



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

+ ITA 1111/2010

COMMISSIONER OF
INCOME TAX

Through Appellant
Ms. Suruchii Aggarwal,
Advocate

versus

M/S. DHINGRA METAL WORKS Respondent
Through Mr. Rajesh Mahna, Advocate.

% Reserved on: 22nd September, 2010
Date of Decision : 04th October, 2010

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE MANMOHAN

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

J U D G M E N T

MANMOHAN, J

1. The present appeal has been filed under Section 260A of Income Tax Act, 1961 (for brevity "Act") challenging the order dated 4th January, 2010 passed by the Income Tax Appellate Tribunal (in short "Tribunal") in ITA No. 2033/Del/2009 for the Assessment Year 2005-2006.

2. Briefly stated the relevant facts of the present case are that on 14th September, 2004, a survey under Section 133A of the Act was conducted out on the respondent-assessee's business premises. During



the course of survey, the tax officials noticed some discrepancy: stock and cash in hand. During the said survey, respondent-assessee surrendered an amount of ₹ 99,50,000/- and offered the same for the purposes of taxation. The additional income offered included a sum of ₹ 45,00,000/- on account of excess stock found during the course of survey and offered by one of the partners of the respondent-assessee as additional income.

3. The answer by one of the partners of the respondent-assessee to Question No. 13 during the survey proceedings is relevant and the same is reproduced hereinbelow :-

“Ques. No. 13: Do you have any other business concerns being run from this premises i.e. B-70/3, Wazirpur Indl. Area?”

Ans. : Yes, the company known as M/s. D.M.W.P. (Ltd.) is also in operation from this premises. This company was incorporated in May, 2000”

4. It is pertinent to mention that in reply to Question No. 36, which pertained to difference in stock, the partner of respondent-assessee had stated *“I, cannot explain this difference now. Therefore, to buy peace of mind I am offering additional income of Rs. 43 lacks for the current financial year i.e. A.Y. 2005-06.”*

5. However, subsequently, the respondent-assessee vide its letter dated 29th November, 2004 contended that the statement about stock was incorrect and that the impugned discrepancy had been reconciled as it was only a mistake. Consequently, the respondent-assessee withdrew



the offer of additional income for taxation on account of excess stock

6. On 31st December, 2007, the Assessing Officer (for short “AO”) passed the assessment order wherein he did not accept the plea of the respondent-assessee that excess stock during the course of survey had been reconciled. The AO relied upon the statement of one of the partners of respondent-assessee given during the course of survey under Section 133A of the Act and concluded that the explanation/retraction by the respondent-assessee was an afterthought and had no element of truth.

7. Upon an appeal being filed by the respondent-assessee, the Commissioner of Income Tax (Appeals) [for short “CIT(A)] deleted the said addition holding that AO did not make any independent enquiry and further that the AO had not made out a case that the amount surrendered during the survey operation had not been included in the final books of account.

8. The Revenue’s appeal before the Tribunal was also dismissed vide order 4th January, 2010. The relevant portion of the impugned order reads as under:-

“5. We have heard the rival contentions and perused the material on record. A perusal of assessment order indicates that the sole basis of making the addition is assessee’s statement during the course of survey recorded u/s 133A(iii) stating to surrender as immediately explanation could not be given. Vide letter dated 29.11.2004 the reconciliation of stock of the assessee and its associated concern M/s. DMW was given which has not been controverted by AO. Thereafter the issue remained silent and only during the course of assessment AO took up the same. The assessee’s



statement during the course of survey is not binding as evidence more so when it given in the eventuality of non-availability of ready explanation. It has not been held the assessee had no explanation to offer; addition has been made only on survey statement. From the record, it clearly emerges that both the concerns are independent entities separately assessed under income-tax and various other departments. Both are registered under various laws including excise and maintain statutory record of excise, stock registers; books of account are duly audited. With all these facts present on record, addition cannot be made ignoring the reconciliation and evidence filed by assessee and relying only on a statement which was given due to non-availability of ready explanation. The assessee immediately thereafter furnished correct stock statement which have not been controverted by AO. In view thereof, we are inclined to uphold the order of CIT(A) deleting addition.”

9. Ms. Suruchii Aggarwal, learned counsel for Revenue submitted that the statement of one of the partners of respondent-assessee recorded during the survey under Section 133A of the Act had evidentiary value and the said statement could not be retracted/explained after a lapse of considerable time.
10. Before we deal with the controversy at hand, we would like to reproduce Section 133A of the Act, which reads as under :-

“133A. POWER OF SURVEY.-(1) *Notwithstanding anything contained in any other provision of this Act, an income-tax authority may enter -*

(a) any place within the limits of the area assigned to him, or

(b) any place occupied by any person in respect of whom he exercises jurisdiction [or]

[(c) any place in respect of which he is authorised for the purposes of this section by such income-tax authority, who is assigned the area within which such place is situated or who exercises jurisdiction in respect of any person occupying such place]



at which a business or profession is carried on, whether such place be the principal place or not of such business or profession, and require any proprietor, employee or any other person who may at that time and place be attending in any manner to, or helping in, the carrying on of such business or profession -

(i) to afford him the necessary facility to inspect such books of account or other documents as he may require and which may be available at such place,

(ii) to afford him the necessary facility to check or verify the cash, stock or other valuable article or thing which may be found therein, and

(iii) to furnish such information as he may require as to any matter which may be useful for, or relevant to, any proceeding under this Act.

Explanation :- For the purposes of this sub-section, a place where a business or profession is carried on shall also include any other place, whether any business or profession is carried on therein or not, in which the person carrying on the business or profession states that any of his books of account or other documents or any part of his cash or stock or other valuable article or thing relating to his business or profession are or is kept.

(2) An income-tax authority may enter any place of business or profession referred to in sub-section (1) only during the hours at which such place is open for the conduct of business or profession and, in the case of any other place, only after sunrise and before sunset.

(3) An income-tax authority acting under this section may, -

(i) if he so deems necessary, place marks of identification on the books of account or other documents inspected by him and make or cause to be made extracts or copies therefrom,

[(ia) impound and retain in his custody for such period as he thinks fit any books of account or other documents inspected by him:

Provided that such income-tax authority shall not-

(a) impound any books of account or other documents except after recording his reasons for so doing; or

(b) retain in his custody any such books of account or other documents for a period exceeding ten days (exclusive of holidays) without obtaining the



approval of the Chief Commissioner or Director General therefor, as the case may be,]]

(ii) make an inventory of any cash, stock or other valuable article or thing checked or verified by him,

(iii) record the statement of any person which may be useful for, or relevant to, any proceeding under this Act.

(4) An income-tax authority acting under this section shall, on no account, remove or cause to be removed from the place wherein he has entered, any cash, stock or other valuable article or thing.

(5) Where, having regard to the nature, and scale of expenditure incurred by an assessee, in connection with any function, ceremony or event, the Income-tax authority is of the opinion that it is necessary or expedient so to do, he may, at any time after such function, ceremony or event, require the assessee by whom such expenditure has been incurred or any person who, in the opinion of the Income-tax authority, is likely to possess information as respects the expenditure incurred, to furnish such information as he may require as to any matter which may be useful for, or relevant to, any proceeding under this Act and may have the statements of the assessee or any other person recorded and any statement so recorded may thereafter be used in evidence in any proceeding under this Act.

(6) If a person under this section is required to afford facility to the income-tax authority to inspect books of account or other documents or to check or verify any cash, stock or other valuable article or thing or to furnish any information or to have his statement recorded, either refuses or evades to do so, the income-tax authority shall have all the powers under [Sub-section (1) of section 131] for enforcing compliance with the requirement made:

[Provided that no action under sub-section (1) shall be taken by an Assistant Director or a Deputy Director or an Assessing Officer or a Tax Recovery Officer or an Inspector of Income-tax without obtaining the approval of the Joint Director or the Joint Commissioner, as the case may be.]

Explanation.- In this section, -

[(a) "income-tax authority" means Commissioner, Joint Commissioner, a Director, a Joint Director, or an Assistant Director or Deputy Director or an Assessing Officer, and for the purposes of clause (i) of sub-section (1), clause (i) of sub-section (3) and sub-section (5), includes an Inspector of Income-tax;]



(b) "proceeding" means any proceeding under this Act in respect of any year which may be pending on the date on which the powers under this section are exercised or which may have been completed on or before such date and includes also all proceedings under this Act which may be commenced after such date in respect of any year.]”

11. From a reading of aforesaid Section, it is apparent that it does not mandate that any statement recorded under Section 133A of the Act would have evidentiary value. In our view, for a statement to have evidentiary value, the survey officer should have been authorised to administer oath and to record sworn statement. This would also be apparent from Section 132(4) of the Act. The said Section is reproduced hereinbelow :-

“132.SEARCH AND SEIZURE.

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xxxx

(4) The authorised officer may, during the course of the search or seizure, examine on oath any person who is found to be in possession or control of any books of account, documents, money, bullion, jewellery or other valuable article or thing and any statement made by such person during such examination may thereafter be used in evidence in any proceeding under the Indian Income-tax Act, 1922 (11 of 1922) or under this Act.

[Explanation : For the removal of doubts, it is hereby declared that the examination of any person under this subsection may be not merely in respect of any books of account, other documents or assets found as a result of the search, but also in respect of all matters relevant for the purposes of any investigation connected with any proceeding under the Indian Income-tax Act, 1922 (11 of 1922) or under this Act.]”

(emphasis supplied)

12. From the aforesaid, it is apparent that while Section 132(4) of the Act specifically authorizes an officer to examine a person on oath,



Section 133A does not permit the same.

13. The Kerala High Court in *Paul Mathews & Sons Vs. Commissioner of Income Tax, (2003) 263 ITR 101 (Kerala)* and Madras High Court in *CIT Vs. Kader Khan, (2008) 300 ITR 157* have also taken a similar view. The relevant portion of the Kerala High Court judgment in the case of *Paul Mathews & Sons* (supra) is reproduced hereinbelow :-

“The provision also enables the income-tax authority to impound and retain in his custody for such period as he thinks fit any books of account or other documents inspected by him, provided the authority records his reasons for doing so and also shall not retain the books of account for a period not exceeding 15 days. Section 133A(3)(iii) enables the authority to record the statement of any person which may be useful for, or relevant to, any proceeding under the Act. Section 133A, however, enables the income-tax authority only to record any statement of any person which may be useful, but does not authorize taking any sworn statement. On the other hand, we find that such a power to examine a person on oath is specifically conferred on the authorised officer only under section 132(4) of the Income-tax Act in the course of any search or seizure. Thus, the Income-tax Act, whenever it thought fit and necessary to confer such power to examine a person on oath, the same has been expressly provided whereas section 133A does not empower any Income-tax Officer to examine any person on oath. Thus, in contradistinction to the power under section 133A, section 132(4) of the Income-tax Act enables the authorised officer to examine a person on oath and any statement made by such person during such examination can also be used in evidence under the Income-tax Act. On the other hand, whatever statement is recorded under section 133A of the Income-tax Act it is not given any evidentiary value obviously for the reason that the officer is not authorised to administer oath and to take any sworn statement which alone has evidentiary value as contemplated under law. Therefore, there is much force in the argument of learned counsel for the appellant that the statement elicited during the survey operation has no evidentiary value and the Income-tax Officer



14. Moreover, the word 'may' used in Section 133A(3)(iii) of the Act clarifies beyond doubt that the material collected and the statement recorded during the survey is not a conclusive piece of evidence by itself.

15. In any event, it is settled law that though an admission is extremely important piece of evidence, it cannot be said to be conclusive and it is open to the person who has made the admission to show that it is incorrect.

16. Since in the present case, the respondent-assessee has been able to explain the discrepancy in the stock found during the course of survey by production of relevant record including the excise register of its associate company, namely, M/s. D.M.W.P. Ltd., we are of the opinion that the AO could not have made the aforesaid addition solely on the basis of the statement made on behalf of the respondent-assessee during the course of survey.

17. In view of the aforesaid, present appeal being bereft of merit, is dismissed.

MANMOHAN, J

CHIEF JUSTICE

OCTOBER 04 , 2010

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