INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI
BEFORE SHRI H.S.SIDHU, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 904, 905, 906/Del/2014
(Assessment Year: 2005-06 to 2007-08)

ACIT, Central Circle-8, New Delhi	Vs.	KP Pouches Pvt. Ltd, 19, Manohar Park, Room No. 1, 1st Floor, New Rohtak Road, New Delhi PAN:AABCK6527A
(Appellant)		(Respondent)

CO. No. 279, 280, 281/Del/2016
(In ITA No. 904-906/Del/2014)
(Assessment Year: 2005-06 to 2007-08)

KP Pouches Pvt. Ltd, 19, Manohar Park, Room No. 1, 1st Floor, New Rohtak Road, New Delhi PAN:AABCK6527A	Vs.	ACIT, Central Circle-8, New Delhi
(Appellant)		(Respondent)

Revenue by :	Shri Vijay Varma, CIT DR
Assessee by:	Shri RS Singhvi, CA
Date of Hearing	29/08/2017
Date of pronouncement	16/10/2017

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. These are the appeals filed by the revenue and cross objections filed by the assessee for the Assessment Year 2005-06 to 2007-08.

2. The revenue has raised the following grounds of appeal in ITA NO. 904/Del2014 for Assessment Year 2005-06:-

"1. That the Commissioner of Income Tax (appeals) erred in law and on facts of the case in deleting the addition of Rs. 8303147/- made by AO on account of undisclosed sales without examining and adjudicating upon the merits of the case.

2. Whether CIT(A) has erred in law and facts as well in not invoking the provisions of section 250(4) of the IT Act, which empowers ltd CIT(A) to conduct further enquiry on the issues involved in this case.
3. (a) The order of the CIT(A) is erroneous and not tenable in law and on facts."

3. The assessee has raised the following grounds of appeal in CO No. 279/Del/2016 for Assessment Year 2005-06:-

l(i) That the assessment order u/s 153A is illegal, arbitrary and without jurisdiction inabsence of any incriminating material found during the course of search u/s 132 of the Income Tax Act, 1961.
(ii) That seizure of incriminating material is sine qua non for initiation of proceedings u/s153A and in the absence of same, the order u/s 153A is illegal and without jurisdiction.
2(i) That even otherwise, the addition of Rs. 83,03,137/- based on search conducted byExcise department and documents found at the premises of 3 rd party is not sustainable in the absence of recording of satisfaction by the Assessing Officer of the assesse in terms of provisions of sec. 153C of the Income Tax Act, 1961.
(ii) Further, since the proceedings u/s 153A are solely based on information received from excise department, there is no case of any addition in terms of provisions of section 153 A of the Income Tax Act, 1961.

4. The revenue has raised the following grounds of appeal in ITA No. 905/Del/2014 for Assessment Year 2006-07:-

1. That the Commissioner of Income Tax (appeals) erred in law and on facts of the case in deleting the addition of Rs. 10315150/- made by AO on account of undisclosed sales without examining and adjudicating upon the merits of the case.
2. Whether CIT(A) has erred in law and facts as well in not invoking the provisions of section 250(4) of the IT Act, which empowers ltd CIT(A) to conduct further enquiry on the issues involved in this case.
3. (a) The order of the CIT(A) is erroneous and not tenable in law and on facts."

5. The assessee has raised the following grounds of appeal in CO No. 280/Del/2016 for Assessment Year 2005-06:-

l(i) That the assessment order u/s 153A is illegal, arbitrary and without jurisdiction in absence of any incriminating material found during the course of search u/s 132 of the Income Tax Act, 1961.
(ii) That seizure of incriminating material is sine qua non for initiation of

proceedings u/s 153A and in the absence of same, the order u/s 153A is illegal and without jurisdiction.

2(i) That even otherwise, the addition of Rs. 10315150/- based on search conducted by Excise department and documents found at the premises of 3 rd party is not sustainable in the absence of recording of satisfaction by the Assessing Officer of the assesse in terms of provisions of sec. 153C of the Income Tax Act, 1961.

(ii) Further, since the proceedings u/s 153A are solely based on information received from excise department, there is no case of any addition in terms of provisions of section 153 A of the Income Tax Act, 1961."

6. The revenue has raised the following grounds of appeal in ITA No. 906/Del/2014 for Assessment Year 2007-08:-

"1. That the Commissioner of Income Tax (appeals) erred in law and on facts of the case in deleting the addition of Rs. 110192860/- made by AO on account of undisclosed sales without examining and adjudicating upon the merits of the case.

2. Whether CIT(A) has erred in law and facts as well in not invoking the provisions of section 250(4) of the IT Act, which empowers ltd CIT(A) to conduct further enquiry on the issues involved in this case.

3. (a) The order of the CIT(A) is erroneous and not tenable in law and on facts."

7. The assessee has raised the following grounds of appeal in CO No. 280/Del/2016 for Assessment Year 2007-08:-

l(i) That the assessment order u/s 153A is illegal, arbitrary and without jurisdiction in absence of any incriminating material found during the course of search u/s 132 of the Income Tax Act, 1961.

(ii) That seizure of incriminating material is sine qua non for initiation of proceedings u/s 153A and in the absence of same, the order u/s 153A is illegal and without jurisdiction.

2(i) That even otherwise, the addition of Rs. 110192860/- based on search conducted by Excise department and documents found at the premises of 3 rd party is not sustainable in the absence of recording of satisfaction by the Assessing Officer of the assesse in terms of provisions of sec. 153C of the Income Tax Act, 1961.

(ii) Further, since the proceedings u/s 153A are solely based on information received from excise department, there is no case of any addition in terms of provisions of section 153 A of the Income Tax Act, 1961."

8. First we take up the appeal of the revenue for Ay 2005-06.

Brief facts and assessment proceedings

9. Assessee is a private limited company engaged in the business of manufacturing of Guthka. A search and seizure operation under section 132 of the income tax act was conducted by the Department on 'Chaurasia group' of companies on 29/04/2008 and appellant premises was also searched on that date. Consequent to that notice under section 153A of the income tax act was issued and served upon the appellant. In response to which the appellant filed his return of income on 13/12/2010 declaring total income of Rs. 3 577490/–.

10. During the course of assessment proceedings, the report of Assistant Commissioner, Division –II, Central excise department, Delhi was received. The Ld. assessing officer therefore sent a letter dated 25/11/2010 to the Assistant Commissioner in respect of information about the assessee. The said office submitted a letter dated 21/12/2010 in respect to copies of order passed in case of assessee. Assessee was issued show cause notice and same was replied.

11. The whole issue in this 3 appeals are based on a letter from additional director, DG CEI, Zonal UNIT , Mumbai about the searches conducted by the Central excise department against the assessee. Based on it the Central excise department in the month of January 2005 raised a demand for Central excise duty on 223 bags valuing Rs. 3582495/– amounting to Rs. 1205868/–. The about dated demand has arisen because of the survey made by the Central excise department on Supreme Road Transport and found that 2404 bags of Guthkha which were seized. The Ld. assessing officer was of the view that assessee has not disclosed the above sales in the books of accounts and hence it is unaccounted sales and therefore gross profit of the undisclosed sales is required to be added. Therefore, on the basis of the above seizure made by the Central excise department he valued the total maximum retail price of the product at Rs. 45362420/– discounted it to 80 % percent and worked out the sale price of Rs. 36289936/-. On the above sales, the Ld. assessing officer computed the gross profit ratio of

22.88 % and worked out the gross profit thereon of Rs. 8303137/– as income of the assessee on account of the above seizure made by the Central excise department. Consequently, assessment under section 153A, read with section 143 (3) of the income tax act was passed on 28/12/2010 determining total income of the assessee of Rs. 11880627/-against the returned income of Rs. 3577490/– wherein the addition of Rs. 8303137/– was made.

Appeal before CIT(A)

12. Assessee aggrieved with the order of the Ld. assessing officer preferred appeal before the Ld. CIT (A) who vide order dated 29/11/2013 deleted the above addition after obtaining the remand report from the Ld. assessing officer and rejoinder of the assessee giving following reasons:-

a. that the income tax department had carried out search on the assessee under section 132 on 29/04/2008 but no material or incriminating evidence have been found in the search indicating that appellant had indulged in any unaccounted purchase, production or sale of the goods.
b. The Ld. assessing officer, having the information from the Central excise authorities regarding the above seizure from the transporter, neither the Ld. assessing officer carried out any examination or cross examination or verification of the information available to trace out the unaccounted sales of the assessee.
c. vide letter dated 28/12/2001 The Ld. assessing officer was intimated by the assessee that the alleged sales of 2404 bags of Guthkha has already recorded in the books of accounts and therefore it cannot be said that they are unaccounted sales of the assessee.
d. Further, on the principles of the natural Justice as well as the information received from Central excise authorities to which the assessing officer has not applied his mind the addition was deleted.

Arguments of Revenue before us

13. Aggrieved by the order of the Ld. CIT (A), the revenue is in appeal before us. The Ld. CIT DR has submitted a paper book containing the remand report submitted by the assessing officer before the Ld. CIT (A) as well as order of the Commissioner of Central Excise Delhi 1 dated 22/12/ 2008. The Ld. CIT DR vehemently contested that the deletion of the addition by the Ld. CIT (A) is without any basis. He further submitted that when the information is available on the basis of the search on the transporter that assessee has given him the material produced by him for onward sales without recording the same in the books of accounts as found during the course of search of excise authorities, such addition of gross profit on that account is in order. He referred extensively to the show cause notice of the assessing officer which is reproduced at para No. 5.1 of the order of the Ld. CIT (A). He further referred to the various paragraphs of the show cause notice issued by the Commissioner of Central Excise, New Delhi dated 22/12/2008. In the end, he submitted that the addition has been made correctly by the Ld. assessing officer.

Arguments of assessee before us

14. The Ld. authorized representative also submitted a paper book contesting that the addition as been made purely on the basis of the Central excise show cause notice where there are no evidences of unrecorded sales have been found. He vehemently submitted that there is no incriminating material found during the course of the search and this is the assessment made by the Ld. assessing officer u/s 153 A of the act without any incriminating metal found during the course of the search of the income tax department. He further submitted that his cross objections filed are solely contesting the above issue, relying on the several decision of the Hon'ble Delhi high court wherein it has been held that no addition can be made in the search assessment without finding any material during the course of the search of the income tax Department. He relied vehemently on the decision of the Hon'ble Delhi High Court in principle CIT versus Meeta Gutgutia 395

ITR 526. He submitted that even in the case of the appeal by the revenue. He can invoke the provisions of rule 27 of the income tax appellate tribunal rules to say that no addition can be made without any incriminating evidence found during the course of search. He also submitted that finding of the ld CIT (A) to that effect in para no 7 of the order has not been contested by the revenue. Even otherwise, referring to the paper book filed by the Ld. departmental representative, he submitted that assessee has shown to the Central excise authorities that that assessee has already accounted the sales of 2404 bags in the books of accounts of the assessee by invoice No. 101 to 122 issued between 8/10/2006 to 14/10/2006. He submitted that when the sales has already been accounted in the books of the assessee there cannot be double addition of sale of this quantity once again in the hands of the assessee when the books of account shows the sales of the above goods at market rates on cash sales basis and consequent profit thereon have been offered for taxation. He further submitted that merely because these excise authorities have not believed the above sales and recovered the excise duty from the assessee, which has been paid by the assessee, profit on the above sales cannot be once again taxed in the hands of the assessee. He further referred to the page No. 17 of the paper book filed by the revenue wherein the above details have been mentioned. With respect to the payment of the excise duty he submitted that the assessee has once again paid the excise duty for recovering the goods on redemption from excise authorities but that cannot go against the assessee for addition of gross profit on it once again. He further submitted that when these goods have been purchased by the assessee once again on redemption by payment of the excise duty they once again have entered the excise records of the assessee and assessee has already shown sales of these items. In view of this he submitted that the addition made by the Ld. assessing officer is double addition in the hands of the assessee and therefore the Ld. CIT appeal has correctly granted the assessee relief of the above amount.

Rejoinder of the revenue

15. The Ld. CIT DR the placed reliance on the decision of the Hon'ble Delhi High Court in case of CIT versus Jansampark advertising and marketing private limited 375 ITR 373 stating that if the Ld. assessing officer has failed to do something that it is the duty of the coordinate bench to make further enquiry and decide the issue.

Reasons and Decision

16. We have carefully considered the rival contentions and also perused the paper book filed by both the parties. We also perused the orders of the lower authorities on this issue. Admittedly during the course of search by income tax authorities, no evidence were found against the assessee of unrecorded sales and as the assessment order has been framed under section 153A of the income tax act, only the additions based on the incriminating materials can be made which were unearthed during the course of the search by the income tax Department. This issue have been decided by the Hon'ble Delhi High Court in case of CIT versus Kabul Chawla 380 ITR 573 (Delhi) and further reiterated by Hon'ble Delhi High Court in case of CIT versus Meeta Gutgutia 395 ITR 526. The addition deserves to be deleted on the single issue also.

17. Furthermore before the Central excise authorities, assessee has submitted that assessee has already accounted for the sales of 2404 bags of guthka , which were sold to buyers under invoice No. 101 – 122 issued between 08/10/2006 to 14/10/ 2006. The above sales have already been accounted for in the books of the assessee and also entered into the excise records of the assessee. The Central excise authorities have rejected these bills for the reason that these invoices are been raised on Cash sale basis to various individual persons who took the delivery of the goods themselves. However, it cannot be denied that assessee has already booked sales of these parties of the identical bags. As assessee has already booked the sales then the profit thereto on the sale of this material has also already been recorded in

the books of the assessee and hence once again the addition made of the gross profit arising out of the same sale will definitely amount to the double addition in the hands of the assessee. It is not the case of the revenue that assessee has not booked the sales of this material in its books of accounts and has not taken it to the credit side of the profit and loss account and resultant gross profit/net profit thereon has not been offered for the taxation. It is also true that assessee has deposited the excise duty demanded by the Central excise authorities and once again taken the possession of 2404 bags of the material and entered them in its excise records. It is also not the case of the revenue that these bags have not once again entered into the Central excise records of the assessee and material thereon has been sold once again. Had that not been the case, the revenue should have disturbed the closing stock of the assessee, which is not the case of the revenue. It is also not the case of the revenue that sales booked by the assessee by invoice No. 101 – 122 are also not at the market rate. According to us and as explained before us it is at the market rate and therefore there cannot be any question of any suppression of or undervaluation of sales on account of sales price. In view of this we are of the opinion that even if demand of the excise duty as been paid by the assessee by paying the redemption fine for release of the goods from the seizure of the Central excise authorities, the addition made by the Ld. assessing officer in the hands of the assessee deserves to be deleted for the reason that

a. assessee has already booked the sales prior to the seizure of the goods by Central excise authorities of the above material, therefore it cannot be said that these sales have not been accounted by the assessee,
b. there is no allegation on the assessee that sales made by the assessee of 2404 bags booked by the assessee prior to the seizure of the Central excise authorities, even if sold to the individuals on cash sales, the sales have been not made at the market rate to those

individuals, the rate of sales are below the market rate and profit earned thereon has not been shown by the assessee.

c. Furthermore the goods released by the Central excise authorities have also been entered by the assessee in to excise records and there is no allegation by the Ld. assessing officer that above goods are not included in the closing stock or have not been sold further.

d. The redemption of goods by payments of excise duty and fine is the normal course of getting the goods released under the Excise rules. It cannot be the basis of the addition of profit on account of unrecorded sales as the material has come back to the assessee. It is merely the removal of goods by the assessee utmost, without payment of duty. When the goods have come back to the assessee, it cannot be said that same goods have been sold unrecorded by the assessee.

e. The ld AO has not found any error in the excise records of the assessee with respect to quantity details such as purchases, sales, opening and closing stock.

18. Furthermore, the reliance placed by the Ld. CIT DR on the decision of Hon'ble Delhi High Court in CIT versus Jan sampark advertising and marketing private limited 375 ITR 373 does not apply to the facts of the case. In that particular case, it was held by the Hon'ble Delhi High Court that in case of unaccounted entries found in the books of accounts of the assessee, it is an obligation of the assessing officer to conduct proper scrutiny of material, in the event of assessing officer failing to discharge function properly, obligation to conduct proper enquiries shifts to the Commissioner (A) and the tribunal and they cannot simply delete addition made by the assessing officer on ground of Lack of enquiry. We are of the opinion that present case is not the case of Lack of enquiry but it is a case of not understanding the accounting entries made by the assessee in the books of accounts. The Ld. assessing officer has failed to appreciate that when the assessee has already booked sales of 2404 bags in the books of accounts by crediting the sales account and debiting the cash on hand,

there cannot be once again an addition on account of the gross profit on the same sales. In the present case, the Ld. assessing officer has failed to appreciate that assessee has already accounted the sales in the books of accounts at the prevailing market rate and profit thereto has already been added by the assessee in its normal accounts. Therefore, there cannot be an unaccounted sales and consequent addition.

19. In view of this we hold that addition made by the Ld. assessing officer is not sustainable. Therefore, we confirm the finding of the Ld. CIT (appeals) in deleting the above addition of Rs. 8303137/–. In the result appeal filed by the revenue for assessment year 2005 – 06 in ITA No. 904/DEL/2014 is dismissed.

A Y 2006-07 ITA No 905/del/2014

20. Now coming to the appeal of the revenue for assessment year 2006 – 07 in ITA No. 905 – Del – 2014 wherein on identical facts and circumstances as stated in assessment year 2005 – 06 in ITA No. 904/del/2014 has been made in assessment order under section 153A of the income tax act, passed by the Ld. assessing officer on 28/12/2010 has been made.

21. The brief facts pertaining to this assessment year is that on the basis of search conducted by the Central excise authorities it was found that 55 bags of material was seized at Bombay Station on 01/03/2007 4 which Bill No. 232 and 233 dated 27/02/2007 were already accounted for in the books of accounts. Over and above, there was no material found by the Central excise authorities also. Therefore the facts of the appeal are that that the sales of 55 bags stated by the Central excise authorities as clandestinely removal of goods was already accounted for in the books of the assessee prior to the date of search by the Central excise authorities.

22. It is also an admitted fact that during the course of search made by the income tax department no incriminating evidence were found pertaining to this year.

23. The only difference in this appeal is that that additional director of DGCEI has alleged that the assessee has produced and sold goods worth Rs. 28.01

crores during the period of December 2005 to February 2007. The Ld. assessing officer has held that the total period in the above time is of 15 months and only 4 months pertain to assessment year 2006 – 0 C1, therefore, he estimated a sum of Rs. 7 469 3336/– as the sales value of the product sold by the assessee from December 2005 to March 2006 and therefore estimated gross profit of 13.81% thereon amounting to Rs. 1 031 5150/– and the same is added in the hands of the assessee.

24. The Ld. CIT (A) has deleted the above addition vide order dated 29/11/2013.

25. The Ld. departmental representative and the Ld. authorised representative submitted that the facts of the case are similar to the issue involved in the appeal of the assessee and revenue for assessment year 2005 – 06, except that in this year the Ld. assessing officer has computed the sales of clandestinely removal determined by the Central excise authorities hereby is on the basis of number of months involved therein. They also submitted that their arguments remains the same.

26. We have carefully considered the rival submissions and also perused the orders of the lower authorities. We have already given our detailed reasons for deleting the addition for assessment year 2005 – 06 confirming the order of the Ld. CIT (appeals). Therefore, for the same reasons and further that during the year there is no unrecorded sales found by the Ld. assessing officer and the sales have been extrapolated without any reasons and evidences found by the assessing officer, we confirm the finding of the Ld. CIT (appeals) for this year also deleting the addition of Rs. 10315150/–. In the result appeal filed by the revenue for assessment year 2006-07 in ITA No. 905/Del/2014 is dismissed.

ITA NO 906/Del/2014

AY 2007-08

27. Now we come to the appeal of the revenue in ITA No. 906/Del/2014 for assessment year 2007-08, wherein the Ld. CIT (appeals) has deleted the addition of Rs. 110192860/– made by the Ld. assessing officer on account of undisclosed sales.

28. The Ld. assessing officer has passed an assessment order under section 153A, read with section 143 (3) of the income tax act dated 28/12/2010, wherein an addition of Rs. 110192860/– was made on account of gross profit on undisclosed sales estimated by the Central excise authorities

29. The brief facts pertaining to this assessment year is that on the basis of search conducted by the Central excise authorities. It was found that 55 bags of material was seized at Bombay Station on 01/03/2007 for which Bill No. 232 and 233 dated 27/02/2007 were already accounted for in the books of accounts. Over and above, there was no material found by the Central excise authorities also. Therefore the facts of the appeal are that that the sales of 55 bags stated by the Central excise authorities as clandestinely removal of goods was already accounted for in the books of the assessee prior to the date of search by the Central excise authorities.

30. It is also an admitted fact that during the course of search made by the income tax department no incriminating evidence were found pertaining to this year.

31. The only difference in this appeal is that that additional director of DGCEI has alleged that the assessee has produced and sold goods worth Rs. 28.01 crores during the period of December 2005 to February 2007. The Ld. assessing officer has held that the total period in the above time is of 15 months and only 11 months pertain to assessment year 2007-08, therefore, he estimated the sales value of the product sold by the assessee from April 2006 to October 2006 and therefore estimated gross profit of 18.93 % thereon amounting to Rs. 110192860/- and the same is added in the hands of the assessee.

32. The Ld. CIT (A) has deleted the above addition vide order dated 29/11/2013.

33. The Ld. departmental representative and the Ld. authorised representative submitted that the facts of the case are similar to the issue involved in the appeal of the assessee and revenue for assessment year 2005 – 06, except that in this year the Ld. assessing officer has computed the sales of clandestinely removal determined by the Central excise authorities hereby is on the basis of number of months involved therein. They also submitted that their arguments remains the same.

34. We have carefully considered the rival submissions and also perused the orders of the lower authorities. We have already given our detailed reasons for deleting the addition for assessment year 2005 – 06 confirming the order of the Ld. CIT (appeals). Therefore, for the same reasons and further that during the year there is no unrecorded sales found by the Ld. assessing officer and the sales have been extrapolated without any reasons and evidences found by the assessing officer, we confirm the finding of the Ld. CIT (appeals) for this year also deleting the addition of Rs. 110192860/- . In the result appeal filed by the revenue for assessment year 2007-08 in ITA No. 906/del/2014 is dismissed.

CO No 279 , 280 and 281/Del/2016

A Y 2005-06, 2006-07 and 2007-08

35. Coming to the cross objections filed by the assessee in all these 3 above appeals for assessment year 2005-06, 2006 – 07 and 2007 – 08. Assessee has contended that that no addition can be made in the hands of the assessee in assessment order passed under section 153A of the act pursuant to the search under section 132 of the income tax act in absence of any incriminating material found during the course of search.

36. The assessee submitted that as these issues already been decided by the Ld. CIT (A) in favour of the assessee in the 1st point in para No. 7 of the order which is not been contested by the revenue therefore it has become final

and hence the assessee does not want to contest this issue by cross objections.

37. In view of the above submission of the assessee, we dismiss cross objections filed by the assessee vide CO No. 279/del/2016 for assessment year 2005 - 06, Co No. 280/del/2016 for assessment years 2006 – 07 and cross objection No. 281/del/2016 for assessment year 2007 – 08.

38. In the result all 3 appeals filed by the revenue for assessment year 200 5 – 06, 2006 – 07 and 2007 – 08 and cross objections filed by the assessee are dismissed.

Pronounced in the open court on 16/10/2017.

-Sd/-	-Sd/-
(H.S.SIDHU)	(PRASHANT MAHARISHI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated:16/10/2017
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi