



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

% Judgment delivered on: 24.01.2011

+ **ITA No.4/1999**

M/S DHARAMPAL SATYAPAL

.....APPELLANT

Vs

CIT

..... RESPONDENT

Advocates who appeared in this case:

For the Appellant: Mr C S Aggarwal, Sr Advocate with Mr Prakash Kumar, Adv.

For the Defendant: Ms Prem Lata Bansal, Advocate

CORAM :-

HON'BLE MR JUSTICE SANJAY KISHAN KAUL

HON'BLE MR JUSTICE RAJIV SHAKDHER

1. Whether the Reporters of local papers may be allowed to see the judgment ? No
2. To be referred to Reporters or not ? No
3. Whether the judgment should be reported in the Digest ? No

RAJIV SHAKDHER, J

1. This is an appeal under Section 260A of the Income Tax Act, 1961 (in short the 'Act') filed against the judgment of the Income Tax Appellate Tribunal dated 30.10.1998 passed in ITA No. 1779(Del)/90 pertaining to assessment year 1986-87. The appellant before us has impugned two additions sustained by the Tribunal. The first one being: an addition in the sum of Rs 34,20,635/- to its trading results. The second being: an addition in the sum of Rs 1,54,477/- on account of excess production of finished stock, which according to the Department ought to have remained in stock on the last day of the accounting year.

2. The brief facts which give rise to the present appeal are as follows:

2.1 The appellant, which is constituted as a partnership firm, in the relevant assessment year, was in the business of manufacture and sale of scented tobacco, also known as Zarda. The appellant claims, it has been carrying on this business since



assessment year 1980-81. The appellant's products are sold under the brand "*Tulsi*" and "*Razni Zafrani Zarda*". The appellant avers that it is also a marketing agent of products, such as, *Rajnigandha Pan Masala* and *Mastaba Gutkha*. Importantly, the finished product of the appellant is largely sold in tins; though there are other forms of packaging material also used by the appellant. As to why we have noted this aspect of the matter, it will become known in the latter part of our judgment.

2.2 The appellant for the relevant assessment year i.e., 1986-87 filed its return of income on 31.07.1986 wherein, it declared a total income of Rs 13,40,034/-.

2.3 On 25.11.1987, the department conducted a search and seizure procedure at the appellant's premises by taking recourse to the provisions of Section 132(1) of the Act. At the stage of search, documents and material were evidently seized by the department. One such document seized which is crucial to the disposal of the appeal is marked A-64. Though the search was relevant for the assessment year 1988-89, the material recovered by the Department was used by the Assessing Officer, in particular, document A-64, to arrive at the taxable income. The learned Assessing Officer vide his order dated 31.03.89 framed the assessment under the provisions of Section 143(3) of the Act. By his order, the assessing officer crystallized the appellant's taxable income at Rs 1,48,00,904/- as against the returned income of Rs 13,40,034/-. In the assessment order, seven additions had been made. However, as indicated hereinabove for the purposes of this appeal only two additions are relevant. It is pertinent to note at this stage that in respect of additions made towards suppressed closing stock, the Assessing Officer pegged the figure at Rs 23,78,942/-.

2.4 Aggrieved by the order passed by the Assessing Officer, an appeal was preferred to the Commissioner of Income Tax (Appeals) [in short 'CIT(A)']. Qua the aforementioned additions, the CIT(A) while confirming the addition of Rs 34,20,635/- reduced the other addition to Rs 15,44,768/- in the first instance by valuing the suppressed closing stock at a lower rate than that adopted by the Assessing Officer. The CIT(A) accorded, in other words, a relief to the extent of Rs 8,34,174/-. This addition



was, however, further reduced to Rs 1,54,477/- pursuant to a rectification order 16.02.1990 passed under Section 154 of the Act.

2.5 The appellant carried the matter in appeal to the Tribunal. The Tribunal vide impugned judgment dated 30.10.1998 sustained the order of the CIT(A). The appellant did not rest there; it chose to prefer a miscellaneous application under Section 254(2) of the Act before the Tribunal. The Tribunal by an order dated 15.10.99 dismissed the said miscellaneous application.

2.6 In the interregnum, the appellant had preferred the instant appeal. By an order dated 26.07.2002, this Court admitted the captioned appeal and framed the following questions:-

“1. Whether there was any material on record to conclude that the assessee had 6932.890 Kg. of finished material which could be said to have been packed and sold?

2. Whether on the facts of the instant case and in the light of the material on record the Income Tax Appellate Tribunal was correct and justified in holding that appellant has made sale of Rs 34,20,635 outside the books of accounts and has suppressed its closing stock by an amount of Rs 1,54,477?”

3. In support of the appeal, arguments were addressed by Mr Aggarwal, Sr Advocate and on behalf of the Department submissions were made by Mrs Bansal.

3.1 Mr Aggarwal confined his submissions to the following: (i) the Assessing Officer had not returned a finding under the then prevailing provisions of Section 145 of the Act to the effect that it was not possible for him to ascertain the income on the basis of the books of accounts produced by the appellant/assessee before embarking upon a computation on the basis of the material seized; (ii) the finding returned by the Authorities below that assessee had sold 6932.890 kgs of finished product outside the books of accounts was not based on any legal evidence or material and hence, the conclusion drawn by the Authorities below that an addition of Rs 34,20,365/- ought to be sustained; is perverse; (iii) the Tribunal had failed to follow its own decision rendered in the subsequent assessment year i.e., 1987-88 whereby, the assessee's explanation with regard to wastage both at the production stage and the packaging stage had been



accepted; and (iv) lastly, the assessee was not given an opportunity to explain the contents of the seized document A-64 which resulted in the breach of natural justice and hence, rendered the entire assessment illegal.

3.2 As against this, Ms Bansal, appearing for the Department relied upon the orders of the authorities below. Ms Bansal submitted that the authorities below had returned a concurrent finding of fact that the appellant/ assessee had not been able to: explain satisfactorily the wastage, and reconcile the excess stock of empties, i.e., the tins evidently available during the relevant assessment year as was discernable to the authorities below after comparing the information available in the seized document A-64 with that disclosed to the department; and the failure of the appellant/ assessee to give cogent justification in support of its stand that the empties, i.e., the tins had been returned to the manufacturer, namely, Metal Box Limited. It was thus contended by Ms Bansal that the addition of Rs 34,20,635/- in the trading results deserved to be sustained. Ms Bansal in nutshell submitted that the findings of the authorities below being pure findings of fact, the appeal deserved to be dismissed.

4. We have heard the learned counsel for the parties as well as perused not only the orders of the authorities below but also the record filed along with the appeal. On a consideration of the aforesaid, in our view, the following emerges:

5. The seizure of document A-64 revealed to the department certain information evidently available with the supervisor of the appellant/ assessee with regard to packaging material, which included empties, such as, tins of the 50 gms and 10 gms as well. The information led to an inquiry whereby, the assessing officer compared the information available in the seized document with that filed by the appellant/assessee with the department. Consequently, the assessing officer proceeded to assess the income on the basis that he best thought fit under the circumstances.

5.1 At this stage we may only note that Mr Aggarwal conceded before us that it was not his contention that the information which was contained in the document A-64 could not have been used by the assessing officer in computing and/or determining the income



for the assessment year in question. Mr Aggarwal, however, contended that the assessing officer had not specifically returned a finding in terms of Section 145 of the Act rejecting the appellant/ assessee's books of account.

5.2 In our view the authorities below including the assessing officer have proceeded on the basis that it was not possible to determine the income of the assessee based on accounts produced by him. A perusal of the orders of the authorities below clearly shows that this ground was not pressed before any of the authorities below in particular the Tribunal both at the stage of an appeal and at the stage of rectification sought under Section 254(2) of the Act; though in the grounds of appeal filed before CIT(A), an objection to that effect is present. Therefore, this submission of Mr Aggarwal cannot be entertained at this stage and hence, is rejected.

6. The next submission of Mr Aggarwal that there was no material or evidence before the authorities below to sustain a finding that the appellant/ assessee had sold, finished product weighing 6932.890 kg., outside the books of accounts will require examination in the light of the orders of the authorities below. The Assessing Officer in coming to the conclusion that addition had to be made took into account, in sum and substance the inability of the appellant/ assessee to reconcile the empties which were evidently available with the appellant/ assessee, the manipulation of the wastage by taking recourse of an ingredient "tichari"; which is nothing but scented water which on the assessee own stand (in the earlier assessment years), dries up during the process of production, and the appellant/ assessee's failure to justify its stand with regard to empties returned to the manufacturer, i.e., Metal Box Limited.

6.1 To appreciate these aspects the findings returned by the assessing officer in this regard would be required to be noticed. In respect of the wastage the assessing officer stated as follows:

"Assessee had manufactured total quantity of 1,36,464 kg. of Chewing Tobacco under different brands with and without silver and with and without saffron under different heads like 0, 00, 000, 0000, 00000. The Tin contains 10gms and 50 gms of the material. Assessee also supplies it in paper bags,



Philes, P. bags and pouch packets. Out of the total manufacturing material of 1,36,464.00 kg. assessee has packed a total of 1,35,485.840 kg. and claimed 978.960 kg. of wastage. This wastage is alleged in packing section only....

.....The wastage on account of packing varies from 0.16% to 1.85%. On this issue of wastage, assessee was specifically asked as to how there is a difference of claiming wastage that is difference is also part and parcel of this wastage occurs in two basis 1) is due to weighing and other is due to packing. He was whether the weighing machine use for one material or no use for the other material i.e. the wastage due to weighing can only take place if there are machines for different brand. There upon the Ld. Counsel neither submitted any explanation nor he was able to explain the reason for this wastage. There are two as acts if there is in one packet by 0.50% there is every likelihood that there is a shortage in the other packed i.e., tin by 0.05% i.e., the marginal error of 0.05% are tolerable plus and minus side thus the resulted figure is that there is no wastage on this account. Even if it is there, it can not be beyond 0.10% as there is no sufficient reason for allowing the wastage of 0.10%. I disallow the full value of the wastage claimed and it is held that the material so alleged as wastage is sold by the assessee out side the books of account which is mentioned in the subsequent paragraph.”

6.2 Similarly, in respect of empties, i.e., tins the Assessing Officer returned the following findings :

“During the course of search some documents was [(sic) (read were)] seized. Annexure A(64) includes the amount of tin stock, available with the assessee under different brands and it also includes purchases and consumed during the month. It was examined on 31st march 1986 that assessee had an excess stock of 94089 tins of 50 gms. packing for which he had no explanation.

This excess stock of empty tins was available in Annexure D(64) i.e. 11,01,068/- whereas the stock in the statement submitted to this office is 10,09,070/-. The similar discrepancies was noted in tin of 10 gms in seized material. There was a stock of 2,90,606/- whereas to this office, assessee has shown a stock of 3,98,950/-. There is a shortage of 1,08,344/-.”

6.3 In this regard the assessing officer went on to state as follows:



“This claim is that tins are returned is nothing but tins sold outside books of accounts

A. *Stock as per seized document 50 gms.*

<i>Annexure A(64)</i>	<i>11,01,970/-</i>
<i>Less:- Stock is shown in the income tax return</i>	<i><u>10,06,970/-</u></i>
<i>Excess stock in the note book</i>	<i><u>94,098/-</u></i>

Out of this excess stock it has been alleged that 22,900/- tins of 50 gms.[Sic (read as 10 gms)] were returned which were found defective over the year. Although assessee was not able to explain the return of 22,900/- tins, there are still the difference of 71,198 tins of 50 gms.

B. *Stock as per seized document of 10 gms*

<i>Annexure A(64)</i>	<i>2,90,606/-</i>
<i>Less: Stock shown in the income-tax return</i>	<i><u>3,98,950/-</u></i>
<i>Excess stock return in the I.Tax record</i>	<i><u>1,08,344/-</u></i>

It has been alleged that stock of 81,000 tins was returned to M/s Metal India for which credit memo dt. 31st March was produced and has been discussed in above paragraph. This alleged claim has been rejected.”

6.4 These findings have been broadly confirmed by the CIT(A). A perusal of the findings would show that while in respect of wastage, the assessee was not able to give a valid explanation, there seems to be some discrepancy with regard to the calculation of excess stock of 50 gms tins.

6.5 It was argued by Mr Aggarwal, in our view correctly, that the seized document A-64 does not refer to a figure of 11,01,970 (against 50 gm tins) based on which an excess stock of 94,098 has been deduced by the assessing officer after subtracting from it stock equivalent to 10,06,970; being information filed with the assessing officer, as contained in Form –IV, maintained under Rule 173G of the Central Excise Act, 1944. The excess stock found by the assessing officer to the extent of 94,098 50 gms tins would be correct if there was material to back the figure of 11,01,970, 50 gms tins, in the first instance. The other error referred to by Mr Aggarwal, and again correctly, was in treating the figure of 1,08,344/- (in respect of 10 gms tins) as excess stock, whereas it actually was on the face of it, a shortage. The assessing officer’s error in this regard is patent since the figure of stock available with the department as filed by the assessee, was higher, i.e.,



3,98,950/- as against that found in the seized document A-64. In our view, the assessing officer could not have treated the excess and shortage in stock similarly while proceeding to make an addition.

6.6 However, as regards returned empties, the assessing officer has rejected the explanation with the following observations:

“It was explained by the learned counsel that there is a credit note of Rs 83,564/- and that of Rs 53,728/- which is the value of 81000 tins and 22900 empty tins respectively. This credit notes was not dated 31.3.1986. Assessee was requested to produce gate pass, challan, original bills, date of receipt and inwards and outwards in stock which resulted in credit note entry. The learned counsel submitted debit note copy of dated 31.5.86 confirmed by Shri I.C. Pande, Manager Sales, of Metal Box India Limited. He submitted that delivery of note No. 7554 dated 26.11.85 is for 50000 tins and for balance 1344 dated 20.11.1985. He has not produced the register wherein these invoices are entered in routine. Also the seized document annexure A-64 reveals that there was a very little stock in the month of December and January in respect of brand of 10 gms and 50 gms. It is submitted that if assessee firm had received goods in the month of November 1985 he cannot keep the defective material pending for more than 4 months. Octroi receipt produces does not bear any date whereas the expense vouchers bears dated 4th March. There is no evidence which proves that tins lot of 81000 and 22900 are defective. Ld. Counsel and A.R. also were requested to give any evidence if there is any such instance earlier wherein the defective goods were returned. No such instance could be quoted. He was further asked to explain if there is any evidence which is on record to show that goods were defective. He was not able to produce evidence for the same. Thus goods purchased in the month of Nov. 1985 and alleged to be returned in the month of March for which confirmation of credit note from sale Manager is for May 1986 is all fabricated and cannot be accepted.”

6.7 It is noted that after taking into account these figures, the assessing officer came to the conclusion that 6932.890 kg. of finished products was sold outside the books. The relevant observations in this regard are as follows:



“There is an excess of 94098 tins of 50 gms. These tins require a materia. of 4704.450 kg. to be filled. Similarly the stock of 22900 tins of 50 gms. alleged to be requires 1145.00 kg. of material to be filled., ie., total of 22045 gms. material has been filled in the un-explained tins stock of 50 gms. discussed above. There is a similar un-explained stock of 10 gms. and the total stock of 108 filled tins are sold by the assessee by filing 1083.440 kg. of material therein: The material so filled has come from the wastage claimed at the initial stage and in the packing stage which remains unproved.”

6.8 As is quite evident, the figure of finished product sold outside the books, which is pegged at 6932.890 kgs. is largely based on the calculation of an excess stock of 94098 50 gms tins. Finished product to the extent of 4704.450 kgs out of 6932.890 kgs is attributed to excess stock of 50 gms tins being 94098 in number. This figure of excess stock of 50 gms tins is in turn premised on the seized document A-64 showing a figure of 11,01,970, 50 gms tins. As indicated hereinabove, we have not been able to ascertain the basis for incorporating the figure of 11,01,970/- 50 gms tins in the assessment order. Furthermore, in so far as 10 gms tins is concerned, there is in fact, a shortage of 1,08,334/- tins. Once again out of a total quantity of 6932.890 kgs 1083.44 kgs is attributed to 10 gms tins, evidently being in excess, which is quite contrary to what is apparent from the record. There is no explanation as to how the assessing officer has arrived at this figure. It is not disputed that the first addition, pertaining to Rs 34,20,635/- is based on valuation accorded to the finished products sans the cost of packaging. While we agree the assessing officer in this case could have adopted his own method to compute the correct income of the assessee, it necessarily had to be based on the material on which he had placed reliance. We find that the CIT(A) and Tribunal have not adequately dealt with this crucial aspect of the matter. The appellant/ assessee had raised this ground before the CIA(A) inasmuch as it had contended that no opportunity had been given by the assessing officer to deal with figures which formed the basis of his computation in coming to the conclusion that there was an excess stock of 94098 50 gms tins. Even before the Tribunal, this ground seems to have been pressed. This is apparent



from the following observations in the order of the Tribunal, while noting submissions of the appellant assessee:

“It was also stated that the assessee had earlier also returned the tins. He questioned that there is no entry of 11,01,970 empty tins of 50 gms. rather it should be 95,028 [(sic) (read 950,028)] which is the opening balance of April meaning thereby the closing balance as on 31.03.1986. It was further argued that if the totaling mistake as pointed out above of 1 lakh tins is correct, the closing stock would work out to 10,01,970 which is less than shown in the return.

Again for 10 gms. variety of tins the assessee’s representative submitted before the first appellate authority that there was no document which shows the closing stock figure at 2,90,606 for the stock of 31.3.1986. The sheet relating to April show the opening balance at 3,79,650. He, therefore, submitted that the stock shown in the seized document is less than as shown in the books of account and excise record. This is bound to be shown because the excise record shows the actual stock whereas the supervisor’s book shows only the useable stock. In view of this it was emphasized that no adverse view should be taken.”

7. The Tribunal seems to have simply adopted the explanation of CIT(A), wherein CIT(A) has stated the following:

“There was a totaling error in the supervisor’s record of stock of 1,00,000 tins on 30.1.86 which remained undetected through out, therefore, the appellant’s stock taking is totally not trust worthy and far from realistic situation when a mistake of one lack (sic) (read lakh) can go unnoticed for such a long time....

...If the supervisor was only showing used tins and issue of goods unusable, quality than the stock in hand should have a balance of useable and unusable plus returned stock meaning thereby as under:-

<i>50 gms tin</i>	<i>9,50,281</i>
<i>Returned stock</i>	<i>94,098</i>
<i><u>Any remaining unusable stock</u></i>	
<i>10 gms</i>	<i>3,79,650</i>
<i>Rt. Stock</i>	<i>81,000</i>
	<i>27,384</i>

Plus any unusable stock still remaining



If the totaling mistake of 1,00,000 tins is made than this figure will further go up by one lac tins.”

8. A reading of this finding along with the record would show that there are several gaps. The figure of 9,50,281 [(sic) (read 950,028)] is apparently based on a summary of opening balance of empty tins for April, 1986 which forms part of the seized document A-64. Similarly, the figure of 3,79,650 also forms part of the same sheet which again forms part of the seized document A- 64. The figure of 94,098/- is, however, based on the calculation of the assessing officer; which as discussed above the Assessing Officer had arrived at by deducting from what he perceived to be the figure of 50 gms. in the seized document A-64, i.e., 11,01,970 and the stock shown in the Form IV filed by the appellant/ assessee, i.e., 10,06,970/-. Since we have already said that there was a discrepancy with regard to the said figure, this reasoning could not have been adopted by the Tribunal. In our view the Tribunal requires to have a re-look at the material on record, since the discrepancies are not reconcilable. This is notwithstanding the fact that Tribunal has at certain places, referred to the quantities of empties, in stock as values in money. This aspect was however brought to the notice of the Tribunal at the stage of Section 254(2) proceedings and therefore due regard will be paid to it.

9. As regards the second addition, we concur with the view of the authorities below that given the size of the operations of the appellant/ assessee, it was inconceivable that on the last date, it did not have any stock. As a matter Mr.Aggarwal did not advance any submissions with respect to this addition. Nevertheless, in our view, the Tribunal while adopting the reasoning of the CIT(A) has correctly concluded as follows:

“From the facts and circumstances we are convinced that AO was justified in estimating 2 days production being closing stock for the year as the same has been shown by the assessee at nil and on enquiry assessee has not been able to justify that there was no closing stock as it also appears strange that for about a week there was no production and so many workers on production side remained idle. Therefore, AO’s action in estimating value of 2 days producing as closing stock of unpacked material is justified



in the absence of any convincing material to rebut the same while the assessee has nothing new to be placed before us to take a different view than taken by the AO. So while confirming the action of AO we dismiss this ground of appeal.”

10. We may only notice that as regards Mr Aggarwal’s submission that the Tribunal ought to have followed its decision in the subsequent assessment year, i.e., 1987-88, we are of the view that this submission is untenable. The Tribunal while coming to the conclusion which it did, evidently appears to have relied upon the findings arrived at by the Assessing Officer and the CIT(A) in respect of only the relevant assessment year. Since the additions primarily related to non-disclosure and/or failure to reconcile the wastage and stock of empties in respect of the assessment year in question - in principle no error can be found in the approach adopted by the Tribunal in not following its decision for the assessment year 1987-88 notwithstanding the fact that the seized document A-64 was common to both assessment years.

11. In view of the above, the appeal is partly allowed. The matter is remanded to the Tribunal in respect of first addition made to the extent of Rs 34,20,635/-. In these circumstances, while the first question of law is answered in favour of the appellant/ assessee, the second question of law is answered against it.

RAJIV SHAKDHER, J

SANJAY KISHAN KAUL, J

JANUARY 24, 2011
mb/kk