

आयकर अपीलीय अधिकरण "G" न्यायपीठ मुंबई में।

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER AND  
SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No. 1528/Mum/2012

(निर्धारण वर्ष / Assessment Year : 2005-06)

आयकर अपील सं./I.T.A. No. 2179/Mum/2012

(निर्धारण वर्ष / Assessment Year : 2005-06)

Income Tax Officer – 8(3)(4), Room No. 202, 2 <sup>nd</sup> floor, Aayakar Bhavan, Mumbai 400 020.	<b>बनाम/</b> v.	Western India Packaging Private Limited 305, B Arena, Lokhandwala Complex, Andheri (W) , Mumbai 400053
स्थायी लेखा सं./PAN : AAACW 4258R		
(अपीलार्थी / <b>Appellant</b> )	..	(प्रत्यर्थी / <b>Respondent</b> )

Income Tax Officer – 8(3)(4), Room No. 202, 2 <sup>nd</sup> floor, Aayakar Bhavan, Mumbai 400 020.	<b>बनाम/</b> v.	Western India Packaging Private Limited 305, B Arena, Lokhandwala Complex, Andheri (W) , Mumbai 400053
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(अपीलार्थी / <b>Appellant</b> )	..	(प्रत्यर्थी / <b>Respondent</b> )

Revenue by :	Shri Rajesh Ojha
Assessee by :	Shri K.K. Tiwari

सुनवाई की तारीख /**Date of Hearing** : 05-11-2015

घोषणा की तारीख /**Date of Pronouncement** : 02-02-2016

आदेश / ORDER

**PER RAMIT KOCHAR, Accountant Member**

These two appeals by the Revenue are directed against the two separate orders of the learned Commissioner of Income Tax (Appeals), Mumbai (Hereinafter called "the CIT(A)") dated 09-12-2011 and 30-01-2012 pertaining to the assessment year 2005-06.

2.     The grounds raised by the Revenue in ITA No. 1528/Mum/2012 in the memo of appeal filed with the Tribunal read as under:-

“1.     On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in granting relief to the assessee without appreciating that the assessee had failed to produce either before the Assessing Officer or before the Ld. CIT(A) any supporting material to disprove the discrepancy found by the Assessing Officer, on the basis of purchase and sale bills submitted by the assessee.

2.     On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in not appreciating that by estimating the assessee's unaccounted transactions of sales, purchase and consequent income, in effect, the Assessing Officer had invoked the provisions of Sec. 145(3), using the information supplied by the assessee.

3.     On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in not appreciating that he has himself in A.Y.2007-08 in the assessee's own case found that the assessee had made unaccounted purchases of Rs.13,50,000 and accordingly confirmed the said addition u/ s.69C of the Act.

4.     On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in not considering the lack of creditworthiness of the alleged shareholders/ applicants and instead deleting the addition of Rs.31,68,000/- u/s 68 of the Act.

5.     On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs.31,68,000/- u/s 68 of the Act on account of share capital, without appreciating that the assessee had failed to prove the genuineness of the share transactions as the assessee had furnished two contradictory statements of shareholding.

6.     On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs.31,68,000 u/s.68 of the Act on account of share capital, without appreciating that the assessee had failed to prove the source of the cash credits before the Assessing Officer as well as the CIT(A) by not furnishing supporting evidence by way of the bank statements of the creditors and in simply accepting the assessee's claim that the investment was made by the creditors by Account payee cheque / drafts.

The appellant prays that the order of the CIT(A) on the above grounds to be set aside and that of the ITO/ AC/DCIT be restored.”

3. The brief facts of the case are that the assessee company's case was selected for scrutiny and during the course of the assessment proceedings u/s 143(3) of the Income tax Act, 1961 (Hereinafter called "the Act" ) read with Section 143(2) of the Act , it was stated by the assessee company that it is in the business of manufacturing of wooden crates, pallets and trading in plywood in wholesale. The wooden crates/pallets are supplied to glass and paper manufacturers and the assessee company has sold plywood to retail dealers in Chennai and Mumbai. The learned assessing officer (Hereinafter called "the A.O.") observed that the assessee company has made profits in the plywood trading business while it has incurred losses in the manufacturing activity. The assessee company submitted that it has identified the buyer of wooden crates for packaging of float-glass namely Saint Gobain Glass India Ltd. (in short "SGGI") in November, 2003 at the rate of Rs. 400/- per crate. A quantity of 8878 crates were supplied to SGGI from 1-11-2003 to 31-3-2004. The Breakeven point was achieved by the assessee company on the supply of 8878 crates and the audited P&L account for the period ending 31-3-2004 showed a meager profit of Rs. 42,546/-. In November, 2004 , the assessee company decided to raise the share capital by Rs. 35,00,000/- and plywood trading was accelerated and a sales turnover of Rs. 2,35,00,000/- was achieved from 1-11-2004 to 31-3-2005. In November 2004, the SGGI invited the assessee company to resume supplies of wooden crates at the rate of Rs. 412/- per crate and SGGI agreed to place orders for 30,000 crates for supplies before 31-3-2005. Since the yield of sawn timber was poor and also very difficult to procure timber in the short period, the assessee company was compelled to import timber, the assessee company incurred loss on procurement of timber which resulted in high cost of production. Since no manufacturing facilities were available at Sriperumbudur , wooden crates were manufactured on job rate basis , this also resulted in high cost of production. The assessee company incurred heavy losses on supplies of 28544 crates and accordingly the assessee

company decided to stop new supplies to SGGI. In the subsequent year, the rates per crate was revised from Rs. 412/- to 529/- per crate and the assessee company engaged casual workers for manufacturing on piece rate basis and reduced the wages cost from Rs. 204/- to Rs. 78/- per crate and in this way the assessee company was successful in reducing the loss of Rs. 467/- to Rs. 63/- per crate. The assessee company submitted that M/s Premier Wood Packers (Chennai) Pvt. Ltd. was the leading supplier of wooden crates to SGGI and this company incurred heavy losses and has gone into liquidation. The A.O. observed that the assessee company has incurred heavy losses and the AO asked the assessee company to file detailed explanations justifying the action as to why the assessee company sold the crates to SGGI at an average price of Rs. 412/- per crate as against the cost of production incurred by the assessee company at Rs. 879/- per crate along with other details to establish genuineness of the losses incurred. A notice u/s 133(6) of the Act was also issued to SGGI requesting to furnish certain information concerned and related to the trade with the assessee company, against which no reply was received by the AO. The assessee company explained that it has accepted the orders for supply of 28,544 crates in view of the growth of the company and enter into the competition in the prevailing market. As SGGI is a 500 fortune company and is a leading manufacturer of the float glass in the world and requirement of SGGI was 1200 crates per day and the SGGI has made huge expansion from 600 tons to 1400 tons per day, the assessee company has accepted the orders below the manufacturing cost in anticipation of the large business, utilization of the infrastructure, to build image in the market for procurement of orders from other leading manufacturers. The assessee company has submitted the copies of purchase bills of woods along with quantitative description of the timber in manufacturing of wooden crates being 58828.19 cu.feet(after wastage) to manufacture 28544 crates. The assessee company submitted that it was not possible to submit quantitative details in respect of the material consumed in

manufacture of one crate because each crate was of different size, thickness etc. The assessee company submitted the copies of the bills raised on SGGI and submitted that the assessee company billed SGGI on the basis of cubic feet and not on number of crates. The A.O. analysed the trading/manufacturing account for year ending 31-03-2005 of the assessee company and the same is detailed below:-

Particulars	Qty (c.ft)	Amount	Particulars	Qty (C.ft)	Amount
Op. stock	13,147.42	2245756.65	Sales to SGGI	58,828.19	11703082.00
Purchases (with duty & freight) and shares	49,302.92	17453053.49	Cl. Stock	2,545.16	416692.37
Job work charges		5821620.00	Wastage	1077.00	0.00
To G. profit			Gross loss		13400655.77
	<b>62,450.34</b>	<b>25520430.14</b>		<b>62,450.34</b>	<b>25520430.14</b>

The assessee company also submitted the details of the sales (date-wise) .The assessee company also submitted month wise summary of sale is as under:-

#### Grujan wood

#### Rubber wood

	Quantity	Amount	Quantity	Amount
September	3441.41	714,091.17	5,500.35	753549.60
October	4,093.61	849,423.72	5,526.93	757,189.56
November	4,508.75	935,563.58	7,834.37	1,072,807.61
December	5,561.87	1,153,788.47	8,790.49	1,204,296.9
January	4,099.73	850,694.42	5,810.13	795,986.58
February	2,908.69	603,558.8	4,913.99	672,717.33
March	2,334.26	496,809.59	3,825.44	524,085.21
<b>Total</b>	<b>26,948.32</b>	<b>5,603,929.75</b>	<b>42201.70</b>	<b>5,780,632.79</b>

Thus it was observed by the AO that it can be seen that the assessee company has sold total quantity of Gurjan and rubber wood to SGGI of 69150.02 cubic feet and the net quantity of wood in the sales of manufactured crates accounted for in its books is only 58828.19 cubic feet. The assessee company submitted that SGGI allows it net tolerance of 15%

and hence actual consumption of timbers for crates is only 58828 cubic ft. which means that the assessee company is billing SGGI for an additional 8824 cubic feet and Rs. 207.50 per cubic ft., the extra amount that the assessee company gets from SGGI is Rs. 18,30,980/-. Thus, the A.O. observed that the above stand of the assessee company is not verifiable in the absence of confirmation from SGGI. Accordingly, the A.O. rejected the contention of the assessee company and held that the sales of rubber wood shows that during the year under consideration, the assessee company has sold to SGGI 42201.70 cub. ft. rubber wood for an amount of Rs. 5780632.79. The A.O. observed that the assessee company had made purchases of rubber wood in the month of February and March, 2005 and the total rubber wood purchased by the assessee company during the said two months is 3,305.20 cubic ft. The A.O. further observed that as per the contentions of the assessee company, it did not have any stock of rubber wood which revealed that the assessee company has sold crates of rubber wood, but it is also a fact that the assessee company did not have any stock of rubber wood till 1-2-2005. The AO held that the assessee company is showing sale of rubber wood @Rs 137 per cubic ft in spite of selling Gurjan wood which is sold @Rs 207.50 per cubic ft. and actual excess stock of Gurjan wood is sold outside books at rate which is higher than its cost price, thus making profits which is not routed through the books of accounts. The A.O. held that the assessee company has made unaccounted purchases of rubber wood and manufactured the crates and sold the same through books. The A.O. accordingly works out the total amount invested for making unaccounted purchases by the assessee company at Rs. 35,00,685/-. The A.O. further observed from the quantitative details of opening stock, purchase, sale and closing stock of Gurjan wood submitted by the assessee company, the following discrepancies was found by the AO:-

Particulars	Qty (c.ft.)	Particulars	Qty (C.ft.)
Op. stock	13,147.42	Sales to SGGI	26,948.42

Purchases (with duty & freight)	45,997.72	Cl. Stock reported	2,545.16
		Wastage reported	1077.00
	59,145.14		30,570.58

The above figures show that the assessee company should have closing stock of 31119.82 cubic ft. of Gurjan wood. However, the assessee company showed in its audited trading & profit and loss account a closing stock of 2545.16 cubic ft. of Gurjan wood. Thus the A.O. observed that the stock of Gurjan wood which is not reflected in the books as on 31-3-2005, is sold out of the books. Thus, the A.O. worked out the total out of books sale of Gurjan wood at Rs. 1,40,03,919/-. Thus the AO held that if the out of books transaction were properly accounted for by the assessee company in its books, the true and fair figures would appear as under:-

#### Trading & Manufacturing A/c

Particulars	Amount	Particulars	Amount
Op. stock	2245756.65	Sales	35638978.53
Purchases (with duty & freight)	26956885.49	Cl. stock	416692.37
Job work charges	5821620.00	<b>Out of books sale as discussed in the order</b>	<b>14003919.00</b>
<b>Unrecorded purchase as discussed in the order</b>	<b>3500685.00</b>		
Gross profit	11534642.76		
	50059589.90		50059589.90

#### **Profit & Loss Account**

Particulars	Amount	Particulars	Amount
Expenses debited to P&L A/c.	997308.37	Gross Profit	11534642.76
Net profit	10537334.39		
	11534642.76		11534642.76

Thus, the A.O. recomputed the net profit of the assessee company at Rs. 1,05,37,334.39 in place of Rs. 34100.39 , thus resulting in an addition of Rs. 1,05,03,234/- to the total income of the assessee company vide orders dated 28.12.2007.

4. Aggrieved by the orders dated 28.12.2007 of the A.O., the assessee company has preferred an appeal before the CIT(A).

5. Before the CIT(A), the assessee company reiterated the submission what was made before the A.O. The assessee company explained the manufacturing process of the industry before the CIT(A) and submitted that the A.O. has failed to understand the very process of manufacture of wooden crates. The assessee company submitted that no error in the books of account was detected by the A.O. and the A.O. has not rejected the books of account and made the addition which is not sustainable in law. The assessee company's books of account were duly audited under the Companies Act, 1956 and also audited under the provisions of section 44AB of the Act. The assessee company contended that the provisions of the Act does not give scope for imagination and no addition could be made to any income by mere imagination. The assessee company submitted that the addition made to its income on the basis of an imaginary profit and loss account drawn by the A.O. based on the imaginary purchases and imaginary sales. The assessee company is also registered with the Sales Tax authorities and books were subjected to audit by sales tax authorities and for the movement of wood, a valid permit issued by the Forest Department is required for every movement/transportation of woods from one place to another place failing which is a non bailable offence , arrest and imprisonment shall be invited. The assessee company has neither applied nor obtained any permit for transportation of wood from his factory. The CIT(A) remanded the matter to the A.O. for his comments.

**The A.O. in his remand report submitted that the assessee company has not produced the books of account for examination of the A.O. There has been massive discrepancies in the statement of account furnished by the assessee company . SGGI has not replied to the notice issued u/s 133(6) of the Act.** It is not correct that no error or omission has been noticed. The difference/errors noticed in the purchase and sales figures have been brought in the order and have led to the enhancement of income. The assessee company's submission that the loss is around 25 to 40% on conversion of logs into timber which requires to be emphasized that the A.O. had not recalculated the wastage on manufacturing process whereas the wastage filed by the assessee company has been accepted and in fact the quantitative details of purchase and sale supplied by the assessee company during the assessment proceedings were compared with its financial statements filed with the return of income. The assessee company in its audit report submitted that the wastage generated comes to 1.79% but the assessee company now contended that its loss or wastage is around 25 to 40% which clearly is an indication that the assessee company is not submitting the true and correct figures. The assessee company's contention that the use of Gurjan wood in place of rubber wood was permitted by SGGI vide their letter dated 20<sup>th</sup> May, 2006 which cannot be admitted as an evidence in view of the fact that SGGI did not respond to the notice issued u/s 133(6) of the Act. The assessee company's contention that the rubber wood is used to meet the short fall is an afterthought to mislead the CITA). The assessee company has not produced the books of account during the course of assessment proceedings and also in the remand proceedings. The A.O. prepared the following details to prove that imagined figures nor presumed events and circumstances to complete the assessment:-

Sr No.		Quantity in cubic feet	Amount in rupees	Remarks
1	Opening stock Gurjan	13147.00	2245757	As per P&L & Exh A to the Ass. Order. As certified by the

				Auditors (Exh B & C to the Ass. Order).
2	Opening stock rubber	Nil	Nil	As certified by the auditors (Exh B& C to the Ass. Order).
3	Purchases of rubber wood	3305.20	296033	As per bill submitted by the assessee and the profits and loss account.
4	Purchases of gurjan wood	45997.77	17453053	As per bill submitted by the assessee and the profit and loss account.
5	Wastages	1077.00	Nil	As per P&L A/c & Exh A to Ass order. As certified by the Auditors (Exh B & C to Ass. Order).
6	Closing stock of gurjan wood	2545.16		As per P&L account & Exh A to ass. Order. As certified by the Auditors (Exh B & C to the Ass. Order)
7	Sales gurjan wood	26948.42	5603930	As per the copies of bills and Exh CI submitted by the assessee during the courses of the assessment proceedings. Exh D summary of sales bills in tabulated form.
8	Sales Rubber	42201.70	5780633	As per the copies of bills and Exh CI submitted by the assessee during the courses of the assessment proceeding. Exh D summary of sales bills in tabulated form.

The A.O. submitted that from the above, it is beyond doubt that the figures are adopted from the documents submitted by the assessee company itself. The assessee company's contention that assessee company had procured the rubber wood to fill in the short fall in Gurjan wood, the process/utilization would reflect the following:-

Particulars	Quantity in cubic feet	Particulars	Quantity in cubic feet
Opening stock - Gurjan	13147.00	Sales Gurjan wood	26948.42
Opening stock of rubber	00.00	Sales rubber wood	42201.70
Purchases of rubber wood	3305.20	Wastages	1077.00
Purchase of Gurjan wood	45997.72	Closing stock - Gurjan wood	2545.16
Undisclosed purchases	10322.36		

	72772.28		72,772.28
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From the above, the AO submitted by written submissions before the CIT(A) that it is clear that the assessee company had sold more cubic feet of wood than it has actually purchased, which clearly shows that the assessee company has made purchases out of books.

The assessee company made its submissions against the remand report wherein the assessee company has reiterated the submissions what has been made before the CIT(A) earlier. In nutshell, the assessee company submitted that the A.O. has not based his assessment order based on the evidences but on surmises, conjectures, assumptions and presumptions without bringing any cogent material on record. The Books of account has not been rejected u/s 144 of the Act before the assessment which is a mandatory requirement under the provisions of law. The assessee company submitted that the A.O. is not aware of the business processes and special features of each business. The assessee company has also produced a Video presentation of the Manufacturing process of Wooden crates, which clearly goes to establish that, the wood wastage arising during the process of sawing and cutting and slicing the wooden logs, are converted and used back for use in the manufacture of lids for the Wooden containers manufactured for SGGI and the assessee company had been permitted to use any alternate wood in place of Rubber wood for the Lids, thereby the assessee company in fact saved further losses, and the A.O. did not recognize the fact that the wastages arising during the process of Wood Sawing, Slicing & Cutting would have not been fit for any other use other than for use as a firewood, and the price for fire wood is as everyone is aware a pittance or negligible and which is even less than the scrap value. The assessee company submitted that the A.O. was not familiar and/or aware of the Production process and the consequent production

wastages, and this has led to making such disproportionate and imaginative additions based on presumptions and assumptions.

The matter was again remanded by the CIT(A) to the A.O. along with the submissions of the assessee company. The A.O. in his remand report submitted that the contentions of the assessee company cannot be accepted and the CIT(A) may decide the issues on the basis of merits of the case. However, the assessee company reiterated the submissions again what has been made before the A.O. as well as the CIT(A), in response to the remand report submitted by the AO.

The CIT(A) after considering the submission of the assessee company and the report of the A.O. deleted the addition made by the A.O. vide orders dated 09-12-2011 , by holding as under:-

“2. I have considered the submissions of the Ld. Counsel and the case laws cited and relied upon by him - as well as the comments of the A.O. in the Remand Report and further comments in response to the reply of the appellant and further replies of the appellant.

In this appeal, the main issue is whether the appellant purchased 'any' wood outside the books of accounts and consequentially made 'sales of wood' outside the books of accounts as alleged by the A.O. on the basis of the fact of 15% shortage being allowed to the appellant by the purchaser - M/s. Saint Gobain Glass India Ltd.

The following contentions of the appellant - clearly shows that the appellant could neither have purchased 'any' wood outside the books of account nor could have made 'sales of of wood' outside the books of accounts:-

- (i) The Process of manufacture of Wooden Packaging Boxes involved in Purchase of Wooden Logs, Slicing of Wooden Logs into the pre-determined required sizes as per drawings furnished by the said purchaser.

(ii) M/s Saint Gobain Glass India Ltd paid higher rates in respect of Thicker Sizes where WIPPL was mandatorily required to use either the 'PINE OR GURJA ' wood, and paid the rate of "RUBBER" wood in respect of "Thin" sizes, wherein the WIPL was permitted to use any ordinary wood.

(iii) The wooden packaging boxes mainly required 2 different sizes - One with Thick Size and one with very Thin size. As per the standards fixed, WIPPL was required to use only "GUJAN WOOD" OR "PINE WOOD" for the Thick Sizes and WIPL was permitted to use any ordinary wood for the 'Thin' Sizes. The Thick Sizes were used for manufacturing the Frame of the Boxes, which would ultimately carry the weight of the Glass, and the 'Thin' size wood was to be used for manufacture of Top and Bottom lids for the said Frame, which was necessary only for purpose of easy Transportation, and had no other purpose or use, resulting in low rates.

(iv) M/s Saint Gobain also permitted 15% of wastage while computing the quantity of "GURJAN OR PINE" towards loss in Slicing, Sawing, of "GURJAN OR PINE LOGS", and further on account of the fact, that a very low rate is paid in respect of wood used for manufacture of Thin Sizes, as M/s Saint Gobain was well aware that the manufacturers would use the retrieved material from the waste resulting while Slicing and Sawing of timber Logs.

(v) Like any shrewd business enterprise, M/s WIPPL also, used to use the waste wood resulting from the Sawing and Slicing of the "GURJAN / PINE LOGS" for the purpose of manufacture of the "Thin" sizes used in the manufacture of Top and Bottom Covers for the Boxes.

(vi) Thin Sizes of wood is recovered out of such wastages resulting from above operation of Sawing, Slicing & Cutting of Logs which are then used for manufacture of Top and Bottom Lids, which did not prescribe use of any particular type of wood, thereby saving substantial costs, which were factored while fixing the rates on account of competition.

(vii) The A.O. called for copies of Sales Bills raised and as well as copies of Purchase bills in respect of purchase of wood made

by WIPPL. The Assessee had purchased wood in Logs and sales were accounted in Numbers along with the details of quantity shown in Cubic ft. Further the Assessee had shown separate Quantity columns in his sales bills as per the requirement of Saint Gobain Glass India Ltd., wherein he was required to show both the quantities relating to the Frame ( Where only Gurjan / Pine was to be used) and the Top & Bottom frames ( Wherein he was permitted to used any wood but the rates of Rubber Wood only would be paid) , and accordingly the Assessee had grouped them as "Gurjan" and "Rubber" for purposes of calculation of rates only and did not reflect the type of wood used in so far as the column relating to "Rubber" was concerned.

(viii) The A.O. even refused to accept the fact that, Assessee was permitted to factor 15% of wastage while computing the quantity relating to Frames made out of Gurjan/Pine wood. The learned A.O. did not understand and / appreciate the fact that, M/s Saint Gobain permitted for billing of this wastage on account of the reason that, they paid a very low rate in so far as it related to the quantity of wood used in the manufacture of Top and Bottom covers, wherein they paid only the Rates of Rubber Wood, since M/s Saint Gobain were aware that, every manufacturer would use the same wood recovered from the wastage, which otherwise could be put use only as Fire wood and sold as Scrap.

(ix) To collate and tabulate a statement without understanding the basic billing method, has led to presumption and assumption that the Assessee has sold off his Gurjan Wood and further has Purchased Rubber wood for manufacturing the Containers as per the specification of Size, and hence tabulated as per Statistical Data, without even finding one single omission and or commissions, and ignoring the very fact that, such movements of Wood would call for verification by various Government authorities namely the Central Excise Department which is again a Central Government Body, and the Forest Department and as "well as the Local Sales Tax Department ( both belonging to the Local State Government of Tamil Nadu).

Merely because no confirmation of accounts was received from M/s. Saint Gobain Glass India Ltd. - it could not result in such a huge addition/disallowance especially when no incriminating material/evidence was in the possession of the A.O. in the form of unaccounted purchase bills or in the form of unrecorded sale bills but

based upon a hypothetical working - hence the additions/disallowances are unwarranted.

All the above clearly shows that it was only a hypothetical working and mere possibility that prompted the A.O. to make the above addition/disallowance - when there was no concrete evidence or hard facts adverse to the assessee - available with the A.O, or on record -, especially when the accounts of the assessee are audited u/s 44AB of I.T. Act and there is a report of the auditor in Form No. 3CD - in which there are no adverse comments by the auditor to warrant any inference of the sort made by the A.O.

Hence, the principle of law that 'suspicion however grave cannot take the place of proof comes into play and the hypothetical working of the A.O. cannot be sustained because the reasons mentioned above clearly show that the wastage of 15%, - has very clearly and convincingly been explained by the appellant and it cannot lead to the presumption - that the appellant must, as of necessity have indulged in making purchases outside the books of account- when on record there is no such evidence or concrete proof of any such malpractice. Similarly, in the absence of any concrete proof of sales outside the books of accounts - no presumption could have been drawn that the appellant must have made sales outside the books of accounts- especially when the A.O. could not with certainty show any bill or transaction which would have a tendency to implicate the appellant for having made sales outside the books of accounts. In the absence of such evidence this addition made by the A.O. is without any basis and the appellant having successfully explained the nature and fact of 15% shortage - its consumption 'and usage etc. especially during the course of remand proceedings - no adverse inference can be drawn at all.

Hence, the addition made by the A.O. on account of unexplained purchase of Rs.35,00,685/- and unexplained sales of Rs. 1,40,03,919/- is deleted and this ground of appeal is allowed.

Hence, this ground of appeal is allowed.

During the course of the appellate proceedings the Add. CIT-8(3) vide letter dated 10.08.2009 stated that the purchases of Rs. 35,00.685/- should not be allowed as a deduction in view of the provisions of Section 69C and to this extent the assessment deserves to be enhanced.

However, since I have already held above that the purchases and sales are fully explained and accordingly, no addition/disallowance can be made of the same. Hence, logically and consequentially - there can be no question of any disallowance u/s 69C also - hence this plea of the Addl.CIT-8(3) is declined and thereby rejected.”

6. Aggrieved by the orders dated 09-12-2011 of the CIT(A), the Revenue is in appeal before the Tribunal.

7. The ld. D.R. submitted that there is unaccounted transactions of sale and purchases made by the assessee company and the A.O. has rightly made the additions vide assessment orders dated 28.12.2007 passed u/s 143(3) of the Act. The books of account of the assessee company were also not produced by the assessee company before the AO even during remand proceedings despite being pointed out by the AO and major discrepancies have been noticed by the AO in the sale/purchase and stock of the assessee company. The ld. D.R. further relied upon the order of the A.O.

8. On the other hand, the ld. Counsel for the assessee company submitted that it was alleged by the A.O. that there is sale/purchase out of the books of account made by the assessee company and the additions have been made without any cogent material brought on record. The assessee company is engaged in the business of manufacturing of packaging material of wooden, plastic and other related materials. The assessee company is procuring Gurjan wood/rubber wood which is used for manufacturing of crates which is mainly supplied to SGGI. The assessee company reiterated its submissions as made before the authorities below and relied upon the orders of the CIT(A). SGGI is engaged in the business of manufacturing of float glass and these crates are used for packaging the same. The ld. Counsel submitted that the process of sawing and cutting i.e. conversion of logs into timber results in a wastage of 25 to 40%. The A.O. has not considered the wastage/losses incurred by the assessee company. However, the SGGI has allowed and / or

permitted a wastage of 15% to be included in the quantity of wood supplied. The ld. Counsel submitted that the assessee company is also registered with the Sales Tax authorities , excise authorities and the movement of wood, a valid permit issued by the Forest Department is required for every movement/transportation of woods from one place to another place failing which results into a non bail-able arrest and imprisonment. The assessee company has neither applied nor obtained any permit for transportation of wood from his factory. The assessee company submitted that the A.O. was not familiar and / or aware of the Production process and the consequent production wastages, and this has led to making such disproportionate and imaginative additions based on presumptions and assumptions. The assessee company submitted that for the subsequent assessment year 2007-08 in cross appeals in assessee company's own case in ITA No.6784/Mum/2011 and ITA No. 6809/Mum/ 2011 vide orders dated 08-05-2013 , the Tribunal has accepted claim of wastage of the wood in manufacture of crates and for un-accounted purchases made in cash , the Tribunal has confirmed the addition of Rs.2.7 lacs to meet the end of justice The assessee company contended that the CIT(A) has rightly allowed the appeal of the assessee company and prayed that the same may be upheld.

9. The ld. D.R., in the rejoinder, submitted that the toleration of 15% as allowed by the SGGI vide document filed during the course of hearing as contended by the assessee company is not evidenced on the record and this is a new fact and an additional evidence brought on record by the assessee company which need to be verified by the AO and the matter need to be set aside to the file of the AO.

10. We have considered the rival contentions and also perused the material available on record. We have observed that the assessee company is engaged in the business of manufacturing of wooden crates, pallets and trading in

plywood . Wooden crates/pallets are supplied to glass and paper manufacturers , mainly to SGGI. The assessee company has incurred heavy losses in the business of manufacturing of wooden crates and has earned profits in the business of trading of plywood. The A.O. has asked the assessee company to produce the books of account which Revenue is contending that the assessee company did not produce even during the remand proceedings. The assessee company has submitted the statements of purchases/sales made by the assessee company but has not co-related the consumption of material to the production of wooden crates and there are mismatches in the said statements in sales, purchases and stock as contended by the Revenue. As contended by the Revenue, the assessee company has not produced the books of account during the assessment nor during the first appellate proceedings. The matter was also remanded by the CIT(A) back to the A.O. twice and the assessee company was given opportunity to produce the books of account to justify the claim of losses incurred by the assessee but despite that the assessee company failed to do so. The assessee company has however produced audited financial statements which were audited both under the Companies Act,1956 and also u/s 44AB of the Act. We have noted that the assessee company is duly registered under the VAT, Excise Department . We have also noted that wood movement is restricted by the Forest Department whereby permission is required for the transportation/movement by the Forest department. The A.O. has also noted discrepancies and mismatches in the statements for the purchase/sale/consumption of wood , sale of crates and stock submitted by the assessee company and it was incumbent on the assessee company to reconcile the same as primary and initial onus is on the assessee company as the entries are appearing in the books of accounts of the assessee company. There was also mismatch in the sale of rubber wood as the Revenue has contended that the assessee company has sold rubber wood during the previous year from April 2004 to March 2005 but the purchases of rubber

wood was made only w.e.f. 01-02-2005 till 31-03-2005 , whereby sale of rubber wood is 42201.70 cub. ft. and the total rubber wood purchased by the assessee company is 3,305.20 cubic ft while the opening stock and purchase during the year of Gurjan wood was 59145.45 cu. feet and the sale shown was 26948.42 cu.feet and closing stock shown was only 2545.16 cu. feet,which in the view of revenue reflect mismatch and more so when the price of Gurjan wood is expensive/costlier vis-à-vis rubber wood which possibly might be the reasons for huge loss to the assessee company . Thus keeping in view all these factual matrix of the case and in the interest of justice, we deem it fit and proper to set aside the matter back to the file of the A.O. to decide afresh this issue de-novo after considering the books of account and other evidences produced by the assessee company before the A.O. We also want to clarify that the AO shall decide the issue afresh on merits un-influenced by our observations in this order. Needless to say the assessee company may be granted proper and sufficient of being heard by the AO and be allowed to produce cogent material and evidences which shall be admitted by the AO along with the books of accounts in support of its contentions in its defense . We order accordingly.

12. Regarding the second issue, the A.O. noted during the course of assessment proceedings that the assessee company has increased liability on account of share application money from Rs.7,45,000/- to Rs.11 ,58,000/- . The assessee company has also increased its equity share capital from Rs.8,16,000/- to Rs. 37,71,000/-. Thus, there was an increase of Rs. 4,13,000/- on account of share application money and an increase of Rs.29,55,000/- on account of share capital. The assessee company was called upon by the AO to furnish details of fresh capital receipt with names and addresses of the shareholders/applicants along with their confirmation. In response , the assessee company submitted letter dated 25.9.2006 enclosing list of shareholders as on 31/03/2005, and confirmations from the

shareholders confirming their share holding in the assessee company's share capital. In all the assessee company enclosed 30 confirmations from individuals i.e. more particularly from all the shareholders to whom fresh shares amounting to Rs.29,55,000/- were issued. The assessee company was then issued a notice u/s.142(1) of the Act requesting details along-with name, address, copy of share application form, proof of identity of the applicants and mode of receipt of money in respect of the shares amounting to Rs. 29,55,000/-. The assessee company vide its letter dated 15.10.2007 submitted the names and addresses of shareholders, copies of share application forms & copies of their PAN card. The assessee company also stated that all the shareholders are relatives and friends of the Directors of the company. The list of shareholders as on 31.03.2005 was enclosed with the letter dated 15.10.2007. On comparing the confirmed list of shareholders submitted on 15.10.2007 with the list submitted by the assessee company vide letter dated 25.9.2006 , it was seen by the AO that though the total number of shares issued by the assessee company in both the lists were identical i.e. 3,77,100 ( 81600 + 295500 ), the names of 13 shareholders holding 72100 shares as on 31.03.2005 were replaced by 5 different shareholders holding identical 72100 shares. Thus, despite there being a change in the number and the name of the shareholders, the total number of shares issued by the assessee company remained the same. This fact was pointed out to the assessee company by the AO. The assessee company submitted that it was an apparent mistake on the part of the Accountant of the assessee company. The AO observed that the assessee company has not submitted the proof of creditworthiness and genuineness of the transaction. The AO observed no bank pass book /bank statement was submitted of the shareholders . The assessee company had not submitted any other evidence in support of the creditworthiness of the shareholders. Since the assessee company had not fully established the genuineness of the capital introduced, the assessee company was informed by the AO that it had neither established

that the capital introduced was genuine nor had it provided the identity, creditworthiness and genuineness of the transaction , in respect of the person who introduced the capital.

In response , the assessee company submitted evidence of payment made by its Directors Shri N.K.Shah amounting to Rs.1,00,000/- and that of Smt.Prabha Shah amounting to Rs.1,00,000/-. Except for these two evidences, the assessee company did not furnish any other evidence in support of its stand that the capital introduced in the form of share capital and share application money is genuine. From the above , the AO concluded that the assessee company has failed to discharge its onus of establishing, not only that the genuineness of the transaction of introduction of share capital, but also that of establishing of the identity, and creditworthiness of the share applicants. The assessee company has, during the course of the assessment proceedings submitted two list carrying different set of names stated to be shareholders of the assessee company. The AO observed that the difference was brought to the notice of the assessee company and on closer verification of the same, was very clear that the assessee company, has projected names of two different sets of people as its share holders. This only leads one to the most logical conclusion, viz. the assessee company is trying to hide true facts from the Revenue and giving evasive replies to cover up its tracks. The A.O. accordingly treated the receipts totaling Rs. 31,68,000/- as income of the assessee company from undisclosed sources and brought to tax u/s 68 of the Act, vide orders dated 28.12.2007.

13. Aggrieved by the assessment orders dated 28.12.2007 passed by the AO, the assessee company carried the matter in appeal before the CIT(A).

14. The assessee company reiterated the submission what has been made before the A.O. and submitted that the assessee company furnished the

complete details of its Shareholders who had paid the money, and also gave the details of their addresses and the details of their PAN number etc. . The assessee company submitted that it has kept the records under the safe custody. The Accountant of the assessee company made the mistake in giving wrong list of shareholders initially which was corrected on coming to know of the mistake by submitting correct list of shareholders. The payment for the share subscription were received through banking channel. The assessee company has duly furnished the list of confirmations physically as desired by the A.O. . The A.O. has wrongly made the addition. The matter was remanded back to the A.O. and in reply the assessee company reiterated the same submissions what has been made earlier. The assessee company submitted that in fact two of the said subscribers were also the Directors of the assessee Company and also were assessed with the very same AO , and they had already disclosed their investment in their returns of income filed. The assessee company submitted that there were some mistakes in the original details filed by the accountant, and though the Managing Director had signed the same, he had no time to verify the same with books of accounts, as he was travelling the same day, and these details were to be filed immediately. Only on account of this, the details furnished could not be verified by the Managing Director though he had signed. The CIT (A) accepted the contention of the assessee and held that the declaration in Form No.2 is before an independent authority which clearly shows that in case there was any doubt the same could have been cross verified with the details filed by the assessee company in Form No.2 with the ROC and the issue could easily have been resolved since all payments were received by the cheques/drafts. Hence, in view of the above factors no addition/disallowance on account of the earlier mistake could have been made by the A.O. Thus, the CIT(A) vide orders dated 09.12.2011 deleted the additions as made by the AO.

15. Aggrieved by the orders dated 09-12-2011, the Revenue is in appeal before the Tribunal.

16. The ld. D.R. submitted that there is an addition of Rs. 31,68,000/- being made on account of disallowance u/s 68 of the Act. The capital received by the assessee company for which identity, creditworthiness and genuineness has to be proved by the assessee company as per mandate of Section 68 of the Act and the assessee company has failed to do so. The ld DR submitted that complete confirmations has not been submitted in respect of all the shareholders . Ld DR submitted that the bank statements of the shareholders were also not submitted. The ld. D.R. submitted that the A.O. has rightly made the additions and he relied upon the orders of the AO,

17. The ld. Counsel for the assessee company submitted that all the details with respect to the names, addresses and occupation of the allottees of the shares have given and the same has been placed vide paper book page 76 to 83 showing name's of the allottee, addresses and occupation etc. . He reiterated the submissions as made before the authorities below. The ld. Counsel of the assessee company relied upon the orders of the CIT(A).

18. We have considered the rival contention and perused the material available on record. We have observed that the assessee company has increased its liability on account of share application money from Rs. 7,45,000/- to Rs. 11,58,000/- and equity share capital was also increased from Rs.8,16,000/- to Rs.37,71,000/- . The assessee company has given list of shareholders at the initial stage along with confirmation's from the shareholders. The assessee company has submitted the revised list of shareholders as there were errors in the original list but no confirmations were submitted in the revised list but we have observed that the assessee company has submitted confirmations from the shareholders along with the

list of shareholders initially which was revised later on and some of the shareholders are same/common in both the list and there is no error in both the list with respect to some of these shareholders . The assessee company has also given PAN, address and mode of payment etc. of shareholders to whom shares were allotted . The assessee company has also submitted form no 2 filed with Registrar of Companies whereby the details of shareholders to whom shares were allotted was duly given. However, the bank statements and tax returns of the shareholders were not given by the assessee company to prove creditworthiness and genuineness of the transaction as per mandate of Section 68 of the Act , except with respect to the shareholders namely Sh N K Shah and Mrs Prabha Shah for which no additions have been made by the AO. It is pertinent to mention here that u/s 68 of the Act, the primary onus is on the assessee company to prove the identity, creditworthiness and genuineness of the transaction . The assessee company submitted documents relating to Sh N K Shah and Smt. Prabha Shah and the AO has not made additions with respect to these shareholders , while the bank statements to verify the transaction has not been submitted as also complete confirmations and tax returns were not submitted with respect to other shareholders. In our considered view and in the interest of justice, the assessee company has not completely discharged the initial and primary onus as cast by Section 68 of the Act with respect to cash credit appearing in the books of accounts of the assessee company with respect to raising of share capital/share application money during the previous year . Thus, In our considered view and the interest of justice will be best served if the matter is set aside to the file of the AO for fresh consideration of the issue de-novo as per mandate of Section 68 of the Act after considering the details and evidences submitted by the assessee company in order to prove the identity, creditworthiness and genuineness of the transaction to satisfy the mandate of Section 68 of the Act, and such evidences submitted by the assessee company in de-novo proceedings shall be admitted by the AO. The assessee company is directed

to produce all the details and evidences before the A.O. to satisfy the ingredients of Section 68 of the Act , in support of its contentions and such evidences which are submitted by the assessee company in de-novo proceedings shall be admitted by the AO . The assessee company shall be given sufficient opportunity of being heard by the AO in accordance with the principles of natural justice in accordance with law. We order accordingly.

**ITA No. 2149/Mum/12**

19. In this appeal, the original assessment was framed u/s 143(3) of the Act vide order dated 28.12.2007 whereby the A.O. has made addition of Rs. 1,05,03,234/- on account of profit earned on the manufacturing of wooden crates which was deleted by the CIT(A) vide orders dated 09-12-2011 , which we have already adjudicated and dealt in detail in ITA No. 1528/M/12 whereby we have set aside the matter to the file of the AO for de-novo adjudication , vide this order. The A.O. has alleged that there was unaccounted purchase of Rs.35,00,685/- on account of difference in the Gurjan wood purchased by the assessee company out of books but no addition was made in the original assessment order dated 28.12.2007 passed u/s 143(3) of the Act , due to oversight and the said expenditure was allowed to the assessee company in the original assessment order while as per the AO, the same should not have been allowed to the assessee company in view of provisions of Section 69C of the Act. The Revenue has initiated the proceeding u/s 147 of the Act within four years from the end of the assessment year as the income has escaped assessment, whereby additions of Rs. 35,00.685/- have been made on account of out of books purchases u/s 69C of the Act , which has been deleted by the CIT(A) vide orders dated 30.01.2012 following the orders of the CIT(A) dated 09-12-2011 w.r.t. appellate proceedings against the original assessment order u/s 143(3) of the Act. Considering the facts and the decision of the CIT(A) dated 09-12-2011 against the original assessment order u/s 143(3) dated 28.12.07 , we have

already adjudicated the appeal No ITA No. 1528/Mum/2012 whereby we have set aside the issue's to the file of the A.O. for de-novo determination of the issue after giving opportunity of being heard to the assessee company. The same decision shall apply to this appeal also and we set aside the issue in this appeal also to the file of A.O. for fresh consideration and de-novo adjudication as indicated in the appeal in ITA No. 1528/Mum/12, as the issue in this appeal is also arising from the same matter related to the alleged un-accounted purchases and sales made by the assessee company.

20. In the result, both the appeals filed by the Revenue are allowed for statistical purposes.

Order pronounced in the open court on 2<sup>nd</sup> February, 2016.

आदेश की घोषणा खुले न्यायालय में दिनांक: 02-02-2016 को की गई ।

Sd/-  
(AMIT SHUKLA)  
JUDICIAL MEMBER

sd/-  
(RAMIT KOCHAR)  
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 02-02-2016

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व.नि.स./ ए.के., Ex. Sr. PS

**आदेश की प्रतिलिपि अग्रहित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned, Mumbai
4. आयकर आयुक्त / CIT- Concerned, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai H Bench
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai