

आयकर अपीलीय अधिकरण पुणे न्यायपीठ “ऐ” पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH “A”, PUNE

सुश्री सुषमा चावला, न्यायिक सदस्य एवं श्री प्रदीप कुमार केडिया, लेखा सदस्य के समक्ष
BEFORE MS. SUSHMA CHOWLA, JM AND SHRI PRADIP KUMAR KEDIA, AM

ITA Nos. 1258 to 1264/PN/2012
Assessment Years: 2004-05 to 2010-11

Kalika Steel Alloys Pvt. Ltd.,
C-7, C-8, Opp. Krishidhan Seed,
Addl. MIDC, Jalna – 431203 Appellant
PAN: AACCK1502A

Vs.

The Asst. Commissioner of Income Tax,
Central Circle, Aurangabad Respondent

ITA Nos.1660 to 1666/PN/2012
Assessment Years: 2004-05 to 2010-11

The Asst. Commissioner of Income Tax,
Central Circle, Aurangabad Appellant

Vs.

Kalika Steel Alloys Pvt. Ltd.,
C-7, C-8, Opp. Krishidhan Seed,
Addl. MIDC, Jalna – 431203 Respondent
PAN: AACCK1502A

Assessee by : Shri J.P. Bairagra
Department by : S/Shri Rastogi & Rajesh Damor

सुनवाई की तारीख / Date of Hearing: 15.09.2015	घोषणा की तारीख / Date of Pronouncement: 24.09.2015
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आदेश / ORDER

PER SUSHMA CHOWLA, JM :

The present bunch of cross appeals filed by the assessee and the Revenue are against consolidated order of CIT(A), Aurangabad, dated 14.05.2012 relating to assessment years 2004-05 to 2009-10 and 2010-11 against respective orders passed under section 143(3) r.w.s. 153A and under section 143(3) respectively, of the Income Tax Act, 1961 (in short "the Act").

2. This bunch of appeals relating to the same assessee on similar issues were heard together and are being disposed of by this consolidated order for the sake of convenience. In order to adjudicate the issue, reference is being made to the cross appeals filed by the assessee and Revenue in ITA No.1258/PN/2012 and ITA No.1660/PN/2012 relating to assessment year 2004-05.

3. In ITA No.1258/PN/2012, the assessee has raised the following grounds of appeal:-

1. *The learned Commissioner of Income Tax (Appeals) erred in confirming the alleged suppression of sales of Rs.3,89,11,352/-.*
2. *The learned Commissioner of Income Tax (Appeals) further erred in confirming the alleged suppression of sales merely on the basis of the order passed by the Commissioner of Central Excise and Customs, Aurangabad and on the basis of evasion of excise duty by steel manufacturers in Jalna cluster found by the Directorate General of Central Excise and Customs (DGCEI).*
3. *The learned Commissioner of Income Tax (Appeals) further erred in confirming the suppression of sales of Rs.3,89,11,352/- on the basis of the order of the Commissioner of Central Excise and Customs, Aurangabad wherein they have relied on the consumption of electricity vis-a-vis production on the basis of an article written by Dr. N. K. Batra, Professor of IIT, Kanpur i.e. on presumption and assumption and without any evidence of purchase of raw material or sales of finished products out of books.*

4. *The learned Commissioner of Income Tax (Appeals) further erred in confirming the alleged suppression of production on the grounds of monthly variation in consumption of electricity vis a vis production.*
5. *The learned Commissioner of Income Tax (Appeals) further erred in confirming the action of the Assessing Officer in holding that the books of accounts of the appellant company are correctly rejected u/s. 145 of the Income Tax Act without any evidence or finding as to how the provisions of Section 145(3) are satisfied.*
6. *The learned Commissioner of Income Tax (Appeals) further erred in confirming the action of the Assessing Officer in making an addition on account of alleged suppression of sales without giving sufficient opportunity to the appellant company to explain the facts in response to the show cause notice issued on 23-12-2011 when the assessment order was passed on 30-12-2011, which is against the rules of natural justice.*
7. *The learned Commissioner of Income Tax (Appeals) further erred in confirming the addition on account of Gross Profit @ 4% on the alleged suppression of sale of Rs.15,56,454/-.*
8. *The learned Commissioner of Income Tax (Appeals) further erred in making addition of Rs.3,74,147/- on account of undisclosed investment under Section 69C of the Income Tax Act.*
9. *The learned Commissioner of Income Tax (Appeals) further erred in not following the order of the Hon. Income Tax Appellate Tribunal in the case of M/s. SRJ Peety Steels Pvt. Ltd. for assessment years 2000-01 to 2006-07 reported in 137 TTJ (Pune) 627, wherein the similar addition was deleted.*
10. *The learned Commissioner of Income Tax (Appeals) further erred in confirming the order passed u/s. 143(3) read with Sec. 153A of the Income Tax Act even though there was no incriminating material or evidence found during the course of the search leading to an assessment being framed u/s. 153A.*
11. *The appellant company further erred in confirming the addition made by the AO on the basis of 4 orders passed by the Directorate General of Central Excise and Customs (DGCEI) on the appellant company.*
12. *The appellant company craves to add to, alter or amend foregoing grounds, which are without prejudice to one another, at the time of hearing.*

4. In ITA No.1660/PN/2012, the Revenue has raised the following grounds of appeal:-

1. *On the facts and in the circumstances of the case the learned CIT(A) has erred in deleting the addition of Rs.1,75,73,238/- by estimating GP at lower rate than adopted by the Assessing Officer at the time of assessment.*
2. *On the facts and in the circumstances of the case, the learned CIT(A) has erred in adopting GP @ 4% arbitrarily without any basis ignoring the factual position on record, thus rendering his decision perverse.*

3. *On the facts and in the circumstances of the case, the learned CIT(A) failed to appreciate that the actual GP is 35% as admitted by the director in his statement recorded u/s.131 of the Act on 17-08-2009, thus rendering his decision perverse on facts.*

4. *On the facts and in the circumstances of the case, the learned CIT(A) has erred in lowering the GP addition ignoring the fact that, imaginary unaccounted manufacturing expenses cannot be allowed as deduction as per the provisions of section 69C of the Act.*

5. *Any other ground that may be urged at the time of hearing.*

5. Briefly, in the facts of the present case, the assessee was engaged in the business of manufacturing of MS Ingots. Search and seizure action under section 132(1) of the Act was conducted in the case of Kalika group of Jalna including the assessee company on 16.06.2009. During the course of search, statement of director Mr.Ghanshyam Goyal was recorded under section 132(4) of the Act and an offer of additional income of Rs.14,30,95,471/- was made in the hands of director of assessee company. The Assessing Officer thereafter, issued notice under section 153A of the Act for assessment years 2004-05 to 2009-10. The assessee in compliance thereto, filed returns of income and also filed the return of income under section 139(1) of the Act relating to assessment year 2010-11. The Assessing Officer during the course of assessment proceedings, noted that the assessee was engaged in the business of manufacturing Mild Steel, Billets from mild Steel Scrap / Sponge Iron. All ingots and billet manufacturers in Jalna produce mild steel from which TMT bars were produced. The Assessing Officer elaborately noted the manufacturing activity of the assessee and the modus operandi of the business of assessee. The Assessing Officer further noted that electricity was major cost input in the process of manufacture of ingots / billets and accounted for major share of expenses. The Assessing Officer observed that the manufacturers in Jalna district were sanctioned load capacity on the basis of unit capacity, which in turn included usage for furnace load and auxiliary load and the major load factor on account of furnace. The Assessing Officer further pointed out that the Central Excise Department, Aurangabad had made detailed study on electricity units consumed

per Metric Tonne of production and made the same the basis of their conclusion that the assessee had indulged in suppression of production. The Assessing Officer thus, held that the electricity consumption was one of the parameters for determination of production because raw material and electricity accounted for more than 90% of the production costs. The Assessing Officer on the perusal of computation of income filed by the assessee for various assessment years observed that the assessee was in receipt of income from various sources like commission, commodity profits, etc. On the other hand, the assessee continued to suffer losses from the core activity of manufacturing of MS billets. The Assessing Officer under para 13 has tabulated year-wise other income earned by the assessee and the losses / profits from core activity and the overall profits / losses declared by the assessee. After considering the process of mining of iron ore to its final destination i.e. utilized in the construction activity, the Assessing Officer was of the view that the assessee was generating huge unaccounted profits, which in turn was introduced in the business in the guise of commission, commodity property, etc. In order to verify the genuineness of the income declared, certain verification exercise was carried out by the Assessing Officer in respect of commission income declared by the assessee.

6. The Assessing Officer further referred to the action of the Director General of Central Excise Intelligence (DGCEI), who had conducted actions on many steel and TMT bar manufacturers of Jalna including the assessee at different times. The DGCEI had been able to substantiate the clandestine removal of goods manufactured by the assessee. The Assessing Officer made reference to various orders passed by the DGCEI, under which duty, penalty and even personal penalties on directors of the assessee company, were levied. The Assessing Officer made reference to the orders passed by the DGCEI against the assessee during the financial years 2004-05 to 2010-11, under para 28 and show caused the

assessee as to why the book results should not be rejected. After considering the reply of the assessee, the Assessing Officer observed vide para 34 of the assessment order that the reliance on the decision of SRJ Peety Steel Pvt. Ltd. and Shri Om Rolling Pvt. Ltd. and the ratio laid down by the Pune Bench of Tribunal having not been accepted by the Department, and appeals having already been filed before the Hon'ble Bombay High Court, Aurangabad Bench on 02.05.2011, the decisions of the Tribunal were not binding. It was further observed by the Assessing Officer that the assessee had merely denied the facts without any corroboratory evidence and in the absence of the same, onus has not been discharged. The Assessing Officer referred to the variance in electricity consumption by different manufacturers and held that the same was not justified and also that the assessee had failed to furnish any documentary evidence to justify the variance in electricity consumption. Reference was made to the report of Dr. Batra and others and also to the order of CESTAT dated 28.02.2011, wherein it was observed that auxiliary load cited by the assessee was static in nature and could not be the cause of high electricity consumption. In the absence of G-7 form being maintained by the assessee, the Assessing Officer held that the reasons for variation in electricity consumption were not justified as claimed by the assessee. The Assessing Officer in view thereof, estimated the suppressed production in the hands of assessee on the basis of data relied upon by the Central Excise Commissioner (CEC), Aurangabad and rejected the books of account of the assessee under section 145(1) of the Act. The Assessing Officer thereafter, computed the production in the hands of the assessee on the basis of production shown as per Excise records and electricity consumption and income was estimated in the hands of the assessee from year to year.

7. The CIT(A) in the consolidated order passed in the case of assessee after considering orders of Assessing Officer and the submissions of the assessee

against each aspect of the assessment order, called for remand report and held that there was suppression of sales and profits in the years under appeal. In view of the observations of Customs Excise & Service Tax Appellate Tribunal (CESTAT) , West Zonal Bench, order dated 01.03.2011 in the case of assessee and others and hence, the profit declared by the assessee could not be accepted without making further addition on account of profit on suppressed sales. The CIT(A) upheld the order of Assessing Officer in arriving at the suppressed production / sales of MS ingots / billets on the basis of electricity unit consumption. The second aspect considered by the CIT(A) was whether Gross Profit was to be taxed in respect of said alleged undisclosed sales and at what percentage of GP or the total amount of consideration towards alleged suppressed production sold after reducing cost of raw material, was to be taxed. The CIT(A) noted that the Assessing Officer had estimated the electricity consumption for one MT production of MS ingots on 1026 electricity units as estimated by the Excise Department and as considered by the Income-tax Department in preceding years. Reference was made to the decision of Pune Bench of Tribunal in SRJ Peety Steels Pvt. Ltd. and Shri Om Rolling Pvt. Ltd. and the appeals pending before the Hon'ble Bombay High Court, Aurangabad Bench. The CIT(A) held that GP in respect of undisclosed production sold could only be taxed in the hands of the assessee. Since the book results were rejected in view of admitted clandestine removal of goods and unaccounted purchase of raw materials and sale of finished goods admitted by the assessee, the GP on undisclosed sales was to be reasonably estimated. The CIT(A) estimated the GP on suppressed production sold @ 4%, which was almost double of GP applied in the case of SRJ Peety Steels Pvt. Ltd., engaged in the same business of manufacturing of MS ingots / billets, decided by the Tribunal. Further, in the cases where the actual GP as per books in the year/s under appeal was more than 4%, the CIT(A) directed that the actual GP rate was to be adopted. Further, vide para 8.6, the CIT(A) considered the plea of the assessee that the GP addition on

account of profit on alleged sale of suppressed production was to be reduced by income offered to tax in the hands of directors / persons who were the beneficiaries of the said income. The CIT(A) noted that in the hands of four persons, the total declaration of Rs.2.80 crores was made by the said persons in assessment years 2006-07 to 2008-09. The details of the profit of the companies of group on suppressed production sold also worked out to Rs.2.80 crores. The claim of the assessee before the CIT(A) was that since it had offered to tax the above additional income in the statement recorded under section 132(4) of the Act and also in the returns of income on account of undisclosed profit, which was to be telescoped against the addition on account of profit on alleged suppressed production sold. The CIT(A) noted that the said income was offered to tax in the hands of directors / individuals out of undisclosed income earned by the flagship companies including the assessee company. From the details of income offered to tax by Kalika group, the CIT(A) further noted that no income was offered to tax in the hands of the assessee company. Therefore, the CIT(A) held that no telescoping was to be allowed in the hands of the assessee. Hence, contention of the assessee about telescoping of the income offered to tax in individual capacity against the income taxed in the hands of the assessee company, was rejected.

8. The second aspect considered by the CIT(A) was the funds / capital required for producing and selling the goods outside the books of account. The CIT(A) held that the said undisclosed investment in respect of undisclosed turnover is to be estimated and an addition of Rs.3,74,147/- was proposed in this case. The CIT(A) also upheld the rejection of books of account under section 145(3) of the Act. The CIT(A) also considered the objections raised by the assessee that the assessment framed under section 143(3) r.w.s. 153A of the Act was bad in law, as no incriminating material or evidence was found during the course of search. The CIT(A) observed that during the course of search and statement recorded under

section 132(4) of the Act, Kalika group had declared additional income of more than Rs.14 crores in various group cases and profit of Rs.2.80 crores, which has been earned on account of profit on suppressed production sold by the flagship companies of Kalika group including assessee company, had been declared in the statement recorded under section 132(4) of the Act and also in the returns of income filed in the hands of directors / persons, who were beneficiaries of the said income. Therefore, it could not be said that no incriminating material was found in course of search. Further, the fact of action by DGCEI and the clandestine removal of goods noted during the course of search / post search enquiries, the CIT(A) upheld the order of Assessing Officer in assessing the income under section 143(3) r.w.s. 153A of the Act.

9. The assessee is in appeal against the confirmation of alleged suppressed sales on the basis of order passed by the CCE, Aurangabad and on the basis of evasion of Excise duty found by the DGCEI. The assessee is also aggrieved by the order of CIT(A) in confirming the addition on the basis of order of CCE, Aurangabad, wherein, they had relied on the consumption of electricity vis-à-vis production on the basis of an article written by Dr.N.K. Batra. The assessee is further aggrieved by the rejection of books of account upheld by the CIT(A). The next grievance of the assessee is the addition made by applying GP rate of 4% to the alleged suppressed sales to work out the addition in the hands of assessee. The next objection raised by the assessee is against the addition made under section 69C of the Act.

10. The issue in ground of appeal No.10 is against the confirmation of addition by the Assessing Officer on the basis of four show cause notices, out of which two show cause notices were cancelled by CESTAT, one by the Commissioner of Appeals (Excise) and against one, the assessee had gone to the Settlement

Commission. The assessee had also raised ground of appeal No.6 against the non-allowance of sufficient opportunity to the assessee by the Assessing Officer before completing assessment, which is not pressed, hence the same is dismissed as not pressed. Further, vide ground of appeal No.9, the assessee has raised objection against the passing of order under section 143(3) r.w.s. 153A of the Act and the said ground of appeal is not pressed, hence, the same is dismissed as not pressed.

11. The Revenue is in appeal against the order of CIT(A) in estimating the profits in the hands of the assessee by applying GP rate @ 4% as against the order of Assessing Officer in making the addition on account of suppressed production in the hands of the assessee.

12. The learned Authorized Representative for the assessee pointed out that search under section 132 of the Act was carried out at the premises of assessee on 08.07.2009. The statement of director Shri Ghanshyam Goyal was recorded under section 132(4) of the Act on 08.07.2009 and further, statement under section 131 of the Act was recorded on 17.08.2009, copies of which are placed in the Paper Book. As per the statement recorded under section 132(4) of the Act, the director had declared Rs.14 crores in the hands of directors of four groups of shareholders and their family members. Further, in the statement recorded under section 131 of the Act, the director had given complete bifurcation of the declaration of Rs.14 crores and also details bifurcation of income declared in the hands of individuals in respective years. The major portion of income was declared in assessment year 2010-11 amounting to Rs.12.08 crores and the balance of Rs.2.80 crores was declared in assessment years 2006-07 to 2008-09. However, in the hands of the group company i.e. the assessee and also sister concern Kalika Steel Jalna Pvt. Ltd., no declaration of income was made.

13. The learned Authorized Representative for the assessee further pointed out that during the course of search, the details of show cause notices issued by the Excise Department were found and the Assessing Officer had show caused the assessee to explain the same. The Assessing Officer had made the addition on account of suppressed production and sale on the basis of orders of Excise Commissioner, which was similar to the order passed in other furnace cases. The learned Authorized Representative for the assessee pointed out that the said addition of suppressed production in the case of furnace cases was deleted by the Third Member of CESTAT. Further, it was pointed out by him that verification of electricity consumption at the factory premises of the assessee was carried out on 25.01.2009 and the said consumption was 1371.50 units per MT. In respect of four show cause notices issued by the Excise authorities, the assessee in the written submissions filed, explained as under:-

- “8. *We have now filed a complete statement showing the final result of the SCNs at Page No.1 from which your honour will find as under:-*
- a. The SCN at S.No.1 is settled before the Settlement Commission together with other parties and the order of Settlement petition is given at Page No.290 – 295 of Paper Book Volume 2. The GP @ 4% on the quantity of 688.50 MT involving total sale value of Rs.1,11,85,530/- comes to Rs.4,47,421/- which is to be now included in the income of the assessee for assessment year 2007-08.*
 - b. The SCN at S.No.2 is on basis of order passed by Excise Commissioner which on lines of other furnace cases and is canceled by the order of the Third Member CESTAT vide order dated 31-07-2014 at Page No.2 – 34.*
 - c. The SCN at S.No.3 is relating to A.Y. 2009-10 and the same is also cancelled by the order passed by the CESTAT dated 22-10-2014 at Page No.35 – 61.*
 - d. The SCN at S.No.4 is relating to the order passed by the Excise Commissioner which is cancelled by the Commissioner (Appeals) of Central Excise and the order of the Commissioner (Appeals) of Central Excise is at Page No.52 – 56.”*

14. The contention of the assessee before us is that the issue in the present appeals is similar to the issue raised in the appeals decided by Pune Bench of Tribunal in the case of M/s. SRJ Peety Steels Pvt. Ltd. Vs. Addl. CIT in ITA

Nos.123 & 124/PN/2012 and appeals filed by the Revenue in ACIT Vs. M/s. SRJ Peety Steels Pvt. Ltd., relating to assessment years 2007-08 and 2008-09, vide order dated 16.01.2015 and also by the other orders of Tribunal in Bhagyalaxmi Steel Alloys Pvt. Ltd. Vs. Addl.CIT & Ors. in ITA Nos.284, 285 and 286/PN/2012 and others, relating to assessment years 2004-05 to 2008-09 decided on 15.07.2015. The learned Authorized Representative for the assessee further pointed out that the earlier decision of Tribunal in the case of SRJ Peety Steels Pvt. Ltd., was against the order passed under section 153A of the Act, which has been confirmed by the Hon'ble Bombay High Court, Aurangabad Bench, relating to assessment years 2000-01 to 2006-07.

15. The learned Departmental Representative for the Revenue in reply, in turn, relied on the order of CIT(A) and also pointed out that the assessee in its statement recorded under section 131 of the Act had admitted to the clandestine removal of goods and had also admitted to the additional income being offered in the hands of its directors. The learned Departmental Representative for the Revenue stressed that the said addition is to be made in the hands of assessee.

16. Coming to the appeals filed by the Revenue, the learned Departmental Representative for the Revenue pointed out that vide grounds of appeal No.1 and 2, the issue was against the addition restricted by the CIT(A) by applying GP rate of 4% on the suppressed sales. The learned Departmental Representative for the Revenue pointed out that vide ground of appeal No.3, the Department has challenged that GP rate of 35% as admitted by the director in the statement recorded under section 131 of the Act on 17.08.2009 should be applied. The learned Departmental Representative for the Revenue thus, stressed that in case GP rate is to be applied, then the same should be applied @ 35% since the

assessee by clandestine removal of goods has evaded the payment of Excise duty and hence, the margins of profits were higher in the hands of assessee.

17. The learned Authorized Representative for the assessee in reply, pointed out that there was no merit in the grounds of appeal raised by the Revenue, in view of deletion of addition made by the Tribunal in the case of Bhagyalaxmi Steel Alloys Pvt. Ltd. (supra). Further, the learned Authorized Representative for the assessee pointed out that director of assessee company though had stated that it would be reasonable to compute the GP rate @ 35% in case of furnace cases and 15% in case of Rolling Mills, but in the said statement itself, it was mentioned that the declaration was made to buy peace of mind and in principle, he was not accepting such results of unaccounted sales. The learned Authorized Representative for the assessee further referred to the order of CIT(A) in para 8.6, wherein, the CIT(A) had not allowed telescoping in the hands of the assessee on account of addition made in the hands of directors / individuals of Kalika group. The declaration made by the director in the hands of individuals was claimed to be under pressure and there was no merit in the aforesaid addition. The learned Authorized Representative for the assessee pointed out that in fact, out of four show cause notices found during the course of search, two were cancelled by the CESTAT, one is cancelled by the Commissioner of Appeals (Excise) and against one, the assessee had gone to Settlement Commission. The learned Authorized Representative for the assessee fairly admitted that the profit on the clandestine removal of goods as admitted by the assessee before the Excise authorities by way of Settlement Commission or otherwise, is to be added in the hands of assessee as directed by the Tribunal in appeals in group of furnace cases.

18. We have heard the rival contentions and perused the record. The issues arising in the present cross appeals filed by the assessee and the Revenue are

against the addition made on account of suppressed production worked out on the basis of electricity consumption as per the report of Dr. Batra. The Excise authorities had issued various show cause notices to the assessee for the respective assessment years and on the basis of the allegation of Excise authorities, vide said show cause notices, the Assessing Officer made additions in the hands of assessee on account of clandestine removal of goods without payment of Excise duty. The basis for the issue of show cause notices was the variation in electricity consumption and also and / or on account of the evidence of clandestine removal of goods having been found against the assessee by way of search at the premises of group cases of assessee by the Excise authorities. The present cross appeals filed by the assessee and the Revenue are pursuant to search and seizure operations carried out against the assessee on 08.07.2009. During the course of search by the Income-tax Department on the assessee, statement of director of assessee company was recorded under section 132(4) of the Act on 08.07.2009, in which he declared undisclosed income of Rs.14 cores in the hands of directors of four groups of shareholders and their family members. Further, statement under section 131 of the Act was recorded on 17.08.2009, in which bifurcation of declaration of Rs.14 crores was given. Admittedly, the said declaration of Rs.14 crores has been offered to tax by the respective persons in their individual returns of income filed pursuant to the said declaration. The income has been taxed in the hands of individual persons and thereafter, even penalty proceedings were initiated under section 271(1)(c) of the Act. No declaration of any additional income was made by the assessee company during the course of search. The Assessing Officer based the addition in the hands of assessee on the basis of variation in electricity consumption, which was the issue raised in various show cause notices issued by the Excise Department.

19. The issue arising in the present bunch of appeals is whether any addition could be made in the hands of assessee on the basis of aforesaid show cause notices issued by the Excise Department on various dates, against which, proceedings were either before the Settlement Commission or the CESTAT. We find identical issue of addition on account of estimation of suppressed production in the case of furnace companies arose before the Tribunal in bunch of appeals with lead order in Bhagyalaxmi Steel Alloys Pvt. Ltd., (supra). The Tribunal vide consolidated order dated 15.07.2015 considered the first aspect of the issue. In the said cases as in the case of assessee, no incriminating material was found by the Income-tax Department and the total addition from year to year was based on the show cause notices issued by the Excise Department. Against the first show cause notice issued by the Excise Department, the assessee had filed petition before the Settlement Commission, in which it had admitted to clandestine removal of certain goods without payment of Excise duty. The assessee admittedly, had not offered the profit on such clandestine removal of goods in its returns of income and the Tribunal had directed the Assessing Officer to add the aforesaid profits in the hands of assessee in the respective years by applying GP rate of 4% and where GP rate shown was more than such GP rate. The second show cause notice was issued to many furnace cases and the same was cancelled by the order of Third Member of CESTAT, dated 31.07.2014 and the Tribunal in turn, following the ratio laid down by the Third Member of CESTAT, had deleted the addition in the hands of assessee. The third show cause notice issued to the assessee was relating to assessment year 2009-10, which was also considered by the Tribunal in another set of appeals relating to assessment year 2009-10 and after considering the cancellation order passed by the CESTAT (Division Bench) and also the verification exercise carried out at the premises of the assessee, wherein the consumption of electricity was found to be far in excess of the allegation of the Excise Department on the basis of the report of Dr. Batra, no addition on account of excessive production was made in

the hands of assessee. Before us, there is fourth show cause notices issued by the Excise Department, which have been cancelled on 25.05.2009 by Commissioner (Appeals) of Excise and the said order is placed on record at pages 50 to 56 of the Paper Book. The Revenue has not filed any appeal against the order of Commissioner (Appeals) of Excise, Aurangabad before CESTAT. The learned Departmental Representative for the Revenue has failed to bring on record any evidence that the said order has been challenged before CESTAT. In view thereof, where the issue is identical to the issue raised in earlier bunch of appeals wherein addition was made on account of erratic consumption of electricity and various show cause notices issued by DGCEI, we hold that earlier ratio laid down by the Tribunal is squarely applicable. The relevant findings of the Tribunal in Bhagyalaxmi Steel Alloys Pvt. Ltd., (supra) are as under:-

“17. We have heard the rival contentions and perused the record. The Ld. AR for the assessee filed argument synopsis and Ld. Spl. AR for the Revenue also has filed notes of his argument which are placed on record. We have also considered all the precedents and decisions relied on by both the Parties.

18. Before addressing the issue on merits, we would like to make a mention of the proceedings before the Bench of the present cases listed before us, which were made vide order sheet entry dated 07.05.2015. The present appeals were fixed for hearing initially on 10.03.2015 and were adjourned at the request of the Special AR for the Revenue as he was not ready to argue the appeals. The reasons stated in the letter dated 10.03.2015 for seeking adjournment i.e. contemplation of filing MA against the earlier orders of the Tribunal, was rejected. The appeals were adjourned to 13.03.2015 and then 05.05.2015 at the request of the Special AR. On 05.05.2015, the Counsel for the assessee opened his arguments which were replied to by Special AR for the Revenue. On 05.05.2015 itself, the Special AR filed written submissions alongwith compilation of case laws and the matter was adjourned to 07.05.2015 for further hearing. On 07.05.2015, the case was taken up in the pre-lunch hour and was argued at length by the Special AR for the Revenue. The Counsel for the assessee strongly opposed the same on the ground that the Special AR for the Revenue had concluded his arguments on earlier date and today the matter was fixed for his rejoinder. The hearing could not be concluded in the pre-lunch hour session and it was directed that the hearing would continue at 03:00 PM i.e. after the lunch hour to which both the parties consented. On reassembling of the Bench, the Special AR for the Revenue furnished letter under his signature stating that the Pr.CIT, Aurangabad was contemplating to file certain petitions before the Hon'ble President/Vice President, ITAT, Mumbai and therefore the matter should be adjourned for three weeks. However, the nature and contents of the petition contemplated was not made known. The

Special AR for the Revenue was asked to continue his arguments by the Bench, but he referred to his adjournment letter.

19. *The Counsel for the assessee started his argument. However, the Special AR for the Revenue walked off from the Court Room. The Counsel for the assessee also furnished written rejoinder in reply to the submissions filed by the Special AR for the Revenue, parawise which were gone into at length. Though, in the course of hearing, the Special AR for the Revenue left the Court proceedings, on the other hand, Smt. M.S. Verma, Ld. CIT-DR and Shri Rajesh Damor, Ld. Addl.CIT-DR were present in the Court. Thereafter, other cases which were to be argued by the Ld. CIT-DR and Ld. Addl.CIT-DR were taken up for hearing and the matters in ITA Nos.125, 127, 430 & 431/PN/2012 along with ITA No.1525/PN/2012, ITA No.1476/PN/2012, ITA Nos.179 to 182/PN/2012, ITA Nos.656 to 659/PN/2012, ITA No.1084/PN/2012, ITA No.1468/PN/2012, ITA No.1558/PN/2012, ITA No.1629/PN/2012, ITA No.1516/PN/2012 and ITA No.1638/PN/2012 were heard. All the other appeals are adjourned to 08.05.2015 as part heard.*

20. *On 08.05.2015, on calling of the matters, we find that the Ld. Special AR is not present in the Court room and there is no intimation about his absence in the bunch of matters, which are listed for hearing. The CIT-DR was present and was asked to explain his absence. In reply she stated that she had no intimation. In view of continued defiance of the Ld. Special AR in yesterday's hearing and his non-appearance in today's hearing, conduct of the Ld. Special AR is to be taken note of. The CIT-DR was informed in the Bench as to why costs should not be imposed on the Department for his continued defiance and for interrupting proceedings of the Bench. The hearing is to continue in the listed matters as annexed on 13.05.2015 as part-heard.*

21. *On 13.05.2005, Shri J.P. Bairagra was present for the assessee and Shri Sunil Ganoo, Ld. Special AR, Smt. M.S. Verma, CIT-DR & Shri Rajesh Damor were present for the Department. The matter was finally heard on 14.05.2015 when Shri J.P. Bairagra present for the assessee and Shri Sunil Ganoo, Ld. Special AR, Smt. M.S. Verma, CIT-DR & Shri Rajesh Damor were present for the Department.*

22. *Though the assessee has raised several grounds of appeal, but the issues raised by the assessee are four-fold on the following accounts:-*

- a) *Reopening of assessment under section 147 and non-supply of reasons for reopening the assessment under section 147 of the Act;*
- b) *Non-issue of notice under section 143(2) of the Act after reopening the assessment under section 147 of the Act; and*
- c) *Addition made on account of alleged suppression of sales on the basis of consumption of electricity as per US standards and evasion of Excise duty by the manufacturers of TMT bars in Jalna cluster found by Director General of Central Excise and Customs; and working out the addition by applying GP rate of 4% on the alleged suppression of sales, after rejecting the books of account under section 145 of the Act.*

- d) *Addition made on account of investment in purchases relating to suppression of sale.*

23. *The Revenue on the other hand, is in appeal against the order of CIT(A) on the following grounds:-*

- a) *In quantifying the suppressed production @ 4% as against the addition made by the Assessing Officer on account of the total suppressed production, where the assessee was found to be indulging in clandestine removal of goods without payment of Excise duty; and*
- b) *Allowability of manufacturing and administrative expenses on the un-accounted production worked out by the Assessing Officer.*

24. *The steel group of cases were heard from day-to-day on various dates and the arguments of both the learned Authorized Representative for the assessee and the Ld. special AR were heard along with written submissions, Notes filed by them and the compilation of case laws relied upon by the respective Authorized Representatives. It may be put on record that the issues raised by the different assessees before us are relatable to the addition made on account of alleged suppression of production and evasion of duty on account of erratic consumption of electricity.*

25. *Now, we are coming to the merits of the issue raised before us. We have heard this bunch of appeals where different issues are raised i.e. in some cases where the assessment is completed under section 143(3) r.w.s. 148 of the Act, the assessee has raised the issue against re-opening of assessment, non-supply of reasons for re-opening under section 147 and also non-service of notice under section 143(2) after recording of reasons under section 147 of the Act. However, in some cases, the assessment has been completed under section 143(3) of the Act and there are no issues against re-opening of the assessment. The Ld. Authorized Representative for the assessee in the present bunch of appeals relating to Bhagyalaxmi Steel Alloys Pvt. Ltd. at the outset stated that the grounds of appeal Nos.1, 2 and 10 in relation to re-opening of the assessment under section 147 and non-supply of reasons for re-opening under section 147 of the Act, are not pressed. Hence the same are dismissed as not pressed.*

26. *The next issue is the working of the suppressed production and the application of GP rate of 4% on such suppressed production and third is the working capital required for investment in such suppressed production. We find that similar issue of addition on account suppressed production on account of erratic consumption of electricity arose before the Tribunal in the case of SRJ Peety Steel Pvt. Ltd. (supra). Though both the parties have raised their arguments in favour of/against the order of the Tribunal in SRJ Peety Steel Pvt. Ltd. (supra), we first refer to the decision of the Tribunal and then meet with the respective objections of both the authorized representatives.*

27. *Though the case of the learned Authorized Representative for the assessee was that the issue raised in the present appeal was identical to the issue before the Tribunal in M/s. SRJ Peety Steels Pvt. Ltd. (supra). However, the Ld. Special AR stressed that the issue was at variance and*

made elaborate submissions. It may be put on record that M/s. SRJ Peety Steels Pvt. Ltd. (supra) is a case of furnace, which is engaged in the manufacture of ingots / billets. In the case of M/s. SRJ Peety Steels Pvt. Ltd. (supra), there was an order of Central Excise Commissioner, Aurangabad in relation to suppression of production on account of erratic consumption of electricity. The assessee filed an appeal against the said order of CCE, Aurangabad before the CESTAT and the Third Member of CESTAT deleted the addition made in the hands of respective furnace cases. Also, in the case of the assessee before us, there is order of CCE, Aurangabad and there is order of Third Member of CESTAT. In some of the years, the owners of furnace on the basis of certain information gathered by the DGCEI had moved a petition before the Settlement Commission and offered additional production, which was accepted by the Settlement Commission in entirety. The Assessing Officer observed that there was suppression of production by the furnace companies in Jalna cluster on the ground of variance in consumption of electricity versus production. The Assessing Officer also referred to the data collected in the cases of furnace owners i.e. M/s. SRJ Peety Steels Pvt. Ltd. and others and relying on the addition made in the hands of M/s. SRJ Peety Steels Pvt. Ltd. (supra), in turn, on the basis of the order of CCE, Aurangabad, made additions in the hands of present set of assesses before us.

28. The Tribunal had elaborately considered all the aspects of addition in the hands of the furnace owners i.e. M/s. SRJ Peety Steels Pvt. Ltd., on the basis of erratic consumption of electricity, which in turn, was the basis for making the additions in the hands of the assessee therein by CCE, Aurangabad and vide order dated 16.01.2015 held that since the order of the CCE, Aurangabad has been overruled by the Third Member of CESTAT, there was no basis for addition in the hands of the assessee. The other aspects of the issue that the assessee therein had made the petition before Settlement Commission in respect of clandestine removal of material without payment of Excise duty, was also considered by the Tribunal and in the absence of any inquiry / investigation or material collected by the Assessing Officer, the Tribunal held that there was no merit in any addition in the hands of the assessee in assessment year 2007-08. Further, in assessment year 2008-09, there was no admission of any clandestine removal of material without payment of Excise duty before the Settlement Commission and in the absence of any other inquiry or investigation being carried out by the Assessing Officer or any other evidence being brought on record, the Tribunal held that no addition is warranted in the hands of the assessee. The issue before the Tribunal in M/s. SRJ Peety Steels Pvt. Ltd. was summarized under para 9, which reads as under:-

“9. At this stage we are not considering the appeals filed by the Revenue for the reason that those appeals are against the finding of the Ld. CIT(A) that the entire value of alleged suppressed production/sales of Ingots and Billets cannot be treated as income of the assessee and some reasonable percentage of the gross profit is to be estimated. Ld. CIT(A), accordingly, directed the Assessing Officer to adopt gross profit @ 4% on the value of alleged suppressed production/sales and accordingly, partly sustained the additions. Now, we first decide the core issue in this case –

(i) On the facts and circumstances of this case whether the Assessing Officer was justified in making the addition of Rs.39,20,36,546/- in the A.Y. 2007-08 and Rs.40,75,72,486/- in the A.Y. 2008-09 on alleged suppression of production/sales and;

(ii) Whether the Assessing Officer was justified in holding that the books of account of the assessee does not give the correct picture of the state of affairs and hence, those books of account needs to be rejected.”

29. After considering the submissions of the assessee in paras 10 to 10.5 at pages 12 to 16 and also summarizing the submissions of the Ld. Special AR in paras 11 to 11.6 at pages 16 to 22 and the rejoinder of the assessee in paras 12 to 12.1 at pages 22 to 24 of the order, the Tribunal observed as under:-

“13. We have heard the rival submissions of the parties and perused the record. Ld. AR for the assessee filed argument synopsis and Ld. Spl. AR for the Revenue also has filed notes of his argument on 05-11-2014 which are placed on record. We have also considered all the precedents and decisions relied on by both the Parties. The assessee is manufacturer of Ingots/Billets. So far as A.Y. 2007-08 is concerned the original assessment of the assessee was completed u/s. 143(3) of the Act on 31-12-2009. While completing the assessment u/s. 143(3) of the Act, in the opinion of the Assessing Officer the electricity consumption shown by the assessee was at higher side as compared to the quantum of production declared by the assessee. The Assessing Officer, therefore, made the addition on the basis of the alleged suppression of the production/sales by the assessee as in his opinion the assessee should have declared or shown more production of the Ingot/Billets. Subsequently, on the basis of the information received from the office of the CCE, Aurangabad vide their letter dated 29-03-2010 as well as adjudication order of CCE quantifying the value of alleged suppressed production and alleged evasion of excise duty, the Assessing Officer initiated the re-assessment proceedings for A.Y. 2007-08 against the assessee company u/s. 147 of the Act. In reasons recorded by the Assessing Officer while issuing the notice to the assessee company u/s. 147 for A.Y. 2007-08 the Assessing Officer gave reference of the communication and order of the CCE Aurangabad received from the Central Excise office at Aurangabad.

14. The Assessing Officer has also referred to one matter in respect of the action conducted by DGCE (Intelligence) against the few brokers and sub-brokers who were involved in the trading into the Ingot/Billets and TMT Bars. The Assessing Officer also referred to the petition filed by the assessee before the Central Excise and Custom Settlement Commission, Mumbai Bench, Mumbai for waiver of penalty, interest and for getting immunity from a prosecution. The Assessing Officer proceeded to decide the alleged suppression of production by the assessee admittedly which was based on the information received from Central Excise Authority as well as the adjudication Order of the CCE, Aurangabad. It is pertinent to note here that in this case that there was a search and seizure action against the assessee and its group companies by the Income-tax Dept. on 17-03-2006 and in consequence of the search and seizure action u/s. 132(1) the assessments of the assessee have been framed u/s. 153A r.w.s. 143(3) for the A.Ys. 2000-01 to 2006-07. It is also pertinent to note that during the course of search and seizure operation no incriminating evidence was found suggesting that the assessee has suppressed the production as compared to the consumption of the electricity. No excess stock of finished goods was also found. We also put on record that the assessment framed by the Assessing Officer in consequence of search and seizure action against the assessee u/s. 153A r.w.s. 143(3) have reached the Hon'ble jurisdictional High Court. We will later refer to the decision of the Tribunal as well as Hon'ble High Court and certain important observations made in respect of

the assessment framed by the Assessing Officer. It is also to be taken note that the A.Ys. 2007-08 and 2008-09 before us are immediately next assessment years after the assessments in consequence of search and seizure action u/s. 132(1) of the Act were completed.

15. *It is also to be taken note of the fact that even for the A.Ys. 2007-08 and 2008-09, no independent investigation or any enquiry is made by the Assessing Officer or any other Income Tax Authorities. In the assessment order the Assessing Officer has placed his reliance only on the information received from the Central Excise Authorities and the proceeding before the Settlement Commission of Central Excise & Custom, Mumbai. The investigation was carried out by Central Excise Authorities i.e. DGCEI, against few brokers/sub-brokers and those brokers gave the names of many companies who are in the manufacturing of Ingot/Billets and TMT Bars. As per the statement given before the Central Excise Authorities by those brokers as well as sub-brokers namely Shri Umesh Modi, Mumbai, Shri Anil D Lingade, Shri Mukesh Gupta it was admitted that they were involved in clearing the consignments from the factory on weighment slips only and no excise duty was paid and they were involved in providing fake trading bills and challans which accompanied the vehicles carrying those consignments. As per the modus operandi adopted by the brokers they used to recover the said fake trading bills and challans after the goods reached their destination. As noted by the Assessing Officer those brokers/sub-brokers also admitted that the entire evidence was destroyed by them and they used to get the commission of Rs.100/- per MT. The Assessing Officer has discussed the information gathered by the DGCEI, Zonal Unit, Mumbai in Para Nos. 2.1, 2.2, 2.3, 2.4, 2.5, 2.6 & 2.7 of the assessment order. So far as action against the brokers and sub-brokers are concerned the Central Excise Authority issued show cause to the assessee as well as the other manufacturers who were involved in clearing the excisable goods without payment of duty. All the manufacturers of the Ingots/Billets and TMT Bars were based in Jalna and the assessee is one of them. As per the investigation done by the Central Excise Authorities, the assessee who is manufacturing of Ingots/Billets supplied 288.500 MT. to Shri Om Rolling Mills Pvt. Ltd. which is engaged in the manufacturing of TMT Bars. The Assessing Officer also referred to a statement of Shri Surendra S. Peety, Managing Director of the assessee recorded on 12-01-2007, by the DGCEI who allegedly admitted that the goods supplied to Shri Om Rolling Mills Pvt. Ltd. i.e. Ingots/ Billets, were removed clandestinely without payment of excise duty and the said material was to extent of 275 MTs. The sale price was received in cash from Shri Om Rolling Mills Pvt. Ltd. and hence, there was no accounting. The assessee admitted the said charge of the Central Excise Authorities i.e. DGCEI and approached the Settlement Commission and paid the excise duty to the extent of Rs.7,79,313/- for clearing the goods without payment of excise duty. The declaration filed by the assessee was accepted without any further addition or objection filed by the Central Excise Authorities. The Settlement Commission levied the penalty of Rs.8,000/-.*

16. *The Assessing Officer also has in detail discussed the process involved in the manufacturing of Ingots as well as Billets in the assessment order. At this stage we are not concerned with the said discussion which is in Para No. 4.1 of the assessment order. The Assessing Officer in his discussion for arriving at the conclusion that as compared to the consumption of the electricity shown by the assessee the production was much more lower, has given the examples or reference of some other manufacturers against whom action taken by the Central Excise authorities. As observed by the Assessing Officer as per an article written by Shri R.P. Varshney, Executive Director, All India Induction Furnaces Association, New Delhi on "Electric Steel Making technology in the 21st Century" which is available on the internet which is on the Electric Induction Furnace and as*

per the said article the power consumption in Induction Furnace is between 650 to 820 units per MT depending upon the input charge used. The Assessing Officer also referred to the Technical report of the IIT, which states that electricity requirement for manufacturing 1 MT of M.S. Ingots where melting scrap is used as an input, varies from 555 to 754 units and where "Sponge Iron" is used as an input, the electricity requirement varies from 815 to 1046 units. The Assessing Officer, therefore, came to the conclusion that the assessment framed by the Commissioner of Central Excise and Custom, Aurangabad in respect of the alleged suppression of production after considering the electricity consumption declared by the assessee and the production rate of units of electricity per metric ton adopted by the CCE, Aurangabad are very much reasonable, fair and justified and he adopted the same for the purpose of calculation of alleged unaccounted production of finished goods (Para No. 4.3 of the assessment order).

17. The Assessing Officer also rejected the books of account of the assessee u/s. 145(3) of the Income-tax Act by giving the reason that the assessee has not given the true and correct picture. The Assessing Officer adopted the suppression of production determined by the CCE, Aurangabad as per his adjudication order and held that the assessee has suppressed the production and accordingly, worked the suppressed production of the A.Y. 2007-08 as under:

A.Y.	Suppressed Production M.T.	Rate per M.T. Rs.	Assessable Value of Suppressed Production Rs.
2007-08	20,751	18,892	39,20,37,546
2008-09	29,276	21,444	40,75,72,486

18. In the A.Y. 2007-08, the Assessing Officer gave the set off of Rs.8,44,01,504/- which was in respect of the addition made by the Assessing Officer while completing the assessment u/s. 143(3) of the Act in the order dated 31-12-2008 and made the net addition of Rs.30,76,35,042/-. So far as A.Y. 2008-09 is concerned no adjustment was made in the A.Y. 2008-09 as it was the regular assessment u/s. 143(3) of the Act. Even though in the A.Y. 2008-09, the Assessing Officer has observed that the information received from the Central Excise Authority is not relevant, but finally the assessment order is framed on the basis of the order passed by the Commissioner of Central Excise and Custom, Aurangabad as per the value determined in the adjudication order for the purpose of levy of excise duty adopting statistic of power consumption. In the computation for the A.Y. 2008-09 the Assessing Officer made the mistakes by mentioning Rs. (-) 1,91,62,000/- as per the order u/s. 143(3) when in fact the said figure is as per the return of income filed by the assessee for the A.Y. 2008-09."

30. After analyzing the submissions of the assessee, the Tribunal noted that in both the years before it, the Assessing Officer had determined the alleged suppression of production / sales as determined by the CCE, Aurangabad on the basis of erratic consumption of electricity. The basis of the order of CCE, Aurangabad was the report of Dr. N.K. Batra, Professor of IIT, Kanpur. The Third Member of CESTAT in group of cases of furnace owners held that the order of CCE, Aurangabad was not sustainable and had to be cancelled in turn, relying on the ratio laid down in R.A. Casting (supra). The relevant finding of the Tribunal in turn, incorporating the order of Third Member of CESTAT in paras 19 to 19.4, which read as under:-

"19. In sum and substance in both the assessment years the Assessing Officer has determined alleged suppression of the production/sales as determined the Commissioner of Central Excise and Custom, Aurangabad

on the basis of power consumption. The copy of the adjudication order passed by the Commissioner of Central Excise and Custom and Service Tax, Aurangabad dated 28-08-2009 (in short referred to as the "CCE") in the case of the assessee is placed at Page Nos. 122 to 174 of the P/B-I. The CCE, Aurangabad has observed that during the scrutiny of electricity bills, it was noticed that the substantial amount of expenditure has incurred by the assessee towards the cost of power consumption (Primary input). He has further observed that from the scrutiny of the various records, the cost of production is much more than cost of sale value, leaving no room for other major expenses like stores, wages, salaries, cost of maintenance etc. The Ld. Commissioner has referred to the study conducted by the Indian Institute of Technology (IIT), Kanpur and has observed that as per the said "Technical Opinion Report" the consumption of electricity for manufacture of one metric ton of steel ingots varies between 555 to 1026 electricity units depending upon the thermal efficiency, electricity efficiency and nature of mix of raw material. As observed by the Ld. CCE in the case of the assessee as per their electricity bills, the average consumption of electricity for manufacture of 1 MT of MS Ingots varies from 1454 to 1856 units.

19.1 He relying on the Technical report of IIT, Kanpur the Ld. Commissioner observed that on calculating the production of M.S. Ingot/Billets on the basis of consumption of 1026 units (Maximum Limit) of electricity for per MT of MS Ingots produced, it is noticed that there is a huge difference in the actual/normal production and the recorded figures in the assessee's records. The Ld. CCE accordingly, observed that the assessee has willfully suppressed the figures of production of Billets/MS Ingots in their records with an intent to evade payment of Central Excise Duty and, have involved themselves in the clandestine removal of final products. He also referred to the show cause notice issued by the DGCEI to the assessee which matter was ultimately settled by the assessee company in the Settlement Commission. The Ld. Commissioner also referred to non-maintenance of the proper electricity consumption record more particularly in Form G-7. The Ld. Commissioner also gave the data of production from April, 2003 to March, 2008 in his order. He has also recorded the objections of the assessee company. It appears that the assessee demanded the cross examination of Dr. N.K. Batra, Professor of IIT, Kanpur which opinion was heavily relied on by the CCE, Aurangabad. The Ld. Commissioner observed that the said Dr. N.K. Batra was no more and hence, his cross examination was not possible. He has also discussed and referred to the different decisions of the Tribunal. The Ld. Commissioner also relied on the investigation made by the DGCEI and show cause notice issued to the assessee and how the assessee approached the Settlement Commission and admitted the evasion and paid the excise duty and obtained immunity from criminal proceedings. The Ld. Commissioner confirmed the demand raised in the show cause notice and also levied the penalty to the extent of Rs.33,07,22,069/-.

19.2 The said order of the Ld. Commissioner was challenged before the CESTAT by filing the appeal u/s. 35B(a) of the Central Excise Act, 1944. There was a difference of the opinion between the Ld. Members of the CESTAT, i.e. L d. Vice-President and Ld. Technical Member and the matter was referred to the Ld. Third Member to resolve the following differences:

- a. Whether in view of the discussion in Para 1 to 31 and in view of the decision of the Tribunal in the case of R.A. Castings Pvt. Ltd. (supra) the impugned orders are to be set aside and the appeal allowed.
- b. Whether in view of the discussion in Para 32 to 68 above and in view of the Hon'ble Supreme Court's judgment in the case of Triveni Rubber & Plastics (supra) and this Tribunal's decision in the case of

Rattan Steels Works (supra), Nagpal Steel (supra) and Hans Castings Pvt. Ltd. (supra), the impugned order are to be upheld and all the appeals dismissed.

19.3 The Ld. Third Member of the CESTAT concurred with the finding of the Hon'ble Vice-President that the order passed by Ld. Commissioner of Central Excise and Custom, Aurangabad was not sustainable and has to be cancelled. The operative part of the order of the Third Member is as under:

"20. It is also seen that the Hon'ble Vice President correctly opined that the judgment in R.A. Casting (supra) is squarely applicable in the facts of the instant appeals. In R.A. Casting the electricity consumption was 2072 to 2443 units per MT, which is higher than the average electricity consumption in the instant appeals.

20.1 The Commissioner in the orders impugned in the instant appeals was having the following reports and clarifications for his consideration-

(i). 555 to 1046 units PMT as per Dr. Batra's report;

(ii). 1800 units PMT as per the report by Joint Plant Committee constituted by the Ministry of Steel, Government of India;

(iii). 1427 units per MT as per the report of NISST, Mandi, Gobindgarh given in June-July, 2006;

(iv). 650 to 820 units/MT as per Article of the Executive Director, All India Induction Furnace Association, New Delhi (Mr. Varshney);

(v). 1000 to 1800 units per Ton or even higher, as per Letters dated 18.3.2008 and 25.4.2008 of same Mr. R.P. Varshney [All India Induction Furnaces Association] informing that his Article prepared in 1989-90 was for Concast Steel making [thus not for Induction Furnace],

(vi). 620 to 690 units/MT as per Letter dated 22.6.2008 from Electrotherm,

(vii). Letter dated 9.8.2008 of Electrotherm to a client suggesting reasons which lead to high power- consumption, and another Letter dated 5.4.2008 of Electrotherm agreeing-., with the views of Induction Furnace "Association and informing that it is very difficult to define any range of power consumption.

20.2 As against this, in para 20 of the Order, the Tribunal in R.A. Casting (supra) considered different electricity consumption figures for production of 1 MT of MS Ingots, reported in following different reports-

(i). 555 to 1046 (KWH/T) as per Dr. Batra's report;

(ii). 1800 KWH/T as per the report by Joint Plant Committee constituted by the Ministry of Steel, Government of India;

(iii). 1427 KWH/T as per the report of NISST, Mandi, Gobindgarh given in June-July, 2006;

(iv). 650 units to 820 units/MT as per the Executive Director, All India Induction Furnace Association, New Delhi (Mr. Varshney);

(v). 851 units/MT in the case of Nagpal Steel v. CCE, Chandigarh reported in 2000 (125) E.L.T. 1147,

20.3 After perusal of these reports, Tribunal opined that wide variations in the consumption electricity have been reported for the manufacture of one MT of steel ingot, and that this renders the norm of 1046 units adopted by the Revenue as arbitrary. After this finding, which is upheld by the Hon'ble Allahabad High Court and even SLP has been dismissed, there was no reason for the Commissioner in the instant cases to consider the norm of 1026 units allegedly as per report of Dr. Batra, for arriving at deemed production. Moreover, the trial run conducted by the department had proved that at that time power consumption was actually higher than that reported in Dr. Batra's report.

20.4 It is also seen that the allegations levelled in R.A, Casting (supra) were mainly-

(i). Inordinately high electricity consumption without any explanation,

(ii). Sale of Ingots at a huge loss over last 4-5 years, which was economically and commercially not possible,

(iii). generation of fictitious profits in the balance sheets by depositing huge amount of cash with the stock brokers and receiving cheques of profits against the cash so deposited,

(iv). Claim of High Auxiliary load of about 35%,

However the Tribunal in categorical terms held that no demand can be upheld based on electricity consumption as such because the clandestine manufacture and removal of excisable goods is to be proved by tangible, direct, affirmative and incontrovertible evidences relating to-

(i). Receipt of raw material inside the factory premises, and non-accounting thereof in the statutory records;

(ii). Utilization of such raw material for clandestine manufacture of finished goods;

(iii). Manufacture of finished goods with reference to installed capacity, consumption of electricity, labour employed and payment made to them, packing material used, records of security officers, discrepancy in the stock of raw materials and final products;

(iv). Clandestine removal of goods with reference to entry of vehicle/truck in the factory premises, loading of goods therein, security gate records, transporters' documents, such as L.Rs, statements of lorry drivers, entries at different check posts, forms of the Commercial Tax Department and the receipt by the consignees;

(v). Amount received from the consignees, statement of the consignees, receipts of sale proceeds by the consignor and its disposal,

20.5 However, since no such evidences were brought on record, the Appeal of R.A. Casting was allowed for want of evidence relating to the above points, with further finding that the Revenue, not having conducted any experiment whatsoever, cannot be permitted to justify the demands raised. Similar is the fact situation in the instant appeals,

20.6 The evidence as per Revenue in the instant appeals are-

a). High electricity consumption without any explanation,

b). Sale of Ingots at loss, which was economically and commercially not possible,

c). Discrepancies in financial accounts in some cases and/or any proceedings under Income Tax,

d). Claim of higher Auxiliary load,

e). Past case settled before Settlement Commission,

20.7 So far as the proceedings already settled are concerned, the Commissioner is not relying on the same and the findings of the Commissioner, as recorded earlier, have not been challenged by the Revenue. All these other allegations were also levelled in R.A. Casting (supra). It was further observed in R.A. Casting (supra) that it would be appropriate on the part of the Revenue to conduct experiments in the factory of the appellants and others and that too on different dates to adopt the test results as the basis to arrive at a norm, which can be adopted for future. It was further held that-

"23. The Tribunal has consistently taken the view that wherever electricity consumption alone is adopted as the basis to raise demands, the order of the lower authorities have been held to be unsustainable in law and set aside* and the Revenue had been directed to carry out experiments in different factories

on different dates to arrive at the average to be adopted as a norm, which can be followed thereafter and the Revenue in the present case not having conducted any experiment whatsoever cannot be permitted to justify the demands raised. It will be appropriate on the part of the Revenue to conduct experiments in the factory of the appellants and others and that too on different dates to adopt the test results as the basis to arrive at a norm, which can be adopted for future. The impugned demand based merely on assumptions and presumptions cannot, therefore, be sustained nor could be justified both on facts and in law.

24. The law is well settled that in every case of alleged clandestine removal, the onus is on the Revenue to prove what it alleges with positive and concrete evidence. In the absence of any positive evidence brought by the Revenue to discharge its onus, the impugned order cannot be sustained."

20.8 In the present appeals, none of the so called other evidences referred in the impugned Orders prove clandestine clearance. The primary evidence of department is admittedly excess electricity consumption based on benchmark adopted allegedly-'from report of Dr. Batra, which was already held to be arbitrary by Hon'ble Tribunal in RA casting (supra). Thus, in my opinion the primary evidence relied in the impugned Order is itself inadmissible, and no other evidence in the instant case proves clandestine production and clearance to sustain, the demand, It is contended by Revenue that furnaces installed in the factory of present appellants were in sound condition as compared to R.A. Casting (supra), however I neither could find any material in support of this argument, nor any such finding in the Orders impugned in the appeals. The Revenue sought to rely on an order passed by Tribunal in Gulabchand Silk Mills Pvt. Ltd., V/s. CCE, Hyderabad-II, 2005 (184) ELT 263, however the same was also considered in R.A. Casting (supra). It has been contention of the department that the Department is not required to prove its case to its mathematical precision, by relying on judgment of the Hon'ble Supreme Court in the case of D. Bhoormull - 1983 (13) ELT 1546 (SC), relied upon by the Commissioner as well as the Hon'ble Member (Technical). It is seen that even this judgment was considered in R.A. Casting (supra),

21. There can be no dispute on the fact that in adjudication proceedings, the charge of clandestine removal is definitely to be established on the basis of preponderance of probabilities. However, it cannot be merely on the basis of presumptions and assumptions, Regarding the claim of the Revenue that subsequent to passing of impugned Orders the power consumption for manufacturing one MT of Ingots has reduced in factories of all the appellants, I am of the view that it cannot be-.a" basis to sustain the findings in the impugned Orders by assuming that there could not be any reason for lower consumption of electricity during the subsequent period. I also agree with the finding of the Hon'ble Vice President that in. any

event, this additional material is also only of power consumption.

22. In written submissions of Revenue, it has also been contended that Report of JPC suggesting electricity consumption upto 1800 its PMT was for electric arc furnace and not induction- furnace. However, the appellant has contended that productivity in. electric arc furnace is higher than induction furnace. In any event, in the Impugned Orders, there is no such reason to discard the report and in any event the letter of Mr. R.P. Varshney suggesting that electric consumption in induction furnace can be upto 1800 units per MT is also on record. Since, varying reports are on record, the ratio of R.A. Casting (sura) is squarely applicable.

23. Revenue, also relied On the judgment of the Hon'ble Supreme Court in the case of Melton India V/s. The Commissioner Trade Tax, U.P, - 2007-TIOL-14-SC-CT, the judgment of the Hon'ble Gujarat High Court in the case of Rajmoti Industries V/s. Joint Commissioner of Income Tax, 2014-TIOL-203-HC-AHM-IT, and an unreported order dtd. 28/9/2010 of Andhra Pradesh Sales Tax Tribunal (Visakhapatnam Bench) in the case of Venkata Raimana Stone Crushers Company V/s. State of Andhra Pradesh. In the case of Melton India (supra), for the norm, of power consumption, actual electricity consumption of the assessment year 2000-01 was taken as 'norm' and the same was applied in subsequent assessment years 2001-02 and 2002-03. This was followed by the Sales Tax Tribunal in the order cited by Revenue. In the case of Rajmoti Industries, facts of the case are that for the assessment year 2005-06, the Assessing Officer rejected the books of accounts of the assessee and made various additions, not only for the reason of unexplained wide fluctuations in the productivity as compared to that in A.Y. 2004-05, but also because the assessee therein had not recorded the work-in-progress in the books of accounts. I am therefore of the opinion that these cases, apart from being under Statutes other than Central Excise Act, do not any manner help in sustaining the findings recorded in the impugned Order. In none of these cases any theoretical report was relied for arriving at deemed production.

24. Further, in Sarvana Alloys Steels Pvt Ltd, 2011- (274) ELT 248 (Tri-Bang.) similar order based on power consumption was held unsustainable and the appeal was allowed after considering inter alia the judgments in D. Bhoormull (supra), Gulabchand Silk Mills (supra), as also Hans Casting (supra). In A.K. Alloys, 2012 (275) E.L.T. 232 (Tri. - Del.) the Tribunal followed the decision of R.A. Casting (supra) and allowed the appeal, as the demand was based mainly on the evidence of power consumption without any evidence of clandestine removal.

25. I therefore concur with the findings of the Hon'ble Vice President and in my opinion, the judgment in R.A. Casting

(supra) would be squarely applicable in the facts of the instant case in all the appeals.

19.4 The common order was passed by the CESTAT on 30-07-2006 as per the majority opinion allowing the appeals filed by the assessee and other appellant companies. The copy of the majority order is placed at Page Nos. 5 and 6 of the P/B – VI. It is pertinent to note here that the Ld. Commissioner has also considered the investigation made by the DGCEI against some brokers and in consequence the show cause notices (SCN) were issued to the assessee and other companies and the assessee and other companies came forward before the Settlement Commission and paid the excise duty. Hence, the investigation of the DGCEI made against the brokers and sub-brokers referred by the Assessing Officer was also before the Ld. Commissioner, Aurangabad. On perusal of the assessment orders it is clear that both the assessments are merely based on the alleged suppression of the production by estimating certain consumption of electricity i.e. 1026 Units for manufacturing of 1 MT of Ingots and Billets. Moreover, even if in the A.Y. 2008-09, the Assessing Officer has observed that the information received from the Central Excise Authorities has no bearing in the said order but on the perusal of the said order, it is seen that entire order is copy of order passed for the A.Y. 2007-08. As vary basis of the assessment order i.e. the order of the Commissioner of Central Excise (CCE), Aurangabad has been set aside and cancelled by the CESTAT, in our opinion the assessment orders passed by the Assessing Officer and confirmed by the Ld. CIT(A) approving the estimated alleged suppression of the production/sales have no legal legs to stand.”

31. The Tribunal thereafter, dealt with the arguments of Ld. Special AR that even the minority decision of Ld. Technical Member of CESTAT was a legal order. This plea of the Ld. Special AR was rejected by the Tribunal in view of the decision of Third Member of the CESTAT.

32. Another objection raised by the Ld. Special AR was with reference to the order of Settlement Commission passed in the case of set of companies. The Tribunal noted that the CCE, Aurangabad in its order had taken into consideration the said material while determining the value of alleged suppressed production and had made observations vide para 19. The relevant observations of the Tribunal in M/s. SRJ Peety Steels Pvt. Ltd. (*supra*) were as under:-

“20.1the Ld. Technical Member of the CESTAT. The Ld. Spl. AR for the Revenue also referred to the order of the Settlement Commission, Mumbai passed in the case of the assessee and other companies. It is true that the assessee approached the Settlement Commission when on the basis of investigation made by the DGCEI against some of the brokers and sub-brokers dealing in the Ingots/Billets and TMT Bars show cause notice was issued to the assessee company and matter was settled. Ld. CCE, Aurangabad in his order has taken in to consideration said matter while determining the value of the alleged suppressed production and has observed as under:

“19. There are other instances of central excise violations detected by other agencies where the assessee was found to be involved. In one instance that assessee had approached the

Settlement Commission, admitted the evasion offence of an identical nature and had obtained immunity from criminal proceedings. The assessee has however argued that each case has to be treated as a separate case based on its own merit and dealt with accordingly. The argument of the assessee is accepted. No reliance has been placed on evidence relied upon in central excise proceedings. The findings in this case are based only on material and evidence that have been brought on record in the instant case.”

33. *The Tribunal thereafter, noted another aspect of the issue that no independent investigation was made by the Revenue, but the entire assessment was framed on the basis of information received from the Central Excise Department as well as the adjudication order passed by the CCE, Aurangabad, which in turn, had been cancelled by the Third Member of CESTAT. The Tribunal thus, held that the foundation for assessment does not exist. It was also noted by the Tribunal in para 21 that the investigation by the DGCEI and proceedings before the Settlement Commission were considered by the CCE in its adjudication order, which in turn, was the subject matter of CESTAT and the said order has been set-aside, hence, it was not necessary to deal with the decisions relied upon by the Ld. Special AR, which are in the context of admission of the Director in the course of investigation made by the DGCEI.*

34. *The second issue of maintaining of Form No.G-7 in respect of electricity consumption, was also before the CESTAT and the Tribunal overruled the arguments of the Ld. Special AR and upheld the arguments of learned Authorized Representative for the assessee that the order of CESTAT had to be applied. The relevant para of the Tribunal order reads as under:-*

“21. Though the Ld. Spl. AR has referred to and relied on the different judgments of the Hon'ble Supreme Court more particularly on the binding nature of the 'admission' of any person-Sec. 17, Sec. 106 and Sec. 115 of the Indian Evidence Act etc. but the fact remains that in the case of the present assessee no independent investigation is made by the Revenue but the entire assessments are framed on the basis of the information received from the Central Excise Department as well as the adjudication order passed by the Ld. Commissioner of Central Excise, Aurangabad. Moreover, as observed above the adjudication Order passed by the CCE, Aurangabad has been cancelled by the CESTAT, Mumbai by majority opinion and hence, foundation of assessments for A. Yrs. 2007-08 & 2008-09 do not exist. The law is also well settled that when the assessee files an appeal challenging an order of the lower authority before the higher appellate authority then the entire order gets merged with the order of the higher appellate forum which in the present case is CESTAT. Moreover, investigation by DGCEI and proceeding before the Settlement Commission has also been considered by the CCE, Aurangabad in his adjudication order. The said order was subject matter before the CESTAT and said order has been set aside. Hence, we do not consider it necessary to deal with decisions relied on by Ld. Spl AR of the Revenue which are in context of admission of the Director of the assessee in the course of investigation made by DGCEI more particularly under the Indian Evidence Act as those decisions are not relevant now though good for academic discussion.

So far as maintaining of Form G-7 in respect of the electricity consumption, the said issue was also before the CESTAT while deciding the fate of order of the Ld. CCE, Aurangabad. Ld. AR vehemently argued to point out how the order of the CESTAT, Mumbai Bench, Mumbai is not correct. The CESTAT is a higher appellate forum under the Custom Act 1962 and Central Excise Act 1944 and we cannot sit as revisionary authority or make any observation whether that order is right or wrong.

35. *The Tribunal held that CESTAT was an appellate forum under the Customs Act, 1962 and Central Excise Act, 1954 and the Tribunal (Income-tax) could not act as revisionary authority or make any observation whether that order was right or wrong.*

36. *The Tribunal further referred to search and seizure operations carried out under section 132(1) of the Act on 17.03.2006 against M/s. SRJ Peety Steels Pvt. Ltd. and the assessment framed under section 153A r.w.s. 143(3) of the Act. The assessee therein i.e. M/s. SRJ Peety Steels Pvt. Ltd. had filed an appeal before the Tribunal and the order of the Tribunal is reported in 137 TTJ (Pune) 627. The Tribunal in M/s. SRJ Peety Steels Pvt. Ltd. (supra) referred to the observations of Tribunal in earlier proceedings relating to assessment years 2000-01 to 2006-07 under section 153A r.w.s. 143(3) of the Act and held that in the said case of search and seizure, it was also held that the consumption of electricity for the manufacture of mild steel, ingots / billets depending on various factors and there was no justification to charge the assessee that it had suppressed the production and indulged into unaccounted production. The order of the Tribunal was challenged by the Department before the Hon'ble Bombay High Court and the Revenue's appeal was dismissed by common order dated 10.02.2014 in the case of assessee and other companies by the Hon'ble Bombay High Court and there were observations on the estimation of production based on the consumption of electricity. The Tribunal while deciding the appeal of M/s. SRJ Peety Steels Pvt. Ltd. in this regard observed as under:-*

"22. We have already mentioned here-in-above that in the case of the assessee, the search and seizure operation was carried out u/s. 132(1) of the Income-tax Act on 17-03-2006 and accordingly the assessment orders for the A.Ys. 2000-01 to 2006-07 were framed u/s. 153A r.w.s. 143(3) of the Act. The Assessing Officer rejected the books of account of the assessee for the A.Ys. 2000-01 to 2006-07 and one of the reasons was that alleged suppressed production which was computed on the basis of consumption of the electricity. The Assessing Officer devised a formula on the basis of electricity consumption and the same was applied uniformly in order to work out certain alleged suppressed production and resultant concealed income in the case of the assessee. The Assessing Officer took 1,600 Units as consumption per MT which was a lowest as shown by the assessee. The Assessing Officer, accordingly, worked out the alleged suppressed production and made the addition in all the years while completing the assessments. In sum and substance the Assessing Officer had simply taken the lowest electricity consumption for a month in a whole year and accordingly worked out the total production as per his formula and on the basis of the formula he worked out the alleged concealed income. There are certain

important observations and findings of the Tribunal which are as under:

31. In the present case, the search was initiated on 17th March, 2006 in the residential and business premises of SRJ Peety Group, Jalna covering the premises of the assessee company as well. Prior to the search, the returns of income for the asst. yrs. 2000-01 to 2005-06 had already been filed under s. 139(1) of the Act accompanied by all requisite documents and proceeding under s. 143(1) of the Act stood completed. During the course of search no incriminating materials were found relating to aforesaid years which could have been added back in the proceedings under s. 153A. The details regarding the consumption of electricity for the production for each of the year under consideration was very well placed before the authorities below in the director's report of each year. The same has not been disputed by the Revenue. The tax audit report also contained the unit production of each year which were accepted year after year along with the returns and no query was ever raised by the Department. The following chart shows the year-wise production vis-a-vis electricity consumption which has been placed before the authorities below along with the returns for each year:

	Asst. yr.	Electricity consumption	Production (MT)	Yearly average consumption (units)
32. The matter of fluctuating consumption of electricity cannot be by no	2000-01	24331059	18,524.239	1313
	2001-02	25528565	17,010.558	1501
	2002-03	31404354	19,709.654	1593
	2003-04	31623843	20,396.313	1550
	2004-05	43123824	23,240.189	1856
	2005-06	62650888	29,582.434	2118
	2006-07	70440580	36,017.983	1956

means be said to be a finding of search since all details regarding electricity vis-a-vis production were before the Department. If the Department had any doubts regarding the same, it could have been raised during the regular assessments and not in the assessment proceedings under s. 153A of the Act. When nothing incriminating was found in the course of search relating to any of these assessment years, the assessments for such years could not be disturbed on this ground.

33. In view of above factual and legal position we find that the additions in question in asst. yrs. 2000-01 to 2005-06 are not corresponding to the seized material found during the course of search. The relevant IT returns for said years were filed prior to the search in normal course disclosing the particulars of subject-matters were already on record. The returns have already been accepted and no assessment as such could be

said to be pending on the date of initiation of search and abated in light of the provisions of s. 153A.

34. Without prejudice to above, with regard to invoking the provisions of s. 145 of the Act, according to which in case the AO is not satisfied about the correctness or completeness of accounts of the assessee or where no method of accounting provided in sub-s. (1) or accounting standards as notified under sub-s. (2), have not been regularly followed by the assessee, the AO may make an assessment in the manner provided in s. 144. Sec. 145 gives the power to AO to reject the books in certain circumstances after considering the following aspects:

(a) Whether the assessee has regularly employed a method of accounting?

(b) Whether the annual profits can be properly deduced from the method employed?

(c) Whether the accounts maintained are correct and complete?

35. Without prejudice to above, we find that having rejected the books of accounts of the assessee company for all the years under consideration, the AO devised a statistical formula on the basis of electricity consumption that was applied uniformly in order to work out certain production and resultant concealed income for each year under consideration. The AO could not substitute the same by cogent reasoning. He has simply taken the lowest electricity consumption for a month in the whole year and treated the production in that month as the correct production and then proceeded to arrive at his production figure by multiplying the production in the books by the ratio of production to the electricity consumption for the month in which electricity consumption was minimum. The method of computing the so-called suppressed production is not justified in absence of sound basis for same.

36. The consumption of the electricity for the manufacture of mild steel ingots/billets depends on various factors like quality of raw material which is the major input, voltage of the supply, power interruptions, mechanical and electrical breakdowns and the chemical composition of the liquid metal which has to be finally cast into ingots/billets. The AO failed to appreciate these facts and did not attempt to establish a direct nexus between the production and electricity consumed for the manufacture of round/TMT bars and arrived at a conclusion that there is an excess consumption of electricity resulting in suppressed production and alleging that the assessee company has indulged in unaccounted production.

37. None of the evidence collected as a result of search or detected during the course of assessment pertains to the asst. yrs. 2000-01 to 2005-06. It is an accepted fact that each year of the assessment is independent and evidences found relating to asst. yr. 2006-07 cannot have an adverse impact on the assessments of the assessee company from the asst. yrs. 2000-01 to 2005-06. Therefore, rejection of books for these years purely on the ground that there has been divergence in

the consumption of electricity and application of s. 144 is not at all justified. Accordingly additions have rightly been deleted in asst. yrs. 2000-01 to 2005-06 in both the cases.

23. *It is clear from the order of the Tribunal in assessee's own case in the search and seizure matter as it is held that the consumption of electricity for the manufacturing of mild steel ingots/billets depends on various factors and there was no justification to charge the assessee that the assessee has suppressed the production and indulged into unaccounted production. The order of the Tribunal was challenged by the Department before the Hon'ble High Court of Bombay Bench at Aurangabad by filing the appeal u/s. 260A of the Income-tax Act, being Tax Appeal No. 30 of 2011. The Revenue's appeal was dismissed vide common Judgment dated 10-02-2014, in the case of the assessee and other companies by the Hon'ble High Court and there are categorical observations of their Lordships on the estimation of the production based on the consumption of the electricity which are as under:*

"4. In that regard, the Tribunal as also the Commissioner of Income Tax (Appeals) have concurrently found that the search was initiated on 17/03/2006 in the residential and business premises of SRJ Peety Steels Pvt. Ltd. Prior to the search, the returns of the income for the assessment year 2000-01 to 2005-06 had already been filed u/s. 139(1) of the Act, accompanied by all requisite documents and proceedings. The scrutiny was thus completed. During the course of search, no incriminating material was found relating to the said years, which could have been added in the proceedings u/s. 153A. The details regarding the consumption of electricity for the production for each of the year under consideration was placed before the Authorities in the Director's Report of each year. The same has not been disputed by the Revenue. The Tax Audit Report also contains the unit production of each year, which was accepted year after year along with returns and no query was raised by the Revenue. The finding of fact dated 31/03/2008 in the order passed by the Income Tax Appellate Tribunal refers to a detailed chart. The matter of fluctuating electricity, therefore, was held to be one, and since details were made available to the Department, which could have been raised during the course of regular assessment and not u/s. 153A of the Act. The finding is that nothing incriminating was found in the course of search relating to these assessment years. The additions, therefore, were not corresponding to the seized material during the course of search. The relevant income tax returns, in normal course, are disclosing the particulars. They were already on record. The returns have been accepted. In such circumstances, the Tribunal, as also, the Commissioner of Income Tax (Appeals) have in their orders, held that there are several factors which have to be taken into consideration and while arriving at a conclusion with regard to the alleged production calculated on the basis of electricity consumption. Rejection of books for these years only on the ground that there has been divergence in the consumption of electricity, therefore, was held not justified."

24. *Ld. Spl. AR for the Revenue argues that the said observations are made in the context of the assessment framed in consequence of search and seizure operation. We are not inclined to accept the argument of the Ld. Spl AR for the reason that even if the assessments are framed in consequence of the search and seizure operation but the important fact remains that nothing was found during the course of search except few loose sheets found in the residence of the Director to make out a case against the assessee for alleged suppression of production or sales. It is also to be taken note*

of the fact that in A.Ys. 2007-08 and 2008-09, no investigation has been done by the Revenue which are immediate next assessment years after the search and seizure operation against the assessee company and hence, in our opinion above findings and observation of the Tribunal as well as the Hon'ble High Court are also important to decide the present appeals more particularly on the additions based on consumption of electricity."

37. The Tribunal vide para 24 took note of the fact that in assessment years 2007-08 and 2008-09, no investigation was done by the Revenue after the search and seizure operations in the immediately preceding year, wherein during the course of search, certain loose sheets were found in the residence of the Director to make out case against the assessee for alleged suppression of production / sales. The Tribunal while deciding the appeal in M/s. SRJ Peety Steels Pvt. Ltd, in turn, relying on the ratio laid down by coordinate Bench of the Tribunal, deleted the addition made on account of alleged suppression of production / sales in entirety. The relevant observations of the Tribunal are as under:-

"25. In the case of ACIT Vs. A.K. Alloys (P) Ltd. (supra) in which the additions were made by the A.O. for alleged suppression of production and investment in purchase of raw material relying on information received from Central Excise (Ludhiana) and when matter reached before the Tribunal and it is held as under:

10. The assessee had filed an appeal against the order of CIT Customs & Excise, before the Customs, Excise & Service Tax Appellate Tribunal with principal Bench at New Delhi (supra). The copy of the order of the Customs, Excise & Service Tax Appellate Tribunal is placed on record by the learned A.R. for the assessee. The Customs, Excise & Service Tax Appellate Tribunal after considering the factual aspects of the case, the quantum of production, the consumption of electricity observed that there is nothing on record to show that high power connection supported by evidence was made on a particular date and that resulted in higher amount of production. It was further observed by the Customs, Excise & Service Tax Appellate Tribunal vide para 4.2 that So far as the production quantum is concerned, there is also no evidence on record to show that the authorities intervened lawfully recording the output in the presence of witness. The Customs, Excise & Service Tax Appellate Tribunal held that therefore, a hypothetical case appears to have been made by Revenue in excessive exercise of its jurisdiction to the detriment of justice. The Customs, Excise & Service Tax Appellate Tribunal further considered the retraction statement of the Director of the assessee company and vide para 6 held as under:

"6. We would have certainly come to the rescue of Revenue had the statement been recorded in a manner known to law and cogent evidence had been brought to record to prove output cleared clandestinely. No cogent evidence is on record to show either suppression of purchase of input or clandestine removal of goods in fool proof manner known to law for which, it can be painfully said that the adjudication has no legs to stand. Both the appeals are therefore, allowed with consequential relief, if any."

11. The Customs, Excise & Service Tax Appellate Tribunal categorically held that the electricity consumption could not be criteria to determine the output laid down in R.A. Castings, where the appeal of the Revenue was dismissed by the Hon'ble Apex Court as

reported in 2011 (269) ELT A-108 (SC). The basis for the addition in the present case was the investigation report of the Central Excise Department and the suppression in production calculated by the said Investigating Team.

The Assessing Officer had completely based its addition on the aforesaid report of the Investigating Team and had also show caused the assessee to establish its point in view of the said report of the Investigating Team. The Customs, Excise & Service Tax Appellate Tribunal (supra) in the appeal filed by the assessee and its Director has categorically held that no cogent evidence has been brought on record to prove that the output had been cleared clandestinely. Further it has been held that there was no cogent evidence to show either suppression of purchase of input or removal of goods. In view of the aforesaid findings of the Customs, Excise & Service Tax Appellate Tribunal in assessee's own case there is no merit in any addition being made in the hands of the assessee on account of the alleged suppression in production and also alleged investment in purchase of raw material. In view thereof, we hold that no addition on account of profit on the sale of unaccounted production or on account of unexplained investment merits to be made in the hands of the assessee. We are also in agreement with the observations of CIT (Appeals) in deleting the aforesaid addition as no independent evidence has been brought on record to establish that the assessee had, a) suppressed its production and; b) it made sale of its unaccounted production, outside the books of account. Upholding the order of the CIT (Appeals) we dismiss the ground Nos.1 and 2 raised by the Revenue."

26. In the case of ACIT Vs. Arora Alloys Ltd. (supra) the addition was made on the basis of electricity consumption to produce 1 MT of Ingots. The confessional statement was also given by the Managing Director of the said company before the Central Excise Authorities. The Ld. CIT(A) allowed the assessee's appeal. The Revenue challenged the order of Ld. CIT(A) before the Tribunal. It was held that there was no justification to support the said addition and the Revenue's appeal was dismissed. In the light of our above discussion, we are of the opinion that the additions made by the Assessing Officer and confirmed by Ld. CIT(A) in both the assessment years based on the order passed by the CCE, Aurangabad as well as on the basis of consumption of the electricity used in manufacturing of Ingots/Billets are not sustainable. We, accordingly, delete the additions made towards the alleged suppression of production and sales at entirety and allow the Ground Nos. 3, 4, 5, 6 & 8 in the A.Y. 2007-08 and Ground Nos. 2,3,4 & 6 in the A.Y. 2008-09."

38. The Tribunal thereafter, held that there was no merit in the rejection of books of account and application of gross profit to determine the income in the hands of the assessee. The Tribunal also gave a finding that since the additions made in the hands of the assessee have been deleted, there was no merit in any addition on account of undisclosed investment in respect of the undisclosed turnover. The Tribunal vide paras 27 to 29 held as under:-

"27. The next issue is the rejection of books of account by the Assessing Officer in both the assessment years. We find that the only reason for rejection of the books of account was the alleged suppression of production/sales and which was determined on the basis of the adjudication order passed by the CCE, Aurangabad as well as the consumption of the electricity used in the manufacturing of the Ingots/Billets relying on the

technical opinion of Dr. Batra, IIT, Kanpur. No other reasons are given by the Assessing Officer. We have already held that the Assessing Officer was not justified in making the additions towards alleged suppression of production/sales. We, therefore, hold that the rejection of the books of account on above reason cannot be upheld. We, accordingly, allow Ground No. 7 in the A.Y. 2007-08 and Ground No. 5 in the A.Y. 2008-09.

28. The next issue is the percentage of the gross profit estimated by the Ld. CIT(A) on the alleged suppressed sales and said issue arises from Ground No. 9 in the A.Y. 2007-08 and Ground No. 7 in the A.Y. 2008-09 are on. As the assessee has succeeded on the main grounds as entire additions made by the Assessing Officer are deleted, the Ground No. 9 in the A.Y. 2007-08 and Ground No. 7 in the A.Y. 2008-09 become infructuous.

29. In Ground No. 10, the assessee has raised the objection for making the addition of Rs.37,69,582/-. The said addition is made by the Ld. CIT(A). He has observed that there is an element of the undisclosed investment in respect of the undisclosed turnover which is estimated as an average undisclosed turnover of the half period of the earlier year under appeal. The Ld. CIT(A) has observed that the undisclosed sale for the earliest year under appeal are of Rs.39,20,36,546/- and the said investment required for production out of books, therefore, worked out Rs.37,69,582/-. In fact, the said addition is made by the Ld. CIT(A) as he has confirmed the alleged suppression of production/sales as held by the Assessing Officer. As the assessee has succeeded in getting the relief by deleting the entire additions towards alleged suppression of production and sales, hence, this addition does not survive and said addition is also deleted. We, accordingly, allow the Ground No. 10 taken by the assessee."

39. The Tribunal also dismissed the appeal of the Revenue against the estimation of gross profit by the CIT(A) observing as under:-

"31. We have heard the parties. The main grievance of the Revenue is against the estimation of GP by Ld. CIT(A). We have already allowed the grounds taken by the assessee on the alleged suppression of the production/sales. As the assessee has succeeded on the basic additions, the grounds taken by the Revenue do not survive as the entire additions are deleted in both the assessment years by allowing the grounds taken by the assessee. Accordingly, all the grounds of the Revenue in both appeals are dismissed."

40. The plea of the learned Authorized Representative for the assessee before us was that the issue raised in the present appeals is squarely covered by the ratio laid down in M/s. SRJ Peety Steels Pvt. Ltd. (supra). It was further pointed out by him that in the case of Bhagyalaxmi Steel Alloys Pvt. Ltd., there was no investigation by the DGCEI and further there was no order of Settlement Commission. However, the CCE, Aurangabad had passed an order against the assessee, but there was no case of clandestine removal of materials without payment of Excise duty against the assessee. The Ld. Special AR admitted that there was no evidence with the Excise Department or the Income-tax Department regarding clandestine removal of materials without payment of Excise duty. However, because of huge fluctuation in electricity consumption and production of ingots / billets, addition was made in the hands of the assessee. However, in Omsairam Steel & Alloys Pvt. Ltd., it was fairly admitted by the learned Authorized Representative for the assessee that there was investigation by the DGCEI and in assessment years 2006-07 and 2007-08, the assessee had filed the petition before the Settlement Commission, which was accepted. However,

in assessment years 2005-06 and 2008-09, there was no such petition filed before the Settlement Commission.

41. *We find that the Assessing Officer in the present case before us had made the addition on account of erratic consumption of electricity based on the report of Dr. Batra. The addition in the hands of sister concern M/s. SRJ Peety Steels Pvt. Ltd. was made on the basis of the report of one Dr. Batra with regard to electric consumption and the Third Member of CESTAT had deleted the aforesaid addition made under the Excise law. Similarly, in the case of assessee before us, there is order of CCE, Aurangabad and of CESTAT and the Assessing Officer worked out the addition on the basis of erratic consumption of electricity as determined by CCE, Aurangabad. Following the same line of reasoning as in the order of M/s. SRJ Peety Steels Pvt. Ltd. (supra), we find no merit in the addition made in the hands of the assessee on surmises. Both the learned Authorized Representative for the assessee and Ld. Special AR has raised identical arguments as in M/s. SRJ Peety Steels Pvt. Ltd. (supra) and since the Tribunal has already decided the issue in M/s. SRJ Peety Steels Pvt. Ltd. (supra), the ratio of the said decision is applicable to the facts of the present case. However, additional production relating to the declaration made before the Settlement Commission is to be added in the hands of the assessee, as admitted by the learned Authorized Representative for the assessee.*

42. *Another objection raised by the Ld. Special AR before us during the course of hearing of the bunch of appeals was that it had moved Miscellaneous Application against the order of Tribunal dated 16.01.2015 and the hearing of the present appeals be kept in abeyance. After hearing the appeals in the present bunch of appeals, the Miscellaneous Application filed by the Revenue in M/s. SRJ Peety Steels Pvt. Ltd. (supra) was also fixed for hearing and the same was heard on 19.06.2015. We have by an order of even date dismissed the Miscellaneous Application filed by the Revenue in M/s. SRJ Peety Steels Pvt. Ltd. (supra) after considering the submissions of both the Authorized Representatives. We have by an order of even date held that there is no merit in the said Miscellaneous Application filed by the Revenue and no remedy is available to the Revenue under section 254(2) of the Act. In view thereof, the next objection of the Ld. Special AR for not relying on the order of M/s. SRJ Peety Steels Pvt. Ltd. (supra) also stands dismissed.*

43. *Another aspect of the issue in relation to the addition on account of suppressed production, raised before us is that where the Assessing Officer had evidence of clandestine removal of material without payment of Excise duty, the addition could be upheld in the hands of the assessee by extrapolating the sales for period of 300 days. The Ld. Special AR for the said proposition relied on the decision of the Tribunal in assessee's own case relating to assessment year 2006-07. The case of the Revenue before us was that where the assessee had admitted to clandestine removal of material without payment of Excise duty before the Settlement Commission for part of the period, then in view of the order of the Settlement Commission and also since the assessee had admitted to additional income on such account before the Assessing Officer, the sales for the entire year should be extrapolated. The basis for declaration of clandestine removal of material without payment of Excise duty was on account of search and seizure proceedings conducted by DGCEI on certain brokers and sub-brokers. Consequent thereto, Shri SRJ Peety, Managing Director of M/s. SRJ Peety Steels Pvt. Ltd. admitted to the said clandestine removal of material without payment of Excise duty and approached the Settlement Commission for*

payment of Excise duty on the said amount. The Settlement Commission accepted the petition of the assessee, but also levied penalty. The assessee before the Assessing Officer admitted that the additional income in respect of the said clandestine removal of material without payment of Excise duty, is to be added in the hands of the assessee. All this information was available before the Assessing Officer during the course of assessment proceedings, but no other investigation or inquiry was made by the Assessing Officer while completing the assessment in the hands of the assessee. The Assessing Officer on the other hand, was of the view that the assessee had not correctly disclosed the production of ingots / billets. The basis for such assumption was the electricity consumption, for which the Assessing Officer placed reliance on the report of Dr. Batra and order of CCE, Aurangabad. The Assessing Officer applying the formula worked out the suppressed production and sales in the hands of the assessee. We in the paras hereinabove have already adjudicated the issue that no addition on account of suppressed production / sales on such account could be made in the hands of the assessee. The Ld. Special AR on the other hand, stressed that where the Assessing Officer had the information of alleged clandestine removal of material without payment of Excise duty and also because of the admission of the assessee before the Assessing Officer, the sales for the period of 300 days should be extrapolated in the hands of the assessee. He stressed that even where the evidence of clandestine removal of material without payment of Excise duty and suppression of income was found for the part of the year, then the Assessing Officer can estimate the additional income for whole of the year. Merely because the Assessing Officer had adopted another methodology of suppression, the addition in the hands of the assessee could be sustained on the basis of extrapolation of sales for 300 days, in view of the admission of the assessee of clandestine removal of material without payment of Excise duty and suppression of income.

44. The evidence of clandestine removal of material without payment of Excise duty was detected by the Excise authorities during the course of search and seizure operation on certain brokers, however, no search and seizure operation was carried out against the assessee. In order to buy peace of mind, the assessee declared the said amount vide petition before the Settlement Commission, which has been accepted by the Settlement Commission in toto. The Ld. Special AR objected to the plea of assessee that declaration was to buy peace of mind, but we find no merit in the same, since the object of moving petition before the Settlement Commission is to settle the dispute. In cases where any settlement petition is moved by the claimants, the authorities have the power to re-visit the offer made by the claimant and where any adverse material is available against the person making the offer, then the figures of settlement can be increased. However, in the case of the assessee, offer of the assessee has been accepted for the financial year and the same cannot be said to be restricted to the number of days for which it was offered. The basis of any settlement is the offer made by the claimant and/or the evidence found against the person offering the settlement and where the evidence has been found for part of the year, such settlement being accepted is relatable to the year under consideration. In cases where the petition is accepted in the hands of the assessee by the Settlement Commission, then no further addition can be made in the hands of the assessee on account of alleged clandestine removal of material without payment of Excise duty or suppressed sales for the balance period, in the absence of any evidence found against the assessee for the balance period.

45. Another aspect of the issue is that though the factum of the assessee filing the petition before the Settlement Commission, was before the Assessing Officer, even additional income on such offer of settlement was offered by the assessee before the Assessing Officer, however, no further inquiry, investigation or action was taken by Assessing Officer in this regard. In the absence of the same, the issue raised in the present appeal is whether any extrapolation of sales for the balance year on the basis of evidence found for the part of the year is justified or not. The answer, in our opinion, has to be in negative.

46. The Ld. Special AR vehemently relied on the ratio laid down by the Tribunal in assessee's own case reported in 137 TTJ (Pune) 627, which in turn has been approved by the Hon'ble Bombay High Court. It may be pointed out that the facts of the case before the Tribunal in assessment year 2006-07 are at variance. The addition in the hands of the assessee was made on the basis of search and seizure action carried out by the Income-tax Department and the documents found during the course of search, which were admitted by the assessee to reflect suppression of sales. On the basis of aforesaid documents, the income for the year was extrapolated, which order of the Tribunal was approved by the Hon'ble Bombay High Court. However, for the year under consideration, there was no search and seizure operation carried out by the Income-tax Department against the assessee and also no investigation or inquiry was made by the Assessing Officer, as stated earlier. In the absence of any evidence collected against the assessee, merely because the addition was made in the hands of the assessee in a preceding year, we find no merit in the submissions of the assessee that following the same ratio, extrapolation of sales for the assessment year 2007-08 should be made in the hands of the assessee, in view of the settlement petition by the assessee before the Settlement Commission. The perusal of the assessment order and the order of CIT(A) reflects no such basis was adopted for making the addition in the hands of the assessee. The sole basis on which the addition in the hands of the assessee made was on account of erratic consumption of electricity. Undoubtedly, both the aspects i.e. the petition made by the assessee before the Settlement Commission pursuant to search conducted by the DGCEI and also the other basis i.e. erratic consumption of electricity, were before the Assessing Officer. However, the Assessing Officer adopted the second issue in the hands of the assessee and made the aforesaid addition, which we in the paras hereinabove had already deleted. The Ld. Special AR pointed out that the said action of the Assessing Officer was one of the methodologies for working out the additional income of the assessee. We find no merit in the stand of the Ld. Special AR since no investigation or inquiry was carried out by the Assessing Officer and merely on the basis of petition filed before the Settlement Commission, which in turn has been accepted, no further addition can be made in the hands of the assessee in the absence of any incriminating material found for the balance period.

47. Reliance in this regard is placed upon the ratio laid down in Ravi Foods Pvt. Ltd. Vs. CCE, Hyderabad (supra). In the facts of the said case, certain documents were found by the Income-tax Department pursuant to search and seizure action, which indicated clearance in sales, on the basis of which the additional income was added in the hands of the assessee. The said information was forwarded to the Central Excise Department pursuant to which, order levying additional Excise duty was passed by the Excise Commissioner. However, the Tribunal cancelled the Excise demand on the ground that there was no corroborative evidence of clandestine

removal of material without payment of Excise duty was found from the possession of the assessee by the Excise authorities.

48. Following the same analogy of reasoning, where the evidence of clandestine removal of material without payment of Excise duty has been found by the Excise Department, in respect of sale of goods for a particular quantity and for a particular period, the same could not be relied upon as evidence, while extrapolating the sales and the additional income thereon in the hands of the assessee during the Income-tax proceedings. The Assessing Officer does not have any evidence for suppressed production and even after the order of Settlement Commission, the Assessing Officer had not investigated or brought any material on record establishing suppressed production and / or its sale outside the books of account.

49. The Ld. Special AR time and again stressed that the assessee had made admission before the Assessing Officer and this was the evidence available with the Assessing Officer. The alleged admission before the Assessing Officer was only by way of the additional income offered by the assessee, which was relatable to the clandestine removal of material without payment of Excise duty admitted before the DGCEI and offered by way of petition before the Settlement Commission. No statement of Directors of the assessee company was recorded either by Assessing Officer or CIT(A) during the course of assessment proceeding. Accordingly, we find no merit in the reliance placed upon by the Ld. Special AR in this regard. The addition at best is to be restricted to the additional income offered by the assessee.

50. In our considered opinion, the issue in hand is to be decided on the basis of findings of the Assessing Officer and CIT(A) and the Tribunal cannot traverse beyond the orders of Assessing Officer and CIT(A). Admittedly, the parties can raise an additional plea before the Tribunal justifying the addition. However, the said plea has to be decided keeping in mind the facts of the case. Though both the Assessing Officer and CIT(A) had not made the addition in the hands of the assessee on the basis of petition filed before the Settlement Commission, but had adopted the erratic consumption of electricity as basis to make the addition, we have adjudicated the alternate plea raised by the Ld. Special AR in this regard and dismissed the same.

51. Now, we come to the reliance placed upon by both the Authorized Representatives in support of individual proposition vis-à-vis the addition on account of extrapolation of sales for the period of 300 days.

52. The Ld. Special AR further relied on series of decisions under the Excise authorities for the proposition that the confessional statement before the Excise Department was an important piece of evidence. We are in agreement with the said proposition laid down by the Hon'ble Supreme Court in Pullangode Rubber Produce Co. Ltd. Vs. State of Kerala and another (supra), but the statement made before any of the authorities is limited to the amounts surrendered vide the said settlement and no inference could be drawn against the assessee for extrapolating the same for full year and for the balance year and in other years, other than the year in which the said settlement was offered. In this regard, we find support from the ratio laid down by the Bangalore Bench of Tribunal in Anjaneya Brick Works vs. CIT (supra), wherein it has been held that mere existence of evidence of concealment in the next assessment year could not be the basis for estimating income in any other assessment years.

53. Further, before the Hon'ble Delhi High Court in CIT Vs. Anand Kumar Deepak Kumar (*supra*), the issue was in relation to the evidence found of unaccounted sales for part of the period during the course of search. The Assessing Officer on the said basis assumed unaccounted sales during the entire year, which was deleted by the CIT(A) and the Tribunal. The Hon'ble Delhi High Court observed that assumption of Assessing Officer may have perhaps been valid if the search had been conducted after the accounting year and the books of account had brought some discrepancy.

54. Similar proposition has been laid down by the Hon'ble Bombay High Court in CIT Vs. C.J. Shah and Co. (*supra*).

55. Further, the Bilaspur Bench of the Tribunal in Chattisgarh Steel Casting Pvt. Ltd. V. ACIT (*supra*) decided similar issue of the information available with the Central Excise Department, wherein unaccounted sales was estimated for 56 days and the Assessing Officer estimated the sales for the remaining period. The addition was deleted in the hands of the assessee and was restricted to the income declared by the assessee on the basis of papers seized, for which the assessee had filed a petition before the Settlement Commission and income on that account was declared by the assessee. The Tribunal held that no further addition could be made in the hands of the assessee for the balance period. The Tribunal further held that hypothetical calculation of turnover and estimation of gross profit merely on guess work and presumption was not sustainable in law. No details were available to the Assessing Officer to arrive at such figure or had there been any concealed sales for 9 months, it could have been detected by the Central Excise authority during their search operations. Therefore, the addition made by the Assessing Officer is purely based on guess work, presumption and surmises and not on the basis of any material found during the course of search operation carried out by the Central Excise authorities. Such addition based on hypothetical calculation of turnover and estimation of GP on presumption and surmises were not sustainable. The Tribunal distinguished the ratio laid down in CST Vs. H.M. Esufali H.M. Abdulali (*supra*). The Ld. Special AR relied on the said decision and in view of the decision of coordinate Bench on similar issue as before us, we find no merit in the reliance placed upon by the Ld. Special AR.

56. The Ld. Special AR during the course of arguments before the Tribunal in Miscellaneous Application filed in M/s. SRJ Peety Steels Pvt. Ltd. vide MA No.17/PN/2015 had raised the issue of extrapolation of sales for 300 days in view of the assessee having admitted to clandestine removal of material without payment of Excise duty and thereafter, filing a petition before the Settlement Commission.

57. The plea of the Revenue raised in the Miscellaneous Application was rejected as no such plea was taken by the Department during the appellate proceedings before the Tribunal and was raised for the first time in the Miscellaneous Application. However, in the interest of justice, the said issue of extrapolation of suppressed sales was adjudicated by the Tribunal by observing as under:-

"41. Before closing the issue, in the interest of justice, we would like to adjudicate the issue of extrapolation of suppressed sales on account of settlement petition made by the assessee. Admittedly, during the course of search and seizure operation on certain brokers, evidences of clandestine removal of material without payment of Excise duty, was found against the assessee. However, no search and seizure operation was carried out against the assessee, but the

assessee claims that in order to buy peace of mind, it had declared the said amount by way of petition before the Settlement Commission. The said offer made by the assessee was accepted in toto. It may be noted that the Excise authorities have the power to re-visit the offer made by the assessee, in case, any adverse material is available against the person making the offer. It may also be noted that the Settlement accepted in the hands of the assessee is for the financial year and is not restricted to the number of days for which it has offered. In other words, once a person makes a settlement petition for a particular year on account of the evidence found for part of the period and once the petition is accepted in the hands of the assessee, no further addition can be made on account of alleged clandestine removal of goods or suppressed sales, in the absence of evidence for the balance period. The above said ratios have been laid down in *Chattisgarh Steel Casting Pvt. Ltd. V. ACIT (supra)*, Hon'ble Bombay High Court in *CIT Vs. C.J. Shah & Co. (supra)*, Hon'ble Delhi High Court in *CIT Vs. Anand Kumar Deepak Kumar (supra)*. The Ld. Special AR had placed reliance on the decision of Hon'ble Bombay High Court in *CIT Vs. Dr.M.K.E. Memon (supra)* while arguing the issue No.2 i.e. estimation of suppressed production is mis-placed. The Hon'ble Bombay High Court in the said decision considered the scope of assessment under Chapter XIV-B and held that what is to be assessed under the said Chapter is undisclosed income of the block period and not the total income or loss of the previous year required to be assessed under regular assessment under section 143(3) of the Act. The Hon'ble Bombay High Court held that such regular assessment stands on a different footing in contrast to the exercise undertaken by the Assessing Officer under Chapter XIV-B, where the Assessing Officer had to assess only the undisclosed income. However, the Hon'ble Bombay High Court further held that under Chapter XIV-B, the Assessing Officer cannot estimate the undisclosed income on an arbitrary basis. We find no merit in the plea raised by the Ld. Special AR in this regard as the facts of the said case are different from the facts of the present case.

42. Even on merits, the Revenue has no case against the assessee. The reliance placed upon by the Ld. Special AR on the ratio laid down in assessee's own case relating to assessment year 2006-07 is misplaced as the addition in the hands of the assessee in that year was made on account of search and seizure operations carried out by the Income-tax Department, wherein sales outside books were found for few days. However, no independent investigation / inquiry by the Income-tax Department has been made before completing assessment proceedings against the assessee. Another aspect of the issue is that the petition before the Settlement Commission has been made by the assessee in assessment year 2007-08 only and no such petition for clandestine removal of material without payment of Excise duty has been made for assessment year 2008-09. The assessee had offered the additional income on account of such clandestine removal of goods before the Assessing Officer for assessment year 2007-08 and the same was the reason for reopening the assessment under section 148 of the Act. Once a particular fact was available with the Assessing Officer, which was taken note of and considered by him during the assessment proceedings, but the addition having been made on only on the issue of erratic consumption of electricity, which is the basis of order passed

by CCE, Aurangabad, who was also in knowledge of the clandestine removal of material and the investigation carried out by the DGCEI and the petition before the Settlement Commission, even the Third Member of CESTAT was aware of all these proceedings, but since the settlement petition filed by the assessee had been accepted in toto by the Settlement Commission, no further addition could be made in the hands of the assessee on this ground, in the absence of any inquiry or investigation by the Assessing Officer. Accordingly, the reliance placed upon by the Ld. Special AR in assessee's own case reported in 137 TTJ 627 [Pune] is mis-placed and there is no merit in the arguments of the Ld. Special AR in this regard."

58. *Another plea raised by the Ld. Special AR was that income could be estimated/ taxed on the theory of preponderance, in turn relying on the ratio laid down by the apex court in Sumati Dayal Vs. CIT (supra) and Collector of Customs Madras and others Vs. D. Bhoormull (supra), which was also relied upon by the Ld. Special AR in M/s. SRJ Peety Steels Pvt. Ltd. (supra) and the same had been considered by the Tribunal. During the course of hearing, the Ld. Special AR relied on series of other decisions, but the ratios laid down by the said judgments are distinguishable and not applicable to the facts of the present case. It may be put on record that all these decisions were relied upon by the Ld. Special AR in M/s. SRJ Peety Steels Pvt. Ltd. (supra) and same have already been considered.*

59. *In the entirety of the above said facts and circumstances, we hold that no extrapolation of sales for 300 days can be made in the hands of the assessee on the basis of the evidence found for clandestine removal of material without payment of Excise duty for few days, which in turn, has been admitted by the assessee by way of filing petition before the Settlement Commission, which in turn, has also been accepted by the Settlement Commission. Merely because the Settlement Commission accepted the claim of the assessee of additional Excise duty payable on the said clandestine removal of material without payment of Excise duty does not establish the case of the Revenue that the said figures of additional production should be utilized for extrapolating the sales in the hands of the assessee for the entire year. Admittedly, the assessee had offered additional income on the said clandestine removal of material without payment of Excise duty, which is to be added as income in the hands of the assessee. The learned Authorized Representative for the assessee fairly admitted that in case the said additional income has not been added while computing the income in the hands of the assessee for the respective years, the same may be directed to be added in the hands of the respective assessee in respective years. Accordingly, we direct the Assessing Officer to verify from the records for the respective years and include the additional income on account of such admitted clandestine removal of material without payment of Excise duty, by the assessee either before the Settlement Commission or before the Excise authorities, in the hands of the assessee. We have heard bunch of appeals and in some years, there is no admission of clandestine removal of material without payment of Excise duty and in those years in the absence of any evidence and / or any investigation or inquiry made by the Assessing Officer and where the Assessing Officer has failed to collect additional evidence, no addition can be made in the hands of the assessee, by way of extrapolation of sales for 300 days on account of any evidence found in any preceding or succeeding years. Further, no addition can be made in the hands of the assessee, where no petition has been filed by the assessee before the Settlement Commission in any of the*

respective years or before the Excise authorities. In the case of Bhagyalaxmi Steel Alloys Pvt. Ltd., there is no investigation by DGCEI and hence, no addition on account of extrapolation can be made, in the absence of any evidence found against the assessee.

60. *Since we have deleted the addition in the hands of assessee on both accounts i.e. addition made on account of erratic consumption of electricity and addition proposed on the basis of evidence found for the part of the year of clandestine removal of material without payment of Excise duty, next addition made in the hands of the assessee i.e. alleged investment in the purchases for effecting such sales which goods have been clandestinely removed, is not sustainable. Accordingly, we hold that no addition can be made in the hands of the assessee on account of alleged investment in purchases under section 69C of the Act.*

61. *One issue remaining to be adjudicated is non issue of notice under section 143(2) after issue of notice under section 148 of the Act. In view of our order in deleting the addition on account of suppressed production/sales, the said issue is dismissed as academic.*

62. *In view of our deleting the addition in the hands of the assessee the grounds of appeal raised by the Revenue i.e. against application of GP rate and allowance of expenses are also dismissed.”*

19. In respect of assessment year 2009-10, the Tribunal has passed separate order, in which they had considered the verification exercise carried out by the Excise Authorities and deleted the addition by holding as under:-

“9. We have heard the rival contentions and perused the record. The issue arising in the cross appeals filed by the assessee and the Revenue are against the addition made on account of extrapolation of sales. The issue arising in the present appeal i.e. whether any extrapolation of sales for the balance year on the basis of evidence found for the part of the year is justified or not, arose before the Tribunal in bunch of appeals with lead order in Bhagyalaxmi Steel Alloys Pvt. Ltd. in ITA No.1292/PN/2012 & 1478/PN/2012, relating to assessment year 2009-10 along with other related appeals, to which both of us are parties, decided the issue vide order dated 15.07.2015. The relevant findings of the Tribunal were as under:-

“9. We have heard the rival contentions and perused the record. The issue raised in the present set of appeals relating to assessment year 2009-10 is identical to the issue raised in the earlier appeals relating to assessment years 2006-07 to 2008-09 in the case of different assesseees. We have by order of even date already adjudicated the issue of addition in the hands of the assessee on account of suppressed production/sales on the basis of erratic electricity consumption. In the facts relevant to assessment year 2009-10, the assessee was held to have clandestinely manufactured and cleared its material without payment of Excise duty, in turn relying on the investigation conducted against the furnace companies in the earlier years. The CCE, Aurangabad had made the addition in the hands of the assessee on the basis of the study conducted by Dr.N.K.

Batra, Professor, IIT, Kanpur and as per his study report for manufacturing one MT of MS ingot, electricity should be consumed from 555 units to 1046 units. However, the assessee's were showing more consumption of electricity for production per MT. The CCE, Aurangabad raised the demands by confirming the order of adjudicating authority. However, in the case of different assessee's trials / experiments were conducted in the factory of most of the appellants and on such experiments / trials, the consumption of electricity was found to be more than 1026 units per MT. In view thereof, the facts of the present case are at variance to the facts before the Tribunal in assessment years 2006-07 and 2007-08 wherein the case of the Excise Authority was that the consumption of electricity was not in accordance with the report of Dr. Batra. However, the said factual aspect has been overturned by the investigation carried out by the Excise Authority at the premises of the assessee on different dates as mentioned hereinabove and the findings of the Authority were as under :-

Sr. No.	Appeal No.	Manufacturer Appellant	Period of dispute	Duty amount and penalty	Details of experiment
1.	E/86268/2014	SRJ Peety Steel Pvt. Ltd.	January 2008 to March 2009	Rs.12,41,64,392 & equal penalty	Specific verification of electricity consumption on 4.3.2009 showed electricity consumption of 1496 units per MT using mix input of scrap and sponge Iron.
2.	E/86151/2014	Bhagyalaxmi Steel Alloys Pvt. Ltd.	April 2008 to March 2009	Rs.5,91,23,193 & equal penalty	Specific verification of electricity consumption on 25.2.2009 showed electricity consumption of 1503.5 units per MT using mix input of scrap and sponge Iron.
3.	E/86275/2014	Mahaveer Steel Re-Rolling Mills	April 2008 - March 2009	Rs.79,74,603/- & equal penalty	Specific verification of electricity consumption on 22.3.2009 showed electricity consumption of 1209 units per MT using mix input of scrap and sponge Iron.
4.	E/86152/2014	Regent Steel Pvt. Ltd.	February 2008 to March 2009	Rs.96,27,516/- & equal penalty	Specific verification of electricity consumption on 19.3.2009 showed electricity consumption of 1199 units per MT using mix input of scrap and sponge Iron.
5.	E/86348/2014	Jailaxmi Casting & Alloys Pvt. Ltd.	2008-09, 2009-10 (up to July 2009)	Rs.1,92,94,575/- & equal penalty	Specific verification of electricity consumption on 18.3.2009 showed electricity consumption of 1147.74 units per MT using mix input of scrap and sponge Iron.
6.	E/86249/2014	Gajlaxmi Steel Pvt. Ltd.	February 2008 to March 2009	Rs.2,76,52,805/- & equal penalty	Specific verification of electricity consumption on 20.2.2009 showed electricity consumption of 1433.78 units per MT using mix input of scrap and sponge

					Iron.
7.	E/86242/2014	Kalika Steel & Commodities Pvt. Ltd.	April 2008 to March 2009	Rs.3,19,92,292/- & equal penalty	Specific verification of electricity consumption on 25.1.2009 showed electricity consumption of 1371.5 units per MT using mix input of scrap and sponge Iron.
8.	E/86330/2014	Meta Rolls & Commodities Pvt. Ltd.	April 2008 to March 2009	Rs.3,26,84,318/- & equal penalty	Specific verification of electricity consumption on 20.3.2009 showed electricity consumption of 1251 units per MT using mix input of scrap and sponge Iron.
9.	E/86220/2014	Nilesh Steel & Alloys Pvt. Ltd.	April 2008 to March 2009	Rs.2,06,54,292/- & equal penalty	Specific verification of electricity consumption on 22.2.2009 showed electricity consumption of 1253 units per MT using mix input of scrap and sponge Iron.
10.	E/86349/2014	Om Sairam Steel & Alloys Pvt. Ltd.	April 2008 to March 2009	Rs.3,90,21,947/- & equal penalty	Specific verification of electricity consumption was done on 25.3.2009; however copy thereof was not give to appellant.
11.	E/86331/2014	Saptashrungi Alloys (P) Ltd.	April 2008 to March 2009	Rs.1,61,53,031/- & equal penalty	No verification of electricity consumption was done during the relevant period.

10. The Division Bench of CESTAT had set-aside the order of the CCE, Aurangabad on account of additions made in the hands of the assessee because of erratic consumption of electricity. The relevant finding of the order of CESTAT reads as under :-

“In the impugned order the adjudicating authority has not considered the specific verification conducted by the departmental officers, who ascertained the actual consumption of electricity to manufacture of 1MT of MS Ingots is more than 1026 units for per MT as alleged in the SCN’s, when the appellants have specifically taken this defense. In fact, the specific inspection/experiment which has been conducted to ascertain the electricity consumption to manufacture 1MT of MS Ingots is vital evidence, which has not been considered by the adjudicating authority. If the physical verification report conducted by the Revenue would have been taken into consideration by the adjudicating authority, then the adjudicating authority was not required to consider the other evidences. Moreover, all the evidences relied upon by the Ld. Adjudicating authority are theoretical and have been considered by this Tribunal in appellant’s own cases for the earlier period; wherein this Tribunal relied on the decision of R.A. Casting Pvt. Ltd. vs. CCE, Meerut reported in 2009 (273) ELT 674 and held that on the basis of study report of Dr. N.K. Batra, the electricity consumption can’t be the basis for demands. The order of this Tribunal was challenged by the Revenue before the Hon’ble High Court and the Hon’ble High Court of Allahabad vide order dt. 9.9.2010

in appeal No.67/2009 dismissed the appeal filed by the Revenue, and against the decision of the Hon'ble High Court, the Revenue filed SLP before the Hon'ble Apex Court and the Hon'ble Supreme Court also dismissed the SLP vide order dt. 31.3.2011. Thereafter, the Revenue sought to file review petition, but the then Attorney General of India, the Shri Goutam Vahanvati opined not to file review petition vide letter No.276/417/2010 CX 8A dated 26.05.2011. Therefore, the reliance on the study analysis conducted by Dr. N.K. Batra, Professor IIT Kanpur, is not an evidence to ascertain the electricity consumption for manufacture of 1MT of MS Ingots.

7. In appellants own case for the earlier period on the basis of the evidence relied upon by the adjudicating authority, Tribunal came to the conclusion that the 1026 units of electricity for manufacture of 1MT of MS Ingots is not correct and set aside the adjudication orders. In the cases in hand there is additional evidence of specific verification/trial conducted by the revenue to ascertain the actual electricity consumption which works out to more than 1026 units of electricity consumption per 1MT of MS Ingots. Therefore, relying on the decision of the earlier period in appellant's own cases and the additional evidences, collected by way specific verification, we hold that impugned orders are not legal and proper whereas during the impugned period, the physical verification was conducted and the electricity consumption for manufacture of 1MT of MS Ingots was found to be more than 1026 units of electricity.

8. In these circumstances, we set aside the impugned orders and allow the appeals with consequential relief and stay applications are also disposed of in the above terms."

11. The addition on account of suppressed production made in the hands of the assessee was deleted by the Division Bench of CESTAT vide order dated 22.10.2014, wherein on specific inspection / experiments by the authorities, conducted to ascertain the electricity consumption to manufacture one MT found that the consumption of electricity was more than 1026 units per MT. The case of the Excise Department was that 1026 units per MT were required to manufacture one MT of MS ingots / billets and the assessee was issued show cause notice in this regard. However, since the physical verification conducted by the Excise Department reflected higher consumption of electricity, the Tribunal came to a finding that in view of the additional evidences of specific verification / trial conducted by the Revenue to ascertain the actual electricity consumption, which worked out to more than 1026 units per MT, there was no basis for making any addition in the hands of the assessee. The Tribunal also referred to its earlier order in the case of different assessee's, where similar addition was deleted.

12. The Tribunal in bunch of appeals with lead order in ITA Nos.284 to 286/PN/2012 relating to assessment years 2006-07 to 2008-09 in the case of Bhagyalaxmi Steel Alloys Pvt. Ltd. vs. Addl.CIT and cross appeal filed by the Revenue in ITA Nos.437 to 439/PN/2012 relating to assessment years 2006-07 to 2008-09 along with other connected appeals while deciding the

issue of addition on account of suppressed production because of erratic consumption of electricity, held as under :-

“12.....Relevant para has already been reproduced hereinabove”

13. The Ld. Special AR for the Revenue before us pointed out that another aspect of the addition is extrapolation of sales to be made in the hands of the assessee for the entire year on the basis information received for part of the year. It may be put on record that in assessment year 2009-10 in the hands of various furnace companies no such investigation was made by DGCEI. In the absence of any information gathered by the Excise Authority of clandestine removal of goods without payment of excise duty, and in the absence of the assessee declaring any additional income in its hand, no such addition is warranted in the hands of the assessee. However, in case any of the assessee have admitted to clandestine removal of goods without payment of excise duty, then additional income relatable to such turnover is to be added in the hands of the said assessee. We have already dealt with this issue in detail by order of even date in the bunch of appeals as referred earlier.

14. Following the same parity of reasoning as per our order of even date in the case of Bhagyalaxmi Steel Alloys Pvt. Ltd. & Others relating to assessment years 2006-07 to 2008-09 and in view of the physical verification carried out by the authorities as referred to by us in the paras hereinabove and the consequent order of Division Bench of CESTAT in the case of present assessee's before us relating to assessment year 2009-10, we find no merit in the orders of authorities below and we reverse the order of CIT(A). We find no merit in the addition made in the hands of the assessee on account of suppressed production consequent to erratic consumption of electricity.

15. The appeals of the Revenue against the adoption of GP rate of 4% and the deletion of working capital required for investment in suppressed production is also deleted by us by following order in the case of assessee and others in earlier years and following the same parity of reasoning, we dismiss the grounds of appeal raised by the Revenue.”

20. In the totality of the above said facts and circumstances and in view of the issue being identical to the issue before the Tribunal in set of furnace cases, we delete the additions made in the hands of assessee on account of suppressed production. However, following the parity of reasoning as in the earlier order of Tribunal as directed by us in paras hereinabove, we direct the Assessing Officer to compute the addition on account of profits relating to the clandestine removal of goods without payment of Excise duty as admitted by the assessee before the Settlement Commission and / or Commissioner (Appeals) of Excise in the

respective assessment years after verification, by applying GP rate of 4% or actual GP rate declared by the assessee, whichever is higher, if so declared by the respective assessee. The assessee has furnished the details of show cause notices issued by the Central Excise Authorities and the quantity involved of clandestine removal of goods and suppression of production in the respective years and also the final result / status of the petitions moved by the assessee either before the Settlement Commission / CESTAT or Commissioner (Appeals) of Excise. The said tabulated details are appended as Annexure to this order. We direct the Assessing Officer to verify the claim of assessee in this regard and include the profit on the suppressed production @ 4% or actual GP rate declared by the assessee, whichever is higher. The assessee is directed to file the requisite details of proceedings before the Excise authorities, before the Assessing Officer in order to compute the additional income in the hands of assessee in the respective years.

21. The Assessing Officer while completing assessment in the hands of the assessee had not relied on the ratio laid down by the Tribunal in the case of SRJ Peety Steel Pvt. Ltd. and Shri Om Rolling Pvt. Ltd. (supra) on the ground that the appeal filed by the Department is pending before the Hon'ble Bombay High Court. The learned Authorized Representative for the assessee furnished on record the copy of order of Hon'ble Bombay High Court in the case of CIT Vs. SRJ Peety Steel Pvt. Ltd. and CIT Vs. Shri Om Rolling Pvt. Ltd. vide Tax Appeal No.30 of 2011 & Ors., wherein the findings of the Tribunal have been upheld vide judgment dated 10.02.2014.

22. Hence, the addition made in the hands of assessee by the Assessing Officer on the plea that the Departmental appeal is pending before the Hon'ble Bombay High Court does not survive.

23. Another aspect to be noted in the present bunch of appeals is that the directors of the assessee company and their family members had offered additional income of Rs.14 crores, which has been declared in the respective returns of income and has been assessed in the hands of respective individuals. The major portion of income was declared in assessment year 2010-11 amounting of Rs.12 crores and the balance of Rs.2.80 crores was declared in assessment years 2006-07 to 2008-09. No benefit of telescoping has been allowed by the CIT(A) in respect of said declaration in the hands of assessee and no ground of appeal has been raised against the said denial by the CIT(A). In the totality of the above said facts and circumstances, we find no merit in the grounds of appeal raised by the Revenue for estimation of GP @ 15% as the basis for applying GP has been deleted by the Tribunal in group of furnace cases decided earlier. Further, there is no merit in any addition on account of investment for the alleged production under section 69C of the Act. Following the same line of reasoning as in the earlier order of the Tribunal dated 15.07.2015, we allow the grounds of appeal raised by the assessee with the direction to the Assessing Officer to compute the additional income in the hands of assessee in the respective assessment years on account of admission of clandestine removal of goods without payment of Excise duty by the assessee before the Settlement Commission, Commissioner (Appeals) of Excise and CESTAT. No other addition is warranted in the hands of assessee. Consequently, grounds of appeal in this regard are allowed as indicated above. The grounds of appeal raised by the Revenue are dismissed.

24. The facts and issues in ITA Nos.1259/PN/2012 to 1264/PN/2012 and ITA Nos.1661/PN/2012 to 1666/PN/2012 are identical to the facts and issues in ITA No.1258/PN/2012 and ITA No.1660/PN/2012 and our decision in ITA

No.1258/PN/2012 and ITA No.1660/PN/2012 shall apply *mutatis mutandis* to ITA Nos.1259/PN/2012 to 1264/PN/2012 and ITA Nos.1661/PN/2012 to 1666/PN/2012.

25. In the result, all the appeals of the assessee are partly allowed and all appeals of the Revenue are dismissed.

Order pronounced on this 24th day of September, 2015.

Sd/-
(PRADIP KUMAR KEDIA)
 लेखा सदस्य / ACCOUNTANT MEMBER

Sd/-
(SUSHMA CHOWLA)
 न्यायिक सदस्य / JUDICIAL MEMBER

पुणे Pune; दिनांक Dated : 24th September, 2015.

GCVSR

आदेश की प्रतिलिपि अग्रेषित/Copy of the order is forwarded to :

- 1) The Assessee;
- 2) The Department;
- 3) The CIT(A), Aurangabad;
- 4) The CIT, Central, Nagpur;
- 5) The DR "A" Bench, I.T.A.T., Pune;
- 6) Guard File.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary
 आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune