ITEM NO.13 COURT NO.11 SECTION XIV

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Petition(s) for Special Leave to Appeal (C) No(s). 20559/2017

(Arising out of impugned final judgment and order dated 27-10-2016 in ITA No. 359/2015 passed by the High Court Of Delhi At New Delhi)

DAYAWANTI Petitioner(s)

VERSUS

COMMISSIONER OF INCOME TAX Respondent(s)

(IA No.62022/2017-EXEMPTION FROM FILING C/C OF THE IMPUGNED JUDGMENT)

Date : 03-10-2017 This matter was called on for hearing today.

CORAM :
HON'BLE MR. JUSTICE ROHINTON FALI NARIMAN
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

For Petitioner(s) Mr. Salil Kapoor, Adv.
Mr. Sumit Lalchandani, Adv.
Ms. Soumya Singh, Adv.
Mr. Praveen Swarup, AOR

For Respondent(s)

UPON hearing the counsel the Court made the following
O R D E R

Issue notice returnable within four weeks.

There shall be stay of operation of the impugned order, in the meantime.

Tag with Civil Appeal No. 10266 of 2017 etc. etc.

(SHASHI SAREEN)
COURT MASTER CUM PS

(SAROJ KUMARI GAUR)
BRANCH OFFICER

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

Reserved on: 02.09.2016
Pronounced on: 27.10.2016

\+ **ITA 357/2015**
\+ **ITA 358/2015**
\+ **ITA 359/2015**
\+ **ITA 565/2015**
\+ **ITA 566/2015**

SMT. DAYAWANTI THROUGH SMT. SUNITA GUPTA (LEGAL HEIR) ……Appellant

Versus

COMMISSIONER OF INCOME TAX ……..Respondent

\+ **ITA 360/2015**
\+ **ITA 361/2015**

AJAY GUPTA ……Appellant

Versus

COMMISSIONER OF INCOME TAX ……..Respondent

Through: Sh. Salil Kapoor, Ms. Ananya Kapoor, Sh. Sumit Lal Chandani and Sh. Sanat Kapoor, Advocates, for the appellants
Sh. Dileep Shivpuri, Sr. Standing Counsel with Sh. Sanjay Kumar, Jr. Standing Counsel, for revenue, in ITA 357/2015, 358/2015, 359/2015, 565/2015 & 566/2015.
Sh. Anup Kumar Kesari, for Sh. Rahul Chaudhary, Sr. Standing Counsel, for revenue in ITA 360/2015 & 361/2015.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT

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1. These seven appeals by the assessee urge common questions, *viz*:

> *1. Whether the Income Tax Appellate Tribunal was justified in upholding the addition made on the basis of the incriminating material found during the search?*
>
> *2. Notwithstanding the answer to Question 1, whether the finding of the ITAT is perverse and against the material of facts?*

Facts of the case

2. Search and seizure operation was carried out on 22nd March 2006 in the premises of M/s. Balajee Perfumes Group, which manufactures *Gutka*. The group belongs to the family of late Shri Bishan Sarup Gupta, survived by his sons- M/s Abhay Gupta, Anoop Gupta and Ajay Gupta. The three brothers, through the firms M/s Balajee Perfumes and M/s Assam Supari Traders, managed *gutka* manufacturing as well as sale and purchase of areca nut business. M/s. Balajee Perfumes is a partnership firm of Shri Varun Gupta S/o Shri Abhay Gupta and Smt. Deepa Gupta W/o. Shri Anoop Gupta. M/s. Assam Supari Traders is the business concern of Smt. Dayawanti (the late assessee- now represented by her legal heir), mother of the three said brothers.

3. The assessee along with other family members i.e her three sons and their wives namely Deepa Gupta, Sunita Gupta and Preeti Gupta, along with Varun Gupta, surrendered a sum of ₹ 3.5 crores at the time of the search, as additional income in respect of business carried on outside books of accounts

in connection with production and sale of Gutka. Statement of the assessee Smt. Dayawanti proprietor of M/s. Assam Supari Traders was also recorded in the course of search. In this statement she said that she had no source of income; that she does not even own any bank account and that she was not assessed to tax. She admitted to being proprietor only on the record and Shri Anoop Gupta looked after all operations along with the help of other family members. Notice under Section 153A was issued on 21st August 2006 requiring the assessee to furnish returns. In response the assessee filed no proper return, though on 22nd December 2007 a photocopy of the return filed earlier under Section 139(1) along with an audit report was placed on record before the AO. In the original return the assessee declared gross profit of ₹ 7,30,961/- on sales of ₹ 69,28,582/- yielding gross profit rate of 10.55%. The AO asked the assessee to produce vouchers of sale, purchases, and expenses. The assessee however, produced computerized books of accounts without producing sale bills, purchases bill etc. to substantiate the declared results. The AO also noted that confirmation from all creditors was not furnished. Further discrepancy in respect of cash balance under the books and financial results was also not explained. In these circumstances, the AO rejected the books of accounts u/s 145 of the Act and estimated the sales at ₹ 1 crores and adopted the G.P. ratio of 20% and added ₹ 12,69,039/-. The AO also made several other additions and determined the income of the assessee at ₹ 45,90,799/- as against declared income of ₹2,42,054/-.

4. Aggrieved the assessee appealed; the CIT (A) upheld initiation of Section 153A proceedings and also the rejection of books of accounts. He however directed the AO to re-compute the addition by adopting the

declared sales by assessee of ₹ 69,28,582/- and the GP rate be applied @ 12% on it. The CIT(A) adopted the GP at ₹ 8,31,430/- as opposed to ₹ 7,30,961/- declared by the assessee. The addition of ₹1,00,469/- was upheld and addition of ₹ 11,68,570/- was deleted. Of the other additions, the CIT(A) upheld addition of ₹1,24,530/- and set aside the rest.

5. Aggrieved by the order of the CIT(A), both the assessee and the revenue cross-appealed to the ITAT. The assessee's appeals related to the validity of the proceedings initiated under Section 153A of the Act. It was contended that the proceedings were a nullity for the reason that there was no search warrant against Smt. Dayawanti. Therefore, the notice issued under Section 153A and all subsequent proceedings were void. This ground was rejected by the ITAT in the following terms:

> *"In our opinion the aforesaid argument cannot be accepted. A search has been conducted on the assessee, once the proprietorship concern of the assessee has been searched. In any case the assessee was the proprietor of the concern on which the search was carried out u/s 132 of the Act. It is pertinent to add here that the premises at which the search was carried out was on the basis of warrant issued in the name of the proprietorship concern of the assessee and it was also the residential premises of the assessee. Therefore we find that there was a valid search on the assessee and as such, provision u/s 153A of the Act was rightly triggered and invoked thereafter."*

6. There was no dispute about the above findings, based on an appreciation of facts. In the circumstances the facial challenge to the applicability of Section 153A notice as not preceded by a valid warrant is baseless and unmerited. The ITAT also rejected the plea principally urged by the assesses that since no material was recovered or discovered during the

search and seizure proceedings, finalized assessments for the periods covered by block years could not be re-opened. The additions made were challenged on this ground. Apart from this, the imposition of a turnover on the basis of a notional calculation and the adoption of 12% GP rate was challenged. These contentions were rejected by the ITAT.

Re Question No. 1

7. A fundamental attack to the block assessment was made by both assesses viz. Dayawanti and Ajay Gupta (the latter being appellant in ITA Nos. 360-61/2015). They argued, before ITAT, that since no incriminating material was found during or pursuant to the search, additions, made on the basis of block assessment, were unsustainable inasmuch as they revisited finally settled assessments. The ITAT after considering the record, which included a statement by Abhay Gupta, recorded the following findings:

> *"23. From a perusal of the aforesaid statement on 18.04.2006 it is manifest that it was not a case of mere surrender as claimed by the ld counsel. On the contrary we find in Pg 60 & 61, Annexure 'A'3 and Pg 1 to 29 of AnnexureA-2 were found and seized from the assessee. Once confronted with the aforesaid seized documents it was admitted by Shri Abhay Gupta that the proprietorship concern of the assessee was engaged in unaccounted cash sales and purchases and therefore there was undisclosed income. Thus the necessary logical fall out of the aforesaid is that there was material found as a result of search on the assessee, showing unaccounted transactions. In our opinion, even the statement obtained whereby, the additional income of Rs.3.5 crores was offered also constitutes material unearthed during search. The ld counsel however has submitted that the said statement was not of the assessee, and was that of the son of the assessee. This argument too does not come to the*

rescue of the assessee, because the assessee also has signed the said statement as no.2 above; and it has been stated very clearly in the statement of Shri Abhay Gupta to question No. 2 (supra) that he has made the statement on behalf of others u/s 132(4) of the Act including the assessee. Moreover the aforesaid statement dated 18.04.2006 was followed by another statement on 03.05.2006, where too Shri Abhay Gupta represented himself as the authorized representative of the proprietorship concern of the assessee and sister concern Balajee Perfumes. In the said statement too the surrender was reiterated. The aforesaid surrender no doubt was not acted upon by the assessee, but the said fact cannot lead us from the irresistible conclusion that incriminating material was unearthed during search. No material has been placed before us to negate the aforesaid factual aspect as well as to support the claims of AR that the admission before the Revenue was not valid and hit by duress and coercion. Before we conclude this issue, we consider it appropriate to note that the ld AR, had also stated that no material Per-se was found pertaining to the year under consideration. However, this argument also does not hold any water because once Section 153A is triggered on account of unearthing of incriminating material during search, the AO is empowered to compute the total income for six assessment year prior to the year of search. There are no fetters or limitation under the statute, so as to curtail the jurisdiction of the AO."

The ITAT also relied on *Commissioner of Income tax v Anil Bhatia* 352 ITR 493 (Del) where it was held by this Court as under:-

"The other reason given by the Tribunal in the same paragraph of its order that no material was found during the search is factually unsustainable since the entire case and the arguments before the Departmental authorities as well as the Tribunal had proceeded on the basis that the document embodying the transaction with Mohini Sharma was recovered from the assessee. While summarizing the contentions of the assessee in paragraph 5 of its order, the Tribunal itself has referred to the contention that no document much less incriminating material

was found during the search of the assessee's premises, except one unsigned undertaking for loan. .... We are unable to appreciate how the Tribunal can say in paragraph 9.6 that no material was found during the search and at the same time in paragraph 10 deal with the merits of the additions based on the document recovered during the search which allegedly contain the loan transaction with Mohini Sharma. Therefore, both the reasons given by the Tribunal for holding that the assessments made under section 153A were bad in law do not commend themselves to us. The result is that the first substantial question of law is answered in the negative, in favour of the Revenue and against the assessee."

8. Mr. Salil Kapoor, learned counsel for the assesses argued that the decision of the ITAT is plainly erroneous. He submitted that it is now well recognized that for completing a block assessment, founded on search proceedings and notice under Section 153A, the assessing officer has to base the order on fresh materials found during the search, in the form of books of accounts, articles seized, or other similar materials. In this case, the revenue could not substantiate its plea that the assesses had concealed their income, because nothing suspect which could result in an addition to the income assessed during the previous years was in fact seized or taken into custody. Therefore, the four assessments for the block period in question had to be set aside.

9. Mr. Kapoor relied on the decision of this court in *Commissioner of Income tax v Kabul Chawla*380 ITR 573, especially the following conclusions:

"Summary of the legal position.

37. On a conspectus of Section 153A(1) of the Act, read with

the provisos thereto, and in the light of the law explained in the aforementioned decisions, the legal position that emerges is as under:-

i. Once a search takes place under Section 132 of the Act, notice under Section 153A(1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place.

ii. Assessments and reassessments pending on the date of the search shall abate. The total income for such AYs will have to be computed by the AOs as a fresh exercise.

iii. The AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The AO has the power to assess and reassess the 'total income' of the aforementioned six years in separate assessment orders for each of the six years. In other words there will be only one assessment order in respect of each of the six AYs "in which both the disclosed and the undisclosed income would be brought to tax".

iv. Although Section 153A does not say 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 AO which can be related to the evidence found, it does not mean that the assessment "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."

v. In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word 'assess' in Section 153A is relatable to abated proceedings (i.e. those pending on the date of search) and the word 'reassess' to completed assessment proceedings.

vi. Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under Section 153A merges into one. Only one assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the AO.

vii. Completed assessments can be interfered with by the AO while making the assessment under Section 153A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment.

10. It was argued that as long as there is incriminating material, which can lead to the inference of income that had been concealed from the previously filed returns in the completed assessment, the AO's jurisdiction is unquestionable. However, if there is no material, *per se* any addition sought to be made would be beyond the competence of the AO. It was highlighted that the revenue could not rely on mere statements, made in the course of assessment proceedings after the search and seizure. Learned counsel stated that the reliance on the statements recorded by one of the family members which was retracted at a later stage of the proceedings was unjustified.

11. Learned counsel also submitted that the statement in the present instance was recorded after the search (which took place on 22-03-2006), on 03.05.2006. Therefore the statement was not under 132(4) of the Act. So the authorities below ought not to have taken cognizance of the statement, which was not admissible evidence. It was further stated that the said statements were not pertaining to the relevant assessment year but was related to AY

2006-07 and not for the year under consideration. Therefore according to counsel no addition can be made for the year under consideration without any incriminating material being unearthed relating to this year. He further submitted that the department has not filed any appeal against the reduction of the addition. It was also stated that the excise department had accepted the sale for the year under consideration so there was no occasion to make the estimate in respect of turnover and increasing the GP rate without citing any comparable cases. It was further submitted that no cessation of liability and the trade creditors, which appeared in the books of account were paid in the subsequent years. Therefore the ITAT was not justified in enhancing the addition u/s 41(1) of the Act. It was contended that on merits also the addition cannot be sustained and the addition required deletion.

12. Mr. Kapoor also argued that the ITAT's decision is incorrect and not supportable on facts, because the imposition of a higher GP rate and the amount of profits calculated were entirely arbitrary, based on no materials. It was urged that the materials seized could at best lead to some inference; to the extent that some addition was made on the basis of those, the revenue could have been justified. However, that did not permit the income tax authorities to add amounts, by way of spread over for previous block periods, assuming, *arguendo* that the surrender alleged could not be interfered with. It was submitted that the increased income should be rooted on actual figures that were withheld at the stage of original assessment and not notionally derived on application of a statistical method.

13. Mr. Kapoor also argued that the so-called admission could not have been relied upon in view of a Board circular, CBDT Instruction dated March

23, 2003. Having regard to statements recorded followed by retractions on the ground of coercion and threat in the course of search and survey operations, the Board issued the Instructions contained in F. No. 286/2/2003 - IT (Inv) dated March 23, 2003. The circular is extracted below:

> *"Instances have come to the notice of the Board where assessees have claimed that they have been forced to confess undisclosed income during the course of the search and seizure and survey operation. Such confession, if not based on credible evidence, are taken/retracted by the concerned assessees while filing return of income. In these circumstances, confession during the search and seizure and survey operation do not serve any useful purpose. It is, therefore, advised that there should be focus and concentration on collection of evidence of income which leads to information on what has not been disclosed or is not likely to be disclosed before the Income-tax department. Similarly, while recording statement during the course of search and seizure operation, no attempt should be made to obtain confession as to the undisclosed income."*

14. Mr. Dilip Shivpuri justified the impugned order and stated that the additions were based on the searched materials. These materials were in the form of documents *kuchaparcha*, sale deeds and other materials, which disclosed the extent of concealed income, and materials to justify a block assessment. This clearly indicated that the declared sale consideration was lower than the actual sale consideration.

15. Reliance was placed on the decisions of the Supreme Court in *Commissioner of Income Tax. v. Durga Prasad More* (1971) 82 ITR 540 (SC) and *SumatiDayal v. Commissioner of Income Tax* (1995) 214 ITR 801 (SC). Mr. Shivpuri argued that the ITAT should have appreciated the documents seized during the search from the standard of preponderance of

probabilities. Since Chapter XVI-B provides a special procedure of assessment in the case of search and seizure, it is essential to take into consideration all materials, including the statements made to assessing authorities. Counsel argued that for a valid and binding retraction, it is not enough that the assessee merely retracts it through an affidavit; the timing of the retraction and the explanation for the statement as well as retraction may be crucial and can be considered by the assessing authorities. Given the legislative object of getting at concealed income, which is secreted away in diverse and different ways, such statements or even documents, which may not be accurate or complete in themselves, have to be scrutinized in the backdrop of probabilities of human conduct. Counsel argued that perfect books of account and materials are not expected in search and seizure cases, which are clandestine income and would in all probabilities be kept outside the books for the shortest possible time. Reliance was placed on *BhagirathAggarwal v Commissioner of Income Tax*[2013]351ITR143(Delhi) where it was held that an addition in assessee's income relying on statements recorded during search operations cannot be deleted without proving statements to be incorrect.

Analysis and Findings

16. 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 strictly 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 related to the materials found. Section 153A(1)(b) requires assessment or reassessment of total income of the six assessment years immediately preceding the assessment year relevant to the previous year in which the search took place. 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. The judgment of the Supreme Court in *CIT* v. *H.M. Esufali H.M. Abdulali* [1973] 90 ITR 271 is relevant here. With introduction of Section 153A the Act resembles the pre-chapter XIV-B *regime*, where assessments were completed on the basis of material and evidence collected during search. In *H.M. Esufali (supra)* assessments under the MP General Sale Tax Act and Central Sales Tax Act were completed of a dealer mainly on the basis of the return of the assessee and the books of accounts. Later, the sales tax department inspected the assessee's business premises and found a bill book for a period of 19 days disclosing a sale to the tune of ₹31,171/- which was not previouslyshown in the account books maintained by him. The Sales Tax Officer initiated reassessment proceedings and after rejecting the account books estimated the escaped turnover at ₹ 2,50,000/- under the MP General Sales Tax Act and further amounts 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 Supreme Court rejected the assessee's contention that the STO's action was arbitrary and that as he had no evidence of escaped turnover for the entire accounting period, 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 held that: –

> *"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 Rs. 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."

17. The impugned order dealt with this aspect and concluded that the statement made under oath could be acted upon, especially since materials and documents were recovered during the search proceedings:

> *"22. In the instant case we find that AO had rejected the books of accounts and made additions by estimating the sales & GP rates, inter-alia on the ground that in the course of search, a statement was recorded by Shri Abhay Gupta u/s 132(4) of the Act on behalf of the assesse too. In the said statement dated 18.04.2006, a copy of which has been placed before us, in Page 89, 90, 91, 92, 93 & 94 of the PB, he has stated as under on behalf of assesse and other assesses in appeal before us which is evident from his opening remarks and signatures of assesse and other appellents appended below the statement recorded on oath u/s 132(4) of the Act. The relevant answers to questions legible from the hand written document is reproduced below for convenience:-*
>
> *"Statement of Shri Abhay Kumar Gupta S/o Late ShriBishanSarup Gupta R/o A- 2/14-A Model Town-I, Delhi aged 58 years old recorded on oath u/s 132(4) of the Income Tax, 1961 at the office of ADIT (Investigation) Unit IV(3), New Delhi in the case of M/s. Balaji Perfumes and M/s Assam Supari Traders on 18.04.2006.*
>
> *sign*
> *Oath Taken* *Oath Administered*
> *Q. No.-Please Identify your self?*
>
> *Ans: I am Abhay Kumar Gupta S/o Late ShBishanSarup Gupta R/0 A-2/14-A, Model Town-I, Delhi aged 58 years old.*
>
> *Q No.2-In what capacity you have presented yourself in the cases of M/s Assam Supari Traders and Balaji Perfumes?*
>
> *Ans: I am present here as duly authorized by five of our family concern/ firms namely M/s. Assam Supari Traders and M/s. Balaji Perfumes as a representative on behalf of all of my family*

members including SmtDayawanti Prop M/s. Assam Supari Traders and ShriVarun Gupta prop M/s. Balaji Perfumes. Smt. Dayawanti is my mother and ShriVarun Gupta prop M/s. Balaji Perfumes. Smt. Dayawanti is my mother and M/s. Varun Gupta is my son. I am also another ... by my brother namely Sh Ajay Gupta, ShriAnoop Gupta and Smt. Sunita Gupta w/o Sh Ajay Gupta, SmtDeepa Gupta W/o Annop Gupta and Smt. Preeti Gupta W/o Varun Gupta to make statements on all our family concern and our family members, and to comment on their behest.

Q. No. 3.....

Q. No. 4.....

Q. No. 5.....

Q. No. 6.....

Q. No. 7. Please let me know whether all the purchases made by your family firms namely M/s. Assam Suprari Traders and M/s. Balaji Perfumes is entered in your regular Books of accounts and whether all the purchases, manufacturing and sales made by above two firms is disclosed to income tax department.

Ans:- We and our family firms namely M/s Assam Supari Traders and M/s Balaji Perfumes generally try to record the transactions made in respect of purchase, manufacturing and sales in our regular books of accounts but it is also fact that some time due to some factors like inability of accountant, our busy schedule and some family problems, various purchases and sales of Supari, Gutka and other items dealt by our firms is not entered and shown in the regular books of accounts maintained by our firms.

Q. No. 9 What are the books of account maintained by your firms?

Ans:- To the best of my knowledge, both our firms maintained cash books, ledger, sales register, bills books and other general books of accounts.

Q,. No. 10- I am showing your annexure A-3 (Page 60 and 61) found I seized from your residence at A-2/14-A, Model Town-I, Delhi on 23.03.2006 during the course of search, seizure please explain the nature, contents and details of these small hand written paichies.

Ans: These small handwritten on unaccounted cash purchase/ sales of various items in Supari which were made by firm M/s. AsomSupari Traders and M/s. Balaji perfumes. Also purchase dated 19.10 on page No. 60 of this annexure represented unaccounted and credited.

Q. No. 11. I am showing your Annexure A-2 having page No. 1 to 29 found and seized form your residence at A-2/14-A, Model Town-I, Delhi on 23.03.2006 during the course of search and seizure operation. Please explain the nature of contents and details of these pages.

Ans:- I hereby admit that these papers also contend details of various transactions include purchase/ sales/ manufacturing trading of Gutkha, Supari made in cash out side Books of accounts and these are actually unaccounted transactions made by our two firms namely M/s Asom Trading and M/s. Balaji Perfumes.

Agreed by me

1. *Ajay Gupta sign*
2. *SmtDaywanti sign*
3. *Anoop Gupta Sign*
4. *SmtDeepta sign*
5. *Varun Gupta sign*
6. *Snita Gupta sign*
7. *Preeti Gupta sign*

23. From a perusal of the aforesaid statement on 18.04.2006 it is manifest that it was not a case of mere surrender as claimed by the ld counsel. On the contrary we find in Pg 60 & 61, Annexure 'A'3 and Pg 1 to 29 of AnnexureA-2 were found and seized from the assessee. Once confronted with the aforesaid seized documents it was admitted by Shri Abhay Gupta that the proprietorship concern of the assessee was engaged in unaccounted cash sales and purchases and therefore there was undisclosed income. Thus the necessary logical fall out of the aforesaid is that there was material found as a result of search on the assessee, showing unaccounted transactions. In our opinion, even the statement obtained whereby, the additional income of Rs.3.5 crores was offered also constitutes material unearthed during search. The ld counsel however has submitted that the said statement was not of the assessee, and was that of the son of the assessee. This argument too does not come to the rescue of the assessee, because the assessee also has signed the said statement as no.2 above; and it has been stated very clearly in the statement of Shri Abhay Gupta to question No. 2 (supra) that he has made the statement on behalf of others u/s 132(4) of the Act including the assessee. Moreover the aforesaid statement dated 18.04.2006 was followed by another statement on 03.05.2006, where too Shri Abhay Gupta represented himself as the authorized representative of the proprietorship concern of the assessee and sister concern Balajee Perfumes. In the said statement too the surrender was reiterated. The aforesaid surrender no doubt was not acted upon by the assessee, but the said fact cannot lead us from the irresistible conclusion that incriminating material was unearthed during search. No material has been placed before us to negate the aforesaid factual aspect as well as to support the claims of AR that the admission before the Revenue was not valid and hit by duress and coercion. Before we conclude this issue, we consider it appropriate to note that the ld AR, had also stated that no material Per-se was found pertaining to the year under consideration. However, this argument also does not hold any water because once Section 153A is triggered on account of unearthing of incriminating material during search, the AO is

> *empowered to compute the total income for six assessment year prior to the year of search. There are no fetters or limitation under the statute, so as to curtail the jurisdiction of the AO. We derive support from the judgment of jurisdictional High court in the case of CIT Vs. Anil Bhatia 352 ITR 493 (Del)..”*

18. The nature of the books included *katchaparchas*, papers containing calculations and amounts routed to bank accounts of various members of the family, sums receivable towards business, etc. They also included documents relating to purchase of property. The statements were made under oath on 18-04-2006 and 03-05-2006. No doubt, they were not during the course of search. Yet, they were made voluntarily. There was no allegation ever that the assessee or any of her family members, including Abhay and Varun Gupta, who made the main statements under oath, were pressurized to do so; there was in fact no contemporaneous retraction. Indeed, the assessee appears to have resiled from the statement, only through the returns, filed after receipt of notice under Section 153A. The probative value of these statements is to be seen not from only whether it was allowed to stand, or whether it was resiled from. The stage when such statement is resiled, whether the assessee was able to give any explanation for the statement, its connection with the material seized, all are relevant, in the opinion of the court, to judge if it is to be considered in an assessment. In other words, there cannot be a rule carved in stone, as it were, that statements that are resiled cannot be considered at all. This court had, in *Bhagirath Aggarwal* ruled as follows:

> *“11. The learned counsel for the appellant/assessee also referred to the Supreme Court decision in the case of Pullangode Rubber Products Co. Ltd. Vs. State of Kerala: (1973) 91 ITR 18*

SC for the proposition that an admission is an extremely important piece of evidence but it cannot be said that it is conclusive. It was contended that it was open to the person who made the statement to show that it was incorrect. There cannot be any doubt about this position in law, but, in the present case the appellant/assessee has not produced any material to show that the admissions made by him were incorrect. The statements recorded u/s. 132 (4) of the said Act are clearly relevant and admissible and they can be used as evidence. In fact, once there is a clear admission, voluntarily made, on the part of the assessee, that would constitute a good piece of evidence at the hands of the Revenue.

12. The learned counsel for the appellant also referred to the circular dated 11.03.2003 issued by the Central Board of Direct Taxes on the subject of Additional Income during the course of SearchandSeizure Operation. As per the circular, there is an observation of the Board that the focus of the search party should be on collection of evidence of income which leads to information on what has not been disclosed or is not likely to be disclosed before the Income-tax Department. There is a further observation that, while recording statements during the course of search, seizure and survey operations, no attempt should be made to obtain confessions as to undisclosed income and that any action to the contrary would be viewed adversely.

13. We do not see how this circular would, in any way, come to the aid and assistance of the appellant. All that it shows is that the Income-tax Officers should not try to force a confession from an assessee. However, if an assessee voluntarily makes a surrender, the officials of the income tax department are bound to record that statement u/s. 132 (4) and such a statement, voluntarily made, is relevant and admissible and is liable to be used as evidence."

19. Earlier, the Supreme Court had held, in *P.R. Metrani v. Commissioner of Income-tax* (2006) 287 ITR 209 (SC) that:

> *"18. Section132 is a Code in itself. It provides for the conditions upon which and the circumstances in which the warrants of authorization can be issued. Sub-section (2) authorizes the authorized officer to requisition the services of any police officer or of any officer of the Central Government or of both to assist him for all or any of the purposes for which the search is conducted. Under sub-section (4) the authorized officer can during the course of search or seizure examine on oath any person who is found to be in possession or control of any books of account, documents, money, bullion, jewellery or other valuable article or thing and any statement made by such persons during such examination may thereafter be used in evidence in any proceeding under the Act."*

This court had in *Commissioner of Income Tax v Dhingra construction* 328 (ITR) 384 (Del)and the Kerala High Court, in *Paul Mathews v Commissioner of Income Tax* (2003) 263 ITR 101, noted the difference in statutory phraseology between Section 132 (4) on the one hand, as contradistinguished with Section 133A (3) (ii). Whilst the former enables-even empowers the assessing officer to record statement on oath and provides for evidentiary value to such statement, the latter is silent. These two judgments held that statements made in course of survey proceedings could not be the sole basis for inferring facts and arriving at findings.

20. The lynchpin of the assessee's submissions on this aspect is also that the statements were not recorded *during the search* but later and that they cannot be considered of any value. This court is un-persuaded with the submission. The search was conducted on 22-03-2006. Various materials: documents, agreements, invoices and statements in the form of accounts and calculations were seized. On 18 April 2006 and 3 May 2006, the assessee's sons (including one of the appellants, Abhay Gupta) recorded statements

under oath; the assessee too made her statement under oath, admitting that though returns were filed ostensibly on her behalf, she was not in control of the business. She and all other family members made short statements and endorsed the statements under oath, of those who elaborated the trading and business operations relating to clandestine income. These statements under oath were part of the record and continued to be so. They were never explained in any reasonable manner. Their probative value is undeniable; the occasion for making them arose because of the search and seizure that occurred and the seizure of various documents, etc. that pointed to undeclared income. In these circumstances, the assessee's argument that they could not be acted upon or given any weight is insubstantial and meritless. This court also notices that the decision in *CIT Vs. Anil Bhatia* 352 ITR 493 (Del) which held that such statements are relevant, though noticed, has not been doubted in any later decision, including *Kabul Chawla*, which is the mainstay of the assessee's case. Consequently the first question of law is answered against the assessee and in the revenue's favour.

Re Question No 2:

21. The assessee's argument on this aspect was that the lower authorities' approach in rejecting the books, estimating turn over and applying a high GP rate to estimate proft, was arbitrary.

22. The AO noticed that in the audited account for the year under consideration, the assessee declared sales of ₹69,28,582/- and Gross Profit of Rs.7,30,961/- yielding gross profit rate of 10.55%. He observed that the assessee produced only computerized books of account and did not produce

sale-bills, purchase bills and vouchers for expenses incurred by it; the AO also pointed out that the assessee did not file confirmation proof to establish the amounts towards sundry creditors and debtors other than five creditors. Based on these, the AO rejected the books of account and adopted the sale at ₹1 crore and GP rate at 20% and added₹12,69,039/-. The CIT(A) concurred with this, saying that in the absence of bills and vouchers entries made in books/ *bahis* were unverifiable and consequently, the book results could not be accepted. The Commissioner, after noticing the statements of the family members which were inculpatory , however also felt that the AO could not bring on record anything to point out defect in the books of account except saying that sales and purchase vouchers were not produced. He concluded that:

> *"I agree with the appellant that there is no justification for rejection of books of accounts and estimating the total at Rs.1 crore for which no basis whatsoever has been given by the AO especially when search as well as survey u/s 133A has taken place in the case of proprietary concern of the appellant. I, therefore, direct the AO not to disturb the sales figures and to adopt the sale at Rs.69,28,582/- only as shown by the appellant."*

Based on this discussion, he held that the assessee's declared sales had to be adopted, and reduced the GP to 12%. The ITAT's finding on this aspect are as follows:

> *"We find that the assessee even could not produce before the ldCIT(A) the sale bills, purchase bills and vouchers for the expenses incurred by her in the relevant AY. Even before us there was no material led to assail the aforesaid factual position. In such a scenario we have no other alternate but to uphold the rejection of books of accounts as there is no material to*

substantiate the correctness and completeness of such books of accounts. We may mention here that thought the ldCIT(A) has correctly held at Pg. 11 in para 11.1.3.1 (supra) that in the absence of bills and vouchers, entries made in books cannot be verified, therefore book result cannot be accepted. However quite strangely he has held in Para1 11.1.3 of his order that there is no justification for rejection of books of account by observing that AO has not placed any material on record to point out defects in books. The aforesaid finding is contradictory to his own finding reproduced above in this order at para 26 and therefore erroneous. Now coming to the estimation as noted above, AO had estimated sales at Rs. 1 crore and GP at 20%. Whereas, the ldCIT(A) has accepted the declared sales and estimated GP at 12%. In the instant case, it is crystal clear that each of the figures declared, be it sales or GP are unverifiable without supporting documents. Thus the question which remains is whether the estimation made by the AO is fair and reasonable on the facts on the case. We have already noted above while disposing of ground No. 1 to 3 that as a result of search, shri Ajay Gupta on behalf of assessee has admitted to unaccounted transactions outside regular books of accounts. It is also true that there is no material indicating unaccounted transactions particularly for the instant year unearthed during search, but it cannot be denied that once book results for the year under consideration are unverifiable in the absence of supporting vouchers, bills then the factum of admission u/s 132(4) of the Act made by Shri Abhay Gupta on behalf of the assessee that unaccounted transactions took place for earlier years would be relevant consideration for estimation. In such circumstances the burden was on the assessee to show as to how the estimation as made by the AO was arbitrary or unreasonable. No material has been placed before us to discharge the said burden. The AO has increased the sales from Rs.69 lakh to Rs. 1 crore which on the facts cannot be said to be arbitrary, where assessee has admitted unaccounted transactions albeit for later years. However in respect of GP rate, while perusing the GP rate estimated by the AO for subsequent Assessment Years. We find the following addition has been made by the AO as under:-

Assessment Year	*Assessee*		*AO*		*Addition*
	Sales	*GP%*	*Sales*	*GP*	
2001-02	*8,,72,506*	*8.69%*	*2 crores*	*15%15*	*23,47,630*
2002-03	*67,36,523*	*9.68%*	*2 crores*	*15%*	*23,47,630*
2003-04	*79,72,200*	*9.47%*	*2 crores*	*15%*	*22,44,884*
2004-05	*60,65,498*	*10.73%*	*2 crores*	*15%*	*23,49,012*

30. Since the AO for subsequent Assessment Year's has estimated GP rate of 15%, we do not find any reason as to uphold the GP rate of 20% for this Assessment Year. So we restrict the GP rate at 15% for this Assessment Year and direct the AO to compute the trading addition by adopting the sales at 1 crore and GP rate at 15% for this Assessment Year. We thus allow the ground raised by the revenue and reject the ground raised by the assessee on this behalf."

23. This court is of opinion that the ITAT's findings do not reveal any fundamental error, calling for correction. The inferences drawn in respect of undeclared income were premised on the materials found as well as the statements recorded by the assessees. These additions therefore were not baseless. Given that the assessing authorities in such cases have to draw inferences, because of the nature of the materials – since they could be scanty (as one habitually concealing income or indulging in clandestine operations can hardly be expected to maintain meticulous books or records for long and in all probability be anxious to do away with such evidence at the shortest possibility) the element of guess work is to have some reasonable nexus with the statements recorded and documents seized. In this case, the differences of opinion between the CIT (A) on the one hand and the AO and ITAT on the other cannot be the sole basis for disagreeing with what is essentially a factual surmise that is logical and plausible. These findings

do not call for interference. The second question of law is answered again in favour of the revenue and against the assessee.

24. In view of the above conclusions, it is held that these appeals lack merit; they are accordingly dismissed.

S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)

OCTOBER 27, 2016