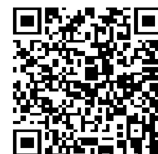

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# HIGH COURT OF DELHI : NEW DELHI

+ **ITA No. 256 of 2003**

% Decided on: November 12, 2003

# COMMISSIONER OF INCOME TAX,
DELHI ...Appellant
! Through: Mr. Sanjiv Khanna, Adv.

Versus

$ M/S S.R. FRAGNANCES LTD. ...Respondent
^ Through: Nemo

Coram:

* **HON'BLE MR. JUSTICE D.K. JAIN**
* **HON'BLE MR. JUSTICE MADAN B. LOKUR**

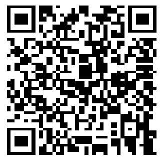
1. Whether the Reporters of local papers may be allowed to see the judgement?

2. To be referred to Reporter or not?

3. Whether the judgement should be reported in the Digest?

* **D.K. JAIN, J. (Oral)**

This appeal by the Revenue under Section 260-A of the Income-tax Act, 1961 (for short "the Act") , is directed against order dated 11 December 2002, passed by the Income-tax Appellate Tribunal,



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New Delhi (for short "The Tribunal") in cross appeals, being I.T.A. No.5856/Del/97 & I.T.A. No.6085/Del/97, by the assessee as well as the Revenue in respect of the Assessment Year 1994-95.

According to the appellant, the order of the Tribunal involves the following substantial questions of law:-

"1. Whether order of the Ld. ITAT deleting the addition of Rs.1,35,80,897/- is perverse and contrary to the evidence and tax audit report of the statutory auditors?

2. Whether the Ld. ITAT has ignored the reasoning of this Assessing Officer and the tax audit report which does not mention any shortage of Supari and Catechu and was right in drawing distinction between shortage and wastage to delete the addition made by the assessee?

3. Hon'ble court may be pleased to amend and modify the questions of law suggested above and/or formulate new/additional questions of law?"

Briefly stated, the background facts, giving rise to the present appeal, are as follows:

The respondent, hereinafter referred to as the assessee, is engaged in the business of manufacture of pan masala. During the course of assessment proceedings for the aforementioned assessment year, the Assessing Officer noticed that in the tax audit report furnished in Form No.3CD against the column "Raw Material", the shortage was shown as `Nil'. Similarly, under the head "Finished Products" against the closing stock at the end of previous year, shortage and percentage thereon a dash

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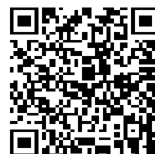



mark was given, indicating that the figure was nil. On further examination, the Assessing Officer found that a loss of 38223 kgs., had been claimed in the consumption of "supari". He also noticed a shortage of 858 kilograms in catechu account. The Assessing Officer felt that on the one hand, the auditors had pointed out no shortage of any raw material, and on the other, afore-noted shortages in supari and catechu accounts had been claimed by the assessee. He also noticed that in the supari account, the assessee had also debited 821 kilograms on account of wastage due to moisture and weighments. Not being satisfied with the explanation furnished by the assessee, the Assessing Officer made an addition of Rs.1,35,80,987/- to the trading results, on the ground that the assessee had processed more pan masala and had sold the same outside the books of accounts.

Being aggrieved, the assessee preferred an appeal to the Commissioner of Income-tax (Appeals). Though the Commissioner agreed with the Assessing Officer in principle, but taking into consideration the cost price of the supari and the explanation of the assessee that the wastage in catechu account took place in grinding and it was claimed only at 2.72 per cent as compared to earlier years, where the wastage was much higher, the Commissioner restricted the addition to Rs.40,51,638/- on account of shortage of raw supari. Thus, the assessee

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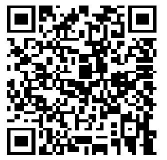

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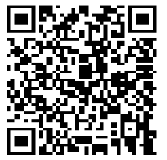
got a relief of Rs.95,29,349/-.

Not being satisfied with the order of the Commissioner, the assessee as well as the Revenue carried the matter in further appeal to the Tribunal. By the impugned order, the Tribunal has deleted the entire addition made by the Assessing Officer to the declared trading results. While granting the said relief, the Tribunal held as follows:-

> "Even assuming that the books of account were rejected on cogent reasons, it was not mandatory that some trading addition has to be made. The facts of each year have to be considered separately. We find that during the year under consideration, the wastage of supari was 13.61%, of catechu 2.72% and of cardamom, it was 27.69%. In the immediately preceding year, the wastage claimed by the assessee and allowed by the AO was much higher. Even in the earlier years, the wastage allowed by the AO was much higher. We also find that since last 8 years, the trading results have not been disturbed though in many years, the assessment under sec. 143(3) has been completed. AO has also not pointed out any defect in the books of account except observing that in the books, the auditors have shown the shortage at nil. As mentioned earlier, it was not shortage but wastage which was shown by the assessee. As there was no shortage in the auditors report, the nil figure was mentioned. We, therefore, hold that the assessee has correctly depicted the figure in the balance sheet as per Schedule-6. As no cogent reasons have been advanced by the AO/CIT(A) for rejecting the books of account, we hold that the rejection of books of account was uncalled for. The wastage claimed by it in the earlier so many years have been allowed by the AO. We, therefore, hold that the partial addition sustained by the CIT(A) is not justified and the same is deleted. In view of our findings, the revenue's ground of appeal on this issue is also dismissed."





Assailing the order passed by the Tribunal, Mr. Sanjeev Khanna, learned senior standing counsel for the Revenue, has submitted that the Tribunal has failed to appreciate that the stand of the assessee was contrary to tax audit report, which is to be accepted as reflecting the correct state of affairs of the assessee. It is also urged that the Tribunal has laid too much emphasis on the words "shortage" and "wastage", which was only an argument of convenience adopted by the assessee when they were confronted with the discrepancy in the audit report and the accounts.

We are unable to persuade ourselves to agree with the learned counsel.

There is no gain saying that the Tribunal being a final fact finding authority, it is required to take into account every fact for and against the assessee with due care and record its finding thereon. At the same time, if the Tribunal has arrived at certain conclusions of fact upon consideration of all the evidence and material before it, its finding is final and cannot be interfered with. Nevertheless, if a finding of fact is arrived at by the Tribunal after improperly rejecting evidence or it is based on material partly relevant and partly irrelevant or it is based on no evidence, such a finding may be vitiated, giving rise to a question of law, falling within the scope of Section 256 of the Act. However, the question for

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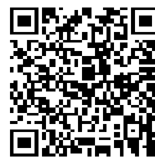



consideration is whether the impugned order involves a "substantial question of law", the phrase employed in Section 260A of the Act, under which provision the present appeal has been preferred. Obviously, a distinction has to be drawn between the expression "question of law" and "substantial question of law".

Although the expression "Substantial question of law" is not defined in the Act or in any other statute where a similar expression appears but its true meaning and connotation is now well settled by various judicial pronouncements. Recently in Santosh Hazari Vs. Purushottam Tiwari **(2001) 251 ITR 84**, while dealing with an analogous provision contained in Section 100 of the Code of Civil Procedure, their lordships of the Supreme Court have observed that to determine whether a question of law raised in a case is "substantial question of law", the tests laid down by the Constitution Bench in Chunilal V. Mehta & Sons Ltd. (Sir) Vs. Century Spinning & Manufacturing Company Ltd. **A.I.R. 1962 SC 1314**, still hold good. The five tests so laid are: Whether (i) it is of general public importance; or (ii) it directly or substantially affects the rights of the parties; or (iii) it is an open question in the sense that it is not finally settled by the Supreme Court; or (iv) it is not free from difficulty and (v) it calls for discussion for alternative views.

Tested on the touchstone of the afore-noted broad principles,

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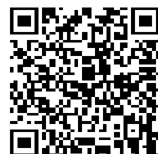


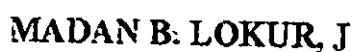


we are of the view that the impugned order does not involve any substantial question of law. In the instance case, as noted supra, while deleting the subject addition, the Tribunal has taken note of a very significant factor, namely, the wastage in supari, catechu and even cardamom, for the preceding years, has been much higher than in the year under consideration, but still the accounts of the assessee were accepted for the last eight years, particularly when assessments in respect of some of the years, were made under Section 143(3) of the Act, i.e. after scrutiny of accounts. The Tribunal has observed that the addition was made on the basis of doubts and surmises held by the lower authorities.

The findings recorded by the Tribunal, which are essentially findings of facts, are based on factors, which cannot said to be irrelevant. In our opinion, no question of law, much less a substantial question of law, arises from the order of the Tribunal.

The appeal is misconceived and is dismissed accordingly.

D.K. JAIN, J



MADAN B. LOKUR, J

NOVEMBER 12, 2003
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