IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'D', NEW DELHI

Before Sh. Bhavnesh Saini, Judicial Member

Dr. B. R. R. Kumar, Accountant Member

ITA No. 5382/Del./2011 : Asstt. Year : 2008-09

ACIT, Circle 4(1) New Delhi.	Vs	M/s Jagan Automotive Pvt. Ltd., No. 14, DDA Transport Centre, Punjabi Bagh, New Delhi-110026
(APPELLANT)		**(RESPONDENT)**
PAN No. AABCJ7818F		

&

C.O. No.220/Del/2012
(in ITA No. 5382/Del./2011 : Asstt. Year : 2008-09)

M/s Jagan Automotive Pvt. Ltd., No.14, DDA Transport Centre, Punjabi Bagh, New Delhi	Vs	ACIT, Circle-4(1), New Delhi
PAN : AABCJ7818F		
(Appellant)		**(Respondent)**

Assessee by : Sh. C. S. Aggarwal, Sr. Adv.
Revenue by : Sh. Deepak Garg, Sr. DR

Date of Hearing: 15.10.2019		**Date of Pronouncement: 19.12.2019**

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal by the Revenue and Cross Objection by the assessee are directed against order of the ld. CIT (A)-VII, New Delhi dated 29.09.2011.

2. Following grounds have been raised by the revenue:

"1. The order of the Ld. CIT(Appeals) is erroneous and contrary to facts & law.

2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting addition of Rs. 1,95,53,369/- in respect of undisclosed income accepted by

the assessee during the course of survey u/s 133A of the Act on account of unexplained stock found at its premises.

2.1 The Ld. CIT(A) erred in not allowing the Assessing Officer an opportunity to comment on merits after admitting the additional evidence under Rule 46-A despite the fact that in his remand report the Assessing Officer had only objected for admission of additional evidence without foregoing his right to comment on merits once his objection is rejected.

2.2 The Ld. CIT(A) erred in not appreciating the fact that quantity and valuation of stock was duly signed and accepted by the director during the course of survey. No allegation of use of force or coercion has been made by the assessee.

2.3 Ld. CIT(A) erred in not appreciating the fact that the assessee was allowed proper opportunity to explain the stock difference, which it could not do. The correctness of inventory and of revised trading account is not proved or corroborated by independent and material evidence.

2.4 Ld. CIT(A) erred in not appreciating that when statement during the course of survey was made voluntarily and was not alleged to have been obtained under threat or coercion, onus was on the assessee to prove that the said declaration was made under any misconception of facts."

3. In the Cross Objection, following grounds have been raised by the assessee:

"1. That on the facts and in circumstances of the case, the income determined of the assessment year 2010-11 will be entitiled for deduction u/s 10A of the Income Tax Act as the respondent is having a unit in Special Economic Zone and income from such units is exempt for the tax u/s 10A of the Income Tax Act, 1961.

2. That on the facts and in the circumstances of the case, income determined for the year after considering the addition if any will be entitled for deduction u/s 10A of the Income Tax Act, 1961."

Ground No. 2

4. The facts of the case, in brief are that the assessee M/s. Jagan Automotive Pvt. Ltd. is engaged in the business of manufacturing and trading of auto parts. A survey operation under section 133A of the

Income Tax Act, 1961 was conducted on 19.03.2008. In response to notice u/s 143(2) & 142(1) of the Act, the assessee filed the return of income of Rs. 85,90,617/- on 28.09.2008. The Assessing Officer made addition on account of undisclosed income of Rs.1,95,53,369/-.

5. During the course of survey, physical inventory of stock was taken and valuation of the same was done on the basis of rates given by the Director of the assessee company and with the help of the employees of the assessee company, by the authorised officer at the business, premises of the assessee at 14, DDA Transport Centre, Rohtak Road, Punjabi Bagh, New Delhi and SDF - 11 - Noida, Special Economic Zone. The stock found at the business premises was valued at Rs.2,09,14,578/- and Rs.80,74,007/- respectively aggregating to Rs.2,89,88,585/-. The Director and the employees of the assessee company under his dated signature certified the inventory of the stock and its valuation. On the basis of books of accounts as on date of survey, a trading account was drawn which was certified by the Director of the assessee company under his signature. As per this trading account, the value of the closing stock was disclosed at Rs.22,88,567/- as against the value of the stock found on the day of survey at Rs.2,89,98,585/-. On being questioned about the source of investment in excess stock of Rs.2,67,00,018/-, the Director of assessee company declared the value of the excess stock as additional income of the assessee company in the year under consideration.

6. Further, during the course of survey, cash amounting to Rs. 17,57,300/- was also found at the premises. A balance of Rs.3,58,397/- was reflected in the cash-book of the assessee company on the date on survey. When questioned about the discrepancy in the cash found at the premises and the cash balance as reflected in the cashbook, the director of assessee company declared unexplained cash amounting to Rs.13,98,903/- as additional income of the assessee company in the year under consideration.

7. The relevant portion of the statement of Shri Suraj Prakash Aggarwal, Director of the assessee company recorded on 19.03.2003 during the course of survey under section 133A is as under:-

"Q 10. Please confirm that all the entries upto date are complete in the books of both the companies. ?

Ans. I confirm that all the entries are entered in the books of both the companies.

Q 11. Please confirm whether all the purchase bills have been received and entered in the books of both the companies of the goods received till date and all the same bills have been issued for the sales made by both the companies till date ?

Ans. I have verified from my records that there is no purchase bill pending to be entered for which goods have been received. Further, after verifying my records of the company I confirm that there is no sale bill pending to be issued for the sale made till dated in the both the above mentioned companies.

"Q.12 You have submitted copy of cash books of both the companies. As per cash books of Jagan Lamps Limited, the cash physically available should be Rs.2,23,533/- and Jagan Automotive Pvt. Ltd. should be Rs. 1,34,864/-. The total comes to Rs.3,58,387/- whereas the total cash found during the survey at this premises which is also certified by you is Rs. 17,57,300/-. Please explain the difference of Rs. 13,98,903/-?

Ans. After verifying my records and physical cash available at my premises, I, confirm that there is excess cash of Rs.13,98,903/- available in the premises. I am unable to substantiate the excess cash of Rs.13,98,903/- but I want to state that the cash belongs to Jagan Automotive Pvt. Ltd. which Is the earning of the company during the current financial year from its unaccounted business activities.

Q. 13 During the survey operation at 14DDA, Transport Centre, Punjabi Bagh, New Delhi inventory of physical stock was prepared in your presence. The same has been valued at Rs. 2,09,14,578/- as per the purchase bills produced by the you and certified to be correct by you. Further, survey operation at SDF No. H-11, Noida, SEZ, UP

inventory of physical stock was taken in the presence of Sh. Ashish Aggarwal, (Director) and has been valued at Rs.80,74,007/- as per the details provided by him and certified to be correct by him. However, as per trading account as on 19.03.2008 of the company submitted by you, the total closing stock is Rs.22,88,567/-. Please explain the difference of Rs.2,67,00,018/- in the physical stock as compared to closing stock in the trading account. Please explain the difference in the stock position?

Ans. *After examining my books of accounts / records, I confirm that there is a difference of stock valuing to Rs. 2,67,00,018/-. I am unable to give any explanation in this regard.*

Q. 14 *Please state what is the source of this stock?*

Ans. *The source of this stock of Rs.2,67,00,018/- is business earning of M/s Jagan Automotive Pvt. Ltd. during the current financial year i.e. 2007-08 which was not recorded in the books of accounts of the company. From this earning, this stock was created.*

Q.15 *Please State I confirm that the stock belongs to Jagan Automotive Pvt. Ltd. only and not to any other company or entity?*

Ans. *I confirm that the above mentioned stock belongs to Jagan Automotive Pvt. Ltd. only and I want to clarify that the stock of Jagan Lamps Ltd. is kept at Piao Maniyari Road, Kundli, District Sonepat, Haryana.*

Q.16 *In response to question no. 12, you have stated that the excess cash of Rs. 13,98,903/- found at the premises is unaccounted and further in response to question no. 13 & 14, you have stated that the stock of Rs.2,67,00,018/- is unaccounted and earned from the business activities of the company. So it is dear from the above that the income of Rs.13,98,903/- and Rs.2,67,00,018/- has not been reflected in the books of accounts and no tax has been paid on this income. Please state why this income of Rs.2,80,98,921/- should not be treated as undisclosed income of the company over and above its regular income and the company may not be treated as assessee is default.*

Ans. *I accept that this income of Rs.2,80,98,921/- is unaccounted income of the company and the company should not be treated as assessee in default as I on behalf of the company is ready to pay the due taxes on it with interest.*

Q.17 *Please state how do you purpose to discharge your tax liability in this regard?*

Ans. *The tax plus interest on the above amounts comes to Rs. 1,00,00,000/- (approximate). I wish to discharge my tax liability by submitting these cheques as detailed below: -*

1. American Express Bank No.000154 Rs.30,00,000/-
2. American Express Bank No.000155 Rs.35,00,000/-
3. American Express Bank No.000156 Rs.35,00,000/-

I am offering this amount of income tax as my additional income over and above the regular income during the current financial year i.e. 2008- 09 with the condition that, no penalty will be initiated or prosecution will be launched on any of the Directors' or on the company.

We have given the above statements voluntarily without any threat fear, coercion. I have read over the above statement and found it to be correctly recorded.

Signed
(Suraj Prakash Aggarwal)

8. The statement of Sh. Suraj Prakash Aggarwal, Director was again recorded on oath under section 131 on 24.03.2008 in the office by ITO, Ward 4(1), New Delhi. The same is reproduced as under: -

"Statement of Sh. Suraj Prakash Aggarwa! S/o Sh. J. N. Aggarwal R/o 90, Arihant Nagar, New Delhi - 110026 recorded on oath under u/sec. 131 on 24.03.2008 in the case of M/s. Jagan Automotive Pvt. Ltd.

Q.1 *Please Identify yourself ?*

Ans. I am Suraj Prakash Aggarwa! S/o Sh. J. N. Agganwal R/o 90, Arihant Nagar, New Delhi.

Q.2 Please give your income Tax particulars including PAN.

Ans. My PAN - AACPA0070E Is and I am filing my Income Tax return in ward 46(3), New Delhi regularly.

Q.3 During the course of survey u/sec. 133A of the Income Tax Act, 1961 on 19.03.2008 at the business premises of M/s. Jagan Automotives Pvt. Ltd, excess cash of Rs.13,98,903/- and excess stock of Rs.2,67,00,018/- as compare to the books of accounts of the company was found. These amounts totaling to Rs.2,80,98,921/- was offered to tax by you as additional income during the current financial year on behalf of the company 3no you have submitted three cheques totaling to Rs.1,00,00,000/- toward the payment of taxes and interest on the above mentioned additional income. Please confirm the same.

Ans. I confirm that during the survey u/sec. 133A of the income Tax Act, 1961 on 19.03.2008 at the business premises of M/s. Jagan Automtoives Pvt. Ltd. excess cash of Rs.13,98,903/- and excess stock or Rs.2,67,00,018/- as compare to the books of accounts of the company was found. These amounts totaling to Rs.2,80,98,921/- was offered to tax as additional Income during the current financial year on behalf of the company and three cheques totaling to Rs.1,00,00,000/- were submitted toward me payment of taxes and interest on the above mentioned additional income. Further, I want to state that I will deposit the due taxes before due date of filing of return.

Q.4 Do you want to state any this else.

Ans. No

The above statement has been given by me without any threat, coercion or inducement and it is true to the best of my knowledge. I have read the above noted statement and it is correctly recorded.

Signed
(Suraj Prakash Aggarwal)

9. During the course of survey trading account for Jagan Automotive Pvt. Ltd. (NOIDA) from 01.04.2007 to 19.03.2008 was drawn as under: -

Trading Account

Particulars	*Amounts*	*Particular*	*Amount*
Opening stock	*1484860.00*	*Sales*	*16422043.00*
Purchases	*1689709.00*	*Closing stock*	*2288567.00*
Gross Profit	*328441.00*		
	18710610.00		*18710610.00*

10. Subsequently, the assessee company filed return of income on 30.03.2008 wherein the gross income from business and profession was declared at Rs.3,30,767/- which was claimed to be exempt. However, the assessee declared other Income amounting to Rs.85,90,617/- which included interest income of Rs.45,065 and income from other sources Rs.85,45,552/-. After submitting the return of income, the assessee submitted a letter dated 29.09.2010 which was received in the office of the Assessing Officer on 30.09.2010. The contents of the letter are as under:-

> "*Our company is exporting Auto Bulbs to various countries. The unit is situated inside the special Economic Zone in Noida. All the units located inside the Special Economic Zone, NSEZ, are under the Control of Customs Authorities. Any material coming inside the Zone and going outside the Zone is physically checked and entrees are made in the Register made by the customs at the Gats of Special Economic Zone.*
>
> *During the course of survey a Stock inventory was prepared by the Team both at our office located at Punjabi Bagh & at the unit premises at SDF No. H-11, Noida Special Economic Zone, NOIDA which is located inside the zone. We were not in the mental condition to physically check and verify either the stock inventory or the rate at which the calculation has been made. We signed all the documents which were directed to sign. Each and every imports and Exports are authenticated by the Customs Authorities with their signatures on the Register maintained by the Unit.*
>
> *On physical verification of the Stock as compared to the inventory made by the department's team. It has been found that the items from S. No. 1 to 60 are correct where as the items from S. No. 61 to 67 are hypothetical. It is also*

apparent from the Stock List that the item quantifies which were running in thousands and in Odd Numbers suddenly becomes in Lacks and in even Numbers which is an apparent mistake while recording the stock inventory. No document has been found during the survey which confirms that we have purchased these goods from local market. These facts were intimated earlier also as per out letter dated 26.03.2008. The value of the stock inventory taken at SDF No. H-11, NSEZ has been calculated as US$ 201857.00 which is in actual is of US$ 107643.00 due to the mistake as explained above.

The amount of closing stock as per the inventory taken by your goodself on 19/03/2008 if calculated & comes to Rs. 4261143.75 whereas the same was considered at Rs.2288587.00 in the trading account furnished to your good self though the stock is carried forward and we had made the correct amount in the dosing stock while computing the income for the year ended as on 31/03/2008.

The price per unit of the Stock inventory noted by the team at Punjabi Bagh Office was on ad-hoc basis which are even higher than the prevailing retail price. There was no document found during Survey that we had purchased the goods from local market. The rates has to be calculated at the import Price + Freight + Custom Duty and accordingly declared in the return.

It is humbly prayed that the return filed may kindly be accepted and assessment order be passed or further relief to be assesses, as this Hon'ble office may deem fit and proper in the circumstances of the case."

11. During the course of assessment proceedings, the assessee company was asked to reconcile the difference between disclosure of unexplained investment / cash made during the course of survey under section 133A and income declared in the return of income. In response, the assessee company has made submissions which as under:-

"A survey u/s 133A was conducted at the business premises of the assessee on 19.03.2008. During the course of survey a sum of Rs.2,80,98,921/- was offered to tax as additional income on account of the following:-

- Excess Cash - as compared to balance as per books of account 13,98,903

- Excess Stock 2,67,00,018
2,80,98,921

The working of excess stock determined was as under: -

- Stock at Noida Rs.2,09,14,578
- Stock at Delhi Rs. 80,74,007
Rs. 2,89,88,585

Stock as per G.P. Rate of 2% Rs. 22,88,567
Excess Stock Rs. 2,67,00,018

Subsequent to the said operations, the assessee company its objection to the above figures of 'excess stock' as per letters dated 26th March, 2008 and 29th September, 2008. In the said letters the assessee company submitted the exact figures about the excess stock and accordingly, declared following as 'Income from Other Sources' in the income tax return filed for the assessment year 2008-09.

- Excess Cash 13,98,903
- Excess Stock 71,47,249
85,46,152

The reasons for discrepancies in the statement drawn at the time of survey can be summarized as under: -

1) Delhi Stock - Rates adopted by the Survey team in respect of the Goods found were unreasonably high.

- The Stock at Delhi was determined at Rs.2,09,14,578/- as against the figure of Rs.71,47,249/- as per rates prevalent.

2) Noida Stock - Excess Stock taken as explained in para 2 and 3 of letter dated 29.09.2008.

There was no excess stock at that premises.

3) In order to work out the excess stock, a trading account was prepared at the time of survey. In the said trading account Gross Profit rate has been taken at an ad-hoc percentage of 2%. The Gross Profit earned by the assessee company is 9.13% as per the audited accounts of the company for the year ended 31.03.2008. The same has resulted determination of excess to the extent of 24 lacs, details enclosed."

12. During the course of assessment proceedings, the assessee company further submitted as under: -

"*in continuation to our letter dated 20.11.2010 regarding the assessment proceedings in the case. We further submit as under:-*

STOCKS AT DELHI: *In support of the rates adopted gor the valuation of stocks held as on 19.03.2008, we are enclosing herewith the quotations obtained by the assesses from its customers. The rates have been adopted as prevalent as on that date indicated by the customers.*

STOCK AT NOIDA: *The reasons for stock difference as on the date of survey has already been explained as per letter dated 26th March, 2008 and 29th September, 2008.*

The operations inside the special Economic Zone (NEPZ) are fully maintained by the customs authorities. Materials coming in and going out are fully checked and monitored at the gate of custom offices. Intact, register of receipt and dispatch of materials at the unit are authenticated by the customs. We are enclosing herewith the material receipt register, materials dispatch register and stock register in support thereof.

It can be observed that the items listed at Items no.1 to 60 are correct and fully reconciled with fie stock register maintained. Items listed at serial No.

61 to 67 are hypothetical and is apparent that though items no. 1 to 60 are running in thousands and are in odd numbers however items serial no. 61 to 67 are in lacs and is totally errorness. There was no excess stock at NOIDA factory at the time of survey. The stock is fully reconciled."

13. The Assessing Officer mentioned that in the instant case, the statement of Director of the assessee company was recorded on 19.03.2004 and the assessee filed its return on 28.09.2008 and the letter to explain its stand was filed on 30.09.2008.

14. The trading account during the course of survey was made on the basis of physical verification of stock and its valuation was made with the help of Director of the assessee company who provided the rates for stock valuation on the day of survey and the valuation was duly accepted by the assessee. Further, the Director of the assessee company did not dispute the valuation of stock during the course survey.

15. The Assessing Officer also observed that the Director of the assessee company did not allege threat or coercion during the course of recording of his statement at the time of survey under section 133A and in the office of ITO, Ward 4(1), New Delhi on 24.03.2008. The director of the assessee company had himself admitted undisclosed income in the statement recorded during the course of survey under section 133A as well as in the office of Income Tax Officer, Ward 4(1), New Delhi and also the company has itself declared other income in its return of Income. It was held that this conclusively proves that the assessee was making sales which were not recorded in the books of account and was therefore, generating unaccounted income. The assessee's contention that hypothetical stock was recorded during the course of survey under section 133A is untenable and unverifiable as the stock inventory was certified by

the Director of company and was not disputed during the course of survey or later when his statement was recorded in office.

16. The Assessing Officer held that the confession need not be ruled out merely because it was retracted. The confessions are to be considered as a whole and not in any edited form. Corroborations may invariably be required where there is retraction. Even retracted confession was held to be binding, reference may be made to the case of Surjit Singh Chhabra (1997) ISCC 508, 509 (SC) wherein petitioner retracted his confession given to the customs officials, yet it was held to be binding. The Indian law on confession can be understood from the following passage in a decision under criminal law in State of UP. V. Boota Singh, AIR 1978 SC 1770. It was held that

> *"As, however, the confession was a retracted one it could be acted upon only if substantially corroborated by independent circumstances. It is not necessary that a retracted confession should be corroborated in each material particular; it is sufficient that there is a general corroboration of the important incidents mentioned in the confession."*

17. The Hon'ble Kerala High Court in Mahesh B Shah Vs ACIT (1999) 238 ITR 130 and the Hon'ble Gauhati High Court in Greenview Restaurant Vs ACIT (2003) 263 ITR 169, examining the similar issue has observed as under:

> *"The petitioner has agreed to treat the expenditure as a capital expenditure both before the Assistant Commissioner of Income-tax as well as before the revisional authority. No evidence of material is furnished to show that the petitioner was coerced to make a statement. Nothing prevented the petitioner to retract the same. The allegation of compulsion or coercion cannot be accepted on a mere statement, it is too late in the day to claim any compulsion. The present stand is nothing but an afterthought self-serving and appears to have been made to suit the convenience. The petitioner himself has signed it on March 13, 1995. Therefore, it will not be permissible to allow the petitioner to go back on his own stand before the authorities below. Such a stand is permissible and will not go against any law."*

b) Greenview Restaurant Vs ACIT (supra) - "That the Assessing Officer recorded the statement on September 23, 1993, in the presence of two witnesses. The retraction of the statement came only on December 24, 1993, followed by a reiteration on the pari of the assessee on February 20, 1995, in the course of assessment proceedings. There was a delay on the part of the assessee and its Director in retracting the statement recorded. There was no material on record to establish that any attempt was made on behalf of the assessee to prove the allegation of inducement, threat or coercion through the witnesses. Thus, the contention advanced by the assessee on this count was liable to be dismissed."

18. It was held by the revenue that the ratio-decidendi of the above-mentioned cases are squarely applicable to the assessee's case because of similar facts and circumstances.

19. The Assessing Officer held that in this case, the admission of undisclosed income of Rs.2,67,00,018/- was corroborated with independent evidence in the form of inventory of excess stock found during the course of survey whereas substituted facts mentioned in retraction were found untenable as discussed above.

20. In the instant case, during the course of survey u/s 133A, cash amounting to Rs.17,57,300/- was also found at the premises. A balance of Rs.3,58,397/- was reflected in the cash-book of the assessee company on the date on survey. When questioned about the discrepancy in the cash found at the premises and the cash balance as reflected in the cashbook, the Director of assessee company declared unexplained cash amounting to Rs.13,98,903/- as additional income of the assessee company in the year under consideration. The assessee has treated the unexplained cash amounting to Rs.13,98,903/- as income from other sources. There is no dispute on the disclosure of cash.

21. The Assessing Officer relied on the judgment in the case of CIT Vs M Ganapati Mudaliar (1964) 53 ITR 623, Hon'ble Supreme Court had held in

no uncertain terms that "Once it is found that a receipt by the assessee was income of the assessee, it is not necessary for the revenue to locate its exact source".

22. Pursuant to the above discussion, an amount of Rs.2,67,00,018/- is treated as unexplained investment in stock u/s 69 and an amount of Rs. 13,98,903/- is treated as unexplained cash u/s 69A and treated as income from undisclosed sources and assessed under the head Income from undisclosed sources by the revenue.

23. The ld. CIT (A) deleted the addition on the grounds that the stock was valued at higher rates instead of market value and the stock shown at Noida is a hypothetical figure. It was also held that the GP rate adopted for working the excess stock was erroneously taken at 2% instead of 9%. He also relied on the judgment of jurisdictional High Court in the case of Dhingra Metal Works 328 ITR 384 wherein it was held that additions made based on the statement recorded during the survey is not a conclusive proof and the assessee's explanation regarding the discrepancy in stock by production of relevant record needs to be considered.

24. Aggrieved the revenue filed before us.

25. Before us during the arguments, the ld. DR argued that the assessment is not solely based on the statement of the assessee but it was based on the discrepancy of the stock found out during the time of the survey. He also argued that the Directors have twice, once at the time of survey on 19.03.2008 has accepted the unaccounted income of the company and also on 24.03.2008 by the statement recorded u/s 131 of the Income Tax Act, 1961, the same has been affirmed. He also took us to the inventory prepared at the time of survey, at the premises of the assessee wherein the inventory duly certified by the personnel of the company. He strongly opposed to the letter of retraction filed at page no. 70 of the paper book.

26. The ld. AR relied on the judgments filed along with submissions on the proposition that no assessing authority can ignore the retraction and proceed with the assessment on the basis of surrender made at the time of search ignoring the retraction made and furthermore corroboration through an independent source is a prerequisite to make addition. He also relied on the case laws which held that the admission cannot be the foundation of assessment, admission may be an important piece of evidence but it cannot be held to be conclusive which also flows to the proposition that surrender by itself cannot be a foundation for assessment. The ld. AR took us through the statement of Sh. Suraj Prakash Aggarwal recorded on 19.03.2008 and on 24.03.2008 and also to the statement of Sh. Pankaj Tiwari, Supervisor recorded on 19.03.2008. He argued based on the inventory of stock at Noida as well as Punjabi Bagh, New Delhi. All the facts have been explained details by the ld. AR along with the balance sheets, tax audit report and report u/s 10AA of the Income Tax Act. It was also argued that at the time of recording the statement neither the inventory was verified by the assessee nor the value thereof and whatever inventoried by the revenue was on the basis of misconception and the offer of the additional income was at the instance of revenue.

27. Heard the arguments of both the parties and perused the material available on record.

28. The survey has been conducted at two premises of the assessee namely SEZ Noida and Transport Centre, Rohtak Road, Punjabi Bagh. The value of the Noida stock was estimated at Rs.80,74,007/- and the value at Delhi was Rs.2,09,14,598/-. The assessee has offered to tax an amount of Rs.13,98,903/- the excess cash found during the survey and also an amount of Rs.71,47,249/- as the value of the excess stock found during the survey at Punjabi Bagh instead of Rs.2,67,00,018/-.The main dispute of the issue:

29. The assessee has retracted the statement vide letter dated 26.03.2008. With regard to the letter of retraction, we find that this letter has not been referred anywhere during the proceeding either before the Assessing Officer or the ld. CIT (A). The very veracity of the filing of the letter has been strongly contended by the ld. DR. We have gone through the material on record and find that there is no iota of the mention of this letter either during the proceedings before the Assessing Officer or during the proceedings before the ld. CIT (A). It do finds mention at page no. 8 of the assessment order wherein the letter was mentioned while reconciling the stock position. The survey was conducted on 19.03.2008 and after completion of the survey, the statement of the Director, Sh. Suraj Prakash Aggarwal was recorded on 24.03.2008 wherein the Director of the assessee company after examining the inventory prepared during the course of survey surrendered an additional income of Rs.2,80,98,921/-. The statement of Sh. Ashish Aggarwal recorded on 19.03.2008 confirms inventorisation of the stock of value of Rs.80,74,007/-. The stock at Noida has been prepared in the presence of the Director and Supervisor of Sh. Pankaj Tiwari has been a part of paper book at page no. 53 to 62. Hence, no credence can be given to the arguments of the ld. AR that there has been retraction on 26.03.2008 inspite of the fact that there have been statements recorded on 19.03.2008 and 24.03.2008 with regard to the stock statement prepared at the premises. The retraction, if any, has to be based on the records and with proper documentary evidences which prove that the documents based on which the disclosure or the additional income has been offered were faulty.

30. The second issue pertains to the stock is that the stock at item no. 62 to 67 at page no. 61 has been grossly inflated. We find that even the items at serial no. 17, 27, 44, 47 & 56 are also in whole numbers and the stock statement does not give any indication of interpolation of stock figures. Hence, the argument that the stock has been wrongly taken

cannot be accepted. The contention of the assessee that hypothetical stock shown at the inventory at Noida cannot be accepted as the stock taking is the physical activity undertaken by going through the entire stock founded the premises. Similarly, a dispute arose about the opening and closing stock taken by the department which varies as per the accounts filed with the department. The assessee's contention that the stock determined taking GP rate at 2% is also considered. The assessee has taken another argument, the stock has been inventorised and the price has been determined at MRP i.e. the tag price. It was explained that while the cost price is Rs.71,47,249/-.

31. The inventory of the stock found during the survey operation at Transport Centre, New Delhi is as under:(page no. 62 of the paper book)

S.No.	ITEM	QTY	RATE	AMOUNT
1	H4 12V 100/90 W	200000	34	6800000.00
2	H4 12V 100/90 CP	289159	35	10120598.00
3	H4 24V 100/90 W	30000	43	1290000.00
4	H3 12V 55 W	80000	13	1040000.00
5	H3 24V 70 W	60000	21	1260000.00
6	H4 12V 60/55 W	5000	28	140000.00
7	H4 24V 75/70 W	2000	42	84000.00
8	12V 60/50 W	20000	9	180000.00
				20914598.00

32. The inventory filed by the assessee during the assessment proceedings is as under:(page 76 of the paper book)

S. No.	*ITEM*	*OTY*	*RATE IN US$*	*RATE IN DNR*	*FREIGHT*	*CUSTOM CLEARANCE*	*CUSTOM DUTY*	*LANDED COST*	*AMOUNT*
	(Automobile Bulb)				*4.50%*	*0.25%*	*34.13%*		
1	*H4 12V 100/90 W*	*200000*	*0.22*	*8.756*	*0.39*	*0.023*	*3.13*	*12.304*	*2460720.83*
2	*H4 12V 100/90 CP*	*289159*	*0.18*	*7.164*	*0.32*	*0.019*	*2.56*	*10.067*	*2910843.71*
3	*H4 24V 100/90 W*	*30000*	*0.24*	*9.552*	*0.43*	*0.025*	*3.42*	*13.422*	*402663.41*
4	*H3 12V 55W*	*80000*	*0.14*	*5.572*	*0.25*	*0.015*	*1.99*	*7.83*	*626365.30*
5	*H3 24V 70W*	*60000*	*0.15*	*5.970*	*0.27*	*0.016*	*2.13*	*8.389*	*503329.26*
6	*H4 12V 60/55 W*	*5000*	*0.18*	*7.164*	*0.32*	*0.019*	*2.56*	*10.077*	*50383.61*
7	*H4 24V 75/70 W*	*2000*	*0.225*	*8.955*	*0.40*	*0.023*	*3.20*	*12.583*	*25166.46*
8	*12V 60/50 W*	*20000*	*0.15*	*5.970*	*0.27*	*0.016*	*2.13*	*8.389*	*167776.42*
									7147249.00

33. The ld. CIT (A) after obtaining the remand report held as under:

"It is not in dispute that a survey operation was conducted u/s 133A of the Act t the business premises of the assessee company on 19.03.2008 and physical inventory of stock was taken, the valuation of which was done on the basis of the rates of the different items given by the Director of the assessee company and with the help of the employees of the company. The value of stock found at the business premises located at Punjabi Bagh, New Delhi and Noida special Economic Zone was found to the extent of Rs.2,09,14,578/- and Rs.80,74,007/- respectively aggregating to Rs.2,89,88,585/-. On the other hand, as per the trading account drawn on the basis of the books of accounts on the date of survey, the value of the closing stock was disclosed that Rs.22,88,567/- which led to the surrender on the part of the assessee as additional income on account of excess stock of Rs.2,67,00,018/-. Apart from that, excess cash of Rs.13,98,903/- was also offered to tax. However, the assessee company filed its objection to the above figures of 'excess stock' as per letters dated 26.03.2008 (exactly after 7 days from the date of survey) and then on 29.09.2008. In the said letters the assessee company submitted the exact figures about the excess stock and accordingly declared an amount of Rs.71,47,249/- on account of excess stock instead of Rs.2,67,99,018/- surrendered on the date of survey. There was no change in the amount of Rs.13,98,903/- on account of excess cash offered to tax on the date of survey. Accordingly, an amount of Rs.85,46,152/- was offered to tax under the head 'Income from Other Sources' in the income tax return filed for the assessment year under appeal. As regards the difference in stock valued at the time of survey, and declared in the income-tax return filed by the appellant, the appellant submitted the reasons thereof alongwith the documentary evidences.

……..

2. In my considered opinion, the above explanation of the assessee appears to be plausible. The Assessing Officer has simply rejected the explanation of the assessee merely n the ground that valuation was accepted by the assessee before the survey party and difference was offered from taxation. In my opinion, if the assessee can demonstrate that valuation adopted by the survey party was wrong with reference to the materials on record, then addition cannot be justified merely on the ground that it was offered for taxation. Though, the

admission of the assessee is piece of evidence but the assessee can demonstrate that admission was wrong. In the present case, the assessee has been able to demonstrate that it is a case of overvaluation. In this context, reliance is placed on the decision of the jurisdictional High Court in CIT Vs Dhingra Metal Works (2010) 328 ITR 384 (Del.).”

34. Since, the material facts remain same, in the absence of any other new material brought to our notice, we hereby decline to interfere with the order of the ld. CIT (A).

35. Ground No. 2.1 relates to admission of additional evidences under Rules 46A. The ld. CIT (A) has rightly called for the report of the Assessing Officer for the comments. We find that the Assessing Officer submitted in the remand report that the submissions of the assessee made on 27.11.2010 were examined, considered and however not found acceptable. The Assessing Officer further replied that the submissions before the ld. CIT (A) are mere reiteration of the submissions made at the time of assessment. Thus, we find a conflict of opinions expressed by the revenue by holding that the submissions are only reiteration of earlier submissions and having grievance for allowing them under Rule 46A by the ld. CIT (A). We also find that the ld. CIT (A) has given adequate reasons for admitting the additional evidences at para no. 3 of the order which we find appropriate and need not be interfere with. Hence, the appeal of the revenue on this ground is dismissed.

36. Ground Nos. 2.2, 2.3 & 2.4 are inter-related and stands dealt while dealing with the ground no. 2 above.

37. The CO relates to allowing the entitlement of deduction u/s 10A of the Act on the higher profits determined owing to the survey operation in a concern having unit at SEZ. The provisions of Section 10A are as under:

“10A. (1) Subject to the provisions of this section, a deduction of such profits and gains as are derived by an undertaking from the export of articles or things or computer software for a period of ten consecutive assessment years beginning with the

assessment year relevant to the previous year in which the undertaking begins to manufacture or produce such articles or things or computer software, as the case may be, shall be allowed from the total income63 of the assessee :

Provided that where in computing the total income of the undertaking for any assessment year, its profits and gains had not been included by application of the provisions of this section as it stood immediately before its substitution by the Finance Act, 2000, the undertaking shall be entitled to deduction referred to in this sub-section only for the unexpired period of the aforesaid ten consecutive assessment years :

Provided further that where an undertaking initially located in any free trade zone or export processing zone is subsequently located in a special economic zone by reason of conversion of such free trade zone or export processing zone into a special economic zone, the period of ten consecutive assessment years referred to in this sub-section shall be reckoned from the assessment year relevant to the previous year in which the [undertaking began to manufacture or produce such articles or things or computer software] in such free trade zone or export processing zone :

[Provided also that for the assessment year beginning on the 1st day of April, 2003, the deduction under this sub-section shall be ninety per cent of the profits and gains derived by an undertaking from the export of such articles or things or computer software :]

Provided also that no deduction under this section shall be allowed to any undertaking for the assessment year beginning on the 1st day of April, [2012] and subsequent years.

[(1A) Notwithstanding anything contained in sub-section (1), the deduction, in computing the total income of an undertaking, which begins to manufacture or produce articles or things or computer software during the previous year relevant to any assessment year commencing on or after the 1st day of April, 2003, in any special economic zone, shall be,—

(i) hundred per cent of profits and gains derived from the export of such articles or things or computer software for a period of five consecutive assessment years beginning with the assessment year relevant to the previous year in which the undertaking begins to manufacture or produce such articles or things or computer software, as the case may be, and

thereafter, fifty per cent of such profits and gains for further two consecutive assessment years, and thereafter;

(ii) for the next three consecutive assessment years, so much of the amount not exceeding fifty per cent of the profit as is debited to the profit and loss account of the previous year in respect of which the deduction is to be allowed and credited to a reserve account (to be called the "Special Economic Zone Re-investment Allowance Reserve Account") to be created and utilised for the purposes of the business of the assessee in the manner laid down in sub-section (1B) :

[Provided that no deduction under this section shall be allowed to an assessee who does not furnish a return of his income on or before the due date specified under sub-section (1) of section 139.]

(1B) The deduction under clause (ii) of sub-section (1A) shall be allowed only if the following conditions are fulfilled, namely:—

(a) the amount credited to the Special Economic Zone Re-investment Allowance Reserve Account is to be utilised—

(i) for the purposes of acquiring new machinery or plant which is first put to use before the expiry of a period of three years next following the previous year in which the reserve was created; and

(ii) until the acquisition of new machinery or plant as aforesaid, for the purposes of the business of the undertaking other than for distribution by way of dividends or profits or for remittance outside India as profits or for the creation of any asset outside India;

(b) the particulars, as may be prescribed69 in this behalf, have been furnished by the assessee in respect of new machinery or plant along with the return of income for the assessment year relevant to the previous year in which such plant or machinery was first put to use.

(1C) Where any amount credited to the Special Economic Zone Re-investment Allowance Reserve Account under clause (ii) of sub-section (1A),—

(a) has been utilised for any purpose other than those referred to in sub-section (1B), the amount so utilised; or

(b) has not been utilised before the expiry of the period specified in sub-clause (i) of clause (a) of sub-section (1B), the amount not so utilised, shall be deemed to be the profits,—

(i) in a case referred to in clause (a), in the year in which the amount was so utilised; or

(ii) in a case referred to in clause (b), in the year immediately following the period of three years specified in sub-clause (i) of clause (a) of sub-section (1B), and shall be charged to tax accordingly.]

(2) This section applies to any undertaking which fulfils all the following conditions, namely :—

(i) it has begun or begins to manufacture or produce articles or things or computer software during the previous year relevant to the assessment year—

(a) commencing on or after the 1st day of April, 1981, in any free trade zone; or

(b) commencing on or after the 1st day of April, 1994, in any electronic hardware technology park, or, as the case may be, software technology park;

(c) commencing on or after the 1st day of April, 2001 in any special economic zone;

(ii) it is not formed by the splitting up, or the reconstruction, of a business already in existence :

Provided that this condition shall not apply in respect of any undertaking which is formed as a result of the re-establishment, reconstruction or revival by the assessee of the business of any such undertakings as is referred to in section 33B, in the circumstances and within the period specified in that section;

(iii) it is not formed by the transfer to a new business of machinery or plant previously used for any purpose.

Explanation.—The provisions of Explanation 1 and Explanation 2 to sub-section (2) of section 80-I shall apply for the purposes of clause (iii) of this sub-section as they apply for the purposes of clause (ii) of that sub-section.

(3) This section applies to the undertaking, if the sale proceeds of articles or things or computer software exported out of India

are received in, or brought into, India by the assessee in convertible foreign exchange, within a period of six months from the end of the previous year or, within such further period as the competent authority may allow in this behalf.

Explanation 1.—For the purposes of this sub-section, the expression "competent authority" means the Reserve Bank of India or such other authority as is authorised under any law for the time being in force for regulating payments and dealings in foreign exchange.

Explanation 2.—The sale proceeds referred to in this sub-section shall be deemed to have been received in India where such sale proceeds are credited to a separate account maintained for the purpose by the assessee with any bank outside India with the approval of the Reserve Bank of India.

[(4) For the purposes of [sub-sections (1) and (1A)], the profits derived from export of articles or things or computer software shall be the amount which bears to the profits of the business of the undertaking, the same proportion as the export turnover in respect of such articles or things or computer software bears to the total turnover of the business carried on by the undertaking.]

(5) The deduction under [this section] shall not be admissible for any assessment year beginning on or after the 1st day of April, 2001, unless the assessee furnishes in the prescribed form73, along with the return of income, the report of an accountant, as defined in the Explanation below sub-section (2) of section 288, certifying that the deduction has been correctly claimed in accordance with the provisions of this section.

(6) Notwithstanding anything contained in any other provision of this Act, in computing the total income of the assessee of the previous year relevant to the assessment year immediately succeeding the last of the relevant assessment years, or of any previous year, relevant to any subsequent assessment year,—

(i) section 32, section 32A, section 33, section 35 and clause (ix) of sub-section (1) of section 36 shall apply as if every allowance or deduction referred to therein and relating to or allowable for any of the relevant assessment years [ending before the 1st day of April, 2001], in relation to any building, machinery, plant or furniture used for the purposes of the business of the undertaking in the previous year relevant to such assessment year or any expenditure incurred for the purposes of such business in such previous year had been

given full effect to for that assessment year itself and accordingly sub-section (2) of section 32, clause (ii) of sub-section (3) of section 32A, clause (ii) of sub-section (2) of section 33, sub-section (4) of section 35 or the second proviso to clause (ix) of sub-section (1) of section 36, as the case may be, shall not apply in relation to any such allowance or deduction;

(ii) no loss referred to in sub-section (1) of section 72 or sub-section (1) or sub-section (3) of section 74, in so far as such loss relates to the business of the undertaking, shall be carried forward or set off where such loss relates to any of the relevant assessment years 74[ending before the 1st day of April, 2001];

(iii) no deduction shall be allowed under section 80HH or section 80HHA or section 80-I or section 80-IA or section 80-IB in relation to the profits and gains of the undertaking; and

(iv) in computing the depreciation allowance under section 32, the written down value of any asset used for the purposes of the business of the undertaking shall be computed as if the assessee had claimed and been actually allowed the deduction in respect of depreciation for each of the relevant assessment year.

(7) The provisions of sub-section (8) and sub-section (10) of section 80-IA shall, so far as may be, apply in relation to the undertaking referred to in this section as they apply for the purposes of the undertaking referred to in section 80-IA.

[(7A) Where any undertaking of an Indian company which is entitled to the deduction under this section is transferred, before the expiry of the period specified in this section, to another Indian company in a scheme of amalgamation or demerger,—

(a) no deduction shall be admissible under this section to the amalgamating or the demerged company for the previous year in which the amalgamation or the demerger takes place; and

(b) the provisions of this section shall, as far as may be, apply to the amalgamated or the resulting company as they would have applied to the amalgamating or the demerged company if the amalgamation or demerger had not taken place.]

[(7B) The provisions of this section shall not apply to any undertaking, being a Unit referred to in clause (zc) of section 277 of the Special Economic Zones Act, 2005, which has begun or begins to manufacture or produce articles or things or

computer software during the previous year relevant to the assessment year commencing on or after the 1st day of April, 2006 in any Special Economic Zone.]

(8) Notwithstanding anything contained in the foregoing provisions of this section, where the assessee, before the due date for furnishing the return of income under sub-section (1) of section 139, furnishes to the Assessing Officer a declaration in writing that the provisions of this section may not be made applicable to him, the provisions of this section shall not apply to him for any of the relevant assessment years.

(9) [Omitted by the Finance Act, 2003, w.e.f.1-4-2004.]

(9A) [Omitted by the Finance Act, 2003, w.e.f. 1-4-2004.]

Explanation 1.— [Omitted by the Finance Act, 2003, w.e.f.1-4-2004.]

Explanation 2.—For the purposes of this section,—

(i) "computer software" means—

(a) any computer programme recorded on any disc, tape, perforated media or other information storage device; or

(b) any customized electronic data or any product or service of similar nature, as may be notified by the Board, which is transmitted or exported from India to any place outside India by any means;

(ii) "convertible foreign exchange" means foreign exchange which is for the time being treated by the Reserve Bank of India as convertible foreign exchange for the purposes of [the Foreign Exchange Management Act, 1999 (42 of 1999)], and any rules made thereunder or any other corresponding law for the time being in force;

(iii) "electronic hardware technology park" means any park set up in accordance with the Electronic Hardware Technology Park (EHTP) Scheme notified by the Government of India in the Ministry of Commerce and Industry;

(iv) "export turnover" means the consideration in respect of export [by the undertaking] of articles or things or computer software received in, or brought into, India by the assessee in convertible foreign exchange in accordance with sub-section (3), but does not include freight, telecommunication charges or insurance attributable to the delivery of the articles or things or

computer software outside India or expenses, if any, incurred in foreign exchange in providing the technical services outside India;

(v) "free trade zone" means the Kandla Free Trade Zone and the Santacruz Electronics Export Processing Zone and includes any other free trade zone which the Central Government may, by notification in the Official Gazette, specify for the purposes of this section;

(vi) "relevant assessment year" means any assessment year falling within a period of ten consecutive assessment years referred to in this section;

(vii) "software technology park" means any park set up in accordance with the Software Technology Park Scheme notified87 by the Government of India in the Ministry of Commerce and Industry;

(viii) "special economic zone" means a zone which the Central Government may, by notification in the Official Gazette, specify as a special economic zone for the purposes of this section.]

[Explanation 3.—For the removal of doubts, it is hereby declared that the profits and gains derived from on site development of computer software (including services for development of software) outside India shall be deemed to be the profits and gains derived from the export of computer software outside India.]

[Explanation 4.—For the purposes of this section, "manufacture or produce" shall include the cutting and polishing of precious and semi-precious stones.]"

38. From the plain reading of the Section 10A of the IT Act, we find that, the Section seeks to promote and boost new business undertakings situated in free trade zones by providing suitable deductions. It provides for a 100 percent deduction of profits and gains derived by undertakings engaged in export of articles or computer software. In the instant case, the amount determined by the revenue by the assessee does not partake the nature of manufacturing and export of goods or articles. Hence, the benefit of the provisions of Section 10A cannot be accorded to the assessee in the instant year.

39. In the result, the appeal of revenue is dismissed and the Cross Objection of the assessee is dismissed.

Order is pronounced in the open court on 19/12/2019.

Sd/-	Sd/-
(Bhavnesh Saini)	**(Dr. B. R. R. Kumar)**
Judicial Member	**Accountant Member**

Dated: 19/12/2019
Subodh
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR