be a ground to reject the account boos u/s.145(3) of the I.T. Act, 1961 much less a ground to make estimated addition. I find that there is no dispute with regard to the fact that the appellant has maintained quantitative details. In the case of CIT Vs. Smt. Poonam Rani 326 ITR 223 (Delhi). It was held that where an addition was made because of mere fall in gross profit with any defect in the accounts accept for the absence of stock register- deletion of addition was upheld by the High Court. The appellant's case finds support from the following decisions:

(a) Ashok Refractories Pvt. Ltd. Vs. CIT (2005) 148 Taxman 635 (Cal.)
(b) ITO Vs. Bothra International (2008) 117 TTJ (jd) 672.
(c) Delhi Securities Printers Vs. Dy. CIT (2007) 15 SOT 353 (Delhi)

Considering the facts and circumstances of the case, as also decisions relied upon by the appellant and those cited above, I am of the view that there was no finding to the extent that the accounts were not correct and complete or that the A.O was of the opinion that the income could not be deduced from the accounts maintained by the appellant.

7.35 The AO has not brought any material on record to disbelieve the book result shown by the appellant. If there is no suppression of material facts, the Authority cannot embark upon a speculative assessment of notional profits. The assessment should be based on cogent facts and there should be no vindictiveness or arbitrariness in passing the assessment order. The estimated additions made by the AO do not bear any relationship with the specific defects in books of accounts and the AO cannot be permitted to make arbitrary addition.

7.36 The core thing to be seen is the evidence found which will be the basis for making the assessment. Coming to the facts of the case, the AO estimated the unaccounted production and sales based on benchmark yield of 89% in case of SMS Division . The entire estimated suppressed sale has been treated as profit. I am convinced that the determination of undisclosed income in this case is merely on the basis of presumptions and on an estimate basis. Search assessment has to be framed on the basis of some material, which in this case is raw material consumed in SMS division for manufacturing of blooms and billets in furnace. No other materials or asset details were found during the course of search.

7.37 The question of best judgment is ruled out and therefore the application of any formula for estimating income does not arise. In the instant case, search had undertaken from 21st June, 2011 to 22nd June, 2011. The statements of various persons associated with the appellant company and Mahamaya Group were recorded and in those statements, no incriminating material was there which could be termed as evidence on the basis of which the undisclosed income could be computed. Certain documents were seized, but there was nothing in those materials relating to sales which could establish that appellant had undisclosed income. Therefore, in my considered view, it is unreasonable to estimate the suppressed sales on the basis of undisclosed yield. It cannot be said that there is always standardized yield during the search period.

7.38 As a matter of fact the Search Team could not come across any evidence of unaccounted sales, in my considered opinion, had there been any unaccounted sales, the same would have been detected by the Search Team. The case of the appellant also finds support from the decision of the jurisdictional Tribunal i.e. ITAT, BILASPUR BENCH in ***Chhattisgarh Steel***

Casting (P) Ltd. Vs. Assistant Commissioner of Income Tax *(2008) 8 DTR (Bilaspur) (Trib) 14.*

7.39 The significance of tangible evidence is indicative from the fact that in ***Commissioner of Income Tax Vs. Vishal Rubber Products*** *(2003) 264 ITR 542 (P&H) : (2004) 136 TAXMAN 151 despite Balance Sheet having been found from the premises searched, no addition was sustained in the absence of tangible evidence.*

7.40 On the contrary, the appellant had provided all the requisite details regarding its production activity. The items of raw material purchased are excisable products, the quantity of raw material purchased as mentioned in Excisable and Commercial Invoice was test checked with the entries in the Excise Record for raw material i.e. RG-1 and the same was found to be in order. The quantity appearing in the Excise Registers was cross checked with the entries in the Excise Returns and the same was found to be in order and tallying with the Excise Records. The inventory appearing in the Excise Records and Excise Returns was found to be the same as in financial records i.e. the books of accounts and Audited financial statements. Undisputedly, the production was meticulously routed through the appellant's daily production register / Excise Records. The entries therein were definitely co-relatable to the entries in the stock register, enabling an easy stock tally, if one was so required. However, the AO did not deem it fit to carry out the exercise of tallying the stock as per these entries in the two types of books. He merely went by the alleged suppressed yield. Various submissions regarding reasons for variation in consumption of power, furnace oil, yield etc. were duly furnished by the appellant. The appellant did not furnish the comparable instances and also demonstrated with technical details of production. These copious evidences were wrongly ignored by the AO. ***Commissioner of Income Tax Vs. Hindustan Tin Works Ltd.*** *(2007) 291 ITR 290 (Del) : (2007) 164 TAXMAN 529.*

7.41. A careful reading of the decision in ***Commissioner of Income Tax Vs. R.K. Rice Mills*** *(2009) 319 ITR 173 : (2009) 185 TAXMAN 107 (P&H) the Hon'ble High Court had upheld the deletion of addition and it leads to an irresistible conclusion that there cannot be any rejection of books of accounts merely because the yield declared by the assessee is lower in comparison to other assessees engaged in similar line of business.*

7.42 The notoriety that appellant suppressed the yield would be merely a background of suspicion and the appellant should not be held to have indulged in such illegal practices without any evidence. The mere possibility of the appellant getting higher yield would be matter of pure conjecture. ***Commissioner of Agricultural Income Tax Vs. M.J. Cherian*** *(1979) 117 ITR 371 (KER).*

7.43 I find no merit in the action of the A.O in rejecting the books of accounts merely due to the reason that the yield achieved by the appellant is less than the yield percentage i.e. 89% which has not been achieved even by other assessees engaged in similar line of business, the A.O has not brought on record the manner in which he worked out the yield of 89% in SMS division. The A.O has no evidence in his possession to indicate that the quality of raw material used by the appellant in all these 7 years was uniform and standardized one. The Hon'ble Madras High Court took judicial note of such facts in C. ARUMUGASWAMI NADAR vs. COMMISSIONER OF INCOME TAX (1961) 42 ITR 237 (MAD).

7.44 ***The facts in the case of the appellant are akin to the facts before the Hon'ble*** *High Court of Assam in* ***Karakchand Arakchand Radhakisan vs. Commissioner of Income Tax*** *(1962) 46 ITR 196 (ASSAM). The Hon'ble High Court of Delhi has laid down certain principles on rejection of books of accounts in* ***Commissioner of Income Tax Vs. Paradise Holidays*** *(2010) 48 DTR (Del) 349 : (2010) 325 ITR 13.*

7.45 In ***SUKHADIA JAMNADAS MAGANLAL vs. INCOME TAX OFFICE*** *(2008) 13 dtr (Guj) 149, the Hon'ble High Court of Gujarat elaborately considered the various questions and issues and ultimately decided the question in favour of the assessee, identical issues and questions are present in the instant case.*

7.46 Undisputedly, the case of the appellant was under scrutiny assessment for three consecutive years i.e. in A.Y 2006-07, 2007-08 and 2008-09. It is self evident from the above referred assessment orders u/s 143(3) that the books of accounts of the appellant were accepted in all these years and yield declared by the appellant was also accepted. Even during the survey proceedings, no incriminating document was found which is evident from the fact that no addition was made in the scrutiny assessment, for the year in which survey proceedings took place, on the basis of incriminating document. The case of appellant finds support from decision in ***Sukhadia Jamnadas Maganlal Vs. Income Tax Officer*** *(2008) 13 DTR (Guj) 149, the Hon'ble High Court of Gujarat.*

7.47 The Hon'ble High Court of Bombay in R.B. Bansilal Abirchand Spinning & Weaving Mills Ltd. Vs. Commissioner of Income Tax (1970) 75 ITR 260 (BOM) has held that "Merely by comparison of the percentage of losses in a particular year, it is not possible to say with any reasonable certainty that the increase in the percentage of loss must be attributable and must lead to a reasonable inference of suppression of production."

7.48 In the instant case also, the ultimate addition has been made on the basis of alleged suppression of yield / unaccounted production. Except

making comparison of yield achieved by the appellant with A.O's own standardized yield percentage of 89%, the A.O has not brought on record any evidence, given the fact that the present proceedings are culminating from the search proceedings, as a matter of fact the search team could not come across even a single document which even indicates of appellant's indulgence into any such suppression of yield or unaccounted sales. It is not the case of the A.O that the buyers of alleged unaccounted sales have given the statements against the appellant, nor any employee uttered any such thing.

7.49 Whether mere variation in yield can even be a ground for rejection of books of accounts was decided by the Hon'ble High Court of Jammu & Kashmir in ***International Forest Co. Vs. COMMISSIONER OF INCOME-TAX*** *1975 CTR (J&K) 88 : (1975) 101 ITR 721 (J&K). Where A.O had failed to bring on record any cogent material to show quantum of sales of assessee out of books of accounts, then addition made by revenue on estimated basis was not justified, this was held in COMMISSIONER OF INCOME TAX Vs. MAHAN MARBLES (P) LTD. by Hon'ble High Court of Rajasthan vide order dated 9th January 2013 (2013) 354 ITR 238 (Raj).*

7.50 It is not the base of the A.O that the stock records and inventory of the appellant or the quantity of production and sales declared by the appellant in its books of accounts was not accepted by the other Revenue Authorities such as Sales Tax Department or the Excise Department. The case of appellant finds support from the decision of Hon'ble High Court of Gujarat in COMMISSIONER OF INCOME-TAX Vs. SANJAY OIL CAKE INDUSTRIES (2005) 197 CTR (Guj) 520 : (2005) 149 TAXMAN 190.

7.51 I am convinced with the reasons for variation in power consumed in comparison to the production in different periods which could be on account of furnace condition, quality of raw material used, labour productivity, incoming voltage, breakdown time, etc. Due to the above reasons, monthly consumption of power may vary. Undisputedly, the statistics of power consumption and production and the similar variation existed even during the course of assessment proceedings u/s 143(3), but no adverse inference had been drawn in those assessment proceedings u/s 143(3). It is gathered that the appellant has maintained regular books of account and sales / purchase or verifiable and vouched, recorded and supported by raw material consumption register and finished goods register and was also subjected to excise duty and its production declared for the instant years had duly been accepted by the Excise Department after verification. The case of the appellant certainly finds support from the decision in the case of N. Raja Pullaiah Vs. Dy CTO (1969) 73 ITR 224 (AP).

7.52 As regards variation in Power Consumption and for that matter variation in consumption of other raw material, it has been held that the mere variation in power consumption cannot be construed as reasonable

ground for rejecting the books of accounts and estimation of income. In PONDY METAL & ROLLING MILLS (P) LTD. Vs. DEPUTY COMMISSIONER OF INCOME TAX ITAT, DELHI 'B' BENCH (2007) 107 TTJ (Del) 336. The case of the appellant finds support from the decision ***in the case of Mahabir Prasad Jagdish Prasad vs. CST 27 STC 337 (All) and decision of the Hon'ble*** *High Court of Rajasthan in* ***Kay Polyplast Ltd. vs. Additional Commissioner of Income-Tax*** *(2008) 9 DTR (Raj) 163.*

7.53 I find that no margin for estimation of suppressed sales and income has been allowed even in those cases where instances of suppression of sales has been found on the basis of incriminating material except for the period for which suppression has been unearthed based on cogent and documentary evidence, undisputedly, in the case of the appellant, nothing incriminating has been found, therefore, as held in Deputy Commissioner of Income Tax Vs. Royal Marwar Tobacco Product (P) Ltd. (2009) 120 TTJ (Ahd) 387 : (2008) 16 DTR 129.

7.54 ***Mere variation in Power cannot be a ground for holding adversity was held in Income Tax Officer Vs. Pragati Fashions*** *vide order dated 12th February 2010 (2011) 12 ITR 444 (Ahd) (Trib).*

7.55 Under similar facts, the Hon'ble ITAT CHANDIGARH BENCH in ***Assistant Commissioner of Income Tax Vs. A.K. Alloys P. Ltd.*** *vide order dated 29th February 2012 (2012) 17 ITR (Trib) 424 (Chandigarh) has decided in favour of assessee. The extrapolation of figures for estimation of income has been held to be unsustainable in Evergreen Bar & Restaurant Vs. Additional Commissioner of Income Tax (2008) 6 DTR (Mumbai) (Trib) 56.*

7.56 In my view, there was no ground for the A.O to reject the books of accounts of the appellant u/s 145, however, even if it is assumed that there was sufficient ground for rejecting the books of accounts, the assessment had to be made to the best of his judgment. As to how the best judgment assessment should be made, the leading decision on the point is the one rendered by the Privy Council in CIT vss Laxmi Narain Badridas (1937) 5 ITR 170 (PC) : TC11R. 192 reversing Laxmi Narain Badridas vs. CIT (1934) 2 ITR 246 (Nag) : TC11R and approving Abdul Baree Chawdhury vs. CIT (1932) 5 ITC 352 (Rang). In this decision rendered under the provisions of the 1922 Act, it was observed : ***"He (the assessing authority) must not act dishonestly or vindictively or capriciously because he must exercise judgment in the matter. He must make what he honestly believes to be a fair estimate of the proper figure of assessment and for this purpose he must, their Lordships think, be able to take into consideration local knowledge and repute in regard to the assessee's circumstances and his own knowledge of previous returns by and assessments of the assessee, and all other materials which he thinks will assist him in arriving at a fair and proper estimate; and though there must necessarily be guess-work in the matter, it must be honest***

guess-work." *These observations received the imprimatur of the Supreme Court in State of Kerala vs. C. Velukutty (1966) 60 ITR 239 (SC) in the following words : "The Privy Council, while recognizing that an assessment made by an officer to the best of his judgment involved some guess-work, emphasized that he must exercise his judgment after taking into consideration the relevant material." Identical observations made by the Judicial Committee in Seth Gurmukh Singh vs. CIT (1992) 194 ITR 507 (All) : TC1R.357 were approved by the Supreme in Dhakeswari Cotton Mills Ltd. vs. CIT (1994) 205 ITR 45 (Gau) : TC1R.508.*

7.57 ***As emphasized by the Supreme Court in State of Kerala vs. C Velukutty (1966) 60 ITR 239 (SC) though there is an element of guess-work in best judgment assessment, it should not be a wild one and should have a reasonable nexus to the available material and the circumstances of each case.*** *Likewise, it has been laid down by the Supreme Court in the case of State of Orissa vs. Maharaja Shri B.P. Singh Deo (1970) 76 ITR 690 (SC) : TC11R.251 that "The mere fact that the material placed by the assessee before the assessing authority is unreliable does not empower those authorities to make an arbitrary order. The power of levy assessment on the basis of best judgment is not an arbitrary power; it is an assessment on the basis of best judgment. In other words, that assessment must be based on some relevant material. It is not a power that can be exercised under the sweet will and pleasure of concerned authorities.* ***The basis of estimate or the basis of computation should be disclosed by the assessing authority, or otherwise the best judgment assessment may be quashed.*** *In Anand Rice & Oil Mills vs. CIT (1977) 108 ITR 372 (Cal) : TC11R.254 huge additions were made by the ITO on the ground that the assessee had inflated the purchase prices of goods and a major portion of the addition was sustained by the Tribunal without furnishing any basis of its own estimate. The Calcutta High Court held that the order of the Tribunal being arbitrary, the same could not be sustained. In Ganga Prasad Sharma vs CIT (1981) 132 ITR 87 (MP) TC 11R. 285 the Madhya Pradesh high court emphasized that while making a best judgment assessment, the basis of computation should be disclosed by the ITO. In CIT versus Ranichehra Tea company limited (1994) 207 ITR 979 (Cal): TC 11 PS.3 the* ***ITO rejected the loss return and determined the loss at nil on default of assessee to produce books of account. No basis for computation was disclosed by the ITO. It was held by the Calcutta High Court that the ITO acted illegally.*** *As assessment has to be completed on the basis of records and material available before the AO and personal knowledge and excitement on events and extraneous facts should not lead the AO to a state of affairs where the salient/primary/ direct evidences are overlooked and should not influence the AO for resorting to attack editions disallowances. If general/casual/ routine observations of the AO are to be considered as material evidence for the purpose of framing and assessment, The AO shalll have blanket and arbitrary power to dispose of*

the scrutiny assessment according to his whims and fancies which is not the spirit of the circular issued by the board on scrutiny assessment. An assessment cannot be made arbitrary and another that an assessment can be sustained, it must have Nexus to the material on record. (CIT versus Mahesh Chandra (1983) 199 ITR 247 249 (All). It is the settled position that though the AO has very wide powers and is not fettered by technical rules of evidence and pleadings, there is one overriding restriction on his judgment and that is, that, he must act honestly and diligently on the material, howsoever inadequate it was, and not vindictively, capriciously or arbitrarily. "Probability cannot be construed as material evidence to form an opinion by the AO to conclude an assessment and for drawing adverse inference against the appellant unless there is evidence to substantiate such probable inference." Assessment has to be made based on the real income theory, i.e. income to be determined for taxation must in variable be proved to have been the correct quantum of income earned by the appellant during the relevant previous year and the one presumed to have been earned. The presumptions and hypothetical estimations and observations made by the AO for making the impugned estimated addition, were extraneous, irrelevant and opposed to the facts obtaining from the record. The fate of the appellant could not be decided by the AO on mere surmises or probabilities (Northern Bengal Jute Mills Trading Co. Ltd. Vs. CIT (1968) 70 ITR 407 (Cal.). The mere existence of reasons for suspicion would not tantamount to evidence (Cal. HC in Narayan Chandra Baidya Vs. CIT (1951) 20 ITR 287 (Cal.)

7.58. It is indeed a case of frivolous addition with facts identical to the facts in the case of Bharti Airtel Limited Vs. ACIT (ITAT Delhi). Looking to the facts and circumstances of the case as also decisions cited above, the addition made by the AO is held to be baseless and without any evidence., hence the rejection of books of accounts is held to be invalid and addition made by the AO on account of alleged suppression of yield is deleted."

6. At the time of hearing, the Ld. DR relied heavily on the findings of the Assessing Officer.

7. Per contra, the Ld. AR of the assessee explained the factual matrix of the entire business set up of the assessee wherein furnace/SMS division which are manufacturing billets and blooms, they are raw materials for Rolling Mill Division which is ultimately manufacturing finished goods i.e.

structural items. Many a times raw materials are required for the Rolling Mill Division i.e. blooms and billets as manufactured by the SMS division of the assessee are less in quantity and for that reason they have to purchase raw materials for Rolling Mill Division from open market. That for this, the Ld. AR invited our attention at Page 43 of the Paper book therein, a chart is given which has already been submitted before the Revenue Authorities in which the assessee has clearly declared for the Financial Years 2008-09, 2009-10, 2010-11 and 2011-12 relevant to the corresponding assessment years, the assessee had purchased specific quantity of raw materials i.e. blooms and billets from the open market. This is also on record. The Ld. AR therefore submitted that the allegation of the Assessing Officer that the assessee had sold raw materials in the open market is not possible, since for its own consumption such raw materials is less and they themselves have to purchase raw materials from the open market.

7.1 The Ld. AR further referred to the order of the Ld. CIT(A) wherein it has been held by the First Appellate Authority that the low yield in comparison to the bench mark adopted by the Assessing Officer basis whereof is still in the dark and has not come on the surface, in the absence of any cogent reasons could not, by itself have been a ground to hold that proper income of the assessee cannot be deduced from the

accounts maintained by it and consequently, could not have been a ground to reject the accounts invoking section 145(3) of the Act. The variation in yield and consumption of power etc. could be for various reasons. There is no finding by the Assessing Officer that actual quantity of finished goods sold by the assessee was more than what it was shown in the accounts books on the strength of documentary evidence.

7.2 The Ld. AR further submitted that the Assessing Officer has not pointed out any suppression of production based on any cogent and incriminating material against the assessee. Material showing financial nexus can only be a valid basis for holding suspicion or making the addition. Unfortunately, not a single document showing any financial dealing by the assessee has been referred to either in the assessment order or even during the course of hearing, despite the liberty granted to the assessee. The facts and circumstances of the present case reveal that the Assessing Officer just brushed aside the objections/submissions and contentions raised by the assessee and evidences placed on record. The Assessing Officer made mechanical addition of the difference between the unaccounted production/sales worked out on the basis of 89% yield suspected by the Assessing Officer that must been achieved by the assessee.

7.3 The Ld. AR further referred to the Para 7.48 of the Ld. CIT(A)'s order wherein the Ld. CIT(A) observed that the ultimate addition has been made on the basis of alleged suppression of yield/ unaccounted production. Except making comparison of yield achieved by the assessee with the Assessing Officer's own standardized yield percentage of 89%, the Assessing Officer has not brought on record any evidence given the fact that the present proceedings are culminating from the search proceedings. As a matter of fact the search team could not come across even a single document which even indicates of assessee's indulgence into any such suppression of yield or unaccounted sales. It is not the case of the Assessing Officer that the buyers of alleged unaccounted sales have given the statements against the assessee, nor any employee uttered any such thing. The Ld. AR further relied on the various binding judicial pronouncements of the Higher Forum.

8. We have perused the case records and heard the rival contentions. We have also analyzed the judicial pronouncements placed before us. The facts on records clearly demonstrates that the Assessing Officer has failed to bring any cogent reasons/evidences for making addition in the case of the assessee. He has arrived at various mathematical calculations and has derived the yield at 89%. All these were done by the Assessing Officer

without bringing on record any single document which indicates that the assessee has suppressed its yield or has indulged in any unaccounted sales. It is also on record that though the Assessing Officer has estimated production at 89% in SMS division and had made various mathematical calculations at Pages 7 to 11 of the assessment order regarding Rolling Mill Division, however, it is seen from the assessment order that the Assessing Officer has not drawn any adverse inference as regards Rolling Mill Division and nor did the Assessing Officer find yield of Rolling Mill Division to be lower. The Assessing Officer has not substantiated the relevance and significance of these mathematical calculations pertaining to Rolling Mill Division.

8.1 We further observe that the Ld. CIT(A) on his own conducted specific enquiry in order to find out the percentage of yield declared by the other assessee engaged in similar line of business. It is noted from such comparison that the yield declared by the different assessees in the same year is not uniform, conversely every assessee declared different yield. Not even a single comparable instance was found declaring yield of 89%. That further, action of the Assessing Officer in rejecting the books of accounts merely due to the reason that the yield achieved by the assessee is less than the yield percentage i.e.89% which has not been achieved even by other assessees engaged in similar line of business. The Assessing Officer

has not brought on record the manner in which he has worked out yield of 89% in SMS Division.

9. In the case of **M/s. Ramesh Steel Industries Vs. DCIT-1(1), Raipur, ITA No.48 of 2015**, the Hon'ble Chhattisgarh High Court has held and observed that "*the power of the Assessing Officer under Section 145(3) is not absolute but was regulated and circumscribed by statutory provisions."* That further "*power consumption in an industry may vary for various reasons. Under Section 145(3) of the Income Tax Act, the jurisdiction of the Assessing Officer arises if he was not satisfied about the correctness of the accounts of the assessee. However, the Assessing Officer should give specific reasons for rejecting books of accounts."*

10. In the instant case, the Assessing Officer calculated yield of 89% and has also calculated consumption of power and difference thereto pertaining to production and has held that the books of accounts are therefore not reliable and rejected the books of account while resorting to Section 145(3) of the Act. As per the legal principles laid down by the Hon'ble Chhattisgarh High Court (supra.) that this power is not unfettered and it has to be used judicially by giving specific reasons which in the instant case, the Assessing Officer has not complied with.

11. In the case of **ACIT-1(1), Raipur Vs. Siyaram Rice Mill in ITA No.59/BLPR/2011**, the Raipur Bench of the Tribunal has observed that " *in a case where the Assessing Officer had applied a mathematical formula and made addition but however, rejected all the submissions of the assessee without passing speaking or reasoned order".* The Raipur Bench of the Tribunal further held that regarding mathematical calculation, the Assessing Officer has not referred to any comparable cases that could prove that the stand taken by him was based on scientific and logical basis. That further "*a reasoned order cannot be passed without considering the reply of the assessee filed by the assessee and without giving reasons as to why the reply was not acceptable."*

12. In the instant case, the Ld. CIT(A) had made exercise to bring out the percentage of yield declared by the other assessee engaged in similar line of business and nowhere the yield was 89%. The Assessing Officer also gave no basis for its calculation of the yield at 89%. There was no scientific or logical basis in the exercise conducted by the Assessing Officer. The submissions made by the assessee, were also summarily rejected by the Assessing Officer which is therefore, not in accordance with judicial principle as herein above enshrined in the various judicial pronouncements. We have also observed in the case of **ACIT-1(1) Raipur Vs. Ramesh Steel Industries in ITA No.95/BLPR/2011,** the Assessing

Officer made addition as he noted that in the year under appeal, the assessee had consumed more units of power as compared to the last two assessment years. The Tribunal observed that "*consumption of power in itself is not an evidence to prove or disprove the production of finished goods."* We further observe that in the case of St. Teressa's Oil Mill (761 ITR 365) and Sulabh Marbles (P.) Ltd. (205 CTR 464) decided by the Hon'ble Kerala and Rajasthan High Court has held that "*disparity in electricity consumption cannot be the criteria for rejection of accounts and for making ad-hoc additions. The assessee had maintained regular books of account and the Assessing Officer had not come across any unaccounted purchase or suppressed sale. In these circumstances, only on the basis of power consumption, no addition could be or sustained*."

13. It is apparent from the records that the Assessing Officer has not brought on record any evidence stating lower or suppression of sales by the assessee. He tried to support his case by showing deficiency in power consumption by the assessee. But the Hon'ble High Courts have held without any direct corroborative evidences on low yield or suppressed sales, the disparity of power consumption cannot be the sole ground or reason for making addition by the Assessing Officer.

14. In view of the aforesaid examination of facts and judicial pronouncements, we find the order of the Ld. CIT(A) is absolutely correct and therefore, the same does not call for any interference. Thus, ground relating to **"issue of the lower yield declared by the assessee" in all the appeals for all the assessment years are therefore dismissed**.

15. The next issue is there only in the assessment year 2012-13. Ground Nos. 3 and 4 of the appeal Memo filed by the Revenue for the assessment year 2012-13 pertains to "**giving credit of cash of Rs.13,00,000/- seized during the course of search operation u/s.132 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') as prepaid taxes while computing tax liability of the assessee.**"

16. At the time of hearing before the Ld. CIT(A), the assessee had submitted that the Assessing Officer was not justified in not allowing credit for cash seized during the course of search as prepaid tax despite specific request having been made by the assessee in this regard. The Ld. CIT(A) relied on the decision of the Mumbai Bench of the Tribunal in the case of Vipul D. Doshi Vs. CIT (2001) 118 Taxman 30 (Mum.) and directed the Assessing Officer to give credit and recompute tax liability since the computation of tax does not reflect adjustment of cash seized against the tax liability of the assessee.

17. We are in conformity with the findings of the Ld. CIT(A) in view of the decision of the Mumbai Bench of the Tribunal in the case of Vipul D. Doshi Vs. CIT (2001) (supra.) and as a matter of fact while determining the tax liability of the assessee whatever amount of cash has been seized from the assessee should be adjusted while determining the tax liability. In the computation of tax such adjustment was not there and therefore, it was right for the Ld. CIT(A) to direct the Assessing Officer for such adjustment to be made in the hands of the assessee while determining tax liability. In view of the matter, we sustain the relief provided to the assessee by the Ld. CIT(A). Thus**, these grounds of appeal for assessment year 2012-13 by the Revenue are dismissed.**

17.1 In the result, **appeals of the Revenue in ITA Nos.232 to 235/RPR/2014 are dismissed.**

CO Nos. 32 to 35/RPR/2015 (By assessee)
A.Ys. 2009-10 to 2012-13

18. Now, we would adjudicate the cross objections filed by the assessee. At the very outset, the Ld. AR of the assessee submitted that these cross objections were supportive of the CIT(A)'s orders. The Ld. AR further

submitted that if the findings of the Ld. CIT(A) is upheld then in that case, all the cross objections filed by the assessee would become infructuous. The assessee has got relief from the Ld. CIT(A) and such relief has been sustained by our order as hereinabove in the preceding paragraphs, **the corresponding cross objections being supportive of the orders of the Ld. CIT(A), become infructuous and hence, dismissed.**

18.1 In the result, **cross objections preferred by the assessee in CO Nos.32 to 35/RPR/2015 are dismissed**.

19. In the combined result, **appeals of the Revenue and cross objections filed by the assesse for assessment years 2009-10 to 2012-13 are dismissed.**

Order pronounced on 7th day of November, 2019.

Sd/-	Sd/-
ANIL CHATURVEDI	**PARTHA SARATHI CHAUDHURY**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

रायपुर/ RAIPUR ; दिनांक / Dated : 7th November, 2019.
SB

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A), Raipur (C.G.)
4. The CIT (Central), Bhopal
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, रायपुर बेंच, रायपुर / DR, ITAT, Raipur Bench, Raipur.
6. गार्ड फ़ाइल / Guard File.

// True Copy //

आदेशानुसार / BY ORDER,

Private Secretary
आयकर अपीलीय अधिकरण, रायपुर / ITAT, Raipur.

		Date	
1	Draft dictated on	06.11.2019	Sr.PS/PS
2	Draft placed before author	07.11.2019	Sr.PS/PS
3	Draft proposed and placed before the second Member		JM/AM
4	Draft discussed/approved by second Member		AM/JM
5	Approved draft comes to the Sr. PS/PS		Sr.PS/PS
6	Kept for pronouncement on		Sr.PS/PS
7	Date of uploading of order		Sr.PS/PS
8	File sent to Bench Clerk		Sr.PS/PS
9	Date on which the file goes to the Head Clerk		
10	Date on which file goes to the A.R		
11	Date of dispatch of order		