

आयकर अपीलिय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री कुल भारत, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI KUL BHARAT, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 82 & 83/JP/2017
निर्धारण वर्ष/Assessment Years : 2012-13 & 13-14.

Paliwal Jewellers, B-360, Himmat Nagar, Tonk Road, Jaipur.	बनाम Vs.	The Income Tax Officer, Ward 6(3), Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No. AAFFP 7182 L		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Shrawan Kr. Gupta (Advocate)
राजस्व की ओर से / Revenue by : Shri Shailendra Sharma (Addl. CIT)

सुनवाई की तारीख / Date of Hearing : 09.11.2017.
घोषणा की तारीख / Date of Pronouncement : 27/11/2017.

आदेश / ORDER

PER SHRI KUL BHARAT, J.M.

These are two appeals by the assessee directed against two separate orders of Id. CIT (A)-2, Jaipur dated 15.12.2016 and 13.12.2016 pertaining to assessment years 2012-13 and 2013-14 respectively. We first take the appeal of the assessee in

ITA No. 82/JP/2017. The assessee has raised the following grounds of appeal :-

1. That on law and facts the Id. CIT (A) has grossly erred in holding that expenses of Rs. 1,23,917/- has been disallowed correct by applying section 40A(3). The expenses has been disallowed wrong, illegal and without considering the submission of appellant.
2. That the Id. CIT (A) has grossly erred in confirming the order of the Id. AO that excess cash balance Rs. 234498/- was treated correct as unexplained cash and income of the assessee. The addition of Rs. 234498/- is totally unjustified and against the facts of record.

3. That the Id. CIT (A) has grossly erred to restrict 10% expenses under the following heads :

Conveyance expenses	Rs. 12345.00
Office & General expenses	Rs. 5004.00
Telephone	Rs. 7238.00

Total :	Rs. 24587.00

The expenses has been disallowed on estimate basis and addition deserves to be quashed.

4. That the order of the Id. AO is bad in law and deserves to be quashed.
5. That the appellant reserves the right to add, amend, withdraw or alter any ground of appeal before the finalization of said appeal.

2. Briefly stated the facts of the case are that the case of the assessee was picked up for scrutiny assessment and the assessment under section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as the Act) was framed vide order dated 19.02.2015. While framing the assessment, the AO made addition of Rs. 1,23,917/- on account of payment of packing expenses and advertising expenses violating the provisions of section 40A(3) of the Act. The AO has also made additions of Rs. 2,34,498/- on account of unexplained cash and Rs. 24,587/- on account of conveyance expenses (Rs. 12345/-), office & general expenses (Rs. 5004/-) and telephone expenses (Rs. 7238/-). Against this, the assessee preferred an appeal before Id. CIT (A), who after considering the submissions, partly allowed the appeal. Aggrieved by this, the assessee has preferred the present appeal before this Tribunal.

3. Ground No. 1 relates to confirming the disallowance of payment of packing expenses and advertising expenses.

3.1. The Id. Counsel for the assessee reiterated the submissions as made in the written brief. He submitted that the assessee has made payment to M/s Balaji Jeweller Purse and Vipul Bag House for manufacture of purses and bags. The manufacturing activities are done on a very small basis from his own house and the activities are in the nature of cottage industries and without power as stated by them. Hence the same is covered u/r 6DD(f), which provides as under:

Where the payment is made for the purchases of the products manufactured or processed without the aid of power in a cottage industries, to producer of such products."

Therefore, Id. Counsel submitted that due to above reason the assessee has made payment in cash, which is not disallowable u/s 40A(3). The Id. AO and CIT(A) both denied the same for want of evidence. There is no proof or any allegation of the revenue that the payments are bogus or not genuine and not incurred. The AO has not found books of account as defective and not rejected the books of accounts. Hence looking to nature of transaction and business the same should be allowed.

3.2. On the contrary, the Id. D/R opposed the submissions. He supported the orders of the authorities below.

3.3. We have heard rival contentions, perused the material on record and gone through the orders of the authorities below. The Id. CIT (A) while confirming the disallowance has observed as under :-

" 2.3. I have perused the facts of the case, the assessment order and the submissions of the appellant. As noted and reproduced in the assessment order, it was seen that expenditures of more than Rs.

20,000/- have been incurred in cash and the same was disallowed by the Assessing Officer under section 40A(3). In the present proceedings, it was stated that M/s. Balaji Jewelers and Vipul Bag House are manufacturer of purses and bags on small basis and are in the nature of cottage industries. However, no evidence to that effect was produced by the Authorized Representative, further it was also not stated as to how they are covered under the exception to the provisions and hence, the disallowance made by the Assessing Officer is confirmed. The ground of appeal is dismissed.

The Id. Counsel for the assessee has not controverted the above finding of Id. CIT (A) by furnishing any evidence. Thus, we find no reason to interfere in the order of Id. CIT (A), which is hereby affirmed. The ground of the assessee is dismissed.

4. Ground No. 2 relates to confirming the addition on account of unexplained cash.

4.1. The Id. Counsel for the assessee reiterated the submission as made in the written brief, as under :-

“In this regard it is submitted that in assessee’s business mostly sales are made in cash. Since purchasers are last user of goods. The sale by the assessee are made as per individual satisfaction of each time. Usually customer changes the article as per his choice and some time due to non availability of desired design of gold ornaments purchasers left cash with the assessee and purchases the item as and when desired gold ornaments are ready as per their satisfaction and bill of purchases is issued on the date of delivery. In this case also the one customers of the assessee namely Sh. Jai Singh Kumawat has also came to the shop of the assessee for purchase of gold on 12.01.2012 and due to not availability of his required items he has left cash of

Rs.4,00,000/- and asked to by the goods for his requirement. However the assessee has not shown that cash of Rs.4,00,000/- as advance in his books and deposited Rs. 5,00,000/- in its bank account on 13.01.2012, with the other cash balance, this Rs. 5,00,000/- also include alleged cash of Rs.2,34,798/- on dt. 13.01.2012. Sh. Jai Singh has finally purchased gold items on dt. 20.01.2012 through bill No.3429 copy of the same is enclosed (PB6), but previously due to non availability of desired gold items cash was paid of Rs.4,00,000/-or deposited with the assessee on dt. 12.01.2012 but actual delivery of gold items were taken on dt. 20.01.2012 and bill was also issued on that date. As such cash of Rs. 4,00,000/- was laying with the assessee on 12.01.2012 out which belongs to Jai Singh Kumawat. And same was deposited in bank excess by Rs. 2,34,798/- on dt. 13.01.2012. However the Id. AO has accepted this sale to Jai Singh and not doubted. The lower authority has rejected the claim of the assessee only due to the reason that he has not produced Sh. Jai Singh for verification. It is general practice no businessman mentioned the full address of customers. And when the assessee was not having any address then how it is possible to produce to him.

2. Here we would like to submit that while doing a judicious act by a person (here the AO) should also keep in mind the circumstance, facts, general approach, nature of business etc.. He should not restrict to himself only to the evidence where the same is not possible. Here the AO restricted to himself only evidence and ignored the circumstance, facts, general approach, nature of transaction etc. Kindly refer the decision of **Mange Ram Mittal v/s ACIT 105 TTJ 594(Del)(SB)** Hence we pray your owner to consider our contention in the interest of natural Justice and delete entire addition."

4.2. On the contrary, Id. D/R opposed the submissions and supported the orders of the authorities below.

4.3. We have heard rival contentions, perused the material available on record. The Id. CIT (A) has given his findings in para 3.3 of his order and for the reasons given therein, he upheld the action of the Assessing Officer. The findings of the Id. CIT (A) are as under :-

" 3.3. I have perused the facts of the case, the assessment order and the submissions of the appellant. On perusal of the cash book, the Assessing Officer found that there was excess cash of an amount of Rs. 2,34,798/- and the assessee was asked to explain the same. It has been submitted that the entire sales are made in cash and in this case one customer Shri Jai Singh Kumawat had left his articles for some modification as well as paid in advance Rs. 4,00,000/- to the assessee which was not credited in the regular books of accounts but was deposited in the bank account. It was submitted that due to this the cash book has shown an OD balance of Rs. 2,34,798/- on 13.01.2012. The Authorized Representative claimed that the cash bill of sale of articles dated 20.01.2012 had been produced but since the sale was in cash the address was not available with the assessee and neither any confirmation was produced nor the party could be produced for the verification. It is seen that the books of accounts are audited and hence the mistake would have been detected. Secondly, no advance has been found recorded in the name of Jai Singh Kumawat on 13.03.2012, further no evidence in the form of confirmation or producing the party was undertaken and in fact the authorized Representative submitted that his address was also not available. In view of the above facts, the explanation of the appellant cannot be accepted and the addition made is confirmed. The ground of appeal is dismissed."

At the time hearing, Id. Counsel for the assessee could not controvert the findings of Id. CIT (A) by placing any documents. We, therefore, find no infirmity in the order of Id. CIT (A), the same is hereby affirmed. The ground of the assessee is dismissed.

5. Ground No. 3 relates to restricting the disallowance of various expenses.

5.1. The Id. Counsel for the assessee reiterated the submissions as made in the written brief. The submissions of the assessee are reproduced as under :-

“ **1.** Firstly it is submitted that in the entire order of the AO on all the disallowance of expense the only allegation is expenses are not properly vouched, some of payment in cash, personal use etc. Only on these basis no disallowance can be made without bring any material, evidence, instance or proof on record. However he ignored that the assessee has produced the ledger account of expenses alongwith the bills and vouchers. Looking to the nature of business of the assessee for that he has to incurred various expenditure.

2. Mere suspicion: A bare reading of the order of the lower authority shall reveal that the disallowances of expenses have been made on ad hoc basis, simply on mere suspicion, surmises and conjectures and on wrong method, without verifying or looking to the nature of business. No single specific instance of any nature whatsoever has been given by the AO in the impugned order to support his contention with the help of documentary evidence that the expenditures were incurred for non-business purposes, excess and element of personal user etc were there. An allegation remains a mere allegation unless proved. Suspicion may be strong however cannot take the place of reality, are the settled principles kindly refer Dhakeshwari cotton Mills 26 ITR 775 (SC), Uma Charan Shaw v/s CIT 37 ITR 271 (SC). All the disallowances deserve deletion on this submission alone.

3. Businessman is the best judge: It is settled that a businessman is the best judge to take care of its own interest & to take decisions and the AO is not supposed to intervene therein nor he can replace the assessee. Here, whatever decisions were taken by the assessee, has to be understood as taken out of commercial expediency. Kindly refer T.T. Pvt Ltd v/s CIT 121 ITR 551 (Kar), 139 ITR 827 (MP) JK Woolen Manufacturers 72 ITR 612 (SC).

4. Wrong basis at all: It is further submitted that the Id. AO has taken own imaginary basis which is not a good basis looking to the nature of expenses or business of the assessee and made higher estimated disallowance. The AO has not brought any other single evidence or material on record before making disallowance. Therefore, also the entire disallowance, so made may kindly be deleted in full. And it is settled that no disallowance and addition can be made without any basis and material.

5. Reasonable Claim made: It is submitted that looking to a turnover of more than Rs.6.87 Crore (approx), claim of above expenditure which is otherwise very lesser or reasonable or meager looking to the business of the assessee. Thus such a claim to achieve such a turnover is not at all unjustified when the assessee is a distributor and commission agent where the margin of profit almost fix and very low.

6. Business Purpose: All these expenses were incurred exclusively for the purpose of businesses and are under the provisions of the Act. On bare perusal of the expenses it shall reveal that the expenses has been claimed for the business and on these account there is no expenses which can be said as personal as wrongly alleged by the AO and looking to the nature of the business these expenses are not higher. The AO blindly disallowance of 10 or 20% expenses without going on the facts, nature of exp., comparable cases and also ignored that the G.P. rate is very higher in this year as against the last year and the Id. AO has blindly ignored these very vital facts and made

the disallowance without any basis and hence, the same may kindly be deleted in full. ”

In support, the Id. Counsel for the assessee placed reliance on the following judicial pronouncements :-

Madnani Construction (P) Ltd V/s CIT 296 ITR 45 (Gau)

ACIT v/s Sarv Prakash 24 DTR 91 (Agr)TM

CIT v/s Ranichhera Tea Co. 207 ITR 979 (Cal)

CIT vs. Swaminarayan Vijay Carry Trade (P.)Ltd. (2013) 84 CCH 311 (Guj)

CIT vs. PORRITS & SPENCER (A) LTD. (2010) 324 ITR 260 (P&H)

The Id. Counsel for the assessee also submitted that :-

“ Books not rejected: Further it is very pertinent to note that one side the AO has accepted the trading results shown by the assessee it means he has accepted the books of accounts and there is no defects founds in the books of accounts maintained by the assessee other side he has made further disallowance of 20% /10% of expenses, which is very contrary its own and unjustice with the assessee. Further on perusal of expenses chart it reveals that none of the expenses have been claimed in excess looking to nature of business and expenses. The nature of these expenses are as that no one can said that these are bogus expenses. The accounts of the assessee are audited u/s 44AB by qualified persons and no defect has been pointed out by him. The AO has neither rejected the books of accounts nor invoked the provisions of Sec. 145(3). But the AO blindly ignored these very vital facts available in records before him and not tried to see the same. Further the AO has not brought on record any evidence to prove that

the expenses claimed by the assessee were bogus, inflated or pertained to have been for non business purpose except wrong allegation on the basis on her assumption and suspicion.

Recently this Honble bench in the case of Sh. Anil Kumar Agrawal v/s ITO in ITA No. 288/Jp/2014 dt. 24.02.2016. It has been held at page 10 para 4.4 that since we have held that books of accounts were duly maintained by the assessee and all the sales and purchases are duly maintained by it, therefore, we do not find any justification for disallowing 5% of the expenses towards Conveyance, Deepawali, General, Telephone, Transport etc.

Hence in view of the above submission the disallowance so made may kindly be deleted in full.”

5.2. On the contrary, the Id. D/R supported the orders of the authorities below.

5.3. We have heard rival contentions, perused the material available on record and gone through the orders of the authorities below. The Id. Counsel for the assessee placed reliance on the Coordinate Bench decision in ITA No. 288/JP/2014 dated 24.02.2016 in the case of Shri Anil Kumar Agarwal vs. ITO wherein similar additions on identical facts have been deleted. In the present case the AO has not rejected the books of accounts of the assessee. The additions made merely on adhoc basis is not sustainable. We, therefore, delete the addition. The ground of the assessee is allowed.

6. Ground No. 4 & 5 are general in nature, needs no adjudication.

7. In the result, appeal of the assessee is partly allowed.

8. Now take up the appeal of the assessee in **ITA No. 83/JP/2017** pertaining to assessment year 2013-14. The grounds raised by the assessee are as under :-

1. That on facts and law the Id. CIT (A) has grossly erred in confirming the order of Id. AO that surrendered value of stock was Rs. 2,12,79,185/- while as per appellant the value of surrendered stock was Rs. 1,61,94,434/-. The value of surrendered stock was valued by the Id. AO by ignoring the departmental valuer report, facts on record and wrongly enhanced the value by Rs. 50,48,751/-. The addition in value of surrendered stock is against the facts on record and addition deserves to be quashed.
 2. That on facts and law the Id. CIT (A) has grossly erred in confirming the order of the Id. AO that surrendered stock valued Rs. 1,61,94,434/- has not been recorded in regular books of accounts hence the same is the income from other sources and not the income from business. Hence remuneration to partners Rs. 64,10,000/- is not allowable. The surrendered value of stock is the income from business and remuneration to partners Rs. 64,10,000/- is allowable and was disallowed wrong and illegal.
 3. That on facts and law the Id. CIT (A) has grossly erred in holding that the surrendered stock was not in the nature of business income. The surrendered stock has direct nexus with appellant business, as such the said surrendered stock is the business income of the appellant. Further on such surrendered stock remuneration to partners u/s 40b is an allowable expenses.
 4. That the order of the Id. AO is bad in law and deserves to be quashed.
 5. That the appellant reserves the right to add, amend, withdraw or alter any ground of appeal before the finalization of said appeal.
9. The brief facts of the case are that the case of the assessee was picked up for scrutiny assessment and the assessment under section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as the Act) was framed vide order dated 20.02.2016. While framing the assessment, the AO assessed the total income of the assessee at Rs. 2,12,09,620/- after considering the surrendered income of Rs. 1,61,94,434/-. Against this, the assessee preferred an appeal before Id. CIT (A), who after considering the submissions, partly allowed the appeal. Aggrieved by this, the assessee has preferred the present appeal before this Tribunal.

10. Ground Nos. 1, 2 & 3 of the assessee's appeal are related to each other. Thus all these grounds are adjudicated together. The Id. Counsel for the assessee reiterated the submission as made in the written brief. The submissions of the assessee are as under :-

1. Correct Facts: At the very outset we submit the correct position, facts which have been ignored by both the lower authority despite the available on record or misinterpreted by them. As the assessee is a dealer and manufacturer of gold and diamond ornaments and jewellery since long. During the year survey u/s 133A was conducted on dated 06.11.2012. During the course of survey actual position of stock was found and as per books of accounts and valued by the AO and departmental valuer were as under:

2. Statement has been read wrongly or misinterpreted: The Id. AO and CIT(A) has wrongly read or misinterpreted the statements of the assessee they have not appreciated the statement in their true sense perspective. In the whole statements there are only three question No. 13,14, and 24(PB5,6,7,12) are related to this issue.

(a) In the statements in Ans.13(PB5) the question is that during the course of survey today on physical verification the inventory of stock has been prepared by the departmental valuer. This inventory has been prepared in two list JF and JF-1 according to that the particulars of stock are as under

1. JF(First floor stock) Gold Net Wt. 2125.100 gm value of Rs.1,03,60,549/-
2. JF-1(Stock ground floor) Gold Net Wt. 20357.150 gm value of Rs.5,43,66,277/-

Thus the total weight of Gold(Swarn Dhatu) comes 22482.25gm and the value comes to Rs.6,47,26,826/-.

There apart some gold jewellery has also been found in the safe kept in basement. The net wt. of which is 446.50 gm and the value is Rs.12,05,550/-. Thus total wt. of gold 22928.75 gm is found during survey, the value of which comes to Rs.6,59,32,376/-.

In Ans. to this the partner has stated that I have no objection regarding the inventory of stock prepared. I have also seen the valuation and I am agree with this valuation.

In this regard we have to submit that in the valuation the departmental valuer has taken the value of Gold as well as stones vide valuation report (PB45A) which comes to Rs.1,03,60,549/-. (Rs.52,75,798/- of 2125.100 gm gold + Rs.50,84,751/- of stones). Thus the assessee has rightly said that I am agree with this valuation of JF, JF-II vide page 45 & 45A. Because the valuer has taken the value of gold and stone separately and made total of both which to Rs. 1,03,60,549/-. Because the value of **2125.100 gold shall not come of Rs.1,03,60,549/-** otherwise the rate of per grams gold comes to **Rs. 4875/-** which rate has never come in the year 2012-13 the rate of gold was around of **2600-2700** per gm in that year. In answer the also the weight of gold taken not of stone.

(b) In the statements in Ans. 14 (PB6) the question is that "on physical verification the total gold was found of 22928.75 gm the value of which comes to Rs. 6,59,32,376/-. While as per your books of accounts the opening stock of today i.e 06.11.2012 comes to 14.396 Kg, the valuation of which is 3,95,21,744/- out of the jewellery of 0.331kg is sold today, after reducing this sale the weight of stock comes to 14.065 kg i.e 14065 gram. Thus the stock of 8863.75 gram found in excess. Please explain".

In Ans. (PB6-7) to this the partner has stated that " I have seen the books of accounts. According to that the stock of 2306.234 which has been received physically by us and we have made payment but we have not received the bill (the details of the same is given at page 7 PB7).

There apart I also want to say that according to books of account in which the summary of opening stock is there, which also include the 1289.800 gm Diamond gold jewellery, the calculation of which has been taken by you in the valuation of stock i.e included in the opening stock valuation of Rs. 3,95,21,744/- but not included in the quantity of opening stock of gold. Because it has been shown separately. Thus **according to me the difference in the quantity of gold come to 5277.72 gm.**

Thus the assessee has accepted the weight of **excess stock of gold at 5267.72 gms** (wrongly written as 5277.72 gms in the statements). Not the quantity of Stones or diamond. Otherwise the department must asked separate or specific question or separate or specific answer given.

(c) In the statements in Ans.24 (PB12) the question is that during the survey upon you stock of total value of Rs.6,59,32,376/- has found, which not include the stock of silver which has been determined by the department valuer at Rs. 201600/-. Thus on physical verification total stock comes to Rs. 6,61,33,976/-.

While as per your books of accounts and after account for the sale done today the value of excess stock comes of Rs.2,10,77,585/- as per you as you have stated in ans to 14. Thus the total stock of Rs. 2,12,79,185/- has found in excess.

In Ans. (PB12)to this the partner has stated that" I am unable to give explanation of this excess stock. It is correct that the excess stock found the value of which is Rs.2,12,79,185/- which is not recorded in the regular books. I surrender for tax.

In this answer the AO has only referred the value he has not referred the quantity. In Whole statement nowhere mention or asked or stated that any excess stock of color stone is found in what ct. it is found.

3. Thus on perusal of the above statements it is very clear that during the course of physical inspection of stock only Gold jewellery was found in excess vide Que. Ans 13,14 (PB-6-7) page No. 6-7 of statement of Sh. Kulbhushan Paliwal partner. Hence value of diamond and color stones of Rs. 50,48,751.00 was added wrongly while calculating of excess stock . The value of diamond and color stones Rs. 5048751.00 declared as an excess stock is an apparent mistake and should be excluded from the valuation of excess stock. The assessee during the course of survey was under mental pressure and at midnight i.e. at 3.30 AM was not in position to explain his own record due to under confusion and disturbed state of mind. For this reason could not explain the mistake in valuation because in Que No. 24 the revenue has only referred the valuation of stock they have not referred the quantity of excess stock that is why he has agreed for surrender value. The mistake of Rs. 50,48,751/- is an apparent mistake in surrendering the value of stock, that is why the assessee has declared the surrender to Rs.1,61,94,434/- against Rs. 21077585.00 declared by the assessee during the course of survey. The Id. AO nowhere rebutted the contention of the appellant.

The assessee has come to know about the above mistake only after getting the copy of statements because the copy of statement of Sh. Kulbhushan paliwal partner of the firm and other persons recorded during the survey was provided on 20.09.2013 and return of income was filed on dated 27.09.2013 the assessee in return of income has given a detailed note in regarding less value of surrender amount vide **AnnexureA-2 attached with this WS**. The assessee after reading the total facts of statement the value of surrender amount as per statement recorded and books of accounts come to know that surrender value wrong due to mistake and same was retracted by him by filing detailed note

alongwith return of income **AnnexureA-2 attached with this WS**. Thus the assessee has filed objection against surrendering amount within a period of 7 days from the date of receipts of statements.

In the above statement the assessee nowhere has stated that I surrender such amount or quantity of color stone in the x quantity and x value. He has only stated about the Gold . Further in the assessment order itself the Id. AO at page 3 in middle para stated that" it resulted in final weight of excess stock of jewellery at 5267.72 gms". It means it is an admitted that the surrender was only for Gold not for studded stone because the weight of stone comes in Carrot not in grams and the valuation of 5267.72 grams at Rs. 2,10,77,5858/- is wrong. **Otherwise weight would have come more than to 5267.72 gm**. Due to wrong valuation in absence of specific question by the Revenue assessee should not be suffer. In the assessment order also the AO nowhere stated that the surrender was also for stones.

Hence in the circumstances the Ld AO is totally wrong and unjustified in not accepting the revised amount of surrender value.

4. No difference in quantity surrender and declared in return: It is very pertinent to note that there is no difference in quantity of excess stock of 5267.716 gram surrender during the course of survey and declared in the return. If the stone were included in the surrender then **Otherwise weight would have come more than to 5267.72 gm**

Further it is also very important that admittedly on the date of survey 331gm gold was sold for Rs. 8,93,700/- hence the rate per grams comes to Rs. 2700/-. If we calculate the excess stock of 5267.716 gms than it come to 1,42,22,833/-. And if we take the value of 5267.716 gram gold at Rs.2,10,77,583/- than the rate of gold comes to Rs. 4001/- which was not or is not the rate till date. Further the department valuer has made valuation of gold and color stone on the same sheet (vide PB45A) at Rs. 1,03,60,549/-, which include the value of color stone at Rs.50,84,751/- otherwise the rate of 2125.100 gold **shall come Rs.4875/-** per gram which was also not or is not the rate till date. **Vide Anexure-A**

Further submitted that assessee is rightful to claim that surrender value was not correct as per submission made in para No. 3 and statement of Sh. Kulbhushan partner. In the various cases it has been held that assessee can retracted his statements recorded during the course of search and survey.

5. No addition on the basis of statement recorded during the Survey u/s 133A: Here we would like to draw kind attention of your good self that the statement as recorded in odd hour of the day i.e. late night.

Here it is agreed that no time is mentioned on the statements as recorded by the authorities but it cannot be ignored that the survey proceedings which were started on 06.11.2012 and completed on 07.11.2012 . The revenue authority has asked regarding the excess stock of gold in ques No.13-14 and thereafter asked for surrender in the question No.24 and statement has been finished in question No. 25 on 07.11.2012, why the department has not asked for surrender continuously after the Ques.14.

5.1 Further it is the settled legal position that the Statement recorded during survey has no evidentiary value as held in ***Paul Mathews & Sons (2003) 263 ITR 101 (Ker.)***. It was held that statement during survey does not give the same status of "evidence". Section 132(2) specifically states that such statement can be used as "evidence in any proceedings under the Act." However section 133A does not give statement during survey the status of an evidence.

It is further submitted that as per section 133A, there is nothing which suggest that a statement can be recorded on oath before the commencement of survey or during survey. However it recourse is taken to section 131(1). During the survey, a statement can be recorded on oath, as the powers to record a statement on oath are vested in the authority u/s 131(1) read with section 133A (6) and in the circumstance specified u/s 133A (6) only. Section 133A does not empower any ITO to examine any person on oath, so statement recorded under section 133A has no evidentiary value and any admission made during such statement cannot be made basis of addition."

In support of his contention, the Id. Counsel for the assessee placed reliance in the following case –

CIT V/s M/s Maverick Share Brokers P. Ltd 57 TW 87(Raj.)
CIT Vs. Khader Khan Son (2008) 300 ITR 157 (Mad.)(HC).
CIT Vs. Satyanorayan Agarwal (2002) 255 ITR (AT) 69 (Kol.) (Trib.)
Abdul Qaymme Vs. CIT (1990) 184 ITR 404 (All.) (HC)
CITVs. Ashok Kumar Jain (2014) 369 ITR 145 (Raj.) (HC).

The Id. Counsel submitted that the Central Board of Direct Taxes has issued fresh instruction vide **F.No. 286/98/2013-IT (INV.II) dated 18.12.2014**, the text of which is reproduced below: -

1. "Instances / complaints of undue influence/ coercion have come to notice of the CBDT that some assessee were coerced to admit undisclosed income during searches/ Surveys conducted by the Department. It is also seen that many such admissions are retracted in the subsequent proceedings since the same are not backed by credible evidence. Such action defeat the very purpose of Search/ Survey operations as they fail to bring the undisclosed income to tax in a sustainable manner heave alone levy of penalty or launching of prosecution. Further, such actions show the department as a whole and officers concerned in poor light.
2. I am further directed to invite your attention to the Instructions/ Guidelines issued by CBDT from time-to time, as referred above. Through which the Board has emphasised upon the need to focus on gathering evidences during Search / Survey and to strictly avoid obtaining admission of undisclosed income under coercion/ undue influence.
3. In view of the above, while reiteration the aforesaid guidelines of the Hoard, I am directed to convey that any instance of undue influence/coercion in the recording of the statement during Search/ Survey/Other proceeding under the I.T. Act 1961 and/or recording a disclosure of undisclosed income under undue pressure/ coercion shall be viewed by the Hoard adversely.
4. Those guidelines may be brought to the notice of all concerned in your region for strict compliance.
5. I have been further directed to request you to closely observe/oversee the actions of the officers functioning under you in this regard.
6. This issue with approval of the Chairperson, CBDT.
7. Further, in respect of pending assessment proceedings also, Assessing Officer should rely upon the evidence/ materials gathered during the course of search/ survey operations or thereafter while framing the relevant assessment orders"

In respect of surrendered stock as income from other sources in place of business income and disallowing the remuneration of Rs. 64,10,000/- to partners, the Id. Counsel for the assessee submitted as under :-

“ At the very outset it is submitted that the above matter is directly covered by the recent decision of this Honble bench in the case of **DCIT v/s Sh. Ram Narayan Birla in ITA No. 482/Jp/2015 dt. 30.09.2016**, where the Honble Bench at page 4 in para 4.3 held that

“ Undisputed facts emerged from the record that at the time of survey excess stock was found. It is also not disputed the assessee is engaged in the business of jewellery. During the course of survey excess stock valuing Rs.77,66,887/- was found in respect of gold and silver jewellery. The coordinate Bench in the case of **Chokshi Hiralal Maganlal v/s DCIT 131 TTJ(Ahd)1** has held that in a case where source of investment/ expenditure is clearly identifiable and alleged undisclosed assets has no independent existence of its own or there is no separate physical identity of such investment/expenditure then first was to be taxed is the undisclosed business receipts invested in unidentifiable unaccounted assets and only on failure it should be considered to be taxed u/s 69 on the premises that such excess investment is not in the books of account and its nature and sources is not identifiable. Once such excess investment is taxed as undeclared business receipts then taxing it further as deemed income u/s 69 would not be necessary. Therefore, the first attempt of the AO should be to find out link of undeclared investment/expenditure with the known head, give opportunity to the assessee to establish nexus and if it is satisfactorily established then first such investment should be considered as undeclared receipts under the particular head. It is observed that there is no conflict with the decision of Honble Gujrat High Court in the case of Fakir Mohd. Hajjhasan(Supra) wherein investment in an assets or expenditure is not identifiable and no nexus was established then with any head of income and thus was not available for set off against any loss under any head. Therefore, the Honble Coordinate Bench held that where asset in which undeclared investment is sought to be taxed is not clearly identifiable or does not have independent identity but is integral and inseparable(mixed) part of declared asset, falling under a particular head, then the difference should be treated as undeclared business income explaining the investment. In the present case stock was part of the stock. The revenue has not pointed out that excess stock has any nexus with any other receipts. Therefore we do not find any fault with the decision of the Id. CIT(A) directing to the AO to treat the surrendered amount as excess stock qua the excess stock.”

Here in the present case is also the same position.

1.2 Further the Honble Bench has followed the above decision in the case of **Bajrang Traders v/s ACIT Cir.2 Alwar in ITA No. 137/Jp/17 dt. 17.03.2017 vide page 6 para 2.7** of the order of Honble ITAT and at page 10 para 2.11 it has been held that “ having

said that, the next issue that arises for consideration is whether the amount surrendered by way of investment in the unrecorded stock of rice has to be brought to tax under the head "business income" or income from other sources. In the present case, the assessee is dealing in sale of food grains, rice oil seeds, and the excess stock which has been found during the course of survey is stock of rice is clearly identifiable and related to the regular business stock of the assessee. The decision of the Coordinate Bench in case of **DCIT v/s Sh. Ram Narayan Birla(Supra)** supports the case of the assessee in this regard. Therefore the investment in the excess stock has to be brought to tax under the head "business income" and not under the head "income from other sources".

The Id. Counsel placed reliance on the following judgments :-

CIT vs. Babulal K. Daga
(2016) 387 ITR 0114 (Guj.)

ITO vs. Sadbhav Developers Co Vandana Trading
(2013) 37 CCH 0396 (Ahd. Trib.)

The Id. Counsel submitted that in view of the above facts, submissions and legal position, the addition so made may kindly be deleted in full.

10.1. On the contrary, the Id. D/R opposed the submissions and supported the orders of the authorities below.

10.2. We have heard rival contentions, perused the material on record and gone through the orders of the authorities below. At the time of hearing, the Id. Counsel for the assessee drew our attention to page 53 of the paper book annexure wherein various details of gold and diamonds ornaments and valuation thereof are mentioned. After considering these details, we find that the details mentioned in the annexure require verification whether the stock surrendered was restricted to gold or

diamond as claimed by the assessee. We, therefore, set aside the order of the Id. CIT (A) and restore the file to the AO for decision afresh after making verification of the stocks surrendered. The grounds of the assessee are allowed for statistical purposes.

11. In the result, appeal of the assessee is allowed for statistical purposes.
12. In totality, **ITA No. 82/JP/2017 is partly allowed** and **ITA No. 83/JP/2017 is allowed for statistical purposes.**

Order pronounced in the open court on 27/11/2017.

Sd/-

(विक्रम सिंह यादव)
(Vikram Singh Yadav)
लेखा सदस्य / Accountant Member
जयपुर / Jaipur
दिनांक / Dated:- 27/11/2017.

Sd/-

(कुल भारत)
(Kul Bharat)
न्यायिक सदस्य / Judicial Member

das/

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

1. अपीलार्थी / The Appellant- M/s. Paliwal Jewellers, Jaipur.
2. प्रत्यर्थी / The Respondent- The ITO Ward 6(3), Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File {ITA No. 82 & 83/JP/2017}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar

