IN THE INCOME TAX APPELLATE TRIBUNAL "E", BENCH MUMBAI
(SPECIAL BENCH)

BEFORE SHRI R.C.SHARMA, AM,
SHRI SAKTIJIT DEY JM
&
SHRI AMIT SHUKLA, JM

ITA No.5996/Mum/1993
(**Assessment Year: 1984-85**)

ITA NO.1055/Bom/94
(**Assessment Year: 1985-86**)
&
ITA NO.1056/Bom/94
(**Assessment Year: 1986-87**)

M/s.GTC Industries Limited Tobacco House, S.V. Road, Vile Parle(W), Bombay – 400 056	Vs.	ACIT – CC-IX, Mumbai - 400020
PAN/GIR No.		**34-002-CZ-6666** **BMY/Cent. Cir. IX**
Appellant)	..	**Respondent**)

Assessee by	Shri Vinod Kumar Bindal with Shri S.G. Gupta and Shri Gaurav Bansal
Revenue by	Shri Girish Dave with Ms. Kadambari Dave
Date of Hearing	**19/12/2016**
Date of Pronouncement	**07/03/2017**

आदेश / O R D E R

***PER AMIT SHUKLA (J.M)*:**

The aforesaid appeals have been filed by the assessee against separate impugned orders dated 30.07.1993 and even date of 14.01.1994, passed by learned CIT(Appeals), Mumbai for the

quantum of assessment passed u/s.143(3) for the assessment years 1984-85; 1985-86; and 1986-87 respectively.

2. Since the issues involved in all the appeals are common arising out of the identical set of facts, therefore, same were referred together and are being disposed of by way of this consolidated order.

3. As a prelude, it would be relevant to refer to the chequered history of the impugned appeals especially the appeal for the Assessment Year 1984-85, which is the base year wherein issues have been discussed threadbare and will have permeating effect in the appeals of the other years. These events are illustrated by way of following chronology of events:-

Date	**Events**
29/06/1984:	Return of income was filed by the assessee company declaring total income of Rs. **3,20,61,410/-.**
31/03/1987:	The assessment order was passed u/s.143(3) r.w.s.145(2) and income was assessed at **Rs.33,76,18,670/-** which was made on two accounts; *firstly,* the addition on account of premium on sale of Cigarettes of **Rs.21,36,25,000**/- and *secondly,* value of suppressed production of Rs.10 crores. As against this, AO has allowed expenses outside the books of Rs.1 crore only.
20/03/1988:	In first appeal, the learned CIT (A) passed the order whereby relief was granted to the assessee

for a sum of Rs. 10 crores towards value of suppressed production and other technical additions. The addition on account of alleged premium collected on sale of cigarettes of **Rs.21,36,25,000**/- was confirmed.

09/02/1989: In the second appeal against the aforesaid order, the ITAT passed the order in ITA No.3567/Bom/1989, wherein the Tribunal set aside the matter to the file of CIT (A) without expressing any opinion on the merits. The relevant observation of the Tribunal in this regard at para 62 are reproduced herein under:-

"We make it clear that we have not expressed any opinion on merits as far as the points involved are concerned. This because after considering the entire material on record an after paying due regard to the detailed arguments that were made before us, we were convinced that an infirmity had crept in, In the assessment proceedings because of the fact that cross examination was not allowed in respect of certain witnesses and yet the statements of those witnesses have been virtually made the basis of making huge additions in the total income. The entire material on record was required to be considered afresh in the light of the answers that might be given by those witnesses in cross examination. Expressing any opinion on any particular piece of evidence at this stage would amounted to prejudging the issue. Consequently we have abstained from expressing any opinion on merits."

10/04/1989: The assessee filed an application u/s 256(1) before the Tribunal for making the reference of question of law to the Hon'ble High Court. This reference was allowed by the Tribunal vide order dated 22/02/1999.

30/07/1993: The ld. CIT(A) passed the order in the second round of proceedings in pursuance of the aforesaid Tribunal Order dated 09/02/1989, after allowing cross examination of five witnesses, wherein he concluded as under:-

In the final analysis, I would like to reiterate that subject only to minor alteration made in the present order, I am in total agreement with the findings and conclusions recorded by my learned predecessor CIT (A). To this extent, the present order is required to be viewed as an order which merely seeks to remove the infirmity suffered in the original appellate proceedings before my predecessor CIT (A). The additional material now brought on record have, as a matter of fact, only helped in further strengthening of the AO's case and confirmed in my predecessor CIT (A)'s order which has dealt with in great detail the issues arising out of the AO's order as well as the detailed submissions made on behalf of the assessee company.

However, the relief of Rs.1,54,19,042/- was given by him out of the premium amount added by the AO on the ground that on-money was being ploughed back in the form of commission in the books of accounts.

01/10/1993: Against the aforesaid order of ld. CIT (A), second appeal was filed by the assessee before this Tribunal being ITA No.5996/Bom/1993.

28/02/1995: Assessee again challenged the violation of natural justice and not allowing cross examination of witnesses. A preliminary order was passed by the Tribunal and decided the issue on preliminary ground of natural justice. The Tribunal held that there was no denial of principles of natural justice by the CIT (A) or by the AO and the said issue of violation of natural justice was thus decided against the assessee. Regarding merits, the Tribunal held that the appeal shall be heard in the normal course.

05/05/1995: The assessee filed a writ petition before the Hon'ble Bombay High Court against the said order of the Tribunal dated 28/02/1995.

31/07/1995: The Hon'ble High Court in Writ Petition No.707 of 1995 against the aforesaid order of the Tribunal passed the order and observed as under:-

"We propose not to go into the merits of the case and accept the statement made by Mr. Rana, learned Counsel appearing for the respondents, to dispose of this petition. Mr. Rana has stated that the department will disclose material if already not disclosed that may be relied upon by the department and the Tribunal shall decide about cross- examination of the witnesses as are

available. The Tribunal is, accordingly, directed to disclose material which is not yet disclosed and which may be relied upon by the Tribunal and decide the question of cross-examination of the witnesses whose evidence is likely to be relied upon.

The Tribunal is at liberty to allow the petitioner to take the cross examination before itself or if it thinks fit to remand the matter to any of the authorities below for this limited purpose. We otherwise make it clear that the controversy is left open and the petition is accordingly stands disposed of."

20/06/1996: The Hon'ble President of the Tribunal passed an order for constitution of Special Bench in respect of appeal No. 5996/Bom/1993, 1055 & 1056/Bom/1994 for the assessment years 1984-85, 1985-86, and 1986-87 respectively.

24/08/1998: Special Bench of the Tribunal passed an order in the aforesaid appeals, however, in the said order three different opinions came to be expressed by the three members constituting the Special Bench on the issue of natural justice. However, the appeal was neither heard nor adjudicated on merits.

08/02/1999: In the writ petition filed by the Revenue against the order of Special Bench, ITAT dated 24/08/1998**,** the Hon'ble High Court passed an order in writ petition No.2252/1998 and directed

one of the members of the Special Bench namely, Shri R.N. Mehta to consider the opinion of the Vice President and also opinion of the Judicial Member and asked him to express the opinion. Thus, the Hon'ble High Court set aside the order dated 13/07/1998 which was the opinion of Shri R.N. Mehta and directed to pass the order giving reasons in accordance with the law.

22/02/1999: The Tribunal in the reference made u/s 256(1) by the assessee against the earlier Tribunal Order dated 09/02/1989 drew up the statement of the case referring following four questions of law before the Hon'ble High Court.

(i) Whether the Tribunal having come to the conclusion that the principles of natural justice had not been complied with, ought to have cancelled / annulled the assessment and / or deleted the addition made by the Income tax Officer?

(ii) Whether on the facts and circumstances of the case, the Tribunal went wrong in not deleting Rs. 23 crores representing the alleged realisation of premium?

(iii) Whether on the facts and in the circumstances of the case, the Tribunal ought to have deleted the interest charged upon the applicant under section 215 of the Act?

(iv) Whether on the facts and in the circumstances of the case and in law, the applicant should be allowed to cross examine only 5 witnesses instead of all the witnesses whose testimony had been used / relied by the department against the assessee company?

31/05/1999: The order of the Hon'ble Vice President Shri R.N. Mehta was passed and which was forwarded to the Hon'ble High Court (order of the Special Bench, third member which was issued separately as per the direction of the Hon'ble High Court). In the said order, he agreed with the conclusion of the Hon'ble President that there was no need to go into each of the 31 items and direct disclosure of the same to the assessee in any particular manner.

30/05/2012: ITAT Special Bench deciding the majority view of the Special Bench order dated 24/08/1998 on the issue, whether the Tribunal should give direction to the AO for disclosing the complete material in respect of 31 items. The conclusion of confirmatory order reads as under:-

16. Under such circumstances it is manifest that firstly we need to give a logical conclusion to the proceedings of the earlier special bench and then proceed further to decide the appeals in entirety. It has been noticed above that both the sides are at variance in reading the majority conclusion drawn by the three Id. members of

the earlier special bench. This has led us to tread through the orders of the three Id. Members of the earlier special bench threadbare. After going through such orders and having heard the rival parties in this regard, we summarize, what we deem as the conclusions drawn by the three members, as under:-

(a) The Id. first Member of the Special Bench directed that complete material qua 31 items, for which request was made by the assessee before the Hon'ble High Court, be furnished to it. He did not accept the contention of the Revenue that whatever material it wanted to disclose to the assessee in accordance with the requirements of law had already been disclosed and there was nothing more to furnish. This is only conclusion drawn by him.

(b) The Id. second Member of the Special Bench dissented with the entire order of the Id. first Member of the Special Bench. His dissent was not restricted only to paras 18 to 22 of the order of the latter. He held that the intention of the High Court was that whatever material which was sought to be disclosed by the Department with regard to the 31 items, which it felt was not disclosed earlier, should be disclosed to the assessee. Since as per the Revenue, sufficient material already stood disclosed to the assessee and there was nothing more to be disclosed further, he held that the Hon'ble High Court may be informed in this regard and to await further orders, if any, to be passed by the High Court on this matter. According to him, it was not for the tribunal to go into the sufficiency or otherwise of such disclosure.

(c) The Id. third Member of the Special Bench, vide his final order, held that it was not for the tribunal to decide the way in which disclosure should be made by the Assessing Officer to the assessee. According to him, the manner and the extent of disclosure ought to have been decided mutually by the assessee and the Revenue and in case of any conflict, the matter could have been taken by them to the Hon 'ble High Court for further directions. He agreed with the conclusion drawn by the Id. second Member of the Special Bench that there was no need to go into each of the 31 items and direct disclosure of the same to the assessee in any particular manner. At the same time, he also desisted from explicitly concurring with the Id. second Member on the question of the tribunal seeking clarification from the Hon'ble High Court in this regard.

17. Having regard to the majority of the three Members' view of the earlier Special Bench, we proceed to pass the confirmatory order. The only issue which was argued before the earlier special bench was as to whether the tribunal should give direction to the AO for disclosing complete material in respect of 31 items? The majority view is in favor of the Revenue and against the assessee. As such, in so far as the tribunal is concerned, it cannot issue any direction to the AO to disclose the material in a particular manner or to a particular extent,

18. After hearing both the sides on the preliminary question, on which we have passed the confirmatory order in above terms, when a suggestion was sought about the suitable date on which the appeals could be taken up for disposal on merits, both the sides proposed a mutually acceptable date of 30th July,

2012, As such we direct the registry to put up these appeals for further hearing on the said date."

08/07/2016: In the reference made by the Tribunal u/s. 256(1), the Hon'ble Bombay High Court reverted back the said reference with the following directions:-

After the Reference was heard for some time, Mr. Jagtiani, learned Counsel appearing for the applicant assessee pointed out that subsequent to the order dated 9th February 1989 of the Tribunal, which has led to this Reference, orders have been passed by the Commissioner of Income Tax (Appeal there from being Appeal No. 5996 of 1993 is pending disposal before the Income Tax Appellate Tribunal.

3. In view of the above subsequent events after the order dated 9th February 1989 of Tribunal, the parties have arrived at a consensus not to press the present Reference, subject to the following directions as agreed by the parties/

(i) It is not necessary to answer the questions framed in the Reference for our opinion by the Tribunal.

(ii) The Tribunal is seized of an appeal by the assessee fort the A.Y. 1984-85 being Appeal No. 5996 of 1993 (arising out of the order of the CIT(A) consequent to the order dated 9th February, 1989.

(iii) The Tribunal will decide the Appeal No.5996 of 1993 for A.Y. 1984-85 on its own merits without being influenced by the order of the Tribunal dated 9'" February; 1989.

> *(iv) All contentions of the parties including those arising in this Reference are expressly kept open to be urged before the Tribunal.*
> *(v) Taking into account at the appeal pertains to the year 1993, the Tribunal will to dispose of the appeal as expeditiously and preferably within a period of six months from today.*
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> *4. This order has been passed on the basis of the statement made by the Counsel appearing for the parties, on instructions from their respective clients.*
>
> *5. In view of the above, Reference is returned unanswered. Accordingly, the Reference is disposed of in the above terms.*

4. In the terms of the aforesaid judgment of the Hon'ble High Court, dated 08/07/2016, it is manifest that, *firstly,* the present Special Bench needs to decide the appeals on merits without being influenced by the earlier order of the Tribunal dated 09/02/1989; and *secondly,* all the contention of the parties including those arising in this reference are expressly kept open to be urged before this Tribunal.

5. So far as the issue of further disclosure of material and cross examination of further witness is concerned which was vehemently argued by the ld counsel of the assessee before us, much water has flown by as the same already stands concluded by this Special Bench vide its confirmatory order dated 30/05/2012 as mentioned above. It has been brought on record that assessee against the said order of the Special Bench has approached the Hon'ble Bombay High Court in writ jurisdiction, being W.P.No.2672 of 2012. However, the assessee later on withdrew the said petition

and the Hon'ble Court allowed the request of the assessee vide order dated 16/08/2013. In this manner the order of the Special Bench has attained finality. Hence, in the present round of litigation, we are confining ourselves for adjudication of the issues on merits on which we have heard the parties at length.

6. To understand the facts and implication thereof on the issues involved, we are taking up the appeal for the AY 1984-85 for our adjudication and finding thereof will apply *mutatis mutandis* on the issues raised in the AYs 1985-86 & 1986-87. The issues which have been raised for our adjudication have been taken by way of concise grounds of appeals filed by the assessee (signed on 27/08/2013), which reads as under:-

> *1. The CIT (A) erred in law and on facts in confirming an estimated net addition of Rs 19,94,64,749/- by applying the provisions of the section 145(2) of the Act on the plea that books of account of the appellant are not reliable based on some evidence and material gathered by the excise authorities which were not to be relied by the income-tax authorities for the reasons explained to him. Thus the addition must be deleted by reversing the findings of the CIT(A).*
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> *2. The CIT(A) erred in law and on facts in confirming the addition without appreciating that the searches conducted by the Excise authorities or later on by the income-tax department, Government of India did not yield any evidence of undisclosed cash, investment, books of account or other documents etc to prove that the appellant was receiving any sale consideration out of its books of account so as to reject the same.*

3. The CIT(A) erred in law and on facts in not properly appreciating the evidence and material, including relevant to the cigarette industry, brought on record by the appellant.

4. The CIT(A) failed to appreciate that the findings of the Central Excise Department are not relevant in the income-tax proceedings in absence of any evidence of concealment of income because quantum of levy of excise duty has various other consideration 1 factors not relevant in the income-tax proceedings.

5. The CIT(A) has failed to appreciate that the assessing officer did not bring on record any evidence to support that the alleged undisclosed bank accounts in the name of H K Patel etc belonged to the appellant or were operated under its directions.

6. The CIT(A) erred in law and on facts by relying on the material brought on record including of Asim Pathak by the assessing officer beyond the scope of directions given by the Hon'ble ITAT in the set aside proceedings.

7. The CIT(A) erred in law and on facts in holding that there was an attempt to influence the witnesses by the appellant though on the contrary he stated that in cross examination the witnesses confirmed their earlier statements given to the excise authorities.

8. The CIT (A) erred in law and on facts in holding that disbursements out of the alleged bank accounts towards advertisement, publicity, printing, mobile vans etc were the liability of the appellant and thus were incurred by the appellant.

9. Without prejudice to above grounds, it is stated that the CIT(A) erred in law and on facts in confirming the findings of the assessing officer in estimating the quantum of expenses allowable against the alleged additional income.

10. The CIT(A) acted on suspicion, surmises and conjectures in confirming the addition.

11. The CIT(A) erred in law and on facts in upholding the levy of interest u/s 215 of the Act.

7. The facts in brief qua the issues involved on merits are that, assessee-company is a public limited company, mainly engaged in manufacturing of cigarettes and for this purpose it had two tobacco processing units, one at Guntur and other at Hyderabad; and two factories situated at Mumbai and Baroda. In addition, assessee also got cigarettes manufactured through number of job working units across the country. For the Assessment Year 1984-85, the assessee filed its return of income on 29/06/1984 declaring total income of Rs.3,20,61,410/-. As against this, the assessment has been completed u/s.143(3) r.w.s.145(2) vide order dated 31/03/1987, thereby assessing the total income of the assessee at Rs.33,76,18,670/- which as mentioned earlier, consists of two kinds of addition; *firstly,* the addition of premium

on sale of cigarettes which was estimated at Rs.23,74,16,750/- and after allowing deduction of 10% on account of wholesale buyers commission and out of books expenses of Rs.1 crore, the net addition on account of premium was made at Rs.20,36,75,075/-; and *second* addition was of Rs.10 crores which was made on account of suppression of production which finally stands deleted by the CIT(A) and the Tribunal in the first round. As stated by both the parties department has not filed any reference u/s.256 and matter has attained finality.

8. The entire premise of the addition made by the AO which has been confirmed by the ld. CIT (A) rests upon the allegation of the Department that the assessee was causing cigarettes to be sold in the market at a higher than the printed price, by evolving a modus *operandi* which in the trade circle of cigarettes was termed as "Twin Branding Mechanism". This Twin Branding Mechanism had led to generation of unaccounted money through sale of cigarettes every year which is in the form of premium over and above the printed MRP price. The Revenue further accredited the assessee that it had directly or indirectly benefited itself from the generation of this money. This entire premise is based on searches conducted by DRI (Central Excise) during September 1982 and again in 1986 in the offices of the assessee company and several 'wholesale buyers' (hereinafter referred as WBs) throughout the Country including certain retail outlets and salesmen etc. From these searches, the AO deduced that the assessee through deceptive packet designs, i.e. "Twin Branding Mechanism" was causing 'premium' to be generated on certain sought after brands in the market and the WBs all across the country were remitting such 'premium' by demand drafts purchased in cash in fictitious names and were being deposited in several bank accounts. In the

impugned assessment order as many as 24 bank accounts have been referred where the drafts were remitted by the WBs which were unearthed during the course of DRI searches. On sample basis, there has been reference to two bank accounts in Indian Bank, Santa Cruz-West, Mumbai in the name of Mr. H K Patel, Current Account No.1391; and Mr. S.K. Mehta, SB Account No.8953 were investigated by the AO on random basis. Tracing back some credit entries in these accounts, independent survey was carried out by the Assessing Officer on the business premises of WBs at Gorakhpur, Muzaffarpur, Darbhanga and Varanasi. During the survey, statements of certain employees of the WBs were recorded wherein they have admitted to have made remittance by way of demand draft out of cash to the fictitious bank accounts in Mumbai in the account of Mr. H K Patel and Mr. S K Mehta. AO on further scrutiny of these bank accounts found that certain payments were made to advertising agencies for the advertisement of the brand and cigarettes manufactured by the assessee company. There was also one incident of donation made to Methodist Church in India at behest of one Senior Official of the assessee company GTC. In the entire assessment order, the aforesaid evidences/materials have been referred to in detail which shall be discussed by us in brief hereinafter.

9. The first set of evidence to deduce the clandestine movement of premium money by the AO was the fictitious Bank accounts in the Indian Bank, Santa Cruz West, Mumbai. The Assessing Officer observed that 24 bank accounts were detected in the Indian Bank, Santa Cruz West Branch where drafts were believed to have been remitted by the WBs. In Annexure A1 of the assessment order, he has given the tabular compilation of 24 bank accounts. On sample basis, he had picked up two bank accounts for scrutiny standing

in the name of Mr. H.K. Patel, C/A.No.1391 and Mr. S.K. Mehta, SB A/c.No.8953. From scrutiny of the account opening forms, specimen signatures and ledger account which has been enclosed in the annexures A1 to A7, he found that these have opened in fictitious names and even the addresses given in these accounts have not been found to be correct after making enquiry on the address given in the bank records wherein it has been found that no such person in the name of SK Mehta or H K Patel ever stayed there. The signature of Mr. H K Patel in account opening form revealed that two different persons have signed these documents and all the cheques were signed by different persons, all in the name of Mr. H K Patel. Similar discrepancies have been found in the account relating Mr. S K Mehta also. Apart from that, AO noted that there are various credit entries on account of demand drafts coming from all over the country including Gorakhpur, Varanasi, Kanpur, Surat, Baroda, Trivandrum, Guntur, Vijayawada, etc., and some from Muzaffarpur kept deposit in the account of S.K. Mehta. He further observed that looking to the sheer volume of said drafts, 100% verification could not be made. Accordingly, he located three centers for survey to find out the identity of the remitter of the drafts namely, Gorakhpur, Varanasi, and Muzaffarpur. In Gorakhpur, survey was made on the premise of whole sale buyers, M/s. Fog Fag. During the survey, one of the Sales Manager, Mr. Kaushal Kumar Srivastava was examined on oath, wherein he deposed that drafts were prepared in the name of two persons namely, S.K. Mehta or H.K. Patel, however he admitted that he did not know anybody by the name of these persons. He also admitted that the drafts were purchased at the instance of his employer, Mr. S. K. Fogla and he also identified names in whose names drafts have been purchased. He further stated that cash for purchase of drafts were provided by his

employer, Mr. S.K. Fogla and he even gave the calculation of premium. The AO also found that drafts purchased on account of these two names were though entered into the books of the accounts of the WBs but drafts were purchased in the name of M/S. Source Marketing and Advertising which has been debited as advertisement expenses in the books of M/S. Fog Fag. During the survey it was also found that six firms were operating from the premise of M/s. Fog Fag which were all the wholesale buyers of the assessee company.

10. Another survey was conducted at Muzaffarpur on the premise of one of the WBs, M/s. Sagar India, during which statements of employees were recorded namely, Mr. Shiv Kumar and Mr. Vinod Kumar Kevadia, who was the Manager of M/s. Sagar India. In his statement Vinod Kumar admitted that he was collecting money which was not entered in the books and such money was around Rs.2-3 lakhs per month and was remitted either in cash or through bank drafts to the owner of his concern (wholesale buyer) Mr. R.K. Goenka at Patna. The AO concluded that the fact that Mr. R.K. Goenka is residing at Patna while drafts were purchased by this WB in favour of some Kolkata parties and this material evidence suggests that the drafts were purchased not at the instance of Mr. R.K. Goenka, but at the instance of GTC for depositing in bank accounts in Kolkata somewhat similar to accounts in Mumbai. It was also stated by the said employee that this on-money was charged from the year 1985 and in response to a specific question, he denied sending money directly to GTC. A follow-up survey was also conducted at Darbhanga in bank account to find out whether wholesale buyer at Darbhanga, M/s. Royal Distributors had also purchased in the name of some Kolkata parties. From this, AO deduced that this would be an

additional evidence to indicate that draft in the name of Kolkata parties may have been at the instance of GTC. Further, enquiries were made at Varanasi on bank accounts in Benares State Bank Ltd. and New Bank of India. These bank accounts also reveal that drafts were purchased by the employees of wholesale buyers M/s. Sharat Agency and Company who had purchased drafts in the favour of GTC and Deepak Silk Mill. On the basis of this interlinking, the AO suspected that the account in the name of Deepak Silk Mill is another account of GTC and again from these information he deduced that the fictitious accounts were opened where drafts were sent by the wholesale buyers (WBs). The Assessing Officer after linking the credit entries of bank accounts from the information and material gathered from the aforesaid surveys held that the premiums which were collected by the wholesale buyers were sent to the fictitious bank accounts in Mumbai.

11. In the second set of evidences to corroborate his stand, the AO proceeded to examine the debit entries of the bank account in the name of Mr. H K Patel and found that payments were made to advertising agencies etc. One such payment was made to M/s. Dimensions, a proprietary concern of Mr. Ashok Tyagi. In the statements recorded, Mr. Tyagi informed that drafts were received in his name for producing 15 jingles for radio advertisement of various products of GTC and the directives for producing such jingles was given by one, Mr. Rajiv Ohri, Marketing/ Advertising Manager of GTC. He further, clarified that bank drafts in question were given to him by Mr. Rajiv Ohri. AO further examined another payment which was made to M/s. Source Marketing and Advertising. When contacted by the Assessing Officer, they informed that receipts were on account of advertising bills of the

various wholesale buyers of GTC (which has been listed at page B-14 of the assessment order) and that the bills were raised against the wholesale buyers at the instance of GTC. One of the wholesale buyers, M/s. Uma Maheshwari Trader Private Limited was summoned and in response, its representative, Shri I C Jain, Chartered Accountant informed that his client has neither received any bill nor payment has been made to M/s. Source marketing. The AO then summoned Shri V. Shanta Kumar of M/s. Source Marketing who stated that effectively GTC alone was coordinating all the advertisements of its products through M/s. Source marketing and no wholesale buyer has contacted him in regard to any advertisement. But he categorically stated that the advertising bills were sent in the names of wholesale buyers which were sent under the instructions of GTC and few bills at times were handed over to GTC also. He thus admitted that the bills for advertisements were sent directly to the wholesale buyers; payments against such bills were received either directly through WBs or through GTC. Similar information was received in the investigation of M/s. HK Printers.

12. One of the payments made from the account of H K Patel were for supply of office equipment against the payment to Methodist Church of India. The Church in enquiry had confirmed that these donations were in kind which was through Ms. Nirmala Sundaram, an Officer of Bank of America. In her statement she has stated that she has arranged donations and the drafts were given by one of the key person of GTC. In her statement she had stated that she had contacted, Mr. Deepak Poddar, Executive of the Company, who is capable of taking such decision for this purpose. Since the GTC had a loan and current account with this Bank, therefore, the assessee must have obliged to the employee of

the bank by giving donation at her request. AO had further examined other bank account debits of this account which has been discussed in detail in part-B of the Assessment Order. The nature of investigation and outcome was that the payments made for advertisement and publicity were at the instance of assessee and bills were collected and paid by the assessee alone through debits from these fictitious accounts. This shows that assessee had some kind of control over these fictitious bank accounts.

13. After discussing in detail, the outcome of the various enquiries and surveys, AO further, noted that assessee-company was earlier controlled by one, Narsee Monjee family and later on Dalmia family took over the control of the company in the year 1979. The Dalmia family replaced all the wholesale buyers and distributors by persons having close relationship with Dalmia family either through blood or through business. He also referred to such wholesale buyers in his assessment order namely, Sharda Brothers, Rajkumar Thard, Sitani Family, Gopi Kumar Singhania, Fogla Group etc. The main premise of the AO to refer to these wholesale buyers was that it eased the collection of premium through Twin Branding. The conclusion of the AO in sum and substance can be summarized as under:-

- Business liabilities or exigencies payments of GTC were made from the bank accounts of S.K. Mehta and H.K. Patel, which are nothing but fictitious bank accounts opened for the benefit of GTC.
- Payment to third parties like advertisers etc., were though made by the wholesale buyers but in reality were paid by GTC.

- Payments on behalf of several unconnected wholesale buyers all across the country have been made from single bank accounts in Bombay.
- Some of the recipients of payments have stated that they had received payments from GTC, this shows the role and control of the assessee on these bank accounts.
- The control of the bank accounts is also reflected from donation to Methodist Church and payments to various agencies which were made at the behest of GTC.

In the assessment order there is also reference to investment in share capital of M/s. Century Hire Purchase Pvt. Ltd., through these bank accounts. AO had also referred to certain other bank accounts in the name of M/s. A K and Company, M/s. C.K. and Company, M/s. K.K. and Company and M/s. V.K. and Company from where drafts sent by wholesale buyers of the company have been credited to these accounts. He observed that all these bank accounts were catering to a single party, that is, these are accounts of GTC. AO has also incorporated the details of pay orders purchased from these accounts in the name of various parties which are mostly advertisers and printers which have been discussed in detail from pages B-25 to B-33. The conclusion of all such details mentioned by the AO is the same, that is, the assessee had control over the fictitious bank accounts and premium collected from all across the country belonged to the assessee.

14. Accordingly, the AO opined that the collection of premium through twin branding actually belongs to the assessee. The twin branding mechanism has been explained in the manner that, Assessee Company first used to introduce in the market, high

price brand of Panama Cigarettes and subsequently when people get used to such brand and product name, then assessee used to introduced lower price brands with a minor variation of the product name with a description of similar name and packaging of that of high brand. This description was not easily discernible to the public and thus consumers would pay the price of higher brand while buying the lower brand cigarettes. This led to a situation where the consumers would pay higher price for low price brands and thus resulting into collection of extra money over and above the MRP printed price. The entire concept of twin branding mechanism is based on presumption that the consumers will not look at the MRP printed in the cigarette packet and pay a higher price assuming it to be price of higher brand cigarette. This premium collected according to AO is a direct benefit to the assessee. Now based on the investigation and information received from DRI Central Excise and his own enquiries, AO rejected the book results of the assessee and proceeded to make the assessment in the manner provided u/s. 144. The way he has computed the premium has been elaborated at Part-D of assessment Order. The relevant discussion on twin branding and the manner he estimated the income for making the addition by the AO, reads as under:-

> *"6. Thus from the discussion above along with the fact of drafts remitted by WBs of the assessee coming into accounts of the assessee which were maintained outside books, I held that premium on sale of cigarettes was being generated and collected at the instance of the assessee and that the drafts to accounts of the assessee represent the actual transmission of such premia. It will be relevant that I had issued show cause why the ex-factory price differential between the ,higher and lower brand prices of two brands marketed, under deceptively*

similar names be not added to the assessee's income. While making such calculation, I have found that in many cases, such ex-factory price differential exceeded the actual premium per unit sale charged on a brand by a WB e.g. the ex-factory price differential between the prices of Panama Virginia and Panama Virginia Special is Rs. 24, whereas the premium actually being charged by the WBs on the basis of records seized by the DRI (Anti Evasion) is Rs. 20/-. This difference is because of differences in official WB's margin for the two brands being different whereas the WBs' margin for Panama Virginia was Rs.9.09 (ignoring discounts), the same was Rs.13.33 for Panama Virginia Special. This has caused the WBs selling price to be Rs.94.20 in the case of Panama Virginia and Rs. 74.20 in the case of Panama Virginia Special (through of course both were being actually said at Rs.94.20). For this reason, I am taking the rate of premium on the basis of which addition will be made to the total income on account of premium for a brand to the same as that being charged by the WBs as determinable from the seized records of WBs lying with the DRI for the brand. This will be followed for all sales for the period upto 28.02.1983. As mentioned earlier, the basis of charge of excise duty was charged from ad-valerom on the ex-factory price to the printed price on the packet w.e.f. 1.3.1983. Following this, the prices of the different brands were revised and after these prices stabilized, new brands were introduced with deceptively similar packet designs at printed prices but all of which had the same price as the brand which it has sought to replace. In such cases, I will be taking the difference between the declared ex-factory prices of the two brands as the basis of charge. From the aggregate premium thus determined, I will be reducing the same by 10%

is fair as seized records of another cigarette manufacturing company where allegations of collection of such premium were leveled, search and seizure action by the Department in the promises of the company and its wholesale dealers led to seizure of several price circulars issued by the company where both executives of the company and several wholesale dealers admitted in course of search proceedings u/s.132 (4) that these circulars represent the prices at which different brands are to be said and the premium to be collected thereon including the WDs share from such premium. The WDs share in such cases never exceeded 10%. The detailed working of the premium determined assessable in the hands of the assessee on the basis of evidences in the brand price movement study is given in the following page. The same works out to Rs.21,36,75,000/-.

15. In the first appeal, which is in pursuance of directions given by the Tribunal vide order dated 09/02/1989 that cross examination was not allowed in respect of certain witnesses and simply on the basis of some uncorroborated statements, huge additions have been made in the total income, therefore, cross examination of certain witnesses are required to be given; the learned CIT(A) had noted that in pursuance of Tribunal's direction, fresh hearing was given to the assessee and assessee's representative has given a list of five persons along with their addresses whom they want to cross-examine. These five persons were as under:-

i) Shri Haji Umer;

ii) Kishore Jojharimal Chitlangia;

iii) Shri V. Shantakumar;

iv) Shri Ashok Tyagi; and

v) Ms. Nirmala Sundaram

Apart from that, AO was directed to complete the investigations on some of the fictitious accounts, the information of which was received after the completion of assessment. Accordingly, AO was directed to submit his remand report. In response to ld. CIT (A)'s remand, AO allowed cross examination of witnesses which have been elaborately discussed by the ld. CIT (A) from pages 6 to 16 of the impugned order. After discussing the points examined in cross-examination by the assessee, learned CIT(A) has observed that in the cross examination, assessee has made an attempt to provide an alternative to the witnesses and assessee had been putting leading questions to the witness and therefore, the cross examination has not been carried out within the parameters of the law. In the process of cross-examination, assessee had tried to establish that nothing clinching is coming out from the statement of witnesses which can implicate assessee in any way, because none of the witness have even remotely stated that either the money has been given to the GTC or the bank accounts are in control of GTC except for the fact that certain work/ advertisement was done on behalf of the GTC. Certain aspects that came into light in the appellate order are discussed in short herein after.

16. In the case of Mr. Ashok Tyagi, who produced jingles for the GTC, one of the key witness relied upon by the AO, the assessee had pointed out that the initial summon was issued by a different Assessing Officer and in his statement he has informed that statement was recorded in the Income Tax Office on 09/12/1986 in the format of a letter addressed to Shri Kaushik, who was not a ITO/AO of the assessee. This shows that AO has not recorded

statement. Another thing which has been pointed out by the assessee was that, Mr. Tyagi had typed the letter in his own portable typewriter which he has brought to the Income Tax Office, but there was some insertion by pen “For the work done for GTC”. This hand written note has been treated as evidence against the assessee that advertisement expenses were borne by the assessee. Assessee pointed out that in cross examination, Mr. Ashok Tyagi gave evasive response that did not substantiate his original statement. There is also element of doubt about why a person would carry his own typewriter to Income Tax office to type his own statement and that too before to a different AO. If matter has been typed from his typewriter, then why a very important aspect has been added by the pen. All these aspects could not be clarified by him. Hence, it was stated by the assessee that no credence can be given to his statement. Similarly regarding statement of Ms. Nirmala Sundaram that donation made to Methodist Church of India was facilitated by one of the key employee of GTC, it was pointed out by the assessee that in the cross examination she was not sure as who from the bank contacted GTC for donation and she genuinely does not remember after a lapse of so much time. She stated that she assumed that drafts were given by GTC, however, she cannot say that drafts were actually sent by GTC. The other intricacies of examination and cross examination have been discussed by CIT (A) in the impugned order. In the remand report before the CIT (A), AO has also mentioned that a search was conducted on 15/03/1990 at the residence of one, Shri Asim Pathak who was close associate of Shri Sanjay Dalmia the MD of GTC. In search, certain papers were seized which indicated that attempt was being made to influence the witnesses whom assessee wanted to cross examine. A note which was seized at the time of search at his residence have been reproduced by the CIT(A) at

page 17. From this note, learned CIT(A) has inferred that the assessee had tried to influence the witnesses who were to be re-examined in view of the instruction of the Tribunal. It has also been brought on record that, Asim Pathak had joined Sanjay Dalmia as Official Secretary in 1977 and he was in the pay roll of Dalmia Brothers Pvt. Ltd. Looking to the proximity of the Asim Pathak with the key person of the assessee an inference has been drawn that assessee had influenced the witnesses. The learned CIT (A) has again reiterated the observations and the findings of the AO regarding various witnesses and material which has been recovered from the surveys conducted by DRI and also the survey done by the Assessing Officer. The entire discussion in this regard are appearing from pages 20-47 of the Appellate Order.

18. After discussing the entire matter in detail, the learned CIT (A) upheld the action of the AO. In sum and substance the conclusion drawn by the learned CIT (A) can be summarized in the following manner:-

- First of all, learned CIT (A) had observed that evidence which has been brought by the AO may be direct, indirect or circumstantial and even the probabilities whose preponderance may constitute proof of the existence. However inference can be drawn against the assessee about the modus operandi of collection of premium and utilization by the assessee of such money. After referring to the decision of Hon'ble Supreme Court in the case of Durga Prasad More 82 ITR 540, he observed that direct rule of evidence does not apply to income tax proceedings to arrive at any conclusion or to establish facts.
- Ld. CIT(A) discusses the entire system of twin branding and how it has led to collection of premium on account of price

differential on twin branding of cigarettes collected from the dealers in a systematic manner. This premium has been collected in the name of fictitious persons in whose names numerous accounts were operated. The money deposited in the bank account had been partly used by the assessee company for advertisement and other purposes. The generation of money is inherently embedded in the scheme of twin branding in manufacturing and marketing of its popular products. He observed that the total material evidence brought on record clearly demonstrates that there was a direct nexus between the twin branding and the generation of premium money which has found its way into bank account maintained in fictitious account and there is an overwhelming preponderance of probabilities. Therefore, the addition made on account of premium generated in sale of cigarettes needs to be confirmed. He has also extensively referred to the finding of the CIT (A) in the first round.

- Ld. CIT (A) rejected the assessee's contention that demand drafts and pay orders received in the fictitious bank account were not found from the possession of the assessee and all the evidences at the most show that the money was received on behalf of the various wholesale buyers and not assessee. He held that the assessee has not been able to prove by establishing the identity of the bank account holder to prove its contention. Thus he confirmed the earlier order of the CIT (A) as well as the order of the AO.

- Regarding computation of premium, he has discussed the matter in detail from pages 52-57 of the appellate order and observed that the commission shown by the assessee was

actually on-money collected by the assessee company and ploughed back in the books of the assessee company in the form of commission. Accordingly, he gave the relief of Rs.1,54,19,042/- which were shown separately by the assessee as commission and the balance amount of Rs.19,94,64,749/- was confirmed.

19. Before us, learned Counsel for assessee, Shri Vinod Kumar Bindal after explaining the entire facts and background of the case submitted that the genesis of the entire controversy have started from searches conducted by the DRI, Central excise, during the course of which various statements were recorded which have been referred to extensively by the AO in the assessment order. By way of preliminary objection, he submitted that now that entire matter is open as per the order of the Hon'ble High Court dated 08/07/2016, therefore, the assessee has all the right to demand for all the materials which has been referred by the AO to draw adverse inference. AO has relied upon the materials from the DRI searches to come to the conclusion and further contented that cross examination of all the witnesses must be allowed and where there has been no cross examinations, no adverse inference should be drawn. He further pointed that in the assessment year 1983-84, similar show-cause notice was issued by the AO in the course of assessment proceeding based on same material, however, after receiving the assessee's reply and considering the various evidences no addition on account of premium etc., was made. Thus, based on same set of facts, no addition should be made in the assessment year 1984-85 as a matter of consistency. He further submitted that, even otherwise also, if the same material or evidences which has been relied upon and considered by the AO and ld. CIT(A) are taken into consideration, which were

mostly found during the searches conducted by the DRI or by the income tax department, then also these evidences do not indicate in any manner that assessee company was getting the undisclosed premium collected by the retailers on sale of its cigarettes. There is not a single statement of any person stating that any part of the alleged undisclosed premium was given to the assessee company. Despite there being several searches and surveys at various places of whole sale buyers or dealers or retailers starting from the year 1982 till 1990, not a single piece of evidence has been found or collected which can implicate assessee directly that assessee was getting the so called premium from the wholesale buyers or retailers. The existence of undisclosed bank accounts in the benami names where the money was sent by WBs and used for post manufacturing expenses including advertisement and other purposes besides withdrawal of cash, does not ascertain or establishes that the assessee company was the operator of the said bank account directly or indirectly. In fact, it has been admitted by the AO that no one from the assessee's company was found involved in operating the said bank accounts nor any of the employee had introduced any of the bank account. Merely because few transactions ranging from Rupees 3 to 4 lakhs of advertisement of the product of the assessee has been found to be incurred from these bank accounts, the presumption cannot be drawn that the said bank accounts belong to the assessee. In fact he pointed out that, there was a committee constituted by the Government of India which studied the practice by the cigarette industry and gave a report that the wholesale buyers/dealers of all the cigarette manufacturers in the country were bearing the post manufacturing expenses including advertisement so as to reduce the cost of the manufacturer for the purpose of levy of excise duty. The revenue has not been able to point out with single concrete

evidence despite several surveys at the various premises of the Assessee Company or elsewhere, that its wholesale buyers had given money directly to the assessee or there is any undisclosed expense incurred by the assessee or on its behalf so that the assessee company can be reckoned as beneficiary in any manner of such accounts. This is a case of public limited company and payment of such huge amount of undisclosed money for its benefit without recording the same in its books is not possible. There has to be some entry in the accounts of the assessee company or any single evidence that assessee has received the premium. If at all there is any benefit, then same may be of some personnel of the assessee company in the management and even for that there is not a single evidence. The personal benefit or gain cannot be roped in the hands of the assessee company which is a corporate entity even if the entire allegation of the revenue is to be accepted. The MRP declared on the packet of the cigarette is duly approved by the Excise Department which requires lot of formalities and giving the complete statistics about the input cost of each cigarette, there is nothing on record to suggest that the permission given by the Excise Department was obtained by the assessee by concealing the facts. In fact, he brought to our notice that, there is a decision of Hon'ble Supreme Court in the case of **M/s. ITC Limited vs. CCE, reported in 2004-TIOL-75 SC (Civil Appeal No.70 of 1999) and 6101 of 1998,** wherein the Hon'ble Supreme Court while dealing with a similar matter of flow back of money on account of difference in actual retail sale price and declared/printed sale price for the subject matter of issue, held that the retail price mentioned in the package is the sale price for the manufacturer and the manufacturer has limited or little control over the action of the retailers who are millions in number and the manufacturer could not be held responsible for the tendency of the retailers to

charge higher than the printed price so as to secure larger margin. This decision of Hon'ble Supreme Court has been followed in assessee's own case by the Hon'ble Supreme Court in its judgment and order dated 16/09/2015 reported in 2015 TIOL 213 SC. Thus, the entire basis of the Revenue to make the addition in the hands of the assessee company stands vitiated by the decision of the Hon'ble Apex Court in the case of the assessee itself.

20. Mr. Bindal pointed out that, another peculiar fact about the estimation of the addition made by the AO and by the ld. CIT(A) is that, it is not based on any amount deposited in the benami bank accounts but of a differential price calculation based on difference in the value of cigarettes on twin branding by considering the higher MRP as sale price on the total quantity sold by the assessee of a particular type of brand, that is, the MRP of a higher brand has been taken as MRP of a lower brand and difference has been treated as the premium/ on money which is to be added in the hands of the assessee. For holding so, first of all, there has to be some evidence that assessee was receiving any share in such premium or there is some record that money has flown back to the assessee. Secondly, guess work and estimation by AO and CIT(A) has gone too farfetched and on the presumption that all the cigarettes of lower brand all across the country must have been sold at a higher price and millions of consumers must have paid higher money and all the extra money collected has reached to assessee cent percent. Such a wild estimation for making the addition is factually and legally unjustified. By way of a write-up he has also given the rebuttal of each and every observation and the finding of the AO as well as that of CIT (A).

21. Coming to the DRI (Investigations) and orders of CESTAT, Mr. Bindal submitted that the Central Excise Department has never alleged that GTC directly collected full or part of the premium alleged to be charged on sale of cigarettes nor any information of material was found by any authority in any search or survey action. The CESTAT Bench of Delhi order reported in 2006 TIOL CESTAT-Delhi has noted the show-cause notice issued by the Central Excise Department, the content of which reflects hereunder:-

> *3.2 That GTC Industries Limited had been claiming the benefit of concessional rate of Central Excise duty during the different periods mentioned in the show cause notices under Notification No.201/85 dated 2nd September 1995 cigarettes. While sending samples of the packets of cigarettes of the said brand for approval by Central Excise Authorities, the Appellants declared the price of Rs. 1.70 per pack of 10s and 3.40 per pack of 20s as maximum retail price [exclusive of local taxes only which cigarettes would be sold. The specimens were approved accordingly. GTC separately filed proforma statements to "'the Central Excise Authorities declaring the above prices for the cigarettes. Cigarettes manufactured and cleared by them were assessed on the basis of the above declaration and adjusted the sale price for different brands of products had been worked out and accepted as the basis for charging duty under the Notification. In the Gate Passes for clearance of cigarettes, GTC declared such adjusted sale price and rate of duty at which cigarettes were chargeable to duty. The investigations revealed that the declaration of adjusted sale price/maximum retail price in regard to this brand was not true, as cigarettes were being sold during the relevant period in retail at the prices higher*

than those prices declared on the packages. The department was of the view that the declarations were made deliberately false, as GTC sold cigarettes to Retailers leaving them a margin on which it would not be economical for them to act as Retailers. The margin indicates that GTC had never believed it is reasonable that the Retailers would sell the cigarettes in accordance with the price declared and GTC therefore, had full knowledge that retail packet would not be sold in accordance with the price declaration made thereon.

3.3 That extra money over and above the prices shown in the invoices was being collected in respect of sale of various brands of cigarettes and extra amount so collected by the Salesmen were passed on to the Retailers and Wholesale Dealers and subsequently in cash to the Super Buyers."

From the said show-cause notice, he pointed out that it is clear that there is no allegation that on-money was collected on behalf of the GTC. DRI was investigating the matter from the point of view that actual MRP of cigarettes were higher than the printed MRP and they were not interested in finding that who shared the premium. The CESTAT Tribunal in fact vide order dated 09/12/2005 after referring to the statement of wholesale buyers and salesmen of wholesale buyers came to the conclusion that the differential amount on the alleged extra collection received from the wholesale buyers does not belong to the assessee company. The Hon'ble CESTAT had also referred to the decision of Hon'ble Supreme Court in the case of ITC Limited vs. CCE (supra) and gave a categorical finding in favour of assessee. This decision of Hon'ble CESTAT Delhi has now been affirmed by the Hon'ble

Supreme Court in the judgment and order dated 16/09/2015(supra).

22. Regarding the observations and the finding of the learned CIT(A) on the cross examination that assessee is not permitted to ask leading questions, ld. counsel submitted that same is contrary to the provisions of Evidence Act, as Sections 142, 143 and 146 specifically provide that leading question can be asked in the course of cross examination. Therefore, to reject the outcome of cross examination of the witnesses by the Ld. CIT(A) where the assessee has established that nothing can be implicated to the assessee cannot be upheld.

23. Regarding cross examination of Mr. Ashok Tyagi (M/s. Dimensions), he pointed out that there are certain inherent contradictions and therefore, his statement as relied upon by the Assessing Officer cannot have any evidentiary value. Mr. Ashok Tyagi was a Proprietor of M/s. Dimensions who was a film producer, in his statement has stated that he was asked to produce jingles for the advertisement of GTC products. During the course of cross-examination, it has been brought on record that the summon was issued by different ITO, Central Circle -6, Mumbai who was not the Assessing Officer of the assessee and in his statement given in cross examination he has informed that his statement was recorded at the income tax office which is in the format of a letter addressed to Shri Kaushik, a different ITO. Thus, the initial statement was not recorded by the AO of the assessee and secondly, why a person will bring his own typewriter for giving the statement before the AO in the time of the original statement. In the typewritten copy of a letter, “For the work done by GTC” was added by hand on the basis of which AO has held that

advertisement expenses have been incurred on behalf of the assessee. Further, it appears that the AO has intimidated his explanation in the letter which has been signed by Mr. Tyagi. In the cross examination, Mr. Tyagi was unable to clarify the content of the letter and he admitted that his typed letter was vague and these incorporations must have been brought up by the ITO. He has challenged the version of Mr. Tyagi who has given dubious answers, thus he submitted that his statement cannot be relied upon. A written synopsis has been filed by the AR on the discrepancies between the original statement as well as the actual truth coming out during the course of the cross examination. Similarly regarding cross examination of Ms. Nirmala Sundaram in relation to Methodist Church donation also, he submitted that there are various inherent contradictions and it cannot be taken as the matter of established fact that the donation was made through fictitious bank account on the direction of the GTC. Likewise in case of Source Marketing and statement of Shri V. Shantakumar also, learned Counsel has highlighted the inherent contradictions and discrepancies which have been elaborated before us by way of written synopsis. Regarding advertisement expenses incurred by the wholesale buyers which is mainly coming from the statement of Mr. Rajkumar Thard, wholesale buyer of Mumbai that he was handling the publicity and advertisement from various agencies with the help of personnel/ representatives of GTC, ld. Counsel pointed out that in his statement he has categorically stated that payment of advertisement done from these agencies were made by him and these payments were out of sale proceeds of cigarettes. The bills were sometimes received directly or through GTC. Further the AO himself in the Assessment order for the A.Y.1986-87 has admitted that advertisement expenses were found to have been debited in

the books of wholesale buyers. However, in the present assessment year, he has presumed that advertisement and publicity is the responsibility and expenditure of manufacturer only. He submitted that there are various decisions wherein it has been held that the wholesale buyers and marketing agent were entitled to carry out independent advertisement at their own costs. Even though assessee may derive some benefit or advantage but nowhere it goes to prove that the assessee alone had incurred such expenditure.

24. Regarding fictitious bank account and surveys at premises of various wholesale buyers as discussed by the Assessing Officer, he pointed out that, nowhere it has been found that money has flown back to the GTC nor there is any statement that the demand drafts prepared was meant for GTC or the fictitious bank accounts in any way relates to the assessee. He pointed out that learned CIT (A) at pages 27 & 28 of the earlier order dated 23/03/1988 (i.e., in first round) has categorically held that he is unable to draw any conclusion either about the ownership or the control which assessee might have over the account, though funds into accounts are traceable to wholesale buyers and have been used to pay for advertisement expenses and though the funds in this account are demonstrative to have been used for meeting advertisement expenses of the assessee's cigarettes. Nowhere has it been established by any evidence that bank accounts belong to the assessee directly or indirectly.

25. Before us, learned Counsel has raised several other contentions, like privity of contract between GTC and wholesale buyers cannot be ignored and cannot be taken as if it has not been done in a good faith. In support of this, reliance has been placed

on Catena of the decisions which are not been discussed herein in this order.

26. Lastly on the issue of application of Section 145(2) for rejecting the books of accounts, he submitted that learned AO has held that firstly, in the present case, it can be proved beyond doubt that assessee has maintained bank accounts in fictitious names outside books and has otherwise incurred expenses which are not reflected in the books of accounts and he has also held that assessee has been maintaining cash in bank account outside the books therefore, the book results are rejected. These two findings are not relevant at all for rejecting the books of accounts. Further, learned CIT (A) has upheld the invoking of Section 145 on the ground that premium was generated in the cigarettes manufactured by the assessee and bank accounts appeared to be channel for circulating the said premium and assessee is bound to have a large share in the said secret money and its circulation. Regarding this finding of the CIT(A), he submitted that now there is decision of CESTAT that no money is flown back from super buyer/wholesale buyer to GTC and even if it is held that original statement of wholesale buyers/ retailers to the effect that there were realization of extra payments for sales of cigarettes and part of excise collection flown back from retailers to the super buyers, then also there is no material on record to establish that there was direct or indirect flow back from super buyers to the assessee. Coming to the observations of excise department that the flow back was in form of interest margin that was collected from super buyers and the fact that super buyer had paid for advertisement of GTC products which were never reimbursed, he submitted that there is no finding at all that extra money collected in cash transaction or there is any evidence of further backwards flow of

money from super buyers or wholesale buyers to manufacturers. Thus, the said finding of the CIT(A) itself gets vitiated. He further submitted that learned CIT(A) has decided the matter on general probabilities and circumstantial evidence which has been discussed by him from pages 22-27, and at the same time has admitted that there is no direct evidence available. Thus, the entire premise of the addition and rejection of books of accounts is based on circumstantial instances and general probabilities sans any evidence to prove the actual facts. Thus, this cannot be the basis for rejection of books of accounts. In support again the reliance has been placed on various decisions as have been highlighted in written statement filed before us.

27. Lastly, on the issue of note of Shri Asim Pathak found from his premises, he submitted that search party never questioned, Shri Asim Pathak for this note or any one from the assessee company was confronted about this note and moreover if the entire cross examination are to be seen, it is evidently clear that no witness has turned hostile or has directly given any statement in favour of the assessee in any manner. Thus such a note does not have any implication at all.

28. Learned Special Counsel, Shri Girish Dave appearing on behalf of the Department, submitted that the generation of premium on sale of Cigarettes is basically based on mechanism of twin branding resorted by the assessee company. The assessee company has been found to selling the cigarettes in the market higher than the printed prices at all India level and this differential price is the main basis of addition made by the AO. Explaining how the 'twin branding mechanism' works, he submitted that it involved a process by which the assessee first introduces a brand,

for example Panama Virginia. The emphasis was to advertise the brand only as 'Panama' without any prefix or suffix like 'Virginia', 'Special Virginia', 'Virginia Special', etc. To begin with, when the modus operandi was started around 1980-1981, there was an existing brand which was called Panama Virginia and was being marketed at Re. 1/- per packet of 10 cigarettes. At that point of time, Panama cigarettes were actually available at Re.1/- per packet and if bought loose, then at 10 paisa per stick. When the twin branding mechanism was introduced, the assessee took permission of the Central Excise authorities to market a new brand called Panama Virginia Special at 80 paisa per packet. They took further permission to emboss the price on the packet rather than print it with ink. In reality, there was no difference in packet design and colour scheme of the packet of the two brands. The words "Special" was printed in such print with such small font size, that the consumers hardly took notice of the new brand name. Advertisements were made only in the generic name of "Panama" for e.g., one such ad was “Panama is a good cigarette, enjoy it to the last puff'. Though officially the retail price of the new brand was 80 paisa per packet, but Panama cigarettes continued to be sold at Re.l/- a packet and 10 paisa per stick, thereby causing generation of 20 paisa per packet at all the street level. A year later, when the price of cigarettes had to be revised on account of change in basis of charge of excise duty on cigarettes, the assessee took permission to raise the price of Panama- Virginia Special from 80 paisa per packet of ten cigarettes to Rs.1.25 per packet. In reality, the price of these cigarettes, at the street level increased from Re.1 to Rs.1.25 per packet of ten cigarettes. For about two months, Panama Special continued to be sold at Rs 1.25 per packet of ten cigarettes and there was no on-money on it. Once the consumers got habituated to paying Rs.l.25 per packet of

10 cigarettes, the assessee took permission of the Central Excise authorities to re-introduce "Panama Virginia" at the old price of 80 paisa per packet. There was no advertisement from the assessee that the prices of Panama cigarettes had been reduced/slashed. Officially, Panama Virginia bore the earlier MRP of 80 paisa per packet, but it continued to be sold at 1.25 per packet, thereby increasing the volume of on-money generated from the brand. The process continued over and over again across all brands. The device employed was that when MRP is reduced from Re. 1 to Rs. 0.80 per packet, the assessee loses 4 paisa per packet while Excise authorities lost Rs.0.16 per packet of excise duty, because in the year 1981-1982, excise duty was close to 400% on ad valorem on the "assessable value" (which is almost the cost of manufacturer). With effect from the Budget of 1983, the basis of charge of Excise Duty was shifted from ad valorem on assessable value to specific rate based on the printed price on the packet. The rate structure has been reproduced in page B-2 (Table-4) of the assessment order for the assessment year 1985-1986. There the AO has demonstrated how the rate structure was such that it gave incentive to the assessee to market cigarettes by declaring a low printed price, thereby paying a lower rate of excise duty which in turn helped the assessee to keep the overall street price of cigarettes low, but making up for the loss by charging "on-money" on sale of cigarettes. In fact, to facilitate the easy generation of "on money", the assessee had kept odd printed pries such as Rs 1.70 per packet of 10 cigarettes fully knowing that at that point of time 65% of all cigarettes were sold loose, i.e., as single stick and small coins like 1 paisa, 2 paisa etc. were out of circulation. Hence, such cigarettes had to be necessarily sold not at 17 paisa but at 20 paisa or the more commonly available coin 25 paisa. Thus, this twin branding mechanism has led to generation of huge premium

amount which was collected by chain of retailers to wholesale buyers and from wholesale buyers to various fictitious accounts in Bombay and elsewhere. This fictitious bank account was used directly and indirectly for the purpose of discharge of certain business exigencies and liabilities of the assessee company and in the form of other benefits which were outside the books of accounts.

29. Mr. Dave submitted that though the entire material and information regarding generation of premium and flow back was unearthed in the searches carried out by the DRI, however, the Assessing Officer after receiving all the information, himself carried out his own set of enquiries and searches to corroborate the material information found during the DRI searches. It is not a case here that the Assessing Officer has not applied his mind independently, *albeit* has made his own efforts to establish the linkage between the generations of on-money in the form of premium and how the assessee company had controlled over the said collection of amount. He also drew our attention to various observations and materials which has been referred to by the learned Assessing Officer as well as learned CIT (A) in the impugned orders. Rebutting the various contentions raised by the learned Counsel he summarized the arguments of the learned Counsel in the following manner:-

(a) The learned Assessing Officer did not make any inquiry of his own and reliance was made by him on statements made before the Central Excise authorities;

(b) No incriminating material was found;

(c) No addition was made on this basis in the assessment years 1983-84 even though show cause was issued based on

same material as was available with the Central Excise authorities;

(d) No flow back of money could be established by the learned Assessing Officer, which fact is evident from judgment of Hon'ble Supreme Court as well from the decision of CESTAT. In support of this argument, learned Counsel sought to rely on Pages 132-140 of the submissions made for stay petition and Pages 141-142 of the same papers;

(e) It was further argued that judgment of Hon'ble Supreme Court in ITC further proves the case of the appellant-Company which was compiled at Z-329;

(f) It was stated that the appellant-Company was not in league with the retailers who may be collecting more money from the end-customers and at the same time contending that nobody can force to charge extra than MRP from a customer;

(g) It was stated that nobody, neither the wholesale dealers nor anybody else has said that money was given to the appellant-Company;

(h) Even the five persons whose statements were recorded by learned Assessing Officer confirmed involvement of the appellant-Company in the charging, collection and use of the on-money; and

(i) No new set of evidence was brought on record.

30. Regarding the main contention raised by learned Counsel that AO did not made similar additions in the A.Y.1983-84, Mr. Dave submitted that besides the principle of res-judicata not

applicable in the income tax proceedings, it was incumbent upon the AO to prove three important things to confirm the addition; *firstly,* whether the products were being sold in the market at higher than the printed price; *secondly,* the premium so generated was mopped up by the wholesale buyers of the assessee company; and *lastly*, whether the premium has flown back to the assessee company or its nominees and the funds so generated were in control of the assessee company or any? In the A.Y.1982-83 and 1983-84, AO though had material obtained from DRI, there was no material or statement made available from DRI of any wholesale buyer whether the premium has flown back to the assessee company. It was in absence of such factual linkage, the AO could not go ahead to make additions in the hands of the assessee. In the subsequent years, when the learned AO could get the factual evidence in the form of bank accounts where demand drafts purchased by up-country wholesale buyers were deposited and encashed by and on behalf of the assessee company and the entire mechanism was in effective control of the assessee, then only the present AO had proceeded to complete the assessment in the impugned years. Not only that, he also made his own set of enquiry to corroborate the same which could not have been done earlier in absence of material being made available to him.

31. As regards, heavy reliance placed by learned Counsel on the judgment of Hon'ble Supreme Court dated 16/09/2015 in Civil Appeal No.5617/06 to contend that Hon'ble Apex Court did not find any error on fact or in law of the decision of CESTAT dated 09/12/2005 is grossly misplaced. In that case, the assessee was claiming the benefit of concessional rate of duty during different periods of Golden Flake King Brands of Cigarettes. The learned Collector of Central Excise classified a product under sub-para-3

of notification and on facts it was found that the department's case was made out of statements of 44 witnesses who were ultimately cross-examined by GTC and it was found by the Tribunal that product of the assessee company was correctly classifiable under sub-para 2 of the table in the notification No.11/83 dated 01/03/1983 as amended by notification No.78/86 dated 10/02/1986 and not sub-paragraph 3 as held by the Collector. He pointed out that in fact the flow back of money was found in the case of the assessee in another decision of the CESTAT which issue was earlier not adverted upon by the CESTAT and on appeal by the department, the Hon'ble Supreme Court vide judgment dated 31/07/2008 had remanded the matter back to the Tribunal to decide the same afresh. Pursuant to the remand of the matter by the Hon'ble Supreme Court, CESTAT vide order dated 27/10/2010 reported in (2010)264 ELT 433 has passed the order implicating assessee. He drew our attention to para 17 of the said judgment which reads as under:-

> *"The materials recovered established exclusive control exercised by GTC in the marketing network over the cigarettes manufactured by NETCO and such materials could not be proved to be unworthy being consciously possessed not being alien to the trade. Nothing could be shown to us to prove that the appellants did not make any gain out of the transactions covered by the impugned materials recovered during investigation. The chain of evidence led by Revenue demonstrated that the materials were instrumental to make undue gain of excess sale price and versions of witnesses corroborated such gain. The gains so made were routed through conduits in the shape of bank drafts. The bank Draft slips and chits recovered in the course of search were testimony of the oblique motive of*

appellants to realize sale price over and above MRP declared.

Series of bank drafts were made in the name of fictitious persons to transmit the ill gains to GTC. Active role of GTC in such activities were well established by series of evidence as has been discussed by the learned Adjudicating Authority in his order. It is well known that it is very difficult for Revenue to prove every link in respect of the commission of the offence under the Act by direct evidence. The whole process of evasion consisted different links. The links aided & abetted each other through remote control by GTC.

Thus, the aforesaid decision of CESTAT clearly goes to prove the case of the Revenue and touches upon all aspects of the matter and in fact this judgment has become final, in view of the fact that Assessee Company failed to deposit the Central Excise Duty as ordered by the Hon'ble Supreme Court. Pursuant to that, Hon'ble Delhi High Court vide judgment dated 18/10/2012 in CEAC 18, 21, 22/2011 disposed of the matter. The copies of these decisions were also filed before us. In this Judgment also, Hon'ble High Court has not dealt upon the issue on merits.

32. The allegation against the assessee was that the cigarettes were being sold at higher than the printed price was found to be correct. During the search, statements were recorded in the case of wholesale buyers wherein it was found to be a Pan-India Phenomena that cigarettes were being revalued at higher than the printed price for a given brand. The retailers were supplied cigarettes by the wholesale buyers at the printed price appearing in the invoice of the wholesale dealers and excise price which was

collected from the retailers where mopped-up by them. This has been found in the form of statements of same wholesalers, retailers and all the employees of wholesale buyers recorded by the DRI during the search operations conducted all over the country in 1983 and also during the course of survey and statements recorded u/s.131 by the Department. The wholesale buyers had purchased demand drafts (DDs) in cash in round sums of tens of thousands (but below Rs.50,000/-) mostly in the names of individuals and mostly by giving incomplete addresses of the purchasers of the DDs and by giving fictitious names or vague names like A. Kumar, B. Prasad, etc. and payable mostly in Mumbai, Kolkata and Delhi. Proof that the upcountry wholesale buyers of the Company purchased DDs in cash came by comparing handwritings by the Examiner of Questioned Documents, in the DD purchase application forms of such DDs purchased in cash and the DDs purchased by transfer in the name of GTC Industries Ltd., for making payment of outstanding. This aspect was thoroughly investigated with reference to DDs purchased at Muzaffarpur in Bihar and Gorakhpur in UP, where employees of the wholesale buyers admitted to the fact that they had bought the DDs in cash and that the handwriting in the DD purchase application forms was theirs. Mr. Vinod Kumar Kedia, the manager of the wholesale buyer of the assessee at Muzaffarpur has, in fact admitted that the DDs were purchased from "on money" generated from the sale of cigarettes. In the case of the wholesale buyer at Varanasi, DDs in cash were purchased by the employees of the wholesale buyer of the assessee by giving their actual names and their residential addresses. The Central Excise authorities had independently conducted a search on the wholesale buyer of the assessee at Trivandrum. During the course of that search, Mr. B Pandian, the Manager of the wholesale buyer

admitted that his firm was charging "on money" on sale of cigarettes and that the on money so collected was converted into DDs and remitted to Bombay, Delhi, Sikkim and other places. Investigations conducted by the then Income Tax, Central Circle-II (IX), Bombay, led to identification of DDs admittedly purchased out of "on-money" generated at Trivandrum, being credited into accounts at Bombay. When the accounts to which the DDs, purchased in cash and remitted by the upcountry wholesale distributors, were investigated by learned Assessing Officer, it was found that the accounts stood with fictitious addresses. It was further found that the person operating the account had also operated the account by assuming a fictitious name. In Bombay alone, more than 100 such bank accounts were unearthed. The credit side of all such accounts was made up of DDs deposited for clearing which were coming from all over the country including Gorakhpur, Varanasi, Kanpur, Surat, Baroda, Trivandrum, Guntur, Vijayawada etc., whereas in most cases the debit side showed almost 100% cash withdrawals from most of the accounts. It was not physically possible to investigate all such accounts because of sheer volume. The fact of on-money being sent to fictitious bank account was common to all such places where GTC had a wholesale buyer. On sample basis, learned Assessing Officer selected three places for survey to find out the identity of the remitter of the drafts, namely, Gorakhpur, Varanasi and Muzaffarpur. It was found that there were about six accounts where there were transfer debits in addition to cash withdrawals. In the six accounts where there were transfer debits [one such account being the account standing in the name of H K Patel in Indian Bank. Santa Cruz (W)], it was found that the transfer entries were for purchase of banker’s cheques, Pay Orders. Over 100 such Pay orders were purchased through debits from the

accounts. Except for three Pay Orders, all the remaining Pay Orders were payable to reputed advertisement agencies. When the reputed advertising agencies were contacted to gather information regarding who gave them the Pay Orders and for what purpose, all the advertising agencies confirmed that these were for advertisement work carried out by them for GTC products and the job orders were given to them by Shri Rajiv Ohri, the Advertising manager of GTC. Only at the time of billing, the advertising agencies were asked to make the bill in third party names and the Pay Orders were received against such billings. As far as the remaining three Pay Orders were concerned, these aggregated to Rs.64,000/- (approximately) and were in the names of suppliers of office equipments. The office equipments were supplied to the Methodist Church of India by three vendors. When the Methodist Church of India was contacted to know how they could make payment for the purchase of office equipments through three Pay Orders, they informed that they had their account with the Bank of America, Nariman Point, Mumbai. They had requested the Officer of the Bank of America, handling their account, Mrs. Nirmala Sundaram, to contact some prosperous clients of theirs for a donation so that they could buy the office equipments. Mrs. Nirmala Sundaram will be able to tell as to who gave the Pay Orders. The statement of Mrs. Nirmala Sundaram was recorded u/s. l31 of the Act, in which she stated that she had contacted Mr. Deepak Poddar, the then President-cum-Managing Director of GTC for the donation. Subsequently, on the directions of the Hon'ble ITAT for the A.Y. 1984-1985, GTC was given the opportunity of cross examination of Mrs. Nirmala Sundaram, wherein she confirmed whatever she had stated in her original statement.

33. Similar evidence could be noticed in all other accounts, including that of S. K. Mehta, which reflected identical set of facts and addition was made in relation to assessment year 1985-86.

34. He pointed out that when the Hon'ble ITAT had taken up the assessee's appeal for the assessment year 1984-85, learned counsel of the assessee argued that there was no evidence that drafts allegedly purchased by the Wholesale Buyer of the assessee at Muzaffarpur and at Gorakhpur had actually been credited to the account of H.K. Patel standing in Indian Bank, Santa Cruz (W), from which the Pay Orders used by the Methodist Church of India, for making purchase of office equipments were purchased through transfer debit of the account. This objection of the Counsel was met by the Department by obtaining the certificate from the Manager, Indian Bank, Santa Cruz (W), along with certified copies of the relevant entries in the Banks registers which proved that Drafts, admittedly purchased by employees of WBs of the assessee at Muzaffarpur and Gorakhpur, were actually credited to the account. Thus, at least the account of H.K. Patel gets clearly linked to GTC as their Benami bank account. Once it is proved that the assessee has even one Benami bank account, it clearly means that the books of account maintained by the assessee are not correct and reliable and hence book results have to be rejected and income has to be estimated. This is what the AO has done. He further submitted that the other accounts which the Assessing Officer had examined is that of S.K. Mehta and enquiries done can be found in the Assessment order for the AY 1985-86 in this regard.

35. He further submitted that, the proof that WBs were charging on-money on the sale of cigarettes also comes from a

survey converted into search in the premises of M/s. Sagar India, a WB of the assessee at Muzaffarpur in Bihar, where the then ITO, Central Circle having jurisdiction over the case of GTC was personally present. It is in the form of a chart where rate of charge of on-money for various brands was recovered. The basis of the charge was the difference between the printed price of the lower priced brand and its corresponding higher priced twin. This chart is reproduced in the body of the assessment order at Page B-9 for the A. Yr 1984-1985 and at Page G-7 for the A. Yr 1985-1986. He pointed out that, because of the under-invoicing of cigarettes, the assessee had gross loss from manufacture and sale of cigarettes to the extent that material cost plus manufacturing expenses plus Excise Duty paid itself exceeded the invoiced value of cigarettes by the assessee. On the one hand, the assessee was having book losses from the manufacture and sale of cigarettes, which is its core activity; while on the other hand, it had a huge stock-pile of cash outside books. An analysis of the financial accounts of the assessee-Company has been done in Part-B at Pages B-1 to B-8 of the assessment order for AYr.1985-1986 in order to substantiate this aspect. This being a very unreal situation, the assessee chose to bring in the money generated outside books to its books by showing bogus trading and commission incomes. This has been discussed at length in Part-E, pages E-l to E-45 of the assessment order for the A.Y. 1985-1986.

36. He also drew our attention to statement recorded by the AO of Shri Kaushal Kumar Srivastava and Shri Vinod Kumar Kedia to show that there was a nexus between the bank account of Shri H. K. Patel and the assessee. He submitted that it is proved by the payments made to; (i) M/s. Dimensions; (ii) M/s. Source Marketing and Advertising; (iii) M/s. HK Printers; and (iv) Donation to

Methodist Church in India. Further he pointed out that from enquiries made by the AO it can be proved that:-

i) Business liabilities of the appellant-Company were extinguished by payments made through these bank accounts operated at the instance of the appellant-Company;

ii) Payments to third parties which were to be made by the wholesale Buyers of the appellant-Company were paid by the appellant-Company;

iii) Payments on behalf of several unaccounted wholesale buyers located across India made from a single bank account;

iv) Recipients of payments claiming that they received payments from the appellant-Company;

v) Donation to Methodist Church by the appellant-Company from the said account of Shri H.K. Patel;

vi) Objection raised by the appellant-Company and clarification of the learned Assessing Officer on certain aspects of mis-match of amounts. (Refer Page B22 of the assessment order);

vii) Investment in share capital of M/s Century Hire Purchase Pvt. Ltd. and discussion of this issue is in Paras 51 to 61 at Pages 23 to 29 of the order of learned CIT (Appeals);

viii) Evidence that bank accounts in the names of A.K & Co, C.K & Co, K.K & Co and V.K & Co belong to one single

person and details of transfer debits by way of pay orders from the bank account of C.K. & Co on 21.4.1983, 26.4.1983 and 28.4.1983 and transfer debits by way of pay orders from the bank account of K.K. & Co on 26.4.1983, 29.4.1983 and 3.5.1983 (Refer Page B25 and B26 of the assessment order); and

ix) Transactions relating to M/s Everest Advertising Pvt. Ltd. and Shilpa Arts & Colour Graphics Ltd. (Refer Paras 36 to 42 at Pages B27 to B33 of the assessment order).

37. On the issue of asessee's defence on the allegation of violation of principles of natural justice, he submitted that this issue has long been settled by the Hon'ble Tribunal while hearing the assessee's appeal in the A.Y.1984-85 and there is a categorical finding that where the statement of witnesses is backed by documentary evidence, then witness is not required to be cross-examined. Only in such a situation where the demand of witness is not backed by any documentary evidence or even where statement is backed by some documentary evidence, but the statement is capable of ambiguous interpretation there the assessee can be set to be handicapped by absence of cross examination. The Tribunal identified around 11 witnesses which were required to be cross-examined and directed CIT (A) to cause cross examination of these witnesses and submit a remand report. The said direction of the Hon'ble Tribunal was followed and the witness whose cross examination were directed to be given was allowed to be cross-examined by the assessee and CIT (A) submitted the report to the Tribunal. After remand report was submitted before the Tribunal, the Tribunal was pleased to hold that there was no denial of principles of natural justice.

38. Regarding other allegation of the learned Counsel that there are certain evidences which have been relied upon by the AO in the assessment order and not confronted to the assessee, is also not correct, because the department has given all the evidences which has been utilised in the assessment order. Even otherwise also, the evidences which assessee claims were not confronted to the assessee before passing the Assessment Order are to be entirely ignored, even then, based on other sufficient materials, the conclusion drawn by the AO and the basis of quantification of undisclosed income remains unaffected. The basis for rejection of book result by the AO is also justified for the reasons that the existence of bank accounts outside books. That the account of H. K. Patel in Indian Bank, Santa Cruz (W) is a Benami bank account of the assessee is proved beyond reasonable doubt. Once the department has proved one such account, then there is very high preponderance of probability that five other accounts through which transfer debits for the purchase of Pay Orders/Bankers Cheques have been made in the names of reputed advertising agencies are also the Benami accounts of the assessee. There is no need to demonstrate that every other account, which the Department alleges is a Benami account of the assessee to be actually Benami because quantification of total income of the assessee is not based on credit entries to these accounts.

39. Mr. Dave contended that there is strong evidence to show that part of the "on money" has been brought into the books by showing unreal commission and trading income. Here, some of the transactions have been proved beyond reasonable doubt that these are not genuine. These findings are contained in Part-E, pages E-1 to E-45 of the assessment order for the A.Y. 1985-86. It may also be mentioned that in the case of commission having been received by GTC, for liaison work connected with the export of Seven Seas Cod

Liver oil to Nigeria by M/s Universal Generics Ltd., M/S Pohoomal Kevalram Sons Exports Pvt. Ltd., 1 then assessed in Companies Circle III Bombay J the Assessing Officer made disallowances in this regard after making necessary enquiries.

40. The basis of estimation of income by the AO is to multiply the volume of sales of a lower priced brand with the differential price of its higher priced brand. This gives the gross generation of on-money owing to the twin branding mechanism. From this gross amount, a deduction of 10% was given as an estimated share of wholesale buyers who aided and abated in the generation of collection of on-money. After the deduction of 10%, further weightage was given for the on-money brought into the books in the guise of income in the form of bogus trading and commission receipts. Only the net amount, after giving credit to the bogus trading and commission income has been taxed. Thus, the addition as made by the AO and confirmed by the CIT (A) should be sustained.

41. We have carefully considered the entire gamut of facts, rival contentions raised by the parties before us and also the material referred to during the course of the hearing. In our operating part of this order, we have already discussed as to how the case has travelled up to this stage and how the Special Bench was constituted for adjudicating the issues arising from the impugned orders. One of the main planks of the argument put forth by the assessee before us is violation of natural justice and that there are various materials and statements for which assessee was never confronted with or cross examination was not allowed for all the witnesses. On this aspect, assessee's counsel was apprised that this matter had already settled by this Special Bench in the same case vide order dated 30/05/2012, and as stated in the earlier part, it has attained

finality. However, the ld. Counsel before us has tried to re-agitate the same issue on similar point on the pretext that, now the Hon'ble Jurisdictional High Court vide its judgment and order dated 08/7/2016 in Income tax reference No.266 of 1999, which was against the order of the Tribunal dated 09/02/1989 has given the mandate to examine all the aspects which has been raised in the reference. In our humble opinion, the Hon'ble High Court first of all has noted that both the parties have arrived at consensus not to press the present reference made u/s 256 (1) subject to certain directions as agreed by the parties which was; *firstly,* it is not necessary to answer the questions framed under reference for the opinion of their Lordships by the Tribunal; *secondly,* the Tribunal has already besieged with the appeal of the assessee for the A.Y. 1984-85 being ITA No.5996/1993 (the present appeal); *thirdly,* the Tribunal will decide the appeal on its own merit without being influenced by the earlier order dated 09/02/1989; *fourthly,* all the contentions of the parties including those arising in this reference are expressly kept open to be urged before the Tribunal; and *lastly,* taking into account the fact that appeal is old i.e., pertaining to the year 1993, the Tribunal should dispose of this appeal as expeditiously as possible and preferably within a period of six months. Thus, the mandate of the Hon'ble High Court is that, this Tribunal should decide the entire appeal on merits. So far as the issue of violation of principles of Natural Justice is concerned, the same has been duly complied with in terms of directions contained in the earlier orders of the Tribunal which has been finally settled in several rounds of litigation before this Special Bench. As per the direction of the Tribunal, finally, the Revenue was required to provide certain material and cross-examination of certain witnesses. In compliance thereof, the Revenue has provided the opportunity to cross-examine in the case of five persons as per the list given by the

assessee. Thus, we are rejecting the similar contention raked up again before us. We are now proceeding to decide the appeal on merits, on the basis of material and evidence on record and on the basis of evidences discussed in the impugned orders as well as the arguments placed by the parties before us.

42. To briefly recapitulate, the assessee is a public limited company which is engaged in the manufacturing of cigarettes which is an excisable commodity and has to comply with the requirements of various provisions of excise laws, keeping of books of accounts, etc.. It has tobacco processing units at Guntur and Hyderabad and two factories situated at Mumbai and Baroda. In addition, assessee has also outsourced the manufacturing activity to number of job working units across the country. The distribution and sale of cigarettes is made through chain of wholesale buyers (also referred to as super buyers or dealers), retail outlets and salesmen. Assessee was manufacturing mostly Panama brand of Cigarettes under various categories like, “Panama Prints Filtered Kings”, “Panama Standard”, “Panama Filtered Regular”, “Panama Premium”, “Panama Virginia”, “Golden Gold Flakes”. The cigarettes under these brands have different MRPs which are printed on the packets on which the excise duty was leviable. The case of the Revenue is that the assessee was selling the cigarettes at a price higher than the declared/printed MRP and thus, generating cash premium/ on-money in the process. Such a premise was based on series of searches and investigation conducted by Directorate of Revenue Intelligence (Central Excise) during the period September 1982 and during January 1986 at the various offices of the assessee as well as wholesale buyers, small retailers etc., throughout the country. The material gathered by the DRI was the main source of material for drawing the inference against the assessee and also the premise on

which the investigations by the department was started and assessments for the generation of premium amount was continued to be made year after year. The main allegation of the Revenue is that the assessee through deceptive packet designs and brand name was generating premium of certain sought after brands in the market and this modus operandi has been termed as "Twin Branding Mechanism". The premium, that is, the price over and above the MRP is first collected at retail level and from retailers to wholesale buyers and from wholesale buyers to some fictitious bank accounts which again has been alleged that it was to provide benefit to the assessee in discharging certain business liabilities and further alleging that assessee had direct or indirect control over such bank accounts. From the orders of the CESTAT as referred to by both the parties, it seems that the charge of the Central Excise Authorities in the show-cause notices had been that the extra money over and above the prices shown in the invoices was being collected in respect of sale of various brands of cigarettes and extra amount collected by the salesmen were passed on to the retailers and wholesale buyers and subsequently in cash to the super buyers and these super buyers were paying for advertisement of GTC products which was never reimbursed. In certain cases, there has been allegation that there was a flow back of such premium money to GTC mostly in the form of difference in the grades of interest under the security deposit scheme as well as by making the wholesale buyers and dealers bear the advertisement expenses of GTC without any reimbursements. There are another set of adjudications and orders by CESTAT, wherein a specific finding has been given that such flow back of on-money has never been passed on to GTC as there is no direct material as well as any statement of wholesale buyers recorded by DRI to point out that flow back of money can relate back to GTC, especially when most of the witnesses have rebutted their

statements. How the on-money has been generated in the form of premium through Twin Branding Mechanism has been elaborately explained by Mr. Girish Dave before us, which has been discussed in our foregoing paragraphs. It has been pointed out that earlier basis of charge of excise duty of cigarettes was *ad valorem* on assessable value, but specific rate based levy of excise duty on the printed price on the packet was revised with effect from the Budget of 1983, from thereon excise duty was leviable on MRP price. Since assessee was following accounting period of June ending for the AY 1984-85, therefore, the basis of excise duty on ad valorem basis was for eight months, that is, prior to the basis of MRP after which the twin branding mechanism/concept was found. Under the twin branding mechanism the allegation of the revenue has been that, the assessee which was selling a particular brand of cigarette, say at Rs.1.25 per packet and later on the assessee introduced low brand cigarette say for 80 paise per packet, however due to deceptive design of the packet, it look similar to the higher brand packet and was sold to the customers at a price of 1.25 per packet. Thus, the difference amount is the premium which has flown back to the assessee. The complete figure of sales, the price, duty paid, net sales and premium amount added by the AO in the impugned assessment years before us are reproduced hereunder:-

Particulars	**AY 1984-85 (Rs. In Lacs)**	**AY 1985-86 (Rs. In Lacs)**	**AY 1986-87 (Rs. In Lacs)**
Sales	15,333.77	16,130.18	19,090.84
Less: Excise Duty	10,453.71	9,382.23	9,838.23
Net Sales	4880.06	6747.95	9252.61
Vis-a- Vis Premium added in Assessment	2136.75	2620.51	5098.70

43. Now the core issue before us is, whether this amount of premium generated through alleged twin branding mechanism has

flown back to the assessee or not; or is there any material to show that the assessee was the sole beneficiary of the entire amount or part of the amount. During the searches conducted by DRI, it was found that as many as 24 bank accounts were operational where drafts were remitted by the wholesale buyers from all across the country. Some of the bank accounts had been taken note of by the Assessing Officer on sample basis, based on which he has carried out his own set of enquiries. The various statements and the evidences which has been relied upon by the Revenue to make the addition in the hands of the assessee company as well as the rebuttal made by the assessee qua those statements / evidences are discussed in brief:-

(I) Bogus Bank Accounts in the name of H.K. Patel and S.K. Mehta:-

As discussed in our earlier part of the order, two bank accounts were picked up for scrutiny, that is, Account of Mr. H.K. Patel, C/A.No.1391; and Shri S.K. Mehta, S/B. No.8953. These bank accounts were found to be standing in the name of fictitious persons because at the given addresses no such persons were found and even there was discrepancy in account opening forms, signatures etc. In these bank accounts various drafts were deposited which were coming from all across the country and from these bank accounts there were certain out goings also. Though Assessing Officer admitted that 100% verification was not feasible to link all the drafts but he came to the conclusion that these drafts were originated from the places where the assessee had wholesale buyers, based on material brought on record by DRI and through his own set of enquiries. In this manner presumption was drawn that assessee had linkage with these deposits in the bank accounts. By way of rebuttal, the assessee's case before us had

been that, *firstly,* there is no direct or indirect evidence of material or statement to link the flow of drafts from wholesale buyers to the bank accounts and from bank accounts to the coffers of the assessee company or to any of its employees. Learned CIT (A) in his original order has specifically held that he was unable to draw any conclusion either about the ownership or the control which the assessee might have over the account and though the funds in which two accounts are traceable to wholesale buyers which have been used to pay for the advertisement expenses or for meeting the advertisement expenses of the assessee's cigarette and against this finding, no second appeal has been filed by the Revenue.

On the other hand, learned Special Counsel stated that the AO's observations or his finding did not rest upon the entries in the bank accounts alone as he traced back certain bank drafts to Gorakhpur, Varanasi and Muzaffarpur. Accordingly, the surveys were conducted by the department on the premise of wholesale buyers in these three places, which are being discussed herein below:-

(II) Survey at Gorakhpur and Statement of Shri Kaushal Kumar Srivastava:-

During the course of survey at the office premise of M/s. Fog Fag (WB of GTC) statement of Sales Manager, Shri Kaushal Kumar Srivastava has been recorded wherein he admitted that he had purchased drafts in cash in the name of H.K. Patel / S.K. Mehta on the instruction of his employer who provided the cash. By way of rebuttal, the learned Counsel had pointed out that, nowhere in his entire statement he has implicated GTC nor there is iota of any material or evidence found during survey to show that either the drafts sent to these bank accounts were meant for GTC or was

done as per the instruction or behest of any higher officials of the GTC company. He had categorically stated that the entire information or knowledge was with his employer. Despite the statement of the Sales Manager, the department did not choose to take any statement or searched the owner of M/s. Fog Fag. Once there is no statement of the employer, then how can any adverse conclusion be drawn even remotely that assessee was responsible for preparation of drafts and was involved in sending the same to the bogus bank accounts. If at all then it should have been made in the hands of wholesale buyer who collected the premium.

III. Survey at Muzaffarpur- M/s. Sagar India (Wholesale Buyer)

In the survey conducted on the wholesale buyer, M/s. Sagar India, statement of employee, Shri Shiv Kumar and Shri Vinod Kumar Kedia in their statement admitted that premium was collected, however, he was unable to confirm about the final destination of the drafts or that it was sent at behest of GTC. A chart was found on the said premise indicating the rate of premium charged. By way of rebuttal, learned Counsel before us had stated that again the employer, i.e., wholesale buyer was not questioned even though the survey was converted into search. What prevented the department to ask the wholesale buyer to get the exact version of collection of premium and whether it was done on the instruction of GTC or not or the money so collected was meant for the benefit of GTC. Further, the search was conducted on 25/11/1986, i.e., post 02/09/1985, when the twin branding had stopped all over the country. The document which is un-dated and uncorroborated then it has to be presumed that same has been maintained for the current selling rate and it cannot relate back to the year 1984-85. The very factum that premium was

charged by wholesale buyer even after 02/09/1985 and there were no debit or credit entries in the alleged bogus bank accounts, this makes it clear that premium charged if any was by wholesale buyers or retailer and has no link with the assessee. In his statement, Mr. Kedia repeatedly stated that this on-money was charged from the year 1985 even though AO asked all kinds of questions to extract the truth by asking same question in different forms. A follow-up survey was also conducted at Darbhanga in one of the Banks account where it was found out that wholesale buyer at Darbhanga, M/s. Royal distributors had also purchased drafts in the name of same Calcutta parties to whom Muzaffarpur wholesale buyers had sent the same draft. However, how the remittance to Kolkata parties can be linked to GTC has not been brought on record or any material indicating the same was found. At the time of recording of statement, Mr. Kedia also denied that the chart was in his hand writing and he was not aware as to how and where it had come from; therefore, no cognizance of said chart can be drawn specifically against the assessee. Even during the survey in bank accounts of Varanasi of the wholesale buyers nothing against GTC was found.

IV. Shri Ashok Tyagi, M/s. Dimensions:-

From the debit entries of H.K. Patel's accounts, it was found that the payment was made to M/s. Dimensions which was a proprietary concern of Mr. Ashok Tyagi, the film producer who was asked to produce radio jingles. In his statement, he admitted that he has received payment for producing radio jingles from the Executive of GTC for producing the radio jingles. In his letter written to the AO, he mentioned that payment was received from Shri Rajiv Ohri who was one of the then Executive of GTC. In this case, Cross examination was allowed to the assessee.

Learned Counsel submitted that during the course of cross examination, he stated that the words, "*For the work done for GTC"* were incorporated by hand at the instance of ITO/ Inspector. Another important thing he pointed out that the letter was typed in his portable typewriter at the office premises of ITO and when he was confronted with this discrepancy he was unable to clarify. Thus, all these circumstances lead to a conclusion that the testimony of this witnesses cannot be relied upon. Even the learned CIT (A) has tried to scuttle down the said contention of the assessee on the ground that during the cross-examination leading question should not be asked which is contrary to the law. Once it is found that testimony was done at the behest of income tax official, then no adverse inference should be drawn against the assessee. He also admitted that drafts were received on behalf of the distributors of the GTC. Thus, again, there is no linkage that draft was given by the GTC and the only adverse inference which was drawn against assessee is that the assessee or one of the officials have asked him to produce the jingles but that does not implicate that the assessee had control over the bank account from where the drafts were sent.

V. Source Marketing Advertisers – V. Shanta Kumar:-

On examination of V. Shanta Kumar, the Assessing Officer found that payment were made through H.K. Patel for advertisement and on this basis he held that GTC was conducting publicity and no wholesale buyer ever contacted advertiser. The bills in the name of wholesale buyers were either handed over to the GTC or some time directly to the wholesale buyers. On this piece of material / statement, learned Counsel submitted that all along the assessee had been contending that role of GTC if at all, was to coordinate advertisement and publicity and was merely

acting as a Post Office and this fact has been confirmed by Mr. V. Shanta Kumar. During the cross examination, he has categorically stated that generally the advertisements are done centrally for all regional and India level and publicity and advertisement bills were never raised on GTC but on the WBs. This goes to prove that advertisement expenses were borne by the wholesale buyers and not by GTC. The relevant statements in this regard are reproduced here under:-

> *Immediately on approval of either media cost or production cost or both the client would inform us as to the names of the parties that we were to bill. On completion of these jobs, these parties would be billed accordingly. Initially these bills would be submitted to Golden Tobacco for onward dispatch to the various parties. Subsequently we were requested by Golden Tobacco to send these bills directly to the parties concerned.*

Not only that, the learned Counsel has pointed out that during the course of survey at Gorakhpur, AO himself found that drafts purchased in the name of M/s. Source Marketing and Advertisement was debited as advertisement expenses in the books of M/s. Fog Fag. Thus, when the buyer has admitted paying the drafts and receiver admitting receiving payment, it only goes to support the case of the assessee that it was only coordinating between advertisers and wholesale buyers. Further, there were certain other documents which were seized from the office premise of GTC wherein it was found that GTC was undertaking the centralized advertisement and sales promotion campaign and the burden of expenditure towards advertisement and promotion was being shifted to the wholesale buyers. One Mr. Raj Kumar Tharad, wholesale buyer for Bombay in his statement dated 05/10/1982 before DRI named various agencies doing advertisement work like,

Everest Advertising, Source Advertisement, Chari Publicity, Oriental Advertising and Yogesh Publicity through whom advertisement was done. He had informed that he was personally handling advertisement with the help of Mr. Rajiv Ohri and one Mr. Dev, employees of GTC and that publicity done through Everest Advertising and Source Advertisement were discussed by representative of GTC for outdoor publicity which was planned by him with others. He has categorically stated that payment for advertisement done through these agencies were done by him and that these payments were out of sale proceeds of cigarettes and that bills were sometimes received directly and sometimes through GTC. He was very specific in stating that the advertisements in Mumbai and other parts of the Country were done primarily to popularise the products of GTC and this was done by the wholesale buyers under coordination and advice of GTC. Thus, from this information and material, it is quite apparent that the financial burden for incurring the advertisement expenses lay wholly upon the wholesale buyers and assessee merely acted as a coordinating entity.

VI. H.K. Printers:-

This agency was printing posters for advertising and like Source Marketing they had also stated that bills were handed over to GTC for passing it onwards to WBs which only goes to corroborate the stand of the assessee.

VII. Uma Maheshwari / I.C. Jain (Wholesale Buyer)

In this case, the AO found that some of the bills of Source Marketing were found entered in the books and some were not. Learned Counsel pointed out that on verification, it was found that these bills were sent to another wholesale buyer and there was

some discrepancy in the posting of entries in the accounts, however, no adverse inference can be drawn against the assessee or to draw any inference that the entire accounts of the wholesale buyer is false.

VIII Statement of Kishore Chitlangia- Sales Manager

The said person was one of the employees of the wholesale buyer who had categorically admitted that premium collection was done at the direction of employer. In the cross examination done by the assessee, he admitted that he never directly dealt with GTC nor any kind of cash was handed over to the GTC.

IX Haji Ali Statement and Cross Examination:-

He was Cycle Sales Man who has admitted to collecting cash and has admitted before the DRI that this cash collection was in the form of premium. By way of rebuttal, Learned Counsel submitted that he admitted that he deliberately stated untruth before the DRI in his earlier statement for fear of income tax action against him and therefore, such an untruthful statement should be discarded. In any case, he has stated that he dealt only with the wholesale buyer and he has not mentioned anything about GTC.

X Church Donation / Ms. Nirmala Sundaram

One of the debit entries in the alleged bogus bank accounts was the payment of donation by way of bank drafts to Methodist Church of India. When contacted with the Church, it was informed that donations were received on the recommendation of Ms. Niramala Sundaram, an Officer in Bank of America with which GTC had an account. He had also stated that these drafts were handed over to them from time to time by Ms. Nirmala Sundaram.

In her initial statement she has confirmed that she has arranged for the donations and drafts were given by the GTC on her request made to one, Mr. Deepak Poddar, an executive of the company capable of taking such decision. Based on this statement, it was inferred that assessee had control on bank accounts for making the payment and therefore, there is a linkage between the assessee and the alleged bogus bank accounts. Later on, when cross examination was allowed to the assessee, then during her cross examination, she was specifically asked whether any charitable institution used to come and asked her about donation, she said several persons used to come to the bank with such kind of request, however, she does not remember the name of the person who brought these drafts and further she had no idea of the bank account from where bank cheques were issued and she had also admitted that there is no evidence or material that drafts were given by GTC, but she vaguely remembers that drafts for donation was arranged by GTC. Learned Counsel further pointed out that later on when Mr. Deepak's Poddar statements was recorded on 01/02/88, he denied having received any request for donation to any Church. Various other discrepancies have also been pointed out before us in her statement which we do not feel relevant to discuss here. Learned Counsel further submitted that, even if it is to be presumed that some donation was given to Church from these bank accounts then also it cannot be implicated that the entire fictitious bank accounts belong to the assessee or assessee had any control over the bank accounts. It only leads to an inference that there could be possibility that some GTC Officials must have requested wholesale buyer to give donation to the Church which may have flown from these bank accounts. Simply because donation has flown from this bank account on behest of some GTC official, it does not mean bank account belongs to the

assessee and thereby all the entries therein pertains to the assessee.

XI. Everest Advertising:

In this case, it was found that demand drafts were received from various wholesale buyers and the officials of GTC alone were contacting this agency. It has been pointed out before us that this agency was doing advertisement for GTC since 1975, i.e., much before the present owners (Dalmia's) had taken over the business. The letter written by this agency to ITO which has been referred in the Assessment Order makes it clear that right from 1975, instructions for release of advertisement were given by the GTC and there was no direct contact with the wholesale buyers. Party wise payments in the name of wholesale buyers were received through GTC.

44. Another important aspect pointed out by the Ld. Counsel before us is that, collection of premium is based on certain statements taken by the DRI and later on it is also a matter of record that more than 40 witnesses had controverted or denied their statements before DRI. That is why CESTAT had held that these statements are not trustworthy. One of the statements of wholesale buyer, Mr. B.K.Sitani, Managing Director of M/s Sitani Trading Company Pvt. Ltd., a Wholesale Buyer denied charging any premium on sale of cigarettes and this fact has been noted by the AO in the Assessment order for the AY 1985-86. AO had rejected the said statement on the ground that no Wholesale buyer being privy to charging of premium would speak truth. Further none of the bank accounts had any evidence to link with GTC, which fact has been admitted by learned CIT (A) in the original order. In the case of assessee at the most it can be inferred that

there was a concept of centralized publicity and the expenses were borne by the wholesale buyers. This plea of the assessee had been rejected on the ground that GTC had failed to produce any documentary evidence which is contrary to the material found and accepted in the assessment orders for the AYs 1982-83 and 1983-84, wherein it has been stated that "*From documents seized from the office premises of GTC in Bombay & Delhi, it has been found that GTC was undertaking a centralized advertising and sales promotion campaign and only the burden of expenditure towards Advertisement & Promotion was being shifted to the wholesale buyers".* The contention of the assessee all through had been that it was only co-coordinating the advertisements and promotional expenses. Once the burden of expenses was upon the wholesale buyers which have been confirmed in various statements of key witnesses before the DRI, then burden cannot be shifted to the assessee. The statement of Mr. Raj Kumar Tharad (wholesale buyer for Bombay) had admitted to the same, which cannot be set aside. Thus, even if the advertising expenses have been incurred through bogus/fictitious bank accounts, assessee cannot be held to be beneficiary or benami owner of such bank accounts.

45. By and large with the assistance from both the parties the relevant evidences, statements and materials which has been referred and relied upon by the AO as well as by the Ld. CIT(A) have been discussed by us and certain other details as discussed in the impugned orders are not being dealt with, because admittedly no implication or inference has been drawn for making the addition made by the AO or confirmed by Ld. CIT(A). From the materials and evidences as discussed above, following inference can be deduced:-

- *Firstly,* some kind of premium was generated under alleged 'twin branding mechanism', that is, price higher than the declared/printed MRP on the sale of various brands of cigarettes was collected by small retailers from customers who were unknowingly paying extra money for lower brand cigarette presuming to be higher brand due to deceptive packet designs. However, to presume that for every single sales made across the country for every packet or loose cigarette, necessarily extra money was charged from the customers by all the retailers/ pan-wallas would be an implausible situation and then again to consider that the entire extra money so collected without any pilferage in between for the purpose of estimation and addition in the hands of assessee would be too far-fetched.

- *Secondly,* from the detail discussion in the impugned orders based on enquiries and information it can be inferred that the alleged premium to a large extent was collected, (that is, extra money over and above the MRP price) through a chain of salesmen and pan-wallas which was passed on to the retailers and from retailers to wholesale buyers/dealers. From the WBs cash premium collected through the said chain is then converted into drafts which has been sent to fictitious bank accounts in Mumbai and elsewhere. These bank accounts are in the benami names where this alleged money so collected is deposited. However, to draw inference that universally all the wholesale buyers who collected the premium amount had sent the entire collection of premium to these bank accounts which was wholly and exclusively under the control of the GTC is not proved conclusively. The evidences and material which has been discussed herein

above only indicate or highlight that in some clandestine manner; the wholesale buyers have sent the money to the fictitious bank accounts standing in benami names, but to say that it was meant only for discharging the liability or benefit of GTC is again sans any material having live link nexus to implicate GTC.

- *Thirdly,* from the careful analysis of the impugned assessment orders and the material as discussed above, it can be seen that, nowhere it has been brought on record that any wholesale buyer was confronted or has admitted that either the GTC or its officials were in the helm of such collection of premium; or these benami bank accounts were either under direct or indirect control of GTC; or they were depositing the DDs on the direction or behest of GTC; or GTC was operating these bank accounts. No concrete material has been brought on record to suggest that Assessee Company or its employees were operating said bank accounts or the account holders were introduced by anyone from the assessee company. Nowhere has it been ascertained by the AO that the GTC or its employees had the actual control of the said benami bank accounts or the amount deposited in said bank accounts has gone to the coffers of the assessee. Various investigations/searches carried out by the DRI as well as survey/searches conducted by the Income Tax Department, not a single material has been unearthed or any statement has been given that GTC company had control over the premium amount generated all over the country.

- *Fourthly,* the material and evidences gathered by the Revenue does show that the money deposited in the Benami accounts were used in post manufacturing expenses including advertisement of the brands and products of GTC. Transaction of some few lakhs of rupees have also been found to be undertaken from these bank accounts from where payment to certain advertising agencies has been made. On this information it can be presumed that advertising expenses do have been incurred from these bank accounts. However, merely because the advertisement expenses have been incurred from Benami bank accounts, can it be held that the said bank accounts belong to the assessee and therefore, can lead to an inference that entire premium collected all over the country is the undisclosed income of the assessee. As stated earlier, there has to be some clinching or direct evidences nailing the assessee that the money from these bank accounts had either flown back in the books of the assessee or it has come into its account in some form or the other. If there is a huge generation of cash all across the country then there has to be some live link material that it has gone into the coffers of the assessee company.

- *Fifthly,* the statements of various employees of wholesale buyers only go to show that certain amount of premium was collected and draft was prepared on the direction of their employers, i.e., wholesale buyers and the drafts were sent to these fictitious accounts; however, none of the employee/s have even uttered the name of GTC or its employee, that for collecting the premium amount and sending it to the fictitious bank accounts there was some role of GTC or was

done at the behest of GTC. *Albeit,* these employees have taken the name of the wholesale buyers in whose directions they were collecting the premium amount. Despite their admissions the Revenue did not proceed further to confront the wholesale buyers to ascertain the truth, whether all these collections were done at the direction of GTC or every transaction was under the control of GTC and these wholesale buyers are merely a conduit.

- *Lastly,* the statements and materials relating to payment of advertisement expenses only goes to show that the GTC acted more like a central/coordinating agency which guided the nature and content of the advertisement and burden/liability of such expenses were borne out by the wholesale buyers. This is evident from the material collected from Source Marketing, H.K. Printers, Raj Kumar Tharad etc. All these persons have categorically deposed that though the advertisement and radio jingles were done at the behest of GTC but bills were sent to wholesale buyers who borne the expenses and some of WBS have even showed it in their books of accounts. Thus, Assessee Company may have the control over the contents of advertisement at all India level but there is no material on record to prove that it was the liability of the assessee to incur such expenditure. Even if it is remotely accepted that these fictitious bank accounts were opened for incurring the advertisement expenses, but to hold that this was the liability only of the assessee is farfetched sans any direct material or evidence on record. Though the Assessing Officer has very diligently carried out enquiries all across the country in various assessment years however, he could not collect any information or material

that advertisement expenses were directly borne by the assessee or the assessee had full control of the bank accounts or these bank accounts are benami of assessee. All his enquiries only prove that premium money was collected on sale of cigarettes which found its way through series of chains to fictitious bank accounts.

46. In situations like this case, one may fall into realm of 'preponderance of probability' where there are many probable factors, some in favour of the assessee and some may go against the assessee. But the probable factors have to be weighed on material facts so collected. Here in this case the material facts strongly indicate a probability that the wholesale buyers had collected the premium money for spending it on advertisement and other expenses and it was their liability as per their mutual understanding with the aseessee. Another very strong probable factor is that the entire scheme of 'twin branding' and collection of premium was so designed that assessee company need not incur advertisement expenses and the responsibility for sales promotion and advertisement lies wholly upon wholesale buyers who will borne out these expenses from alleged collection of premium. The probable factors could have gone against the assessee only if there would have been some evidence found from several searches either conducted by DRI or by the department that Assessee Company was beneficiary of any such accounts. At least something would have been unearthed from such global level investigation by two Central Government authorities. In case of certain donations given to a Church, originating through these benami bank accounts on the behest of one of the employees of the assessee company, does not implicate that GTC as a corporate entity was having the control of these bank accounts completely. Without going into the

authenticity and veracity of the statements of the witnesses Smt. Nirmala Sundaram, we are of the opinion that this one incident of donation through bank accounts at the direction of one of the employee of the Company does not implicate that the entire premium collected all throughout the country and deposited in Benami bank accounts actually belongs to the assessee company or the assessee company had direct control on these bank accounts. Ultimately, the entire case of the revenue hinges upon the presumption that assessee is bound to have some large share in so called secret money in the form of premium and its circulation. However, this presumption or suspicion how strong it may appear to be true, but needs to be corroborated by some evidence to establish a link that GTC actually had some kind of a share in such secret money. It is quite a trite law that suspicion how so ever strong may be but cannot be the basis of addition except for some material evidence on record. The theory of 'preponderance of probability' is applied to weigh the evidences of either side and draw a conclusion in favour of a party which has more favourable factors in his side. The conclusions have to be drawn on the basis of certain admitted facts and materials and not on the basis of presumption of facts that might go against assessee. Once nothing has been proved against the assessee with aid of any direct material especially when various rounds of investigation have been carried out, then nothing can be implicated against the assessee.

47. Both the parties before us have relied upon decisions of CESTAT. One set of decisions have been cited by the learned Special Counsel wherein there is a finding that flow back of money has gone into the coffers of the assessee and other set of judgments relied upon the by the assessee where it has been

found that there is no material on record to establish that there were direct or indirect flow back from super buyers to the assessee. Whereas the decision relied upon by the learned Special Counsel which has been stated by him has been confirmed by the Hon'ble Supreme Court and High Court (which has referred to above in the part of our order dealing with his argument), it is seen that the judgments of the Hon'ble Supreme Court or the High Court whereby one of the orders of the CESTAT dated 27/10/2010 has been confirmed, is not on merits, *albeit,* assessee's appeal has been dismissed on technical grounds of non-deposit of fees. On the contrary before us, learned Counsel has referred to a judgment of Hon'ble Supreme Court in the case of **M/s. ITC Ltd., vs. CCE** (supra), wherein the dispute related to excise duty payable by ITC for the period 1983-87 on the cigarettes manufactured by it. While interpreting the notification of 1983 wherein the concept for levy of excise duty was brought with reference to retail sale price of cigarettes instead of wholesale price at the time at which the manufacturer sold cigarettes at the time and place of the removal under section 4. According to the assessee the printed price of each cigarette company was in accordance with the "Standards Weights & Measures Act 1976" and "Packaged Commodities Rules, 1977". The assessee had paid the excise duty on the basis of MRP which was exclusive of local taxes printed by the assessee on each cigarette packet. Like in the case of GTC, extensive surveys were carried out by Central Excise Officers and DRI at various premises of the assessee including factories, branch offices as well as the premises of wholesale dealers all across the country. Based on these searches a show cause notice was prepared revealing that ITC consciously and deliberately ensured that actual retail sale price of these cigarettes were higher than the declared and printed sale price and the assessee had been controlling the margin /

prices of wholesale dealers, secondly wholesale dealers and retailers and they have been fixing the margins and varying the same to suit their convenience and communicate such margins/ trade prices in a clandestine manner after the changes made in the Budge of 1983. Assessee drastically reduced the margins available to the wholesale dealers. Secondly, wholesale dealers and retailers at the same time increased their sale price and sale realization and the margins of retailers were also reduced. The assessee was alleged to unofficially fix the effective prices being the actual price of its cigarette and these effective prices were generally higher than the printed declared price and therefore, assessee had deliberately printed false price on the packets that is, it was taking more than the printed price. This exactly is the allegation here also where assessee has been alleged to twin branding pricing mechanism. On these facts and background, the Hon'ble Apex Court after detailed discussion and analysis had made a very important observation which for the ready reference reproduced hereunder:-

> *"It is this single retail price which has to be printed on the package. If one were to accept the High Court's prima facie view, the printed MRP should reflect the actual price at which the particular kind of cigarette is sold throughout the country. The patent impossibility of this was acknowledged by the Tribunal which held that the actual price at which the cigarettes were sold could not "lawfully or logically" be the printed MRP* ***because "the manufacturer has limited or little control over the actions of the retailers" who are, in the case of the appellant, "about a million in number"; that the appellant could not be held responsible for "the***

tendency of the retailers to charge higher than the printed price so as to secure larger margin" and that different prices may be actually charged for the same brand all over the country. Therefore, the Tribunal held that the printed MRP should have been the "reasonable price" at which the cigarettes could be sold*. This led the Tribunal and the adjudicating authority to go into an elaborate exercise to determine what should be that single reasonable price for the entire country which should have been declared and printed by the appellant on the packages.*

In our opinion the outcome of this would be equally illogical. It envisages an excise officer in one part of the country determining what would be the reasonable market price throughout the country for that particular brand, an exercise which the Tribunal itself concede would require the examination of the cost data and market considerations and would be a "very complicated and time consuming impractical exercise which was rightly not provided for". And yet according to the Tribunal's and the Revenue's interpretation of the notification, the Excise Officer would have had to do just that. Apart from the patent impracticability of the matter, the question whether the price so fixed by the Excise authority is 'reasonable' or not would itself be justiciable with the consequent blockage of revenue in the quagmire of litigation. That is precisely what the Notification had sought to avoid.

The certainty of specific rates which was sought to be achieved by the notification has been undone by the adjudicating authority and the Tribunal. The notification

had introduced a system for levy of excise duty on an experimental basis. If the experiment was a failure for whatever reason, it was open to the respondents to do away with it and replace the system by some other as it did in 1987. But as long as the notification stood, it had to be given effect to. In the view we have taken, there is no need to go into other questions debated before us."

48. The ratio and principle laid down by this judgment of Hon'ble Apex Court was followed by the CESTAT Delhi in the case of the (GTC) Assessee Company reported in 2006 TIOL 57, wherein the Hon'ble Tribunal has observed and held as under:-

" The collector has found on the basis of statements of super buyers, / wholesale dealers etc that extra amounts were collected in cash by the retailers from their dealers and were passed on to the super buyers [wholesale buyers]. However, we note that during the cross examination, the retailers and wholesale dealers disowned their original statements, on which reliance has been placed by the adjudicating authority. Therefore, their credibility is substantially eroded. The reasoning of the Collector to discard the stand of the retailers and wholesale dealers in their cross-examination is that their statements have been retracted inter alia after several years. This may be relevant in so far as the confessional statements of accused are concerned, but as far as the statements of witnesses are concerned, such delay is not fatal. In any event, even if it is held that the original statements of wholesale dealers/wholesale retailers/retailers are to the effect that there were realizations of extra payment for sales of cigarettes and

that part of excess collection flowed back from the retailers to the super buyers, there is no material on record to establish that there was direct or indirect flow back from the super buyers to the appellants. According to the Department, the flow back was indirect in the form of interest margin that was collected from the super buyers and also the fact that super buyers paid for advertisement of GTC products, which was never reimbursed. There is no finding that any extra amount collected in cash passed on further backwards from the super buyers to the manufacturers. The finding of the Collector that there was a flow back to GTC, is based upon his findings that money flow back is by way of difference in rates of interest under the security deposit scheme as well as by making the wholesale buyers and the wholesale dealers bear the advertisement expenses of GTC without any reimbursement. According to the appellants, the security deposit scheme was created only for the purpose of clearing the interest of GTC vis-a-vis wholesale buyers; that the deposit was in the nature of consideration for giving distributor-ship rights to the super buyers and that it had absolutely no nexus or relationship with the price at which dealers or wholesale buyers or super buyers sold the cigarettes. Therefore, they contend that there is no flow back either direct or indirect to GTC of the difference between printed price and higher price charged by the retailer or wholesaler. They contend that GTC had to maintain adequate security deposit in order to maintain safe positions in the market vis-a-vis sales, bad debts, defective goods etc.

16.3 As regards advertisements etc, GTC'.s case is that the advertisements were made by the super buyers or wholesale buyers to promote their own sales and they were not directed to charge the expenses to GTC and their expenses including advertisements have no relation to the adjusted sale price.

16.4 As regards security deposit scheme, we note that even after full deposit has been made to GTC towards sale of goods by super buyers the profit of the super buyer cannot be calculated directly in terms of deposit made in excess. The turnover of the super buyer fairly exceeds the deposit amount. Therefore, even after making deposits and paying differential 17% interest, the super buyer can make profit in view of its very high turnover. The deposit scheme was started sometime in 1978-79, which is well before the issue of Notification No.2] 0/85 dated 20th September 1985. Therefore, it cannot be alleged or found that the scheme was evolved only in order to indirectly receive the excess amount, which may be collected by the retailers from the consumers, and, eventually by super buyer. From the affidavit filed by GTC, it is seen that even in the year in which the deposit was made, the turnover of the super buyer was 12 to 15 times of the amount of deposit. However, the deposit scheme was not unique to GTC as several other companies were taking similar deposit and this fact is brought out in the order dated 5th May j 994 of the Collector of Customs, Mumbai wherein the proceedings raised against GTC were dropped. Even in the case not covered by deposit scheme and where the payment was not made in time, interest at the rate of 18% was being

charged by GTC, which is more or less corresponding to differential interest under security deposit scheme. Therefore, the differential interest cannot be considered a ploy to indirectly receive a part of the alleged extra collection received by the super buyer. We, therefore, hold that there is no link between security deposit schemes and so called extra collection.

22. In the light of the above discussion and the Apex Court's judgment cited supra, which is squarely applicable to the present case, we hold that the benefit of concessional rate of duty under Notification No. 201/85 and 78/86 is admissible to the appellants, set aside the duty demand and penalties and allow the appeals."

Now it was brought to our attention that, this decision of CESTAT was subject matter of appeal by the Revenue before the Hon'ble Supreme Court which has upheld the order of the Tribunal vide judgment and order dated **19/09/2015 reported (2015 TIOL-213 SC-CX).** The relevant judgment reads as under:-

"This case raises a factual question arising out of three show cause notices which confirmed various duty demands and demands of penalty. The Collector of Central Excise by a voluminous order dated 17.01.1995 ultimately found that M/s. GTC Industries Ltd., the respondent herein, had been claiming the benefit of a concessional rate of central Excise Duty during the different periods mentioned in the show cause notices under Notification No. 201/85 dated 2nd September, 1995 and Notification NO.78 /86 dated 10th February, 1986 on Golden's Style Filter King brand of cigarettes. While sending samples of

the packets of cigarettes of the said brand for approval by the Central Excise Authorities, the appellants have declared the maximum retail price Rs. 1.70 per pack of 10 cigarettes and Rs. 3.40 per pack of 20 cigarettes. The specimens were approved accordingly. However, the Department 'found that the declarations made were deliberately false, as MI5. GTC Industries Ltd. never believed that the retailers would sell the cigarettes and had, therefore, full knowledge that the retail packet would not be sold in accordance with the price declaration made thereon. It was, therefore, alleged that the extra money over and above the prices shown in the invoices was being collected in respect of sale of various brands of cigarettes extra amount so collected was passed on to the retailers and wholesale dealers and subsequently in cash to the persons described as "Super Buyers" who were large wholesale purchasers.

2. The learned Collector ultimately found on facts that the Department's case was made out by the statements of as many as 44 witnesses who were ultimately cross-examined by M/s. GTC Industries. These statements were taken from a large number of persons including wholesalers and retail purchasers.

3. The Tribunal in an exhaustive judgment dated 9th December, 2005 after setting out the terms of the notification No. 11/83 dated 1st March, 1983 as amended by the Notification No. 78/86 dated 10th February, 1986 ultimately found that the product of the respondents were correctly classifiable under sub-paragraph 2 of the table in

the said Notification, and not sub-paragraph 3 as was wrongly held by the Collector. This was done after the Tribunal went into the standards terms and conditions of the" business with the wholesale buyers and after appreciating the witness statements made and particularly retractions made from the said statements in cross-examination. Ultimately, it held as under:

"As regards security deposit scheme; we note that even after full deposit has been made to GTC towards sale of goods by super buyers the profit of the super buyer cannot be calculated directly In terms of deposit made in excess. The turnover of the super buyer fairly exceeds the deposit amount. Therefore, even after making deposits and paying differential 17% interest the super buyer can make profit in view of its very high turnover. The deposit scheme was started sometime in 1978-79, which is well before the issue of Notification No. 210/85 dated 20th September, 1985. Therefore, it cannot be alleged or found that the scheme was evolved only in order to indirectly receive the excess amount which may be collected by the retailers from the consumers, and, eventually by super buyer. From the affidavit filed by GTC, it is seen that even in the year in which the deposit was made, the turnover of the super buyer was 12 to 15 times of the amount of deposit. However; the deposit scheme was not unique to GTC as several other companies were taking similar deposit and this fact is brought out in the order dated 5th May, 1994 of the Collector of Customs, Mumbai wherein the proceedings raised against GTC were dropped. Even in the case not covered by deposit scheme and where the payment was not made in time, interest at the rate of 18% was being

charged by GTC; which is more or less corresponding to differential interest under security deposit scheme. Therefore, the differential interest cannot be considered a ploy to indirectly receive a part of the alleged extra collection received by the super buyer. We, therefore, hold that there is no link between security deposit schemes and so called extra collection.

4. On the facts, therefore, the Tribunal found that the case of the Department had not in fact been made out. Apart from this, the Tribunal also relied upon the judgment of this Court in ***ITC Ltd., vs. Commissioner of Central Excise, New Delhi & Anr. (2004) 7 SCC 591) = 2004-TIOL-75-SC-CX*** *and found that on a reading of the said judgment, the alternative submission of the respondent was also made out. We do not find any error in the said judgment either on fact or on law.*

5. In the aforesaid circumstances, the appeal lacks merit and is, accordingly, dismissed.

49. The aforesaid judgment of Hon'ble Supreme Court affirming the order of the CESTAT in the case of the assessee clearly negates the charge/contention of the Revenue that the alleged extra money over and above the price shown in the invoice which was being collected in respect of sale of various brands of cigarettes and extra money so collected was passed on to the retailers and wholesale dealers and subsequently to the persons described as super buyers and from them to GTC. Thus, aforesaid judgment ostensibly vindicates the stand of the assessee. We are unable to agree with the contention of the learned Special Counsel that this decision of the Hon'ble Supreme Court and also the judgment of ITC Ltd would not be applicable here in this case. The entire basis

of the Revenue to draw adverse inference in fact originated from the investigation and surveys carried out in the case of wholesale buyers and the statement given by the wholesale buyers about generation of premium money; and whence, finally the said allegation of the excise department has not been found be acceptable by the Hon'ble Apex Court, then the entire substratum on which the revenue's case hinges upon is shaken. The aforesaid judgment of the Hon'ble Apex Court clearly clinches the issue in favour of the assessee and without any corroborative material; it would be difficult to appreciate the stand of the revenue that the assessee was beneficiary of the premium money or relate back the flow back of the money to the assessee. It appears that the charging of premium amount over and above the MRP by the retailers and wholesale buyers may be keeping the assessee in loop to coordinate for meeting out certain expenses which also included advertisement and sales promotional expenses. The entire scheme was so designed that the liability of sales and promotion expenses or advertisement lies with the wholesale buyers and not on the assessee and assessee merely acts as a coordinating/managing central agency. But such a managing and coordinating of advertisement does not implicate the assessee that it is the sole beneficiary or owner of the entire premium money generated as held by the Hon'ble Apex Court in the case of the ITC that there could not be any presumption that manufacturer is getting the money over and above the MRP. Thus, on this account also the revenue's case fails.

50. Now coming to the issue of rejection of books of accounts as well as the estimation of income by multiplying the volume of sales of lower price brand with the differential price of higher price brand on account of theory of 'twin branding mechanism' and

thereby giving an adhoc reduction of 10% on the ground that some of the share in premium money belonged to the wholesale buyers. First of all, it is noticed that, the basis of rejection of books of accounts by the Assessing Officer u/s 145(2) is that, *firstly,* assessee has maintained bank accounts in fictitious names outside the books and has otherwise incurred expenses which are not inflected in books of accounts; and *secondly,* assessee has been maintaining cash in bank accounts outside the books. Learned CIT (A) has further added one more ground that, bank accounts appearing to be channel for circulating such premium or assessee is bound to have a large share in such secret money and its circulation. First of all the first allegation of the AO that it is proved beyond doubt that assessee has maintained bank accounts in fictitious names outside the books, the same is not tenable because as already held above, it has not been proved through any direct or indirect material or evidence that bank accounts belong to the assessee company. Though the premium was collected by the wholesale buyers which were deposited in the fictitious bank accounts from where certain advertisement expenses and other expenses were incurred, but as discussed in detail in the foregoing paragraphs, there is no material as such or any statement implicating the assessee that these bank accounts have been either maintained by the assessee or was under the control of the assessee or was benami of the assessee. If that is so, then the entire premise for rejecting the books of accounts gets vitiated. Once we hold that there is no material to implicate the assessee then the presumption that assessee is maintaining cash in bank account outside the books also fails because this allegation too is not flowing from the first premise of the AO. The additional reason cited by the Ld. CIT (A) falls within the realm of suspicion and surmises and based on such suspicion and surmise sans any

direct material, the same cannot be upheld. As stated several times herein above, there is no finding or any cogent material to establish that extra amount collected in cash by shopkeepers/retailers have been passed on further from wholesale buyers/ super buyers to the manufacturer, i.e., assessee; and once that is so, the presumption of indirect flow back cannot be made the basis for such addition or estimation of income. Various case laws have been referred by the learned counsel before us on this point; however, we are not referring to these decisions because, we have arrived at our conclusion on the basis of material facts brought on record and as referred to before us.

51. Even though we have held that AO & CIT(A) were not correct in law and on facts to reject the books of account, however for the sake of completeness, we deem fit to deal with issue of estimation as has been made by A.O. in brief. The estimation made by the AO for assessing the income is very faulty because, it is based on high degree of presumption and hypothesis that on each and every sale of lower brand cigarette all across the country made to millions of consumers through millions of retailers, there has been collection of extra money equivalent to the price of high brand value cigarettes and then such collection of money has cent percent flown back to the assessee directly; and out of that premium money some minor share pertains to the wholesale buyers. Such a wild speculation or basis for estimation on the facts of the present case is very farfetched and implausible. The best judgment does not entail wild guess work or huge additions should be resorted to, *albeit* it lays down the determination of income based on fair and reasonable analysis based on some tangible material. The framing of the best judgment though entails some kind of fair and honest estimation but at the same time it should be based on material

and information on record. The best judgment is not a provision to penalize the assessee and resort to wild estimate but it is a machinery provision which is to be based on assessing the correct income and that too based on material and evidence having live link nexus with the income which is to be assessed. Thus, on this count also, we are unable to uphold the kind of estimation or addition which has been made by the AO and sustained by the Ld. CIT (A) and accordingly, we direct the AO to delete the entire addition. In the result assessee's appeal is allowed.

52. As regards the appeals relating to AY 1985-86 and AY 1986-87, it has been admitted by both the parties that similar facts are permeating through in these years also and common issue is involved, that is, the estimation of income in the similar manner based on similar set of material and findings in the impugned orders. Therefore, our finding given in the appeal for the A.Y.1984-85 will apply *mutatis and mutandis* and consequently the appeals of AY 1985-86 and 1986-87 is treated as allowed

53. In the result, the entire addition as sustained by the learned CIT(A) in all the years are deleted and assessee's appeals are allowed.

Order pronounced in the open court on this 07/03/2017.

Sd/-	**sd/-**	**sd/-**
(R.C. SHARMA)	**(SAKTIJIT DAY)**	**(AMIT SHUKLA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**	**JUDICIAL MEMBER**

Mumbai; Dated 07/03/2017
Karuna Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)

ITAT, Mumbai