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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ ITA 411/2024

THE PR. COMMISSIONER OF INCOME TAX -CENTRAL-1

.....Appellant

Through: Mr. Ruchir Bhatia, SSC with
Mr. Anant Manu, JSC & Mr.
Pratyaksh Gupta, JSC

versus

ULTIMATE CREATIONS

.....Respondent

Through:

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE RAVINDER DUDEJA

ORDER

02.08.2024

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1. The Principal Commissioner assails the validity of the order handed down by the Income Tax Appellate Tribunal [**“Tribunal”**] on 07 February 2024 and has framed the following questions of law for our consideration:-

“2.1 Whether on facts and circumstance of the case, the Ld. ITAT was justified in deleting the addition of Rs.6,13,75,028/- by ignoring the fact that the partner of the assessee firm at the time of survey has accepted this as unaccounted stock and was ready to pay tax on any additional income accruing out of difference of stock as assessed?

2.2 Whether on facts and circumstances of the case, the Ld. ITAT has erred in ignoring the fact that the Ld.CIT(A) has sustained the addition by making remarks that the assessee could not offer any explanation at the time of survey and it is just afterthought that these stocks are lying with the firm for delivery and was sold to 3 different companies a day before survey but at the time of survey no agreement to sell/bills were found, possession of the stock was with assessee's firm and no payment/advance payment was received by assessee firm?

2.3 Whether on the facts and circumstances of the case, the Ld. ITAT has erred in law to allow post-dated fictitious entries and



claims to over-ride specific physical findings of search and survey operations?

2.4 Whether on the facts and circumstances of the case, the order passed by Ld. ITAT is perverse in law as well as on fact in respect of the items referred to in the questions herein above?"

2. We note that before the Assessing Officer [“AO”] itself the assessee had furnished a detailed explanation with respect to discrepancies in the stock which was noticed during the course of the survey. This becomes evident from a reading of para 6 which is reproduced herein below:-

“6. Addition on account of unexplained stock of Rs 6,13,75.0281:-

6.1 During the assessment proceedings, the notice u/s 142(1) of the IT act dated 15.10.2018 and 03.09.2019 was issued to the assessee vide which question no.36 was asked which is as follows:

"During the survey u/s 133A at 415A, Katra Chouban, Chandni Chowk, Delhi, inventory of stock was physically inventoried and physical stock valuing to Rs. 8,53,07,745/- was found. However, the value of stock s per books of account on that day was Rs. 2,39,32,717/-. Details of stock found during the survey u/s 133A and as per books of account are under:-

S. NO.	Found at premises during survey u/s 133A(1)		Found as per books (in grams)		Difference (grams)	Different in value
1	Gold Bar	27,000.000	Gold bar	7,505.734		
2	Gold coins	33.000	Standart gold bar	0.003		
3	Bullion gold	994.300	Gold ornaments	0.003		
4	22 ct. gold ornament	549.800	22 ct. gold ornament	550.500		
	Total (Gold)	28,577.100		8,056.240	20,520,860	6,13,75,028
	Silver Bar	25,860.000	Silver bar	25,774.240	85.760	



Thus excess stock of Rs. 6,13,75,028/- was found during the survey. When confronted, Shri Sanjay Malhotra-partner accepted the excess stock found at Rs.6,13,75,028/- is undisclosed income of the firm and agreed to pay tax on it. However in the return filed u/s139 of the Act, no such additional income has been declared. Please show cause as to why addition of Rs. 6,73,75,025/- may not be made on account of unaccounted/unexplained stock. "

In compliance to the said notice, the assessee filed its explanation dated 18.11.2019 which is reproduced as under:-

"The survey proceedings u/s 133A of the IT Act, 1961 was conducted on the assessee on 29.11.2016 at the premises situated at 4 15A, Katra Chouban, ChandniChowk, Delhi. During the course of survey, the survey/investigation team has never physically verified the stock. The survey/investigation team has never prepared any list of inventory. There is various type of inventory held by the assessee firm on the day of survey. Each gold ornament item, gold bar, silver bar, gold coin always has a different size and grammages, however the survey/investigation estimated the gold bar in round figure as per their convenience. This clearly shows that they have not inventoried any items and not prepared any list and made a valuation report only on guess work and assumptions.

The partner of the firm Mr. Sanjay Malhotra in his statement clearly told to the survey/investigation team that "I am not able to explain the difference right now". It is clearly shows that the survey/investigation team threatened and pressurized to the partner to accept the difference of Inventory.

It is worthwhile to note here that, the assessee has sold approx. 30KG gold bar on the day before survey and approx. 20KG gold bar was undelivered to some of the parties which was kept aside in the premises of the assessee firm. This is a normal business practice in every business to deliver goods after generating invoices either on the same day or if invoices generated late evening, then on the next day or even after 2-3 days the goods are delivered after arranging secured transport facility. All the invoices were acknowledged by the receiving party when the actual goods were delivered to them. The assessee firm prepared all the sales invoices on 28th November, 2016 and delivered goods to some of the parties, however the undelivered goods were kept aside in the premises in. The survey was conducted on 29.11.2016 and concluded on 30.11.2016, therefore the assessee firm was not in a position to deliver the goods to the respective parties. We are submitting the following documents for your ready reference as



Annexure-A: -

i)A copy of all the undelivered invoices dated 28.11.2016 with a copy of acknowledgement dated 01.12.2016

ii)A copy of ledger account of party

iii)A copy of bank statement where payment reflected

iv)A copy of Inventory List of one month from 27.10.2016 to 28.11.2016

v)A copy of Reconciliation of Inventory as on 28.11.2016

vi) Copy of valuation report dated 30.11.2016 during the course of survey

The survey/investigation team has found out the difference of same inventory without making any inventoried list and make only a valuation report in round figure with weight/grammages of gold bar and took a statement from the partner of the firm.

The assessee is a lay person and doesn't know the impact of these proceedings. Further, he was very upset and distressed at the time of survey and accepted whatever was suggested by the survey/investigation team, under duress.

The differential of inventory as per the valuation report was solely on the basis of the statement taken from the partner Mr. Sanjay Malhotra. The survey/investigation team have not brought any iota of evidence suggesting that the assessee has any unexplained/unaccounted stock out of the books.

There are many cases including those in the recent past on this aspect that merely and solely based on the confessional statement, admitting some income, without there being any corroborative evidence or cogent material, no addition is permissible in law.

- *The Hon'ble Madras High Court in the case of CIT vs. Kader Khan (2012) 300 ITR 157 (Mad.) has held that where assessee has admitted suppressed income but there was no documentary evidence in possession of the department, now held that Section 133A does not empower any I.T. Authorities to examine any person on oath and hence such statement has no evidentiary value. Consequently, admission made during such statement cannot by itself be made a basis of addition unless corroborated by some independent evidence. S.L.P. of the department against the*



said judgment has been dismissed vide order dated 20-9-2012 in CIT vs. Kader Khan (2013) 352 ITR (St.) 480 (SC).

- *In the case of CIT vs. Ashok Kumar Jain (2014) 369 ITR 145 / (2015) 229 Taxman 65 (Raj.), the assessee surrendered 5 crores during course of survey, however in the return of income he offered only 3 crores. AO made the addition of 2 crores. Tribunal deleted the addition. On appeal by revenue the Court held that if the assessee did not adhere to the surrender made during the course of survey, it was for the Assessing Officer to bring on record cogent material and other evidence to support the addition rather than rely on the statements simpliciter. Therefore, there was no infirmity or perversity in the order of the Tribunal.*

In view of above submissions, it is clear that there is no inventory which remains unreconciled/unaccounted unexplained which needs to offer for tax."

6.2 The explanation of the assessee is not supported by the evidence in regard to excess stock found incourse of survey operation and the same has not been explained and reconciled with the stock register by the assessee during the survey operation."

3. It is in the aforesaid backdrop that the Tribunal has in paras 17 and 18 of the order impugned before us held as follows:-

“17. It is relevant to note that the Id, CIT(A) has erred in mentioning the date of recording of statement of Sh. Sanjay Malhotra as the statement of Sh. Sanjay Malhotra was recorded on 29.11.2016 & 30.11.2016 and not on 10.03,2017. Therefore, the reasoning given by the Id, CIT(A) that assessee has reaffirmed after 3 months for rejecting the explanation of the assessee for difference in stock is incorrect and against the facts and hence not sustainable. It is important to point out no incriminating documents were found during survey, There was no evidence of any sale or purchases outside the books of accounts. The books of accounts with all purchases and sales invoices were available during survey. The contention of the Revenue that it is an afterthought is incorrect, keeping the fact that payment from these parties have been received in bank account as is evident from PB Pg. 98 & 99 where these payments are credited in the Bank A/c. The sale invoices are dated 28.11.2016 and were duly recorded. Each of these parties on cross verification by the A 0 has confirmed that they have made the payment, invoices have been issued and delivery against invoices was recorded on 1 St & 2nd December 2016.



18. The assessee having given the explanation which was plausible explanation which stands verified in inquiry by the Assessing Officer, the same cannot be rejected arbitrarily by indulging into surmises. It is also relevant to point out that the assessee has produced complete books of accounts during assessment proceedings. No defects have been pointed out and the books of accounts have been accepted. Thus when the difference in physical stock found during survey and as recorded in the books is duly reconciled by the assessee and supporting evidences have also been furnished before the Assessing Officer & Id. CIT(A) in which no defect or discrepancy whatsoever has been pointed out by the Assessing Officer or Id. CIT(A), no addition is called for.”

4. In our considered opinion, merely because the discrepancy in stock could not be immediately explained on the date when the survey was undertaken would not be fatal to the material which was ultimately placed for the consideration of the authorities below and which on review had come to be accepted.

5. In view of the aforesaid, we find that the appeal fails to raise any substantial question of law. Consequently, it shall stand dismissed.

YASHWANT VARMA, J

RAVINDER DUDEJA, J

AUGUST 2, 2024

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