

IN THE INCOME TAX APPELLATE TRIBUNAL "D", BENCH KOLKATA

BEFORE SHRI A.T. VARKEY, JM & DR. A.L.SAINI, AM

आयकरअपीलसं./ITA No.446/Kol/2016

(निर्धारणवर्ष / Assessment Year: 2011-12)

ACIT, Circle-2, Burdwan	Vs.	M/s Ram Chandra Das & Son Jewelers Pvt. Ltd.
Aayakar Bhawan, Court Compound, Burdwan – 713101.		Bara Bazar, BC Road, Burdwan, Dist-Burdwan – 713104.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. : AADCR 6669 K		
(Appellant)	..	(Respondent)

Appellant by :Shri Arindam Bhattacharjee, Addl. CIT(DR)

Respondent by :Shri Saikat Maulik

सुनवाईकीतारीख/ **Date of Hearing** : **16/01/2018**

घोषणाकीतारीख/**Date of Pronouncement** : **23/03/2018**

आदेश / O R D E R

Per Dr. Arjun Lal Saini, AM:

The captioned appeal filed by the Revenue, pertaining to assessment year 2011-12, is directed against an order passed by the Commissioner of Income Tax(Appeals)-Burdwan, in Appeal No.60/CIT(A)/Asl/ACIT/Cir-2/Bwn/2014-15, dated 22.12.2015, which in turn arises out of an assessment order passed by the Assessing Officer u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act'), dated 18.03.2014.

2.The grounds of appeal raised by the Revenue reads as under:

"1.That the Id. CIT(A), Burdwan was not justified in deleting the addition of Rs.42,39,945/- made u/s 69 of the Income Tax Act, 1961 being the excess weight of gold ornaments as undisclosed investment in the facts of the case.

2. That on the facts and circumstances of the case, the Id. CIT(A) erred in deleting the addition made by the Assessing Officer of Rs.42,39,945/- u/s 69 being the excess weight of gold ornaments measuring 2166 gms found at the business premises of the assessee during the course of survey u/s 133A of the Act.

3. That the Id. CIT(A) erred in not giving the cognizance to the findings and disclosure made by the assessee on the issue of excess weight of gold ornaments found during the course of survey operation u/s 133A of the Act.”

3. The brief facts apropos this issue are that assessee filed his return of income on 28.09.2011 disclosing total income of Rs.79,81,875/-. A survey u/s 133A of the I.T Act was conducted on 20.01.2011. During the survey proceedings, the survey team found excess of gold ornaments weighing 3822.36 gram. As per the valuer's valuation report, the value of excess gold ornaments came to Rs.74,82,271/-. During the assessment proceedings, the AO asked the assessee to explain the difference in weight of gold ornaments. The assessee submitted before the AO that at morning, on 20.01.2011, Karigar has delivered gold ornaments measuring 2166 gms. This gold had been issued to them on 13.01.2011 (vide GS-11 impounded). GS-11 is the stock register which contains the details of the gold which is issued to the Karigars for doing job work. After receiving the ornaments assessee has to check for quality and quantity and only then assessee normally prepares receipt vouchers and makes the entry in the ornament stock register of GS-12. TheGS-12 is the stock register which contains the details of the gold which is received by the assessee from karigars after completion of job work. The assessee on the basis of receipt vouchers of ornaments from Karigar, prepared the labour charges bill for payment to be made in future. In this process, sufficient time is required. When the survey started, karigar could not enter the business premises of the assessee, and waited outside for long time. Thereafter, karigars left the place as the stock had already been physically received from karigars and entries in stock register had not been done. So, out of the total difference of 3822.36 gms, 2166 gms can be explained as stock received from karigar. Since all the books of accounts have been impounded by the I.T Department, therefore, assessee made the receipts entry in new GS-12 on the next day i.e. on

21.01.2011. In the impounded GS-12 register on the last page, the I.T. Department had put a remark that 'it is before 20.01.2011'. The newGS-12 register again started by assessee from 21.01.2011, therefore, it was clear that entries are required to be made for transactions taken place before commencing of survey on 20.01.2011, otherwise correct picture of all transactions could not be ascertained. This way, the assessee has explained the reasons why 1656.36 gms i.e. (3822.36 gram – 2166 gram) was unaccounted for in the books as undisclosed gold ornaments instead of 3822.36 gms as found apparently at the time of survey. This fact had also been highlighted by the assessee while giving answer to Question No.6. However, the AO rejected the contention of the assessee.

3.1 Having gone through the submissions of the assessee, the assessing officer noted that during the survey proceedings, excess of gold ornaments weighing 3822.36 gms were found. This fact was confronted with the assessee at the time of survey and was admitted by them. While preparing return of income for the year under consideration, the assessee brought to books, the ornaments weighing 1656 gms. With respect to balance ornaments weighing 2166 gms, they have submitted that the karigars had deposited the items in the premises but entry remained to be made in the books. The AO held that contention of the assessee was not accepted due to the fact that all the ornaments were costly items. No karigar will surrender costly items without taking proper receipts from the persons concerned. The AO further noted that 2166 gms of gold were issued to the karigars on 13.01.2011, it means that this gold was in process and therefore, must be a part of stock reflected in the books on the date of survey but as revealed by survey team, the stock was not reflected in the books and hence the gold ornaments found were out of books investment. Therefore, AO noted that the balance of 2,166 gram of gold remains to be accounted for. Hence, the value of this balance gold ornaments amounting to Rs.42,39,945/- (2166 gms × 1957.50/-), value on the date of survey proceedings was considered

by the AO as undisclosed investment u/s 69 of the Act and added to the total income of the assessee.

4. On appeal, the Id CIT(A), deleted the addition made by assessing officer. The Id CIT(A) observed that it was admittedly a fact that the gold of 2166 gms was issued to karigars and it was also true that the assessing officer had not brought anything on record to state that this was not received back. It was also a fact that the receipt of such ornaments was not entered in the GS-12 register, because of the reason that the GS-12 register was admittedly in the possession of the Department.

5. Not being satisfied with the order of the Id. CIT(A), the Revenue is in appeal before us. The Id. DR for the Revenue has primarily reiterated the stand taken by the assessing officer which we have already noted in our earlier para and is not being repeated for the sake of brevity.

On the other hand, the Id. counsel for the assessee has submitted before us that stock of 2166 gms of gold was issued to karigars on 13.01.2011 and after 7 days i.e. on 20.01.2011, there was survey in the assessee's business premises. The gold quantity of 2166 gms was properly recorded in GS-11, impounded books. The said gold was returned on 20.01.2011, audit could not be recorded in GS-12 register due to survey and the said gold was recorded in GS-12 on next day i.e. 21.01.2011, as the GS-12 was impounded by the Income Tax Authorities. This fact was clarified to the assessing officer at the time of assessment proceedings and the AO has examined the books of accounts and did not find any defects in the books of accounts. Moreover, the AO has not rejected the books of account u/s 145 of the Act. During the assessment proceedings, the statement was recorded on oath which does not have any evidentiary value because the said statement has not been corroborated by any tangible evidence. The Id. counsel for the assessee also submitted that there is no requirement under the law specially u/s 133A to take the statement on oath. However, what is recorded in the statement on oath has not been corroborated by any

evidence. Therefore, the statement taken during survey does not have any evidentiary value.

6. We have given a careful consideration to the rival submissions and perused the materials available on record, we note that assessee has explained the difference in stock of 2166 gms in gold stating that the stock was issued to karigars on 13.01.2011 and the survey was conducted after 7 days i.e on 20.01.2011 and therefore, the gold issued to karigars on 13.01.2011 and returned back by them on 20.01.2011, was not entered in GS-12 register, because the said register was impounded by the Department. We note that the GS-11 is a stock register in which the assessee does entry when the gold goes outside the business organization/issued to karigars for job work and when this gold is returned back by the karigars, then assessee does the entry in GS-12(stock register).

6.1. We note that when the gold was issued to karigars on 13.01.2011, the said gold was duly recorded in GS-11 which was impounded by survey team on 20.01.2011 i.e. on the date of survey. Therefore, the assessee could not make the entry in GS-12 stock register on the date of survey because survey team kept questioning the assessee and asking information from the books of accounts and documents etc. It was brought to our notice that the Karigars had in fact brought the gold given to them on 13.01.2011 on the date of survey but could not enter the shop of the assessee because the survey team prohibited anyone from entering the premises. Therefore, on the next day of survey i.e. on 21.01.2011, the assessee has recorded the gold which was returned by the karigars, in new GS-12 register. This factual aspect has not been examined by the assessing officer at the time of assessment proceedings even though the assessee brought it to the notice

of Assessing Officer. We note that assessing officer had accepted entry in GS-11 stock register about the gold issued to the karigars and therefore we are of the view that when the entry in GS-11 stock register, is accepted by assessing officer, then the entry made on 21.01.2011, GS-12 stock register ought not to have been summarily rejected because the very same gold issued to the karigars on 13.01.2011 came back to the assessee on 20.01.2011 which was recorded on 21.01.2011. We note that the assessing officer did not find any mistake in GS-11 register about the gold issued to karigars which was admittedly impounded by the I.T. Department during the survey. We note that survey team had taken the stock value at the market price whereas the assessee has shown stock valued in his books of accounts at cost price because the trite law in respect of valuation of stock is the cost or net realizable value, whichever is lower. Therefore, the Assessing Officer erred in taking the value of stock at market price when the cost of stock was lower. It is admittedly a fact that this gold was issued to karigars and it is also true that the AO has not brought anything on record to state that this was not received back. It was also a fact that the receipt of such ornaments was not entered in the old GS-12 register, which was admittedly in the possession of the Department therefore assessee recorded the receipts of gold in new GS-12 register on the next day of survey. The assessee, during the survey explained in his statement in reply to Question No.6 that the said stock of 2166 gms could be with karigars, and the aforesaid fact of return of gold ornament by the karigars, which was entered in new GS-12 register, corroborates this fact.

6.2 We also note that the assessing officer did not reject the books of accounts of the assessee u/s 145(3) of the Act and he did not find any infirmity in the purchase and sale of the assessee and if the purchase and sale is not doubted then stock records of the assessee should naturally going to be correct because GS-11 register had recorded the gold issued to the karigars and the said fact had not been found to be false, by the assessing officer. Therefore, once the gold/ornaments issued to karigars by

making entry in GS-11 register, then naturally the said gold will be returned back by the Karighars, which will get recorded in newGS-12 register, as the old GS-12 register was impounded by the Department's survey team.

6.3 We also find that during the survey, the survey team took the statement of the assessee on oath which is in violation of the provisions of section 133A of the Act. We note that there is no requirement to take the statement on oath, only the requirement is as per section 133A(3)(iii), is that the during the survey, the Income Tax Authority may record the statement of any person which may be useful for or relevant to, any proceedings under the Act. Therefore, the statement taken on oath by the survey team, in the assessee's case under consideration does not, on its own, have any evidentiary value and so it can not be used against the assessee. For that we rely on the judgment of Hon`ble Kerala high court in the case of **PAUL MATHEWS & SONS**,263 ITR 0101, wherein it was held that 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 IT authority only to record any statement of any person which may be useful, but does not authorize for taking any sworn in statement. The IT 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 ITO to examine any person on oath. Thus, in contra distinction, to the power under section 133A, section 132(4) enables the authorized 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 IT Act. On the other hand, whatever statement recorded under section 133A is not given any evidentiary value obviously for the reason that the officer is not authorized to administer oath and to take any sworn statement which alone has the evidentiary value as contemplated under law. Therefore, there is much force in the argument of

the counsel for the appellant that the statement, elicited during the survey operation has no evidentiary value.

Therefore, considering the position in law and facts discussed above, we are of the view that there is no infirmity in the order passed by the Id. CIT(A). That being so, we decline to interfere in the order passed by the Id. CIT(A), his order on this issue is hereby upheld and the grounds of appeal raised by the Revenue is dismissed.

6.4 In the result, the appeal filed by the Revenue, is dismissed.

Order is pronounced in the open court on 23.03.2018.

Sd/-
(A.T. VARKEY)

न्यायिक सदस्य / JUDICIAL MEMBER

कोलकाता /Kolkata; दिनांक Dated 23/03/2018

[RS SPS]

Sd/-
(DR. A.L.SAINI)

लेखा सदस्य / ACCOUNTANT MEMBER

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant –ACIT, Circle-2, Burdwan
2. प्रत्यर्थी/ The Respondent-M/s Ram Chandra Das & Son Jewelers Pvt. Ltd.
3. आयकरआयुक्त(अपील) / The CIT(A),
4. आयकरआयुक्त/ CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, कोलकाता/ DR, ITAT, Kolkata
6. गार्डफाईल / Guard file.
सत्यापितप्रति

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By Order

Senior Private Secretary,
Head of Office/D.D.O,
I.T.A.T, Kolkata Benches,
Kolkata.