

IN THE INCOME TAX APPELLATE TRIBUNAL, KOLKATA BENCHES  
KOLKATA

[Before Hon'ble Shri J.Sudhakar Reddy, AM & Smt. Madhumita Roy, JM ]

**ITA No.1704/Kol/2011**  
Assessment Year : **2007-08**

Smt. Madhu Chhanda Sirkar Kolkata (PAN: ALGPS 1525 K) (Appellant)	-versus-	D.C.I.T., Circle-50, Kolkata  (Respondent)
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**ITA No.1567/Kol/2011**  
Assessment Year : **2007-08**

D.C.I.T., Circle-50, Kolkata  (Appellant)	-versus-	Smt. Madhu Chhanda Sirkar Kolkata (PAN: ALGPS 1525 K) (Respondent)
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**ITA No.1084/Kol/2014**  
Assessment Year : **2007-08**

Smt. Madhu Chhanda Sirkar Kolkata (PAN: ALGPS 1525 K) (Appellant)	-versus-	D.C.I.T., Circle-50, Kolkata  (Respondent)
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For the Assessee: Shri Soumitra Chowdhury, Advocate  
For the Department : Shri G.Hangsing, CIT(DR)&  
Shri Saurabh Kumar, Addl.CIT, Sr.DR

Date of Hearing : 10.09.2018  
Date of Pronouncement : 26.09.2018.

**ORDER**

**PER MADHUMITA ROY, JM**

The instant cross appeals have been filed by the assessee as well as by the Revenue against the order dated 30.06.2011 passed by the Id. CIT(A)-XXXII,

Kolkata arising out of the order dated 31.12.2009 passed by the D.C.I.T., Circle-5, Kolkata for A.Y.2007-08.

**ITA No.1704/Kol/2011 (Assesee's Appeal)**

2. The instant appeal is time barred by one day. An application for condonation of delay has been filed by the assessee along with an affidavit before us. The statement made by the assessee in support of the delay is justifiable and thus the delay is condoned.

3. In the instant appeal the assessee has come up before us with the following revised grounds :-

*"1. For that on the facts of the case, the order passed by the Ld. C.LT.(A) on 30.06.2011 is completely arbitrary, unjustified and illegal.*

*2. For that on the facts of the case. Ld. C.I.T.(A) was wrong in not considering the merit of the case that 'survey was made on 12.09.2006 and income & expenditure were duly recorded in trading and profit & loss a/c. as on 31.03.2007, no material has been brought into record to justify the addition/ disallowance and without an specific defects, therefore, the order passed by the Ld. C.I.T.(A) is completely arbitrary, unjustified and illegal.*

*3. For that on the facts of the case, the C.I.T.(A) was wrong in dittoing the order of the A.O. and confirming the addition of Rs.3,25,000/- on the basis of personal diary (M CS- 16) for the Financial Year 2005-06 found at the time of survey, treating the same as unexplained expenditure which is completely arbitrary, unjustified and illegal.*

*4. For that the A.O. has estimated the addition of Rs.325,000 / - by adding 2 digits in (MCS-16), therefore, the actual expenditure is R.s.3250/-, therefore, the addition of Rs.325,000/ - which is confirmed by Ld. CIT(A) should be deleted.*

*5. For that on the facts of the case, the A.O. was wrong in not considering the facts that the assessee has made personal expenditure from her personal drawing amount and the business expenditure has been duly recorded in respective head of expenditure at Audited accounts as on 31.03.2007, therefore, the addition of Rs.3,25,000,- a unexplained expenditure which is confirmed by the Ld. CIT(A) is completely arbitrary, unjustified and illegal.*

*6. For that on the facts of the case, the Ld. C.I.T.(A) was wrong in dittoing the order of the A.O. and confirming the addition of Rs.33,730! - on account of*

*advance from customers were summarized in the documents marked as (MCS-17) found at the time survey made on 12.09.2006, treating the same as unexplained receipt which is completely arbitrary, unjustified and illegal.*

*7. For that on the facts of the case, the Ld. C.I.T.(A) was wrong in dittoing the order of the A.O. and confirming the addition of Rs.38.893j- on account of contractual remuneration paid to goldsmith on the basis of karigarh note book (MCS-12) found at the time of survey, treating the same as omission of receipt of making charges which is completely arbitrary, unjustified and illegal.*

*8. For that. on the facts of the case, he Ld. C.LT.(A) has allowed only Rs.9,24,798/-, out of total addition mace by the A.O. at. Rs.55,70,948/- as undisclosed stock of gold [MCS 12 to 15]therefore, confirming the addition of Rs.46,46,150/ - is completely arbitrary, unjust.ified and illegal.*

*9. For that. on the facts and in the circumstances of the case, the Ld. C.I.T.(A) ought. to have considered that. the assessee had discharged its onus by furnishing all the relevant documents in connection with the stock of gold and also proved the identity and creditworthiness and genuineness, therefore, the Ld. C.I.T.(A) may be directed to delete the addition amounting to Rs.46,46, 150/-.*

*10. For that. on the facts of the case, the Ld. C.I.T. (A) was wrong in dittoing the order of the A.O. and confirming the add Lion of Rs.3,40,697/ - on account of excess stock of silver found at the time of survey, treating the same as unexplained investment. u/s 69 of the .I.T. Act which is completely arbitrary, unjustified and illegal.*

*11. .For that on the facts of the case. the Ld. CIT(A) has allowed only Rs.6,74,336/-, out of total addition made by A.O, amounting to Rs.17,36,816/- as bogus sundry creditors therefore, restricted the addition amounting to Rs. 10,62,4801 - is completely arbitrary, unjustified and illegal.*

*12. For that on the facts of the case, the Ld. CIT(A) was wrong in sustaining the addition amounting to Rs.77,553/-, out of total addition made by A.O amounting to Rs.10,24,258/- as unexplained investment from undisclosed sources, therefore, restricted the addition amount.ing to Rs.77,553/- is complet.ely arbitrary, unjustified and illegal.*

*13.For that. on the facts of the case, the Ld. CIT(A) was wrong in dittoing the order of the A.O. and confirming the addition amounting to Rs.1,866/-, Rs.1,000/- and Rs.6,700/-, totaling at Rs.9,566/- on account of advance paid made to the karigars [MCS- 13, 14,.15] which is completely arbitrary, unjustified and illegal.*

*14. For that. the appellant reserves the right to adduce any further ground or grounds, if necessary, at or before the hearing of the appeal”*

4. Ground No.1 and 2 are general in nature and the Id. Representative of the assessee does not press these grounds. Thus these grounds are withdrawn as not pressed.

**Ground No.3, 4 and 5 :**

5. The assessee has challenged the validity of the order passed by CIT(A) in confirming the addition of Rs.32,500/- on the basis of recording in the personal diary for the F.Y.2005-06 which was found at the time of survey; the said amount has been treated as unexplained expenditure. The brief fact leading to this case is this that there was a survey u/s 133A of the Act at the business premises of the assessee on 12.10.2006. The return was selected compulsorily for scrutiny and a notice u/s 143(2) of the Act was issued on 30.09.2008 which was duly served on the assessee followed by another notice u/s 142(1) issued on 10.07.2009. During the survey proceedings documents like books, loose sheets in bunches were found and inventorised marked as MCS-1 to MCS-27. MCS- 12 to 27 were impounded u/s 133 of the Act which was retained with the department having been proved by the competent authority. It is relevant to mention that the assessee is having a jewellery manufacturing and trading business namely M/s M.C.Sirkar & Sons. Annexure MCS-16 contains record of several expenditures incurred by the assessee. According to the APO the same was not explained and came to a conclusion that the record were made by suppressing two digits. The total recording was of Rs.3250/- instead of Rs.325000/- as observed by the Id. AO and the same was added to the income of the assessee. In appeal the Id. CIT(A) confirmed such addition. The case of the assessee is this that these expenditures were made from the assessee's personal drawing amount and the business expenditure has duly been recorded in respective head of expenditure on audited accounts as on 31.03.2007. The Id. Representative of the assessed argued before us that the AO by adding two digits in Annexure-MCS-16 and the actual expenditure was of Rs.32500/-. The addition, thus, is not sustainable. In appeal we find that the assessee submitted the following :

"The assessing officer added a sum of Rs.3,25,000/- to the total income of your petitioner merely based on own assumption. During the course of survey he collected several information from a note book under the labelled of MCS 16. "The Assessing officer made no proper investigation against the information collected by him. The assessing officer has mentioned in his order sheet that tuition fees for Economics Teacher can not be Rs. 20/- only and he also has mentioned in his order sheet that payment to an accountant for the month of April 2006 is not a true entry. No doubt it is true that payment made such small amount to economics Teacher and standard Chartered Accountant is a absurd matter. Payment paid to Economics teacher may be Rs. 200/- or 2000/- instead of Rs. 20/- and payment paid to Ashok Babu, a standard Chartered Accountant may be Rs. 500/- or Rs. 5000/- instead of Rs. 50/-. But the assessing officer has stated in his order that payment has made to Economics teacher Rs. 2000/- by adding two digits and similarly payment has made to Ashok Babu, a standard Chartered accountant Rs. 5000/- by adding two digits. Now the Question is Whether payment paid to Economics teacher is Rs. 200/- or 2000/- and payment paid to standard chartered Accountant is Rs. 500/- or 5000/- ? so it is a contradictory matter in respect of payment paid. It is expected from the prudent person that proper verification is necessary for knowing the actual fact. The assessing officer made no personal appearance and made no initiations for sending letters U/S. 133 (6).

The Assessing Officer has mentioned in his order that A/R has admitted the fact suppression of two digits. A/R is person whom power of Attorney is given for appearing a particular case, A/R is not a permanent staff of your petitioner. It is not possible any A/R to know all the personal expenditure of the assessee. AR may know about the part of personal expenditure of the assessee. There were two A/R s in this case standard chartered Accountants Mr. Asok Kr.. Das was one of them. The assessing officer made no attempt to know from Mr. Ashok Das about his remuneration received from your petitioner. So the A/Rs admitted the fact of suppression on their personal assumption basis. The Assessing officer has not found any credit card in the name of your petitioners during the course of Survey.

So the assessing officer without making a proper investigation and proper enquiry against the information which was under his custody, he added to two digits in all respects. So the Assessing officer should make assessment based on proper enquiry. " "

6. The Id. CIT(A) failed to find out any reason for such payment of small amount to the economic teacher and Chartered Accountant neither could justify that two digits has been suppressed by the assessee in the said MCS-16. On the contrary he wanted the assessee to justify that he has not suppressed two digits in recording expenditure as

revealed in the said documents. We find no justification of the same for such assumption that the assessee has suppressed two digits in each count of expenditure as mentioned in the said documents and confirmed the addition made on the basis of the findings made by the Id. AO. Further that the expenditure were made in the earlier order and not relevant to this assessment year. On the contrary the Id.DR relies on the orders of the authorities below.

7. Having heard the representative appearing for the parties and having regard to the facts and circumstances of the case we are of the view that there is no justification of addition of Rs.32,500/- on the basis of assumption of deletion of two digits on account of expenditure as recorded in MCS-16 as revealed or that the assessee has failed to show any evidence that the figures recorded therein or have been suppressed by only one digit during the survey proceedings from assessee's business place. Further more when the expenditure was made in the previous earlier year not relevant to this assessment year, the same cannot be added to the income of the assessee as not explained. We therefore delete the addition made by the authorities below.

8. The next ground no.6 is not pressed by the assessee.

9. Ground No.7:-- This ground is directed against the addition of Rs.38,893/- on account of remuneration paid to the goldsmith on account of making charges the AO made the following observations :-

“MCS-12 : On perusal of MCS-12, a hand-written small note book, it is seen from page I to 9 that jewellery weighting 1080.350 grams was manufactured by the goldsmith, Paritosh, but the making charge relating /0 those ornaments manufactured realized by the assessee could not be identified by the A.R. from the books of accounts produced before the undersigned. During the relevant period making charge realized from the customer was Rs.60/- per gram. 60% to 65% share of making charge is kept with the assessee out of the manufacturing charges as was the convention in jewellery business. Hence,, Rs.38.893/- (1080.350 X 60% of Rs.60/- ) would he the share of the assessee. This was not reflected in the books of account of the assessee. The A.R. also could not explain such omission. Therefore. Rs.38,893/- is added hack to the total income of the assessee. ”

10. The case of the assessee is this that there are permanent sales contractual worker. In this particular case remuneration has been given to one Paritosh a contractual worker. Since remuneration is being paid on the basis of quantity of gold maintaining kharigar is assigned for contractual remuneration. Paritosh was paid remuneration for making ornaments of 1080.350 gms of gold for making jewellery on such 10800.350 gms. of such gold. The AO estimated a sum of Rs.38,893/- as making charges collected by the assessee. For calculation of making charge receipt the gold should be owned by the customers but the AO has failed to rely upon any evidence that shows the quantity of gold was owned by the customers and has made addition of Rs.38,893/- on an estimated basis. The ld. DR relies on the orders of the authorities below.

11. We have heard the ld. Counsel appearing for the parties. We have perused the materials available on record. We find substance in the submissions made by the assessee's representative. No cogent reason has been assigned by the authorities below while making addition on estimate basis on the making charge of the gold as mentioned therein. We thus delete the order passed by the authorities below in making addition of Rs.38,893/- on account of contractual remuneration paid to the goldsmith.

12. Ground No.8 and 9 : These two grounds are against the addition of Rs.46,46,150/- on the ground of undisclosed stock of gold. During the course of survey stock found in the business premises was valued by the Registered Valuer at Rs.1,14,67,026/-. In the net weight of gold was found at 11206.200gms the value of which was determined at Rs./1,00,19,342/-. Apart from that silver and diamond jewellery worth Rs. 14,47,684/- were also found. During the assessment proceedings the assessee sought to substantiate the claim of gold weighing 4442.470 gms belonging to kharigars. The names and addresses of 26 kharigars were also furnished before the ld. AO. Letters were issued for verification of the claim of the assessee which is appearing from pages 116 to 119 of the paper book. Confirmation from 10 persons as appearing from page 94 onwards of the paper book were made. The ld. AO made addition of Rs.55,70,948/-.

13. In appeal the Id. CIT(A) allowed Rs.9,24,798/- out of said total addition of Rs. 55,70,948/- as made by the AO. It appears from the records that the assessee during the appellate proceedings made an elaborate submissions before the Id. CIT(A). The assessee further requested the CIT(A) to determine the value of gold and silver at the cost price. The statement of conversion of 24 carret to 22 carret of gold from 01.04.2006 to 12.09.2006 were also provided by the assessee. The Id. CIT(A) ultimately deleted the addition of Rs.9,24,798/- out of the total amount of Rs.55,70,948/- as made by the AO with the following observations :

“I have carefully perused the assessment order, submissions of the assessee, remand report of the A.O. and the assessee's rejoinder. The undisputed facts in this case are that gold jewellery of net weight of 11206.200grms, was found in stock with the assessee on the date of survey. The assessee claimed 4442.470grms. of such net gold to be belonging to karigars who had deposited the same with the assessee as 'security' and 1352.170grms. of net gold to be belonging to various customers who had given the same for repairs to her. The assessee was unable to prove the genuineness of her claim. On verification carried out by the A.O. by issue of notices u/s.133 (6) and summons u/s.131 to the alleged karigars and customers, only seven of the karigars replied and three of the customers specifically denied any transactions with the assessee. Four of the customers admitted to have had transactions with the assessee but they neither submitted any details nor any evidence of having given jewellery for repair to the assessee. Rest of the customers did not reply to the notices/summons issued to them by the A.O. The assessee also could not adduce any evidence, either at the assessment stage or during the appellate proceedings or during the remand proceedings to prove her claim or having received gold/jewellery from karigars and customers.

However it is noticed that seven of the karigars had confirmed in response to notices issued to them u/s 133(6) that they had deposited gold with the assessee as 'security' . The total quantity of gold admitted by the seven karigars was 1108.870 gms. The claim of the assessee of having received balance gold totalling to 3333.600 gms from karigars from karigars and jewellery of the net gold content of 1352.170 gms from customers remained unsubstantiated, therefore, is not accepted.

As regards the A.R.'s contention that the karigars and customers to whom notices/summons were issued by the A.O. were confused about the name of the persons in respect of whom information was sought by the A.O., it is observed that the assessee could have availed the opportunity of remand proceedings to remove and address any such confusion and could have got the verification done. But no such effort was made by her.

The A.R. also contended during the appellate proceedings that the Departmental Valuer had valued the stock applying the rate of 24 carat gold and that he erred in not valuing the stock by applying the rates of 22 carat gold as the jewellery is normally made in 22 carat gold. This claim of the assessee is erroneous. From the perusal of the valuation report, a copy of which is placed on record by the A.R., it is observed that the departmental valuer has mentioned the gold contents of the stock as 22 carat and valued the stock accordingly. Therefore, this contention of the A.R. is not acceptable.

In the light of the above discussion it is clear that the assessee has failed to explain and reconcile the excess stock found at the time of survey except the stock to the tune of 1108.870grms. of gold admitted by the seven karigars to be belonging to them. As per the valuation report of the Departmental Valuer the applicable rate of 22 carat gold as on the date of survey was Rs.834/- per gram. Therefore, the claim of the assessee regarding 11 08.870grams of gold is accepted. and addition on account of excess stock is reduced by an amount of Rs.9,24,798/- ( 1108.870 X Rs.834/-). Accordingly, the assessee gets relief of Rs.9,24,798/- and the balance addition of Rs.46A6, 150/- is confirmed.

As regards the addition of a sum of Rs.3,40,697/- on account of excess payment Silver found at the time of survey, the A. O. has mentioned in the assessment order (on pages 9 and 10) that the difference had been admitted by the assessee in her submissions furnished before him on 30/11/2009. In this connection the A.R. submitted that the difference arose because the assessee was valuing her stock at cost whereas the departmental valuer valued the stock at market rate.

It is the fact that the assessee was having no stock register. The assessee has also not been able to explain, with the help of supporting evidence, as to how much quantity of silver was purchased when and at what rate and how much of the silver in stock was purchased at what rate. In the absence of any such information and in the absence of stock records the contention of assessee in this regard can not be accepted, accordingly, the same is rejected. Therefore, the addition of the sum of Rs.3,40,697/- is confirmed.”

14. The Id. Advocate appearing for the assessee that when the undisclosed purchases of such nature had disclosed its gross profit embedded in the transactions could be added to the total income of the assessee. He relies on the decision of the jurisdictional High Court in ITAT 196 of 2015 (Principal CIT vs M/s Subarna Rice Mill which was passed in favour of the assessee deleting the addition made therein. On the contrary the Id.DR relies on the orders of the authorities below. Another judgment of ITA.No.1550/Kol/2016 passed by the Coordinate Bench of this Tribunal

in the case of Ghosh Bishayee & Associates vs ACIT, Circle-1, Burdwan was relied upon.

15. We have heard the representative of both the parties and perused the materials available on record. We find from the records that the entire amount has been added on the basis of the undisclosed stock of the business. The question arises as to whether the discrepancy in stock addition or the gross profit embedded therein is to be considered for addition. The issue has been settled by the following judgement relied upon by the representatives of the assessee passed by the jurisdictional High Court with the following observations :-

*“The assessee's appeal before the Commissioner (Appeals) failed and by an order of August 25, 2014, the assessment order of March 28, 2013 was upheld. The Commissioner looked into the facts, the statements made by or on behalf of the assessee and the books of the assessee that had been looked into at the time of survey which the assessee subsequently claimed had been lost or destroyed and, in respect whereof, no complaint had been lodged by the assessee. On facts, the Commissioner (Appeals) found no grounds to interfere with the quantum of excess stocks discovered by the assessing officer in course of the survey. The Commissioner also agreed with the assessing officer as to the quantum of income which had escaped assessment.*

*There are two aspects to the order impugned dated June 30, 2015 passed by the Appellate Tribunal: the factual findings of the Commissioner (Appeals) as appear to have been interfered with by the Appellate Tribunal; and, the direction given for taking sales of rice and bran into account before arriving at the additional income which could be said to have escaped assessment.*

*Before the Commissioner (Appeals), the assessee had relied on a document signed by an official of the Food Corporation of India that evidenced the stock figures at the relevant point of time. The Commissioner (Appeals) dealt with such aspect of the matter in great detail and by referring to the admitted statements of the representatives of the assessee, which were not sought to be controverted at any point of time on behalf of the assessee, concluded that it was the physical verification of the stocks undertaken by the Assessing Officer in course of the survey operation that was to be given primacy. Indeed, the Commissioner (Appeals) found that there was no evidence that the FCI official who had issued the certificate had undertaken any physical verification of the stock at the rice mill of the assessee and the document appeared to have been filled up by the assessee and merely signed by the FCI official. Such part of the order of the Commissioner (Appeals) was unexceptionable and could not have been interfered*

*with by the Appellate Tribunal. Indeed, no reasons have been furnished by the Appellate Tribunal in disregarding the physical verification of the stocks carried out by the Assessing Officer. Further, the area of the godown as indicated in the FCI certificate was of no consequence since the Assessing Officer found stocks piled outside the godown at the time of the survey.*

*Accordingly, to the extent that the Appellate Tribunal accepted the quantum of additional stocks on the basis of the certificate issued by the concerned FC! official, such order is unacceptable and is set aside. The order of the Commissioner (Appeals) in such regard is restored. The additional quantum as discovered during the course of the survey operation win fasten to the assessee. However, the other aspect of the matter was dealt with by the Appellate Tribunal on a point of principle and such matter does not call for any interference.*

*According to the Appellate Tribunal the value of the entire quantity of additional stocks that were discovered in course of the survey operation could not be regarded as the additional income of the assessee and amenable to tax. There was a specific ground taken before the Appellate Tribunal which was a legal question, as to whether the undisclosed purchase could be taken as the additional income without reference to the possible sale of the paddy when converted.*

*The assessee refers to a judgment of the Gujarat High Court reported at 388 ITR 377. The principle enunciated in such judgment is that when undisclosed purchases of such nature are discovered, it is only the profit embedded in the transaction which can be added to the total income. The Gujarat High Court relied on some of its previous judgments to hold that "not the entire purchase price but only the profit element embedded in such purchases can be added to the income of the assessee."*

*In the circumstances and particularly since the factual findings rendered by the Commissioner (Appeals) as to the quantum of additional stocks have now been restored, the order impugned on the methodology for the ascertainment of the income which escaped assessment would pass muster. The Appellate Tribunal merely directed the gross profit that the additional purchase was capable of generating to be regarded as the additional income for tax to be assessed on such basis. Such view of the Appellate Tribunal does not call for any interference. Accordingly, ITAT NO.196 of 2015 and GA NO-4047 of 2015 are disposed of by modifying the judgment and order of the Appellate Tribunal dated June 30, 2015 as indicated.*

*There will be no order as to costs."*

16. The coordinate Bench of this Tribunal held as follows :-

*“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/Ko1/2014 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 NoA047 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 Rs.6,94,832/- in these peculiar facts and circumstances.”*

17. Respectfully relying upon these judgments we observe that only the gross profit can be added to the income of the assessee and not the entire undisclosed stock. We thus delete the addition made by the authorities below.

18. Ground No. 10 : As against the confirmation of addition of Rs.3,40,697/- on account of excess stock of silver found at the time of survey treating the same as unexplained u/s 69 of the Act. At the time of hearing of the instant appeal on this ground the Id.. representative of the assessee fairly submitted before us that in the event if any addition is required to be confirmed then the same can only be done on the basis of gross profit as has already been argued in support of ground no.8 and 9 addition. However the Id. DR relies on the order passed by the authorities below. We find from the recording of the order of the Id. AO that in the assessment year the difference has been admitted by the assessee in his submission furnished before him on 30.11.2009. Such submissions was made on this premise that the difference arose because the assessee was valuing her stock at cost while departmental valuer valued this stock at market rate. However since there were no supporting documents how much quantity of silver was purchased and at what rate and how much silver was in stock and at what rate in the absence of which the contentions made by the assessee was not accepted by the CIT(A) and an addition of Rs.3,40,967/- was confirmed. We have however not appreciated the stand taken by the Id. CIT(A) relying upon the observations made herein above in respect of ground no..8 and 9 we delete the said

addition of Rs.3,40,967/- and remand this issue to the file of the AO in view of the above gross profit declared by the assessee which in our considered view will be the undisclosed purchases as shown by the assessee and same is admitted by the revenue. In our opinion reasonable gross profit rate will be 10% for computing the profit of the assessee. We, thus, restore the issue to the file of the AO to re-compute the income after deleting of addition made on account of undisclosed purchase and to apply the gross profit rate of 10% on such undisclosed purchases.

19. Ground No.11 and 12 : The assessee in these two grounds has challenged addition amounting to Rs.10,62,480/- as bogus sundry creditors and confirmed the addition of Rs.77,553/- out of the total addition made by the AO amounting to Rs.10,24,258/- as unexplained investment from undisclosed sources.

20. The facts of this is this that the facts pertaining to this issue as discussed in the assessment order are that the assessee had claimed one M/s. Laxmi Narayan Bullion to be her creditor for an amount of Rs.17,36,816/-. On verification by issue of notice u/s.133(6) by the A.O., the said creditor informed the A.O. that a sum of Rs. 10,24,258/- only was due to them from the assessee. As per the A.O., the assessee failed to reconcile the difference in the closing balance as per her own books of account and as per the accounts of M/s. Laxmi Narayan Bullion, therefore, the A.O. added the entire amount of credit balance of Rs.17,36,816/- claimed to be due by the assessee to M/s. Laxmi Narayan Bullion. The A.O also added a sum of Rs.10,24,258/- for the reason that that amount was not reflected in the books of account of the assessee.

21. During the assessment proceedings the details of the submissions in this regard was made by the Id. AO including detailed account of the said M/s Laxmi Narayan Bullion. The AO found no discrepancy in respect of the purchases made by the assessee from him. The said M/s. Laxmi Narayan Bullion also replied to the notice u/s 133(6) intimating that he had no balance with the assessee as on 01.04.2006 and an outstanding dues from the assessee as on 31.10.2007 was Rs.674336.43. However, without considering the assessee's previous years record and reconciliation statement

produced by the assessee the AO added a sum of Rs.17,36,816.39 as bogus sundry creditors and Rs.10,24,258.25 as unexplained investment to the total income of the assessee. However, the difference between closing balance of the assessee's books of account and as per the books of account of M/s. Laxmi Narayan Bullion was considered by the Id.CIT(A) and added Rs.1062480/- (1736816 – 674336) to the total income of the assessee. We find that in both the cases when there is a discrepancy in the accounts of the assessee and with the statements made by the assessee that no cash payment has been made by the assessee to M/s Laxmi Narayan Bullion the Id. AO ought to have done enquiry on this issue by issuing summons to the party concerned for verification of the controversy involved in the issue. In the absence of which addition as made by the AO and confirmed by the Id. CIT(A) is not called for. We therefore delete the addition of Rs.1062480/- as confirmed by the Id. CIT(A) on account of bogus sundry creditors and Rs.77553/- as confirmed by the Id.CIT(A) on account of unexplained investment . This grounds of appeal are allowed.

Ground No.13 raised by the assessee is not pressed.

### **ITA NO.1567/Kol/2011**

22. The instant appeal has been filed by the revenue with the following grounds :-

*“Ground No 4: That Ld CIT(A) has erred in law as well as facts in deleting the addition of Rs 10,32,3111- was made on the grounds that she had not made payments to South City Projects out of her Bank Accounts.*

*Ground No 6. That Ld CIT(A) has erred in law as well as facts in deleting Addition of Rs 55,70,948/-, which was made on the grounds undisclosed stock.*

*Ground No 7. That Ld CIT(A) has erred in law as well as facts in restricting Rs 17,36,816 to Rs 10,62,480 on accounts of Bogus Sundry Creditors and rs 10,24,258 to Rs 77,553 unexplained investment successively.”*

23. The first ground was not pressed by the Revenue due to low tax effect i.e. tax effect is below the pecuniary limit of Rs.20,00,000/-. Thus this ground of appeal is dismissed as not pressed.

24. Ground No.2 of the revenue's appeal relate to that of ground no.8 of the assessee's appeal which we have dealt with by us we reply upon the same and dismiss this ground preferred by the revenue.

25. Ground No.7 relates to ground no.11 of the assessee's appeal . Ground No.7 is akin to ground no.12 of the assessee's appeal.

26. In the result the appeal of the revenue is dismissed and the assessee's appeal is partly allowed for statistical purposes.

### **ITA No.1084/Kol/2014**

327 The instant appeal been filed by the assessee against the order dated 17.02.2012 passed by the Id. C.I.T., Kol-XVII, Kolkata u/s 263 of the Act arising out of the order dated 31.12.2009 passed by the D.C.I.T., Circle-5, Kolkata for A.Y.2007-08.

28. There is an application for condonation of delay of 731 days in filing the instant appeal before us. In support of his statement an affidavit affirmed by the assessee has also been filed which has been gone through by us. We find sufficient reason for delay in preferring the instant appeal by the assessee particularly in view of death of the husband of the assessee. Hence the delay is condoned.

29. The assessee is engaged in the jewellery business . The observation as made by the Id.CIT in the order impugned is this that the documents filed before the AO where certain expenses were incurred in cash. Further that the Id.CIT observed that it was not ascertainable from the assessment order as to whether the AO had examined the expenses which were duly vouched or not neither there was any examination as to whether any element of personal use were there in those expenses. The issue of car running expenses as claimed amounting to Rs.18,758/- has been treated to be too low by the Id. CIT. Regarding other expenses no examination was made by the AO for abnormal increase of the same over the immediately preceding year as observed by the Id.CIT(A). Further that while dealing with the order made by the AO the Id. CIT held as follows :-

(i) Certain expenses were incurred in cash as follows :-

a) Incentive to staff	Rs.5,78,118/-
b) New year expenses	Rs.2,68,000/-
c) Travelling and conveyance	Rs.78,280/-
d) Puja expenses	Rs.48,000/-
e) Staff welfare expenses	Rs.86,000/-
f) Repair and maintenance	Rs.3,91,700/-

It is not ascertainable from the assessment order that the AO had examined whether the above expenses were fully vouched or not. The AO also did not examine whether there was any element of personal use in those expenses. The AO did not examine the issue that the car running expenses claimed was so low at Rs.18,758/-. In respect of some other expenses, it has not been examined as to why there was abnormal increase over the immediately preceding year.

(ii) In respect of expenditure under the head advertisement of Rs.8,29,189/-, the violation of provision u/s.194C has not been examined requiring invocation of provision u/s.40a(ia) of the I.T. Act.

(iii) There were sundry creditors at Rs.38,89,543/- which included an amount of Rs.17,36,816/- payable to M/s. Laxmi Narayan Bullion. Inquiry u/s.133(6) was made from the party. But for the remaining sundry creditors, no verification u/s.133(6) was made.

(iv) Under the head other creditors, there are two entries (i) Rs.5,00,000/- as advertisement (ii) Rs.3,00,000/- as repairs and maintenance. The exact nature of these transactions was not examined by the AO.”

30. In addition to that the Id. CIT has observed that the assessment records does not reveal that the AO had properly examined the expenses relating to incentive to staff, new year expenses, travelling and conveyance, staff welfare expenses, advertisement, repair and maintenance, car running expenses and puja expenses which were incurred in cash by the assessee. The AO had not examined the balance with various creditors excepting M/s Laxmi Narayan Bullion as also opined by the Id.CIT On this premise the Id.CIT came to a finding that the assessment order is erroneous and prejudicial to the interest of the revenue. While observing this the Id. CIT upon setting aside the assessment order directed the AO to do the assessment afresh in terms of law after carrying out necessary verification in respect of issues mentioned in clause (i) to (iv)

of the order. At the time of hearing of the instant appeal the Id. Representative of the assessee vehemently argued against the order passed by the Id. CIT in remitting the issue to the file of the AO for making assessment order afresh which according to the Id. Representative of the assessee is without jurisdiction. In support of his argument he relied upon the judgment of the Hon'ble Delhi High Court in the case of ITO vs D.G.Housing Project Ltd. 343 ITR 329 and he thus prayed for quashing of the order impugned before us. On the other hand, the Id. Representative for the department relies on the orders passed by the Id. CIT.

31. We have heard the Id. Representative for the parties and perused the relevant materials available on record we find from the order passed by the Id.CIT that he has shifted the duties and obligations on the AO while setting aside the order passed by him. It is a well settled law that in the event the Id. CIT finds that the order is erroneous on the ground of lack of enquiry and /or investigations on the part of the AO on the issue involved then it is the duty of the Id. CIT to conduct an enquiry into the matter and upon enquiry and examination of evidence to come to a conclusion upon specific finding that enquiry conducted by the Id. AO is inadequate and the order passed by the Id. AO is erroneous and prejudicial to the interest of the revenue. Such an enquiry has not been done by the Id. CIT(A) to prove the order passed by the Id. AO erroneous and prejudicial to the interest of the revenue instead he has shifted the ball to the Id. AO's court which in our considered view is not permissible under law. The judgement relied upon by the Id. AR in the case of ITO vs DG Housing Projects Ltd. (supra) considered this particular issue and finally observed in favour of the assessee. The case is identical to the instant case of the assessee. The relevant portion therein is as follows :-

*"7.1. In the case of Income Tax Officer vs. D.G. Housing Projects Ltd. 343 ITR 329, the Hon'ble Delhi High Court held as follows:-*

*"16. Thus, in cases of wrong opinion or finding on merits, the CIT has to come to the conclusion and himself decide that the order is erroneous, by conducting necessary enquiry, if required and necessary, before the order under Section 263 is passed. In such cases, the order of the Assessing Officer will be erroneous because the order passed is not sustainable in law and the said finding must be recorded. CIT cannot remand the matter to the Assessing Officer to decide whether the*

*findings recorded are erroneous. In cases where there is inadequate enquiry but not lack of enquiry, again the CIT must give and record a finding that the order/inquiry made is erroneous. This can happen if an enquiry and verification is conducted by the CIT and he is able to establish and show the error or mistake made by the Assessing Officer, making the order unsustainable in Law. In some cases possibly though rarely, the CIT can also show and establish that the facts on record or inferences drawn from facts on record per se justified and mandated further enquiry or investigation but the Assessing Officer had erroneously not undertaken the same. However, the said finding must be clear, unambiguous and not debatable. The matter cannot be remitted for a fresh decision to the Assessing Officer to conduct further enquiries without a finding that the order is erroneous. Finding that the order is erroneous is a condition or requirement which must be satisfied for exercise of jurisdiction under Section 263 of the Act. In such matters, to remand the matter/issue to the Assessing Officer would imply and mean the CIT has not examined and decided whether or not the order is erroneous but has directed the Assessing Officer to decide the aspect/question.*

**17.** *This distinction must be kept in mind by the CIT while exercising jurisdiction under Section 263 of the Act and in the absence of the finding that the order is erroneous and prejudicial to the interest of Revenue, exercise of jurisdiction under the said section is not sustainable. In most cases of alleged "inadequate investigation", it will be difficult to hold that the order of the Assessing Officer, who had conducted enquiries and had acted as an investigator, is erroneous, without CIT conducting verification/inquiry. The order of the Assessing Officer may be or may not be wrong. CIT cannot direct reconsideration on this ground but only when the order is erroneous. An order of remit cannot be passed by the CIT to ask the Assessing Officer to decide whether the order was erroneous. This is not permissible. An order is not erroneous, unless the CIT hold and records reasons why it is erroneous. An order will not become erroneous because on remit, the Assessing Officer may decide that the order is erroneous. Therefore CIT must after recording reasons hold that the order is erroneous. The jurisdictional precondition stipulated is that the CIT must come to the conclusion that the order is erroneous and is unsustainable in law. We may notice that the material which the CIT can rely includes not only the record as it stands at the time when the order in question was passed by the Assessing Officer but also the record as it stands at the time of examination by the CIT [see CIT v. Shree Manjunathesware Packing & Products Camphor Works [1998] [231 ITR 53](#) / [98 Taxman 1](#) (SC)]. Nothing bars/prohibits the CIT from collecting and relying upon new/additional material/evidence to show and state that the order of the Assessing Officer is erroneous."(Emphasis ours)*

32. In that view of the matter we do not appreciate the stand taken by the Id. CIT in setting aside the order of the Id.AO for the reasons mentioned hereinabove . In the present facts and circumstances of the case following the decision passed by the Hon'ble Delhi High Court we quash the order passed by the authorities below.

33. In the result ITA No.1704/Kol/2011 and ITA No.1084/Kol/2014 are allowed and the appeal preferred by the revenue being ITA No.1567/Kol/2011 is dismissed.

**Order pronounced in the Court on 26.09.2018.**

Sd/-  
[J.Sudhakar Reddy]  
Accountant Member

Sd/-  
[ Madhumita Roy ]  
Judicial Member

Dated : 26.09.2018.

[RG Sr.PS]

Copy of the order forwarded to:

1. Smt. Madhu Chanda Sirkar, AE-336, Salt Lake City, Sector-I,, Kolkata-700064.
2. DCIT, Circle-50, Kolkata.
3. C.I.T.(A)-XXXII, Kolkata.      4. C.I.T- Kolkata
5. CIT(DR), Kolkata Benches, Kolkata.

True Copy

By order,

Senior Private Secretary  
ITAT Kolkata Benches Kolkata