

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "H", MUMBAI

Before Shri C N Prasad, Judicial Member &
Shri Rajesh Kumar, Accountant Member

ITA No.597/Mum/2016
Assessment Year : 2005-06

ITO 20(2)(3), Mumbai.	Vs.	Kishore Kumar M Jain, Gala No.222, Bharat Industrial Estate, Thakorshi Jivraj Road, Mumbai 400 015.
(Appellant)		PAN AACPJ6434F (Respondent)

ITA No.393/Mum/2016
Assessment Year : 2005-06

Kishore Kumar M Jain, Mumbai 400 015.	Vs.	ITO 18(2)(4), Mumbai
(Appellant)		(Respondent)

Revenue By : Shri M C Omi Ningshen
Assessee By : Shri B P Puroht & Ms. Lavanya Rajpurohit

Date of Hearing : 09.05.2018	Date of Pronouncement : 29.05.2018
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ORDER

Per Rajesh Kumar, Accountant Member

These appeals by the assessee and the department are against the order, dated 06.11.2015 of learned CIT(A)-33, Mumbai pertaining to assessment year 2005-06.

2 We shall first take up appeal by the assessee in ITA 393/Mum/2016, wherein the following ground has been raised:

"1. On the facts and in circumstances of the case and in law, the CIT(A) has erred in sustaining addition of Rs 7213000/- made on account of gifts, none of which is received by the appellant and which the AO has added to the income of the appellant "in the interest of revenue", The said addition may therefore, Kindly be deleted."

The sole grievance of the assessee in this appeal is against the confirmation of addition of ` 72,13,000/- by the CIT(A) as made by the AO on account of gifts, none of which was received by the assessee.

3. The facts in brief are that the assessee filed return of income on 25.10.2005 declaring total income at ` 9,41,420/-, which was processed u/s. 143(1) of the Act. The case of the assessee was selected for scrutiny and survey was conducted u/s. 133A on 23.11.2004. During the course of survey statement of the assessee was recorded and gift declarations/deed of following persons were found:

S.No.	Name of the donor	Name of the donee	Amount
1.	Shri Ajay Vedia	Dipen Pravin Jain	Rs.6,00,000
2.	Shri Japan Kumar Modi	Kishore Kumar M. Jain HUF	Rs.5,00,000
3.	Shri Mukesh Maneklal Choksi	Devika Navin Jain	Rs.11,91,000
4.	Shri Prakash B. Tuklia	Navin Kumar M. Jain (HUF)	Rs.5,00,000
5.	Shri Mahesh Pandya	Pravin Kumar M. Jain	Rs.5,00,000
6.	Ms. Minaxi M. Chokshi	Alka Kishor Jain	Rs.12,11,000
7.	Shri Fenil Shah	Dikshit Pravin Jain	Rs.5,00,000
8.	Shri Mukesh M. Chokshi	Ms. Nikita Pravin Jain	Rs.12,11,000
9.	Shri Ganeshlal M. Sissodia	Ms. Shantibai M. Jain	Rs.10,00,000
		Total	Rs.72,13,000

Accordingly, the AO issued show cause notice to the assessee as to why the gift deeds/declarations as found by the survey team in the premises of the assessee amounting to ` 72,13,000/- should not be added to the income of

the assessee. As the assessee failed to give any explanation before the survey team, the AO issued summons u/s. 131 to the donors of gift on 6.12.2007 at the addresses mentioned on the gift deeds. Out of the nine summons sent, three were returned unserved and remaining six donors did not respond. The learned AR of the assessee vide letter dated 12.12.2007 submitted that none of the gifts were received by the assessee and, therefore, the same could not be added to the income of the assessee. The AO not being satisfied with the reply of the assessee added the same as unexplained income of the assessee by framing assessment u/s. 143(3), vide order dated 24.12.2007. In the appellate proceedings, the learned CIT(A) after considering the contentions and submissions of the assessee dismissed the appeal of the assessee by observing and holding as under:

9.6. The above contentions of the AR of the appellant have been carefully considered in the light of facts on record and findings made in the assessment order. It is observed that during the survey proceedings, copies of nine gift deeds are found, where the donees were found to be closely related to the appellant. In order to ascertain further facts, the AO has made the necessary enquiry by issuing summons u/s 131 of the Act. As observed in the preceding paragraphs, three of the summons had been returned back unserved by the postal authorities' with a remark "left/not known" and balance donees either did not attend or no any reply filed. Once the summons are returned back or the concerned persons did not attend, the onus shifts on the appellant to prove the transactions as not belonging to him since the documents were found from his premises and not established to be a dump paper. From the assessment order as well as from the reply of the appellant, I find that the onus of coming clean on this aspect, by producing the donees before the AO for verification, is not discharged during the assessment proceedings. The appellant has also admitted that loans were immediately taken in the books of the appellant from some of the donees. The act of the AO in not disallowing interest paid on such loans will not act as a facilitator in automatically establishing the genuineness of the gifts, if the surrounding circumstance prove otherwise.

9.7 appellant has contended that it is the responsibility of the AO to prove that the apparent is not real. I find that the surrounding circumstances can also be looked from the angle as to whether the apparent can be considered as real. As laid down by the Hon'ble

Supreme Court in the case of CIT vs Durga Prasad More 82 ITR 540, the apparent must be considered as real only if it is shown that there are reasons to believe that the apparent is not real and that too taxing authorities are entitled to look into the surrounding circumstances to find out the reality and the matter has to be considered by applying the test of human probability. For this proposition, I draw support from the decision of the Hon'ble Supreme Court in the case of Sumati Dayal vs CIT 214 ITR 801 wherein the Supreme Court has held

"dismissing the appeal, that the settlement Commission after considering the surrounding circumstances and applying the test of human probabilities had rightly concluded that the appellant's claim about being her winning from races was not genuine."

In the instant case, copies of gift deeds are found from the premises of the appellant during survey proceedings, all the donees are found to be closely related to the appellant, genuiness of the donees was not established by the appellant and the incident of immediate loan received by the appellant from some of the donees clearly points out to the fact that apparent is not real and it is ultimately the appellant whose undisclosed income is represented by the gifts.

9.8 In view of the facts and circumstances cited above in my considered opinion, the addition of ` 72,13,000/- made by the Assessing Officer as representing appellant unexplained income is correct and hence it is upheld. Hence, ground no.7 is dismissed."

4. The learned AR vehemently submitted before us that the CIT(A) has ignored all the material and relevant facts on record especially the fact that the gift deeds/declarations, which were found in the premises subjected to survey were not relating to the assessee at all and in none of the cases, the assessee was involved in any way. The learned AR referred to page 1 & 2 of the paper-book, which contain names and addresses of the donees, date of gifts and amount of gifts etc. The learned AR also brought to our attention reply, dated 12.12.2007, filed before the AO, which is placed at pages 3 to 8 of the paper-book, wherein at para 9 it has been stated that in none of the cases the gift is received by the assessee but have been received by other persons. It was also stated that summons u/s. 131 were issued to them and

donees and in compliance thereto, the donees have submitted respective gift deeds, copy of acknowledgments of returns and details as required by the AO. The learned AR reiterated that none of the gifts were received by the assessee and all the donees were identified and the AO even passed on the information to the AO concerned, who exercised jurisdiction over donees and in some cases notice u/s. 143(2) were also issued. The learned AR contended that when the assessee is not involved in any way in these gift deeds, the addition made by the AO was purely on the basis of presumptions, surmises and conjectures, which is not permissible under the Act and, therefore, deserved to be deleted.

5. The learned DR, on the other hand, opposing the arguments of the learned AR, contended that undoubtedly the gift deeds belonged to the assessee as the same were found in the premises in which the assessee was carrying on business. He further contended that if the assessee was not connected with any of the gift deeds/declarations how the papers could be found in the premises of the assessee. He also submitted that all replies were filed by the CA on behalf of the donees and not the donees themselves, which raised doubt on the nature and character of the transactions. Keeping in view these facts the learned DR submitted that the order of the CIT(A) needs to be confirmed.

6. In the rejoinder, the learned AR submitted that the premises which were subject to survey u/s. 133A were not belonging to the assessee but to the brother of the assessee and therefore, the plea of the learned DR that these documents were lying at the premises of the assessee carries no weight and, hence, should be discarded.

7. We have heard the rival submissions and perused the material available on record. The undisputed facts are that the nine gift deeds involving amount of ` 72,13,000/- were found by the survey team on 23rd Nov. 2004

during the course of survey. The undisputed facts are that in none of the gift deeds/declarations the assessee was involved either as a donor or as a donee. The assessee has also furnished the names and addresses of the donee/donors, who were income tax assesseees. The learned AO also issued summons u/s. 131, which were served in six cases and in three cases it was returned unserved. All the donees in response to summons issued u/s. 131 filed their replies furnishing documents such as copy of gift deed, acknowledgment of return filed and PANs etc. The learned AO passed on these information to the AO concerned, who exercised their jurisdiction over these donees. Under these circumstances when the donees as well as the donors were identified and even responded to the verification process by the AO, the addition of the gifts amounting to ` 72,13,000/- in the hands of the assessee is unwarranted, without any basis and therefore cannot be sustained. In the present case, the Revenue has failed to bring on record the necessary evidences to prove that the money either belonged to the assessee or had come to the assessee after being gifted by the donee. The Revenue has completely failed to take the investigation to a logical end. Under these circumstances, we are not in agreement with the findings of the learned CIT(A) and his order is accordingly set aside on the issue. The AO is directed to delete the addition.

8. Now coming to the Revenue's appeal ITA No.597/Mum/2016, wherein it has raised the following grounds:

"1. On the facts and in the circumstances of the case and in law, the Ld CIT(A) erred in deleting the addition of Rs.54,76,827/- on account of unexplained stock of gold.

2. On the facts and in the circumstances of the case and in law, the Ld CIT(A) failed to appreciate the fact that excess stock of gold of 8862.18 gms was determined from documents, books and incriminating material found during the course of survey on the assessee.

3. *On the facts and in the circumstances of the case and in law, the Ld CIT(A) failed to appreciate the fact that the onus is on the assessee to explain and substantiate the correctness of stock of gold ornaments.*

4. *The appellant prays that the order of the CIT(A) on the above grounds be reversed and that of the AO be restored.*

5. *The appellant craves leave to amend or alter any ground or add a new ground which may be necessary.”*

9. The issue involved in all these grounds is against the deletion of addition of ` 54,76,827/- by the CIT(A) as made by the AO on account of unexplained stock of gold and the failure on the part of the CIT(A) to appreciate the fact that excess stock of gold of 8862.18 gms was determined from the documents, books and incriminating material found during the course of survey.

10. The facts in brief are that during the course of survey, the survey team found stock of gold to the tune of 12392.890 gms as belonging to the assessee and 8862.18 gms as that of customers received for the purpose of manufacturing gold ornaments. Accordingly, the AO required the assessee to produce the address of the persons from whom the gold was received for manufacturing gold ornaments. The assessee replied to the AO vide submissions dated 3.11.2007 and 05.11.2007. The AO issued summons u/s. 131 to the parties to whom the gold belonged to and recorded their statements. According to the AO the statement recorded u/s. 131 were not co-relating with the explanation of the gold to the tune of 8862.18 gms found during the course of survey and served to show cause notice on the assessee as to why the value of gold should not be added to the income of the assessee, which was again replied by the assessee vide submission dated 12.12.2005, placed at page 36 of the paper-book. Finally the AO added a sum of ` 54,76,827 as unexplained stock of gold to the income of the

assessee by observing that the assessee has submitted wrong details of stock and further held that the stock of 8862.18 gms of gold belonged to the assessee. As per the assessee the stock as appearing in the books of account – stock register as belonging to the customer was 8862.18 gms whereas stock physically found as belonging to the customers were 5935.37 gms, which were duly reconciled before the AO. But the AO did not consider the same. In the appellate proceedings the CIT(A) deleted the addition by observing as under:

“4.7. I have gone through the assessment order, remand report of the AO and various submissions and rejoinder filed by the assessee during appellate proceedings and material available on record. My observations are in the following paragraphs.

4.8 The Assessing officer in paragraph 3 of the order has stated that the statement of the appellant was recorded u/s.131 of the IT.Act on 4.2.2005 by the Assessing officer. In the said statement the Assessing Officer asked the appellant to provide complete address of the person from whom the stock of gold amounting to 8862.18 grams found during the course of survey was received by him for manufacturing of gold ornaments. The Assessing officer after examining the explanation of the appellant which is mentioned in page 2 of the order held that the stock of 8862.18 grams of gold has not been explained by the appellant. He stated that appellant has adjusted the stock and submitted wrong details. The value of gold of 8862.18 grams found during the course of survey amounting to Rs.54,76,827/- was accordingly, added by the Assessing officer as unexplained stock. From, the above, it can be seen that the stock relating to the appellant himself related to 2392.890 grams. This figure of 12392.890 grams has been stated in statement dated 25/11/2004.

4.11. It is further observed that according to a computer generated printout found the stock of gold relating to customer was stated to be 8862.6 grams whereas the actual stock difference found during the course of survey found was 5935.37 grams. The Assessing Officer has examined the explanation of the appellant in page No.2 of the assessment order. The appellant has submitted during appellate proceedings that all these details relating to reconciliation were submitted on 15/02/2005 and 12/12/2007 before the AO, a copy of the said letter was duly acknowledged by the IT. Office and filed during the present proceedings. The reconciliation of customer's stock, as submitted vide reply dated 12/12/2007, is also reproduced in page 2 of the assessment order. The AO did not accept the reconciliation, as

she observed that the gold ornaments delivered to M/s.Shefali Arts and M/s.Manibhadra Jewellers before the date of survey i.e. 23/11/2004. Thereafter, the AO has adopted the figure of 8862.18 grams as unexplained stock of gold found during survey.

4.12. Considering the aforesaid matrix of the fact, I find that the AO has taken wrong stock figure & without properly verifying the inventories of stock taken and statements recorded during survey proceedings and in response to summon issued u/s.132 of the IT. Act. Even in the remand report, proper facts were not brought on record. From the above discussion and on appreciation of facts on record, it is clear that stock difference of 5935.37 grams and not 8862.16 grams was found during the survey proceedings. Actually the figure of 8862.16 grams represents the figure of stock of gold relating to customers and found from a computer printout. It was explained to the AO during post survey proceedings that even the stock of 5935.37 grams represents the stock of gold of customers. The reconciliation of figures of stock of gold of customers as physically found of 5935.37 grams and as per computer printout of 8862.16 grams was submitted and even considered by the AO during assessment proceedings. In the assessment order, the AO has given a general finding for not accepting the reconciliation statement that gold ornaments were shown to. be delivered to M/s.Shefali Arts and M/s.Manibhadra Jewellers before the date of survey. I find that the AO has recorded the statement of Sh.Jayant Kumar Sancheti, Prop, of M/s.Shefali Arts and Sh. Suresh Kumar R.Punamiya, director of M/s. Kundan Jewellers in this regard during post survey proceedings. Nothing wrong was found in these statements. There is nothing on record to substantiate the findings of the AO. In view of the facts that emerge from the above discussion, I find no occasion for making addition of Rs.54,76,827/-relatable to 8862.18 grams of gold. Hence the AO is directed to delete the addition of Rs.54,76,827/-. Ground No.1 is accordingly allowed.”

11. The learned DR argued before us that the first appellate authority has wrongly deleted the addition made on account of unexplained stock. The Id DR submitted that 8862.18 gms of gold belonged to the customers, which was received by him for manufacturing gold ornaments though the actual stock belonging to the customers found by the survey team was 5935.37 gms. The learned DR submitted that even during the statements recorded post survey, the addresses of the persons from whom the gold was received by the assessee were not co-relating with the facts on record and thus, the

AO has rightly added the same to the income of the assessee as unexplained stock. The assessee tried to explain the difference by submitting that the stocks were delivered to Shefali Art and Manibhadra Jewellers were entered twice, which was rectified. The AO found the reconciliation filed by the assessee as unbelievable and held that the entire exercise was undertaken to tally the stock discrepancies which were found during the course of survey. The learned DR submitted that even in the remand proceedings, the assessee has submitted report to the CIT(A) explaining the different in clear terms. The learned DR therefore, submitted, that the addition as deleted by the CIT(A) was based on wrong facts and presumptions and therefore, deserved to be deleted.

12. The learned AR on the other hand relied heavily on the order of the CIT(A). He submitted that a very detailed and substantial finding of fact have been recorded by the CIT(A) before deleting the addition. The learned AR took us through the submissions made before the AO, copies of which have been filed at page nos. 16 to 22 of the paper-book. The learned AR took us through the statement recorded of Shri Jayant Kumar Sancheti, proprietor of Shefali Art & Shjri Sureshkuar R Punamiya, Director of Kundan Jewellers P. Ltd. and submitted that nowhere both the parties disowned gold given to the assessee for manufacturing of ornaments. The learned AR submitted that the assessee submitted the tally of total stock found during the course of survey and duly reconciled it with its books of account. The learned AR submitted that the AO has confused the stock as per stock register of 8862.18 gms as belonging to the customers with the stock of 5935.67 gms which was physically found by the survey term as belonging to the customers. The reconciliation in this respect was duly filed before the AO in the original proceedings as well as in the remand proceedings. The AR also submitted that very comprehensive and detailed stock register has been maintained by the assessee and took us through the inventory of stock as found during the

course of survey, the details of which is placed at pages 42 to 46 of the paper-book. The AR finally submitted that the AO has made the addition on account of unexplained stocks of gold in a confused state of mind by mixing up various documents and, thus, failed to appreciate them in a correct perspective, whereas the CIT(A) after having gone into the facts on record in great depth correctly reached a conclusion that the AO has not properly gone into the issue of stock belonging to the customers and that of the assessee, even though reconciliation was filed by the assessee. Finally, he prayed that the order of the CIT(A) should be upheld as it is well-reasoned and based on correct appreciation of facts on record.

13. We have heard the rival parties and perused the material available on record. The undisputed facts of the assessee case are that the assessee was subjected to survey u/s. 133A during the course of which discrepancy was found in the stocks as per the stock register and stock physically found at the assessee's premises. As per stock register, the stock belong to the customers was 8862.18 gms whereas the actual stock found was 5925.79 gms. From the facts before us we observe that the AO confused the stock of 8862.18 gms and 5925.37 gms i.e. 5935.37 gms were found physically during the course of survey and 8862.18 gms was as per the computer print out at the time of survey as belonging to the customers. We also find that the assessee has filed reconciliation, which was not accepted by the AO. The first appellate authority after examination of records and submissions of the assessee has reached the conclusion that the AO has not correctly understood the issue and made the addition on wrong appreciation of facts. A perusal of the order of CIT(A) reveals that he has taken a correct view of the matter by into the stock records , reconciliation etc and thus deleted the addition. The operative part of the said order has been reproduced by us hereinabove. Under these facts and circumstances, we do not find any

reason to interfere with the order of the CIT(A) and thus we are inclined to uphold the same.

14. In the result, the appeal of the assessee is allowed and that of the Revenue is dismissed.

Order pronounced in the open court on this day of 29th May 2018

Sd/-

(C N Prasad)

JUDICIAL MEMBER

Mumbai; Dated : 29th May 2018

Sd/-

(Rajesh Kumar)

ACCOUNTANT MEMBER

SA

Copy of the Order forwarded to :

1. The Appellant.
2. The Respondent.
3. The CIT(A), Mumbai.
4. The CIT
5. The DR, 'H' Bench, ITAT, Mumbai

BY ORDER,

//True Copy//

(Assistant Registrar)

Income Tax Appellate Tribunal, Mumbai