

आयकर अपीलिय अधीकरण, न्यायपीठ – “B” कोलकाता,
*IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH “B” KOLKATA*

Before **Shri S.S.Godara, Judicial Member** and
Dr. A.L. Saini, Accountant Member

ITA No.1550/Kol/2016
Assessment Year :2011-12

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| Ghosh Bishayee & Associates, P.O. Vill. Bijur, P.S. Memari, Dist. Burdwan-713422 [PAN No.AAEFG 9412 A] | V/s. | ACIT, Circle-1, Aayakar Bhawan, Court Compound, Burdwan- 713101 |
| अपीलार्थी /Appellant | .. | प्रत्यर्थी/Respondent |

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| अपीलार्थी की ओर से/By Appellant | Shri Soumitra Choudhury, Advocate |
| प्रत्यर्थी की ओर से/By Respondent | Shri S. Dasgupta, Addl. CIT-DR |
| सुनवाई की तारीख/Date of Hearing | 01-08-2018 |
| घोषणा की तारीख/Date of Pronouncement | 31-08-2018 |

आदेश /O R D E R

PER S.S.Godara, Judicial Member:-

This assessee's appeal for assessment year 2011-12 arises from the Commissioner of Income Tax (Appeals)-7, Kolkata's order dated 29.02.2016, passed in case No.544/CIT(A)-7/Wd-25(3)/142-15, in proceedings u/s. 143(3) of the Income Tax Act, 1961; in short 'the Act'.

Heard both the parties. Case file perused.

2. The assessee has raised two substantive grounds in the instant appeal in challenging correctness of both the lower authorities making undisclosed investment addition of ₹77,89,600/- based on alleged discrepancies found in paddy stock during the course of survey in question followed by the gross

profit estimation @ 8.92% coming to ₹6,94,832/-; respectively in the course of assessment as affirmed in lower appellate proceedings.

3. Both the Learned Representatives take us to the CIT(A)'s detailed discussion on the former main issue of stock discrepancy addition amounting to ₹77,89,600/- reading as under:-

“2.2 I have gone through the submissions made by the appellant. The AO has taken the physical stock available in the business premises as on the date of survey and worked out the difference as per the books stock as well as the physical stock. There was no dispute as far as taking up physical stock is concerned. the appellant furnished copy of letter dated 04.03.2011 addressed to the ACIT, Circle-1, Burdwan, objecting the method of stock taking stating that the ‘survey team has taken the physical stock without any pains for counting the bags full of paddy. They did not given break the stage to get the actual stock position, hence the stock position as taken is false, concocted and motivated. The actual stock as physically appeared in the godowns was tallying with the registers maintained by the rice mill. The counting of stock is not an easy task an it will take at least 2 hours if you engage sufficient staff but they survey team has got it counted within one hour.’. The objection letter was filed before the ACIT Circle-1 who was neither the AO nor the ITO conducted the survey. During the survey the partner was present and signed the stock statement and given a statement that the physical stock was correct. The partner also accepted the method of stock taking in the statement recorded at the time of survey. How the stock was inventorized, what was the method followed by the survey team, how much time the survey team spent for taking stock was not mentioned in the statement or in the stock inventory. The appellant also did not make any such objections in the statement recorded during survey or in the physical inventory The appellant also did not make any such objections in the statement recorded during survey or in the physical inventory statement. After both the Assessing Officer and the assessee have satisfied themselves regarding the correctness of stock inventory, it was completed and signed by both the parties. The method of stock taking and the correctness of stock inventory were not disputed by the appellant till completion of the survey. If the manner and method of stock was objectionable the appellant should have raised objection before the survey team left the premises so that the stock can be reinventorised physically. The objection made by the appellant regarding the manner in which the stock was taken after four days of completing the survey is not a bona fide objection and it is nothing but an afterthought.

2.2(1) The appellant stated in his argument that the survey was carried out by Income-tax Officer Ward 2(2), Burdwan on 28.02.2011. Objection thereon was preferred on 04.03.2011 before ACIT, Circle-1, Burdwan and the Commissioner of Income-Tax, Burdwan. The faulty method of counting of stock was also brought to the attention of Income-Tax Officer, Ward 52(3), Kolkata on 21.02.2014 i.e. before completing the assessment. The reason for filling the objections with ACIT, Circle-1, Budwan who was neither the AO nor the ITO conducted the survey was better known to the appellant but not explained and made any argument.

The appellant's territorial jurisdiction vets with the Burdwan whereas the am jurisdiction vets with the ITO ward 52(3), Kolkata. The survey was conducted by the ITO Ward 2(2), Burdwan and the appellant has filed the objection with the ACIT Circle-1, Bu9rdwan who was neither the Assessing Officer nor the officer was conducted the survey. The appellant is well aware of his assessment jurisdiction because he is a regular assessee. Therefore, the objections raised by the appellant

vide their letter dated 04/03/2011 before the ACIT-Circle-1 who did not hold the jurisdiction is not valid.

Accordingly, the objection raised by the appellant in Ground No.1 regarding the manner and method of physical verification is not tenable and accordingly dismissed.

2.3 As on the date of survey the physical stock available, the book stock and the difference of paddy was as under:

| Name of the Item | Physical verification Qntls. | Books Qntls. | Remarks Excess(+)/Short(-) |
|------------------|------------------------------|--------------|----------------------------|
| Paddy | 19320.00 | 9583.00 | 9737.00 |

The AO estimated the value of difference of stock of paddy @ Rs.800/- per quintal which worked out to Rs.77,89,600/- for which the appellant could not explain the source of investment either at the time of survey or during the assessment, therefore, the AO made the addition of Rs.77,89,600/- to the returned income as unexplained investment.

2.3(i) The appellant has stated that the survey was carried out by Income-Tax Officer Ward 2(2), Burdwan on 28.02.2011. Objection thereon was preferred on 04.03.2011 before ACIT, Circle-1, Burdwan and Commissioner of Income-Tax, (Burdwan). The faulty method of counting of stock was also brought to the attention of Income-Tax Officer, Ward 52(3), Kolkata on 21.02.2014. It was also alleged that signature of Shri Hari Sadhan Ghosh, Partner was taken on the Inventory statement by coercion.

The appellant has neither raised nor before the officer who has conducted the survey. Therefore the objections raised by the appellant vide their letter dated 04/03/2011 cannot be held as valid. First time the objections raised before the AO was on 21/02/2014 before completing the assessment. Though not accepting that the objection raised by the appellant was valid even if it is presumed to be valid the appellant has raised the objection regarding the stock taking only after the four days of completing the survey that too before the officer who did have the jurisdiction. The method of stock taking and if any dispute in the physical stock, should be pointed out before the survey team leaves the premises so that the stock inventory can be reinventorised physically. But in this case the appellant filed the letter after the four days of completing the survey which is not tenable. Therefore, I hold that the physical stock available as on the date of survey was correctly taken and there is no reason to doubt the physical stock available as on the date of survey.

2.3(ii) The Second contention of the appellant was that the survey team has taken the statement on coercion. The survey was conducted with an intention to collect the evidences useful for the assessment and there is no reason to coerce the appellant. The appellant has certified in the statement recorded u/s. 133A that the statement was given voluntarily without any coercion. Therefore, the argument of the app that the statement recorded under coercion has no basis and accordingly rejected.

2.3(iiii) The appellant has also objected the statement recorded under section 133A on oath placing reliance on Hon'ble High Court judgment in the case of CIT Vs. Khader Khan & Sons (2013) 352 ITR 480. This issue has been examined by the Hon'ble Bombay High Court in the case of Dr. Dinesh Jain v. Income Tax Officer - 11(2)-2, [2014] 45 taxmann.com 442(Bombay) Mumbai and held that statement under section 133A does not lose its evidentiary value merely because it is made on oath. In the cited case Hon'ble High Court held as under:

'4. We shall now consider the questions as proposed for the appeal relating to assessment years 2006-07 for our consideration.

(a) Regarding Question No.A:

- (i) The grievance of the appellant before us is that no reliance can be placed upon the statement made by the appellant during the survey proceedings under Section 133A of the Act for the reason that it was recorded on oath. It is undisputed that even under Section 133A of the Act dealing with survey proceedings, the revenue authorities are entitled to record the statement of any person which may be useful or relevant to proceedings under the Act. the power to record a statement during survey proceedings is found in Section 133A(3) of the Act. The relevant portion of which reads as under:-

“Power of Survey

Section 133AA (1)to (2)

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

*(i) & (ii) ***

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

The requirement of recording a statement on oath is found in Section 132 of the Act i.e. during search and seizure proceeding and such a requirement is not found in Section 133A of the Act. Nevertheless, a statement under Section 133A of the Act does not lose its evidentiary value merely because it is made on oath. Besides, the statement in this case is one of the evidences being relied upon and not the sole evidence. The Tribunal in the impugned order has recorded that the addition of income is based not only on the statement of the appellant-assessee but also based on “Page No.17”.

The case law relied upon by the appellant in the matter of CIT v. S. Khader Khan Son arising from the decision of Madras High Court in CIT v. S. Khader Khan Son proceeded on the fact that the authorities did not accept the retraction made by a deponent of a statement made on oath during survey proceedings under Section.133A of the Act. This was on the ground that statement was made on oath. Besides the sole evidence against the assessee in that case was the statement made on oath during the survey proceedings which is not the case in the present facts. Further, in this case the appellant-assessee has not been able to show that the statement made is not correct and/or unbelievable. Therefore, the case law relied upon by the appellant-assessee is completely distinguishable and not applicable to the present facts.

Further Hon'ble Allahabad High Court in the case of Sanjeev Agrawal v. Income Tax Settlement Commissioner, Allahabad [2015] 56 taxmann.com 214 held that the statement given during the survey is a valid piece of evidence and cannot be retracted at the whims and fancies of the assessee. I reproduce hereunder the relevant paragraph of the judgement of the Hon' High court.

‘10. In Pullangode Rubber Produce Co Ltd. v. State of Kerala the Supreme Court held that an admission is a piece of evidence though it is not conclusive. Consequently a statement made voluntary under Section 133A of the Act cannot be retracted unless the assessee files evidence to show that the admission made in the statement at the time of survey was wrong and against the material on record. The mere fact that the Commissioner of Income Tax in his report has held that the statement given by the petitioner was on oath and therefore, it cannot be retracted is immaterial in the context of what we have said aforesaid.

11. No doubt, Section 132(4) and 133A of the Act are distinct and different. Under Section 133A of the Act, there is no provision to administer oath and to take a sworn statement whereas under Section 132(4) of the Act there is no provision to examine a person on oath. But it does not mean that a statement under Section 133A of the Act can be retracted at the whim and fancy of the assessee. In the light of the aforesaid, the assertions made by the learned counsel for the petitioner cannot be accepted.

In the case of the appellant the Assessing Officer has taken a physical inventory of stock and on the basis of physical inventory found during the course of survey the statement under section 133A was recorded, therefore, the case law relied up on by the appellant has no application and the case laws referred by me are squarely applicable in the appellants case. Therefore, I hold that statement recorded under section 133A by the AO is valid and the retraction has no basis and the physical stock available at the time of survey was correct. The AO estimated the value of difference of stock of paddy @ Rs.800/- per quintal which worked out to Rs.77,89,600/-. The appellant has not explained the source of the investment at the time of survey or during the appeal proceeding. Therefore, the addition made by the AO amounting to R.77,89,600/- is confirmed and this ground of appeal is dismissed."

4. We have given our thoughtful consideration to rival contentions. The assessee reiterates his stand adopted throughout that the impugned addition is not based upon any material fund during the course of survey since both the lower authorities have gone by the alleged survey statement only which is against CBDT's circular dated 10.03.2003. We find no merit in either of these two submissions. It has come on record that both the lower authorities have made the former addition based on physical verification to assessee's paddy stock during the course of survey there on mere statement recorded therein or with reference to any vague evidence. We thus find no reason to delete the impugned addition in principle.

5. Now comes the equally important question as to whether the entire discrepancy in stock addition or only the profit element embedded therein is to be considered for the impugned addition. We find this issue to be no more *res integra* as co-ordinate bench of this tribunal in *M/s Subarna Rice Mill vs. ITO ITA No.1781/Kol/2014* decided on 30.06.2015 holding only the profit element liability to be added in such circumstances; stand upheld by hon'ble jurisdictional high court's recent judgment dated 20.06.2018 in ITAT 196 of 2015 GA No.4047 of 2015. We therefore conclude that the impugned former

addition of the entire discrepancy in stock deserves to be deleted. We accordingly accept assessee's former substantive ground challenging correctness thereof. Its latter substantive ground stands declined in view of our foregoing discussion. We confirm the gross profit addition of ₹6,94,832/- in these peculiar facts and circumstances.

6. This assessee's appeal is partly allowed.

Order pronounced in the open court 31/08/2018

Sd/-

(लेखा सदस्य)

(Dr. A.L. Saini)

(Accountant Member)

Kolkata,

*Dkp, Sr.P.S

दिनांक:- 31/08/2018

कोलकाता ।

Sd/-

(न्यायिक सदस्य)

(S.S.Godara)

(Judicial Member)

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-Ghosh Bishayee & Associates, P.O.& Vill. Bijur, P.S. Memari
Dist. Burdwan-713422
2. प्रत्यर्थी Respondent-ACIT, Cir-1, Aayakar Bhawan, Court Compound, Burdwan-713101
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,

Sr. Private Secretary, Head of
Office/DDO

आयकर अपीलीय अधिकरण,

कोलकाता ।