*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 14th May, 2012
% *Date of Decision: 7th August, 2012*

\+ **ITA No.2021/2010**
\+ **ITA No.2045/2010**
\+ **ITA No.1788/2010**
\+ **ITA No.2023/2010**
\+ **ITA No.1789/2010**
\+ **ITA No.2024/2010**
\+ **ITA No.1791/2010**

COMMISSIONE ROF INCOME TAX-VII .....Appellant
Through: Ms. Rashmi Chopra, Sr. Standing Counsel.

Versus

CHETAN DAS LACHMAN DAS ....Respondent
Through: Mr. Arvind Bansal, Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V. EASWAR

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

R.V. EASWAR, J.:

1. In these appeals by the Revenue filed under Section 260A of the Income Tax Act, 1961 ('Act', for short) the following questions of law were framed by us on 14.05.2012: -

ITA NO.	ASSESSMENT YEAR	QUESTION FRAMED

2021/2010	2000-01	Whether the Income Tax Appellate Tribunal (ITAT) was right in law in deleting the addition of ₹40,12,470/- and ₹1,05,69,539/- on account of suppressed sale value of Hing and compound Hing, respectively?
2045/2010	2001-02	1. Whether the Income Tax Appellate Tribunal (ITAT) was right in law in deleting the addition of ₹44,59,659/- and ₹1,14,75,914/- on account of suppressed sale value of Hing and compound Hing, respectively? 2. Whether Income Tax Appellate Tribunal (ITAT) has failed to decide the issue of depreciation on the alleged foreign car and therefore the order is perverse?
1788/2010	2002-03	1. Whether the Income Tax Appellate Tribunal (ITAT) was right in law in deleting the addition of ₹68,10,158/- and ₹1,02,93,262/- on account of suppressed sale value of Hing and compound Hing, respectively? 2. Whether Income Tax Appellate Tribunal (ITAT) has failed to decide the issue of depreciation on the alleged foreign car and therefore the order is perverse?
2023/2010	2003-04	1. Whether the Income Tax Appellate Tribunal (ITAT) was right in law in deleting the addition of ₹89,81,169/- and ₹1,37,45,163/- on account of suppressed sale value of Hing and compound Hing, respectively? 2. Whether Income Tax Appellate Tribunal (ITAT) has failed to decide the issue of depreciation on the alleged foreign car and therefore the order is perverse?
1789/2010	2004-05	1. Whether the Income Tax Appellate Tribunal (ITAT) was right in law in deleting

		the addition of ₹73,58,074/- and ₹1,32,07,596/- on account of suppressed sale value of Hing and compound Hing, respectively? 2. Whether Income Tax Appellate Tribunal (ITAT) has failed to decide the issue of depreciation on the alleged foreign car and therefore the order is perverse?
2024/2010	2005-06	1. Whether the Income Tax Appellate Tribunal (ITAT) was right in law in deleting the addition of ₹2,22,40,033/- and ₹1,36,92,746/- on account of suppressed sale value of Hing and compound Hing, respectively? 2. Whether Income Tax Appellate Tribunal (ITAT) has failed to decide the issue of depreciation on the alleged foreign car and therefore the order is perverse?
1791/2010	2006-07	1. Whether the Income Tax Appellate Tribunal (ITAT) was right in law in deleting the addition of ₹2,22,40,033/- and ₹1,36,92,746/- on account of suppressed sale value of Hing and compound Hing, respectively? 2. Whether Income Tax Appellate Tribunal (ITAT) has failed to decide the issue of depreciation on the alleged foreign car and therefore the order is perverse?

2. The assessee is a partnership firm engaged in the business of *Hing*. It also carries on the processing of *Hing* under which edible *Hing* is produced from pure/ raw *Hing* by subjecting the same to a process. The partners of the assessee firm are Anil Kumar Bhatia (HUF) and Sanjay Bhatia (HUF). On 13.12.2005 there was search of the assessee's premises under Section 132 of the Act. In the course of the search certain

documents were found which according to the Assessing Officer suggested gross under invoicing of sales and suppression of production/ yield of *Hing*. As required by Section 153A of the Act, the assessment for the assessment years 2000-01 to 2006-07 were completed by the Assessing Officer in which additions were made on account of suppressed sale value of *Hing* and compound *Hing* and suppression on account of input – output ratio of process of *Hing*. In all the assessment years except the year 2000-01 the Assessing Officer also disallowed depreciation of car on the ground that it was on imported car.

3. A perusal of the assessment orders show that the gross profit rate had shown an abnormal volatility. This can be seen from the following chart set out in the assessment order for the assessment year 2000-01: -

Rate	A.Y. 06-07	A.Y. 05-06	A.Y. 04-05	A.Y. 03-04	A.Y. 02-03	A.Y. 01-02	A.Y. 00-01
G.P.%	1.5	9.24	5.2	6.4	NIL	19.28	11.54
N.P.%	2.5	1.8	1.5	1.8	7.8	3.2	3.9

The Assessing Officer also noted that the documents seized during the search showed that the assessee was indulging in under invoicing of sales and purchases of *Hing* and that the seized papers related to business transactions between 1st November, 2005 and 18th November, 2005. It was noticed that some of the sale transactions recorded in these papers exactly matched with the sale bill issued to various persons except the rate of sale of *Hing*. The Assessing Officer referred to several such instances from the seized material at pages 21 to 23 of the assessment order for the assessment

year 2000-01. They are not reproduced here for the sake of brevity. In addition, he also referred to 7 instances of sales where two rates of sale were mentioned in the papers. This is also set out at pages 23-24 of the aforesaid assessment order. One of these rates was higher than the other. According to the Assessing Officer the sales were made at the higher rate whereas bills were issued only for lower rate. On the basis of these papers the Assessing Officer made the additions for suppressed sale value of *Hing* and compound *Hing*. The following tables set out at pages 26 and 28 of the assessment order for the assessment year 2000-01 indicate the additions made on this score: -

HING:

A.Y.	Qty. sold as claimed by assessee in Kgs.	Sale @ 2000 per Kg.	Actual Sales	Difference in addition made	G.P. @ 25%
2000-01	5,450	1,89,00,300	28,50,117	1,60,49,883	40,12,470
2001-02	10,896	2,17,92,000	39,53,364	1,78,38,636	44,59,659
2002-03	16,517	3,30,34,000	57,93,367	2,72,40,633	68,10,158
2003-04	22,074	4,41,58,000	82,23,325	3,59,24,675	89,81,169
2004-05	19,546	3,90,92,000	96,59,705	2,94,32,295	73,58,074
2005-06	58,390	11,67,80,000	2,78,19,867	8,89,60,133	2,22,40,033

COMPOUND HING:

A.Y.	Qty. sold in Kg.	Rate adopted @ 500 per kg.	Sales recorded	Difference
2000-01	26,099	1,30,49,500	24,79,961	1,05,69,539

2001-02	26,683	1,33,41,500	18,65,586	1,14,75,914
2002-03	24,590	1,22,95,000	20,01,738	1,02,93,262
2003-04	32,238	1,61,19,000	23,73,837	1,37,45,163
2004-05	33,451	1,67,25,500	35,17,904	1,32,07,596
2005-06	36,584	1,82,92,000	45,99,254	1,36,92,746

4. The assessee carried the matter in appeal to the CIT (Appeals) who examined the facts, evidence and contentions in considerable detail and recorded the following findings in his orders which are substantially the same for all the assessment years: -

(a) The seized material relied upon by the Assessing Officer relates to the assessee firm, about which there can be no doubt.

(b) However, the papers seized show figures in terms of *Kattas* and not in kilograms as erroneously assumed by the Assessing Officer. Therefore, the adoption of the sale value of the *Hing* uniformly at ₹2,000/- per kg. for all the 7 years is arbitrary, considering that the rates of sale in this business fluctuate depending on the international market conditions. The rate also cannot be constant for such a long period of 7 years.

(d) The Assessing Officer was not justified in estimating the sales of *Hing* for several years merely on the basis of seized material available with him for the month of November, 2005.

(e) The rate of gross profit cannot be uniform in all the years since it represents a combined rate of profit in respect of various

items such as *Hing*, *Badam*, black pepper, *Loung*, *Mulathi*, *Pista*, *Jeera*, etc. There can be no standard gross profit for all these items.

5. After recording the above factual findings the CIT (Appeals) proceeded to hold as under: -

(a) There is evidence to show that the assessee recorded two rates on the papers found whereas in the bills it had accounted only for the lower rate.

(b) Though the seized papers related only to November, 2005, it indicates the practice of the assessee to suppress the real sales and such practice was also admitted by the partner during the search. Therefore, the rejection of books is justified and estimate of profit is also justified.

6. It may be seen from the above that the CIT (Appeals) relied on the seized papers to infer therefrom the practice of the assessee to indulge in suppression of sales which were kept away from the regular books of accounts. He has accordingly justified the action of the Assessing Officer in rejecting the books of accounts by virtue of his powers under Section 145 of the Act. The CIT (Appeals) has also recognized the right of the Assessing Officer to estimate the profits, having rejected the books of accounts. He thereafter proceeded to consider what in his opinion would be a reasonable rate of profit earned by the assessee in the business. As far as the *Hing* is concerned, he enhanced the gross profit by 2% of the sales and added the difference to the profits. In doing so he has taken the sales as disclosed by the assessee. With regard to the *Hing* compound he held

that there is no record or evidence to show that the assessee did produce the alleged quantity of *Hing* compound and sold them in the market. He found that the Assessing Officer had assumed that there can be a production of 10 to 25 kgs. of *Hing* compound out of 1 kg. of pure *Hing*. The Assessing Officer has also assumed that there is no manufacturing account for production of compound *Hing*. He found fault with the procedure adopted by the Assessing Officer which according to him had no basis. The estimated turnover computed by the Assessing Officer was found to be without any record or evidence. He, therefore, took the sales as disclosed by the assessee as correct. However, he found justification for a higher estimate of gross profit than what was shown by the assessee. He adopted the same rate of gross profit in respect of *Hing* compound which he adopted in the case of *Hing* and thus added the difference to the profits. In order to appreciate the procedure adopted by the CIT (Appeals) with regard to *Hing*, it would be helpful to reproduce the following portion of his order for the assessment year 2000-01: -

> "*During the year the assessee has disclosed sale of hing kabuli at ₹34,24,081/- and the gross profit disclosed is ₹6,27,477/- @ 18%. However considering the above discrepancies noted as well as expenses under telephone, car which has personal element, it is reasonably estimated the gross profit at 20% on ₹34,24,081/- which comes to ₹6,84,816/-. Thereby difference of ₹57,339/- is directed to be assessed as difference in gross profit and delete the addition of ₹40,12,470/- made by the A.O. on account of turnover.*"

As regards the compound *Hing*, the following extract from the order of the CIT (Appeals) for the assessment year 2000-01 may be useful: -

"*As far as addition of ₹1,05,69,539/- on account of difference in the sale value of hing compound is concerned, I have considered submissions of the both. The A.O. purely proceeded to make the above estimated addition on the basis of assumptions only. There is no record of evidence to show that the assessee had produced the alleged quantity of hing compound and sold in the market. She has estimated on the belief that there is production of 10 to 25 kgs of hing compound out of 1 kg of pure hing. The A.O. also proceeded on the ground that there is no manufacturing account has been shown by the assessee for the production of a compound and accordingly estimated the same by taking the value at ₹500/- per k.g. By taking this value she has computed the total sales at ₹1,30,49,500/- as against ₹24,79,961/- disclosed by the appellant. The above addition has no basis at all. There is no support either for turnover or for rate taken up for valuation. The A.O. has simply assumed the production rate and proceeded to estimate the value without bringing on record any cogent evidences. It is difficult to sustain the estimated turnover computed by the A.O. without any record of evidences. Accordingly, the same is directed to be deleted. However, as held in the above paragraphs there is tendency on the part of the assessee to suppress the profit rate on the sales made in respect of hing compound also. During the year on a turnover of ₹24,79,961/- declared gross profit of ₹2,93,813/- @ 11.8%. As already decided in respect of hing, the same rate of G.P. is taken in this case also i.e. @ 20% which comes to ₹4,95,992/-. Thereby the difference of ₹2,02,179/- is directed to be assessed as income of the assessee in respect of hing compound which represents difference in the gross profit disclosed in the books by the assessee. Accordingly the A.O. is directed to delete the addition of ₹1,05,69,539/- which represents the estimated sale value on hing compound and add the amount of ₹2,02,179/-, being the additional profits on hing compound.*"

The orders of the CIT (Appeals) for all the other years are on the same lines.

7. As regards the depreciation on the car which was disallowed by the Assessing Officer, the CIT (Appeals) examined the invoices to verify whether the vehicle was purchased in India or imported from abroad. He found that it was purchased from the authorised dealer in India by obtaining finance from the bank. He, therefore, held that though the vehicle was a foreign brand, it was purchased from the authorised dealer in India and therefore the claim of depreciation cannot be disallowed. He accordingly allowed the same.

8. Both the Revenue and the assessee filed appeals before the Tribunal, the Revenue challenging the relief given by the CIT (Appeals) in respect of the additions made for suppression of sales of *Hing* and compound *Hing* and the allowance of depreciation on the car, whereas assessee filed appeals before the Tribunal against the additions sustained by the CIT (Appeals) in respect of the *Hing* and compound *Hing*.

9. The Tribunal passed a consolidated order in respect of the appeals filed by the assessee as well as income tax department on 20.11.2009. As regards the additions made on account of *Hing* and compound *Hing* the Tribunal held as follows: -

> "*11. We have given our careful consideration to rival submissions and perused the record. The sole reliance for addition by AO is that assessee is charging differential rates, one for billing and other for actual realization. However, it is to be noted that for excess pricing in loose papers, no further corroborative material is found to suggest that actual price realized is much more than as stated in bills raised by the assessee. The sales prices are realized by account payee cheques and all the parties are identifiable. No enquiry at all is conducted with any of the customer before concluding that*

actual price realized is much more than billed. No excess cash/ assets are found to suggest so. Therefore there is no basis to adopt higher turnover or excess price realization. The addition in this behalf are rightly deleted by Ld. CIT (A)."

10. It would appear that before the Tribunal the Revenue placed reliance on the judgment of the Supreme Court in *Commissioner of Income Tax, Madhya Pradesh v. H. M. Esufali H. M. Abdulali*, (1973) 90 ITR 271. The Tribunal held that this decision was inapplicable to the present case because of the following reasons: -

"*a) Besides loose material found, no evidence is found that actual turnover of assessee is much more than declared turnover. To estimate turnover higher than declared, primarily evidence on record should suggest that actual turnover is not correct and not by inference it needs to be estimated.*

b) Since in present case, undisputedly, no independent enquiry at any time from any of the purchasers of the assessee has been done either by AO or Ld. CIT (A), to find out whether there is any understatement of sale consideration, although subject loose papers may be sufficient for invoking/ arousing suspicion and enquiry but, same in our opinion, is not sufficient to draw the conclusions.

c) Since it is well settled that even though loose papers are not properly explained by assessee, if nothing corroborative/ material is found to substantiate the contents of loose papers, no addition on mere loose papers can be made. For this purpose reference can be made to decision of Hon'ble P & H High Court in (184 Taxman 6) Atam Valves; and of Guj High Court in CIT vs. Maulikkumar K. Shah (307 ITR 137)

d) Since CIT (A) himself has concluded at once place that no serious consideration can be given to subject loose papers, same in our opinion is sufficient to conclude that there is nothing more in revenue's kitty apart from those/ said loose

papers pertaining to Nov 2005 (financial year 2005-2006) to support suppression of sales receipts on part of assessee firm.

e) The Jurisdictional Delhi High Court in Anand Kumar Deepak Kumar (294 ITR 497) on 25/8/2006 has held as under: -

> *"….Merely because there were some discrepancies in the pre-search period, it cannot lead to any presumption that the discrepancies would have continued in the post-search period particularly when there was factually no evidence at all as found by both the authorities below to support such a view…."*

11. We have considered the facts and the rival submissions. We are concerned with the search assessments made under Section 153A of the Act. Unlike Chapter XIV-B which provided for a special procedure for assessment of search cases, Section 153A which provides for an assessment in case of search, and was introduced by the Finance Act, 2003 w. e. f. 01.06.2003, does not provide that a search assessment has to be made on the basis of evidence found as a result of search or other documents and such other materials or information as are available with the Assessing Officer and relatable to the evidence found. The earlier Section 158BB which is not applicable in case of a search conducted after 31.05.2003, provided that the computation of the undisclosed income can only be on the basis of the evidence found as a result of search or other documents and materials or information as are available with the Assessing Officer, provided they are relatable to the evidence found. Section 153A (1) (b) provides for the assessment or reassessment of the total income of the six assessment years immediately preceding the assessment year relevant to the previous year in which the search took place. To repeat,

there is no condition in this Section that additions should be strictly made on the basis of evidence found in the course of the search or other post-search material or information available with the Assessing Officer which can be related to the evidence found. This, however, does not mean that the assessment under Section 153A can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material. The question, however, is whether the seized material can be relied upon to also draw the inference that there can be similar transactions throughout the period of six years covered by Section 153A. It is in this context it is relevant to note the judgment of the Supreme Court in H M Esufali H. M. Abdulali (supra). We have to remember that with the advent of Section 153A we are taken back to the pre-chapter XIV-B situation, where assessments were made on the basis of material and evidence collected during search. In the cited judgment the facts were these. The case arose under the sales tax law. Assessments under the MP General Sale Tax Act and Central Sales Tax Act had been completed on a dealer of iron and steel. They were made primarily on the basis of the returned filed by the assessee and the books of accounts. Subsequently, the flying squad of the sales tax department inspected the business premises of the assessee and found a bill book for the period of 19 days from September 1 to 19, 1960 showing sales of the value of ₹31,171/- which had not been entered in the account books maintained by the dealer. On this basis the Sales Tax Officer initiated reassessment and after rejecting the account books estimated the escaped turn over at ₹2,50,000/- under the MP General Sales Tax Act and ₹1,00,000/- under the Central Sales Tax Act, adopting the sale

of ₹31,171/- as escaped turnover for a period of 19 days as the basis. The contention of the assessee in that case was that the action of the Sales Tax Officer was arbitrary inasmuch as he had no evidence of escaped turnover for the entire accounting period and he was not legally correct in estimating or inferring that the assessee would have indulged in sales outside the books of accounts for the entire accounting period. The Supreme Court rejected such a contention in the following words: -

> "*It is now proved as well as admitted that his dealings outside his accounts during a period of 19 days were of the value of ₹31,171.28. From this circumstance, it was open to the Sales Tax Officer to infer that the assessee had large-scale dealings outside his accounts. The assessee has neither pleaded nor established any justifiable reason for not entering in his accounts the dealings noted in the bill book seized. It is obvious that he was maintaining false accounts to evade payment of sales tax. In such a situation, it was not possible for the Sales Tax Officer to find out precisely the turnover suppressed. He could only make an estimate of the suppressed turnover on the basis of the material before him. So long as the estimate made by him is not arbitrary and has nexus with facts discovered, the same cannot be questioned. In the very nature of things the estimate made may be an over-estimate or an under-estimate or an under-estimate. But, that is no ground for interfering with his "best judgment". It is true that the basis adopted by the officer should be relevant to the estimate made. The High Court was wrong in assuming that the assessing authority must have material before it to prove the exact turnover suppressed. If that is true, there is no question of "best judgment" assessment. The assessee cannot be permitted to take advantage of his own illegal acts. It was his duty to place all facts truthfully before the assessing authority. If he fails to do his duty, he cannot be allowed to call upon the assessing authority to prove conclusively what turnover he had suppressed. That fact must be within his personal knowledge. Hence, the burden of proving that fact is*

on him. No circumstance has been placed before the assessing authority to show that the assessee's dealings during September 1, 1960, to September 19, 1960, outside his accounts were due to some exceptional circumstance or that they were proportionately more than his dealings outside his accounts during the remaining periods. The assessing authority could not have been in possession of any correct measure to find out the escaped turnover during the periods November 1, 1959, to August 31, 1960, and September 20, 1960, to October 20, 1960. The task of the assessing authority in finding out the escaped turnover was by no means easy. In estimating any escaped turnover, it is inevitable that there is some guess-work. The assessing authority while making the "best judgment" assessment, no doubt, should arrive at its conclusion without any bias and on rational basis. That authority should not be vindictive or capricious. If the estimate made by the assessing authority is a bona fide estimate and is based on a rational basis, the fact that there is no good proof in support of that estimate is immaterial. Prima facie, the assessing authority is the best judge of the situation. It is his "best judgment" and not of anyone else. The High Court could not substitute its "best judgment" for that of the assessing authority. In the case of "best judgment" assessments, the courts will have to first see whether the accounts maintained by the assessee were rightly rejected as unreliable. If they come to the conclusion that they were rightly rejected, the next question that arises for consideration is whether the basis adopted in estimating the turnover has reasonable nexus with the estimate made. If the basis adopted is held to be a relevant basis even though the courts may think that it is not the most appropriate basis, the estimate made by the assessing authority cannot be disturbed. In the present case, there is no dispute that the assessee's accounts were rightly discarded. We do not agree with the High Court that it is the duty of the assessing authority to adduce proof in support of its estimate. The basis adopted by the Sales Tax Officer was a relevant one whether it was the most appropriate or not. Hence the High Court was not justified in interfering with the same."

12. In the present case the CIT (Appeals) found that the assessee did record two rates as found from the seized papers, but entered only the lower rate in the sale bills. He rightly stated that even though the seized papers related to the period of 18 days in November, 2005 "it reiterates the fact of assessee's conduct in suppressing the profit rate disclosed in the books". The CIT (Appeals) has further found that "the fact of such practice was also admitted by the partners during the search". On the basis of these findings the CIT (Appeals) rightly agreed with the Assessing Officer that the book results deserved to be rejected under Section 145 and an estimate of the true income earned by the assessee had to be made. Where, however, he appears to have misdirected himself is that after recording the above findings, he should have upheld the turnover of *Hing* and compound *Hing* as estimated by the Assessing Officer instead of directing him to accept the turnover of *Hing* and compound *Hing* as shown by the assessee, with a slight enhancement of the gross profit by 2% in the case of *Hing* and by directing the Assessing Officer to adopt the same rate of gross profit in the case of compound *Hing* as was adopted in the case of *Hing*. The CIT (Appeals) does not appear to be justified in interfering with the estimate made by the Assessing Officer, having regard to the observations made in the judgment of the Supreme Court cited (supra). The limited question which the CIT (Appeals) could have examined was whether the turnover estimated by the Assessing Officer was arbitrary or based on some material.

13. Coming to the order of the Tribunal, we are of the view that the reasons given by it to distinguish the judgment of the Supreme Court cited (supra) are not sound. Firstly, there was seized material in the present case

to show that the assessee has been indulging in off-record transactions. The observation of the Tribunal that no evidence was found to show that the actual turnover of the assessee was more than the declared turnover is hair splitting. The Tribunal lost sight of the fact that all was not well with the books of account maintained by the assessee and it has been keeping away its income from the books. That should have been sufficient for the Tribunal to examine the estimate made by the Assessing Officer, having regard to the principles laid down in the judgment of the Supreme Court (supra). The Tribunal also failed to note the difference between Section 158BB appearing in the Chapter-XIVB and the assessment made by virtue of the provisions of Section 153A of the Act. Secondly, the Tribunal expects the purchasers from the assessee to come forward and declare that they have paid more than what was appearing in the sale bills issued to them and has commented upon the lack of any inquiry from the purchasers on this line. Suffice to say that this throws an impossible burden on the Assessing Officer, having regard to the observations of the Supreme Court that the assessee cannot be permitted to take advantage of his own illegal acts, that it was his duty to place all facts truthfully before the assessing authority, that if he fails to do his duty he cannot be allowed to say that assessing authority failed to establish suppression of income, that the facts are within his personal knowledge and therefore it was the burden of the assessee to prove that there was no suppression. Thirdly, the Tribunal has stated that there was no corroborative material to substantiate the contents of the loose papers found during the search. We are not impressed by this reason at all. The papers are not denied or disputed by the assessee. The CIT (Appeals) has found that the partners of the assessee firm had admitted

to the practice of suppressing the profits. The papers themselves show two different rates, one higher and the other lower and on comparison with the sale bills it has been found that the sale bills show the lower rate and these findings have not been denied by the assessee. The Tribunal, therefore, erred in looking for some other corroboration to substantiate the contents of the loose papers, overlooking that the loose papers needed no further corroboration and the sale bills compared with the seized papers themselves corroborated the suppression of income. Fourthly, the Tribunal has relied on the observations of the CIT (Appeals) that no serious consideration can be given to the loose papers and has held that this shows that there is "nothing more in Revenue's kitty apart from those said loose papers pertaining to November, 2005 (financial year 2005-06) to support suppression of sales receipts on the part of the assessee firm". The Tribunal, with respect, has misread the observations of the CIT (Appeals) and has relied on a single observation without reading the order of the CIT (Appeals) as a whole. Moreover, in such cases, it is expected of the Tribunal to also independently examine the decision of the CIT (Appeals) which is impugned before it. In such cases it would be more appropriate to find out or ascertain whether there is any positive material which is in support of the assessee's case or anything upon which the assessee can rely in order to discharge the burden placed upon him in the light of the judgment of the Supreme Court in H M Esufali H. M. Abdulali (supra). Mere negative findings should not be made use of to throw out the case of the department. Lastly, the reliance placed by the Tribunal on the judgment of this Court in *CIT v. Anand Kumar Deepak Kumar*, (2007) 294 ITR 497 does not seem appropriate. There it was held that there was no

presumption that unaccounted sales in the pre-search period would continue in the post search period also. This judgment has no application to the present case because the search took place on 13.12.2005 which falls in the year relevant to the assessment year 2006-07. The assessments under Section 153A of the Act have been completed up to and including the assessment year 2006-07. Even if there can be no presumption that after 13.12.2005 there could have been unaccounted sales of *Hing* or compound *Hing*, it is hardly material since only a period of 3½ months were left after the date of search till the end of the previous year i.e. 31.03.2006.

14. One more aspect of the matter needs reference and clarification. In the seized papers from pages 19 to 26 which are referred to in the assessment order, there are instances of sale of *Hing* at rates per kilogram. The CIT (Appeals) on an examination of the seized material, noted that though the material related to the assessee firm, but "*the values mentioned therein are in terms of kattas but not in kilograms as assumed by A.O. Hence no serious consideration can be given to some of the papers recovered from the assessee*".

15. The Tribunal ought to have examined whether this finding is correct after looking into the seized papers because the Assessing Officer, when he refers to the seized papers in the assessment order has repeatedly noted the rates mentioned therein as for per kg. Moreover, he has also referred to the statement dated 13.12.2005 recorded from J. K. Khann @ Tainu a broker who is stated to have admitted that the rate of import of *Hing* is between ₹1,500/- to ₹1,700/- per kg. approximately and the same was being sold in

the local market at ₹3,000/- per kg. The CIT (Appeals) has held that the rate of ₹2,000/- is unreasonable and arbitrary. Whether this finding can stand ought to have been examined by the Tribunal in the light of the statement of the broker as well as the seized papers where the sale rate per kg. of *Hing* ranges from ₹300/- to ₹1,900/-. It is also significant to note – which fact appears to have been missed by the Tribunal – that when the Assessing Officer issued inquiry notices under Section 142 (1) on various dates mentioned in the assessment order, the assessee did not comply with them. When the Assessing Officer issued a letter on 27.03.2006 along with summons under Section 131 to Lachman Das Bhatia said to be the main person of the group to seek clarification regarding the seized papers, the latter opted to keep silent from which the Assessing officer, not without justification, drew the inference that Bhatia was not in a position to offer any explanation. This aspect – the stoic silence of the assessee before the Assessing Officer – has been lost sight of by the CIT (Appeals) whose decision was subjected to further appeal before the Tribunal. It was not for the Tribunal to merely endorse the findings of the CIT (Appeals) in a case like this, though normally it may not be necessary for the Tribunal to give detailed reasons in support of its decision if it agrees with the findings and conclusions of the first appellate authority. There are exceptions to this rule. Where the matter is complex and fact – intensive, particularly where it is a case of search where material or documents have been seized, it would be more appropriate for the Tribunal to put the findings of the departmental authorities to a detailed examination by itself, without merely endorsing the conclusions of the first appellate authority. The Act has constituted the Tribunal as the final fact finding body and that role requires

to be fulfilled, more particularly in a case such as the present one. It is particularly so because the additions made by the Assessing Officer were huge by any standards and they have been scaled down by the CIT (Appeals) against which the Revenue was in appeal before the Tribunal. We are not to be understood as conveying an impression that the decision of the CIT (Appeals) and the endorsement thereof by the Tribunal was on merits not justified. What we are pointing out is that there is precious little in the order of the Tribunal to show that it had undertaken an examination of the seized material in order to test the soundness of the findings of the CIT (Appeals). The decision making process is as important as the correctness of the decision itself. Merely because the correctness of the decision appears unquestionable, the serious flaws or gaps in the steps that constitute the judicial decision making process cannot be overlooked. The Tribunal in a different context has been held to be an institution of correction. In *Controller of Estate Duty v. R. Brahadeeswaran*, (1987) 163 ITR 680, V. Balasubramanian J. speaking for the Madras High Court examined "the philosophic or basic considerations on which we have got to comprehend the real scope of jurisdiction of the Tribunal in an appeal", and held "that an appeal is a continuation of the process of assessment, that the appellate authority is as much committed to the assessment process as the assessing authority, that it can itself enter the arena of assessment and hence, functionally speaking the appellate authority is no different from the assessing authority itself". The learned Judge characterized the Income Tax Appellate Tribunal as an "institution of correction" overseeing not a *lis* between the assessee and the taxing authority or "a forensic controversy between the two parties ranged on opposite sides as adversaries", but as an

institution monitoring the entire procedure of assessment so that it is made as accurately as possible and in accordance with the statutory provisions. These observations were no doubt made in the context of the power of the Tribunal to admit a ground which was not raised before the lower authorities. However, we understand these observations as throwing light on the real function of the Tribunal as an institution of correction having an appellation containing the cognates of an appeal. An institution of correction is under a duty to ensure that the assessment is made as accurately as possible consistent with the statutory provisions and where complex facts, evidence or material is involved, it is all the more necessary for the correctional institution to bestow its care and attention on them in a manner consistent with the status conferred upon it by the Act and in a judicial spirit.

16. Moreover, the Tribunal is the ultimate fact-finding authority and an appeal to the High Court is provided only on a substantial question of law. The findings of fact entered by the Tribunal are normally binding on the High Court. However, if those findings are perverse or are so unreasonable that no person, properly instructed on facts and in law could have reached the findings which the Tribunal did, it is open to the High Court to disregard the findings of fact as not binding on it. This is a well-settled position and has been accepted in several cases, a few of which have been noticed by us in our decision in the case of the *CIT v. Nova Promoters and Finance Ltd.*, (ITA 342/2011 dated 15.02.2012) (reported in (2012) 342 ITR 169). Herein, we find that the Tribunal has not examined the order of the CIT (Appeals) in the manner required of it and has also not looked into the seized material to find out if the crucial findings of the CIT (Appeals)

were justified. The Tribunal has not adverted to the assessee's conduct before the Assessing Officer nor has it referred to the admission made by the assessee before the Assessing Officer that it was indulging in suppression of profits. In the light of the evidence, it was for the Tribunal to examine whether the CIT (Appeals) was justified in substantially reducing the additions by holding that the sales turnover cannot be estimated on the basis of the seized material showing sales for a few days and whether this scaling down of the addition was in conformity with the legal position expounded by the Supreme Court in the judgment cited (supra). We are, therefore, of the view that the findings of fact arrived at by the Tribunal are not borne out by the evidence on record. We, therefore, do not feel bound by the findings of the Tribunal. It is true that the order of the Tribunal cannot be said to give rise to a substantial question of law merely because the High Court is of the view that it would have come to a different conclusion on the same evidence; however, where the appreciation of the evidence is wholly unsatisfactory and crucial aspects of the evidence have been missed, it is a case of finding or conclusion which no person properly instructed on the facts and the legal position would have reached. That is what has happened in the present case.

17. In the connected cases of *CIT v. Lachman Dass Bhatia*, (ITA 1731/2010, 1733/2010 and 1734/2010 pronounced on the same day) we have dealt with the issue of correctness or justification for making addition on account of low gross profit rate. That assessee belongs to the same group as the present assessee. The CIT (Appeals) in that case deleted the additions on the ground that no incriminating material had been seized during the search under Section 132 from the assessee in that case, which

was also conducted on 13.12.2005. His decision was confirmed by the Tribunal and we have held that the order of the Tribunal does not give rise to any substantial question of law. It is seen that the seized papers referred to in the present case are the same which were referred to by the Assessing Officer in the case of Lachman Dass Bhatia (supra). However, the seized papers have been found by the CIT (Appeals) to relate to the present assessee namely M/s. Chetan Dass Lachman Dass. The CIT (Appeals) in the present case has also found that the partners of the present assessee – firm admitted that they adopted the practice of suppressing the profits. We have also found earlier in our order that the partners did not adduce any explanation or evidence before the Assessing Officer in response to the various notices issued by him and they remained silent throughout. Lastly both the Assessing Officer and the CIT (Appeals) have found in the present case that one J. K. Khann @ Tainu, who was a *Hing* broker, gave a statement that the rate of imported *Hing* was between ₹1,500/- to ₹1,700/- per kg. and the same was being sold in the local market at ₹3,000/- per kg. In holding that the Tribunal was not justified in the present case in upholding the order of the CIT (Appeals) substantially deleting the additions made for suppression of profits, we have differentiated and distinguished between the present assessee's case and the case of Lachman Dass Bhatia (supra) on account of the distinguishing features noted above. These reasons/ factors were not present in the case of Lachman Dass Bhatia.

18. So far as the second question in all the appeals, except the appeal in ITA No.2021/2010 (assessment year 2000-01), is concerned, it relates to the depreciation on car. The assessee's claim of depreciation on Mercedes

car was disallowed by the Assessing Officer on the ground that there was no proof to show that the car was manufactured in India which was a condition for the allowance. On appeal the CIT (Appeals) examined the invoices to verify where the vehicle was purchased in India or imported from abroad. He found that the car was purchased from an authorised dealer in India by obtaining funds from the bank. According to him, though the vehicle is a foreign vehicle, since it was purchased from an authorised dealer in India, no statutory condition was violated and hence depreciation was allowable. We find that though the Revenue challenged the decision of the CIT (Appeals) in the appeals filed by it before the Tribunal, the Tribunal has omitted to deal with the ground.

19. In the circumstances we think that the proper course for us is to set-aside the order of the Tribunal for all the years under appeal. The only question in ITA No.2021/2010 and question No.1 in all the other appeals are answered in the negative, in favour of the Revenue and against the assessee. However, we pass an order of remit to the Tribunal, which shall hear the appeals on this point afresh and decide them in accordance with law. As regards the second question in all the appeals except ITA No.2021/2010, since the Tribunal has failed to decide the ground raised by the Revenue, the Tribunal is now directed to decide the ground also in accordance with law. We, however, clarify that it is only an omission by the Tribunal to deal with the ground and for that reason there could not be said to be any perversity. Thus the second question is also disposed of by passing an order of remit.

20. In the result the appeals of the Revenue are allowed in the above terms. In the circumstances there will be no order as to costs.

R.V.EASWAR, J

SANJIV KHANNA, J

AUGUST 07, 2012
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