

IN THE INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH "H" NEW DELHI]

BEFORE SHRI G. S. PANNU, PRESIDENT

AND

SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER

आ.अ.सं./I.T.A No.1695/Del/2020
निर्धारणवर्ष/Assessment Year: 2011-12

M/s. S.A.M. Overseas, 9 - OAK Lane, DLF Chattarpur Farms, New Delhi - 110 030.	<u>बनाम</u> Vs.	ACIT, Circle : 24 (1) New Delhi.
PAN : ABFFS1117G		

AND

आ.अ.सं./I.T.A No. 169/Del/2021
निर्धारणवर्ष/Assessment Year: 2011-12

ACIT, Circle : 24 (1) New Delhi.	<u>बनाम</u> Vs.	M/s. S.A.M. Overseas, 9 - OAK Lane, DLF Chattarpur Farms, New Delhi - 110 030.
		PAN : ABFFS1117G
अपीलार्थी / Appellants		प्रत्यर्थी/ Respondents

निर्धारितकीओरसे / Assessee by :	Shri C. S. Aggarwal, Sr. Advocate; Shri D. B. Jain, C.A.;& Shri R. P. Mall, Adv.
राजस्वकीओरसे / Department by :	Shri M. Baranwal, Sr. D. R.; & Shri Sanjay Kumar, Sr. D. R.

सुनवाईकीतारीख/ Date of hearing :	21/04/2023
उद्घोषणाकीतारीख/Pronouncement on :	22/06/2023

आदेश / O R D E R

PER C. N. PRASAD, J. M. :

1. These appeals are filed by the assessee and Revenue against the order of the Id. Commissioner of Income Tax (Appeals)-II [hereinafter referred to CIT (Appeals)] New Delhi, dated 31.07.2020 for assessment year 2011-12.

2. The assessee in its appeal has raised the following substantive grounds of appeal:-

1. That on the facts and circumstances of the case and in law, the Commissioner of Income tax (Appeals)-32, New Delhi ["the CIT(A)"] has erred in upholding the disallowance of Rs.30,76,482/- being the commission paid to foreign agents, allegedly for the reason that the amount paid was fees for technical services and as such, TDS should have been deducted under section 195 of the Income tax Act, 1961 ("the Act").

1.1. That on the facts and circumstances of the case and in law, the CIT(A) did not appreciate that the commission paid to foreign agents was not chargeable to tax in India within the meaning of respective DTAAS.

1.2 That on the facts and circumstances of the case and in law, the CIT(A) in upholding the disallowance has erred in not adjudicating on the additional evidence being the agreements

with foreign agents, though the remand report of the Assessing Officer was called for.

2. That on the facts and circumstances of the case and in law, the CIT(A) has erred in sustaining the addition of Rs.28,78,632/- in respect of the parties from whom the Appellant had purchased material or availed the services, simply for the reason that summon could not be served to the parties.

2.1 That on the facts and circumstances of the case and in law, the CIT(A) in upholding the addition of Rs.28,78,632/- allegedly on account of undisclosed income from other sources did not appreciate the ground realities of the business of the Appellant.”

3. The Revenue in its appeal has raised the following substantive grounds of appeal:-

“1. That, in facts and circumstances of the case, Ld. CIT(A) has erred in deleting the addition of disallowance of interest expenses of Rs.63,70,992/-.

2. That in facts and circumstances of the case, Ld. CIT(A) has erred in restricting the addition of Rs.4,29,63,309/ to the extent of Rs.28,78,632/.”

4. First we take up the appeal of the Revenue. Ground No. 1 of the Revenue’s appeal is in respect of deletion of disallowance of interest expenses of Rs.63,70,992/-.

5. Brief facts are that the Assessing Officer in the course of assessment proceedings noticed that the assessee debited Rs.3,63,36,223/- under the head bank charges and interest in the profit and loss account. This interest was paid on secured loan of

Rs.27,52,19,033/- to Syndicate Bank and Allahabad Bank. The Assessing Officer on perusal of Schedule 5 to balance sheet i.e. loans and advances noticed that assessee advanced loans to the following persons:-

S. No.	Name of person to whom advance made	Amount (In Rs.)
1.	Sh. Jasjeet Singh Shergill	15,10,000/-
2.	M/s M.K.Infracon Pvt Ltd.	35,00,000/-
3.	M/s. Omsons International	60,00,000/-
4.	M/s. Samtex Designz	7,00,00,000/-
	Total :	8,10,10,000/-

6. The Assessing Officer observed that the loans/advances were given without charging interest whereas the assessee had paid interest on funds borrowed from Syndicate Bank and Allahabad Bank. As the assessee, according to the Assessing Officer, had paid loans/advances to sister concerns and other related parties out of interest bearing funds the assessee was required to show cause as to why the excess and proportionate interest should not be disallowed. The assessee submitted that it had advanced interest free loans of Rs.8,10,10,000/- to present entities out of its own funds and, therefore, relying on the decision of the Hon'ble Bombay High Court in the case of CIT Vs. Reliance Utilities [313 ITR 340 (Bom.)] the assessee contended that no disallowance is warranted. However, the Assessing Officer disallowed interest @ 8% per annum calculated on the interest free loans/advances observing that there was no business purpose of advancing these loans.

7. On appeal the ld. CIT (Appeals) deleted the disallowance following the order of the Tribunal in assessee's own case for assessment year 2009-10 wherein similar disallowance was deleted for the reason that as the assessee had sufficient interest free funds available with it for making advances to sister concerns and other related parties.

8. The ld. DR strongly supported the order of the Assessing Officer.

9. The ld. Counsel for the assessee submits that the present matter is fully covered both on facts and in law by the judgement of Hon'ble Bombay High Court in the case of CIT Vs. Reliance Utilities [313 ITR 340 (Bom)]. The ld. Counsel for the assessee referring to page 329 of the paper book which is the balance sheet as on 31st March, 2011 submits that the assessee had own funds to the extent of Rs.14,21,00,000/- as at the beginning of the previous year which stood at Rs.12,91,00,000/- as on 31.03.2011. Therefore, the ld. Counsel submits that once it is clear that the eventuality on own funds at the beginning of the year and at the end of the year far exceeded the loans advanced which facts have not been controverted by the Assessing Officer the ratio of the Hon'ble Bombay High Court in the case of CIT Vs. Reliance Utilities (supra) clearly applies and, therefore, there can be no disallowance of interest on the ground that advances were given out of interest bearing funds. The ld. Counsel further submits that an identical disallowance was made by the Assessing Officer in the case of the assessee for the assessment year 2009-10, similar submissions of the assessee were accepted by the ld. CIT (Appeals) and the appeal of

the Department was dismissed by the Tribunal by order dated 14.11.2014 in ITA. No. 644/Del/2013.

10. Heard rival submissions perused orders of the authorities below. On perusal of the balance sheet as on 31st March, 2011 he observed that the assessee having interest free funds at Rs.12,91,74,091/- and the assessee paid loans/advances of Rs.8,10,10,000/-. The interest free funds as on 1.04.2010 stood at Rs.14,25,00,488/-. Therefore, we observe that the interest free funds available with the assessee for giving loans/advances exceeded far more than the loans/advances made by the assessee during the assessment year under consideration. The Hon'ble Bombay High Court in the case of CIT Vs. Reliance Utilities (supra) held as under:-

"If there be interest-free funds available to an assessee sufficient to meet its investments and at the same time the assessee had raised a loan it can be presumed that the investments were from the interest-free funds available. In our opinion, the Supreme Court in East India Pharmaceutical Works Ltd. vs. CIT [1997] 224 ITR 627 had the occasion to consider the decision of the Calcutta High Court in Woolcombers of India Ltd. [1982] 134 ITR 219. where a similar issue had arisen. Before the Supreme Court it was argued that it should have been presumed that in essence and true character the taxes were paid out of the profits of the relevant year and not out of the overdraft account for the running of the business and in these circumstances the appellant was entitled to claim the deductions. The Supreme Court noted that the argument had considerable force, but considering the fact that the contention had not been advanced earlier it did not require to be answered. It then noted that in Woolcombers of India Ltd.'s case [1982] 134 ITR 219 the Calcutta High Court had come to the conclusion that the profits were sufficient to meet

the advance tax liability and the profits were deposited in the overdraft account of the assessee and in such a case it should be presumed that the taxes were paid out of the profits of the year and not out of the overdraft account for the running of the business. It noted that to raise the presumption, there was sufficient material and the assessee had urged the contention before the High Court. The principle, therefore, would be that if there are funds available both interest-free and over draft and/or loans taken, then a presumption would arise that investments would be out of the interest-free fund generated or available with the company, if the interest-free funds were sufficient to meet the investments.”

11. As could be seen from the above the principle laid down by the Hon'ble Bombay High Court is, if there are funds available both interest free and over-draft and/or loans taken then a presumption would arise that investments would be out of the interest free funds generated or available with the assessee if the interest free funds were sufficient to meet the investments. In the case on hand admittedly the interest free funds available at the beginning of the year i.e. as on 1.04.2010 stood at Rs.14,25,00,000/- and at the end of the year as at 31.03.2011 the interest free funds stood at Rs.12,91,00,000/- which are far more than the loan/advances of Rs.8,10,10,000/- given by the assessee and, therefore, the presumption would be that the loan/advances given by the assessee during the year under consideration is out of interest free funds available with the assessee by applying the principle laid down by the Hon'ble Bombay High Court. We also find that an identical issue was decided by the Tribunal in assessee's own case for assessment year 2009-10 in

ITA. No. 664/Del/2013 by order dated 14.11.2014 wherein the Tribunal held as under:-

“5. We have heard both the sides on the issue. We have also considered the case laws relied upon by both the sides. The assessee was having interest free own funds of Rs.15,45,96,046.94 at the end of the financial year 2008-09, i.e. as on 31.03.2009. The interest free advances were of Rs.6,59,25,670/-. In view of the various case laws relied upon by the Id. AR including the Hon'ble Bombay Hon'ble High Court decision in the case of CIT vs. Reliance Utilities, cited supra,, the CIT (A) was justified in deleting the addition. In the aforesaid decision, the Hon'ble Bombay High Court has held as under :-

“.....It noted that to raise the presumption, there was sufficient material and the assessee had urged the contention before the High Court. The principle, therefore, would be that if there are 6 ITA No.644/Del/2013 funds available both interest-free and over draft and / or loans taken, then a presumption would arise that investments would be out of the interest-free fund generated or available with the company, if the interest-free funds were sufficient to meet the investments.”

In view of this, we dismiss the ground taken by the revenue in this appeal. “

12. Therefore, respectfully following the decision of the Hon'ble Bombay High Court in the case of CIT Vs. Reliance Utilities (supra) and the decision of the co-ordinate bench in assessee's own case we uphold the order of the Id. CIT (Appeals) in deleting the disallowance of interest expenses of Rs.63,90,992/- and reject ground No. 1 of appeal of the Revenue.

13. Ground No. 2 of grounds of appeal of the Revenue is in respect of restricting the addition of Rs.4,29,63,309/- to

Rs.28,78,632/- towards unexplained stock. The assessee also in its ground No. 2 contested the order of the Id. CIT (Appeals) in sustaining the addition to the extent of Rs.28,78,632/- towards unexplained stock.

14.1 Brief facts are that the assessee is a firm engaged in the business of manufacturing and export of ready-made garments filed its return of income on 30.09.2011 declaring loss of Rs.83,38,278/-. A survey was carried out at various business premises belonging to the assessee on 6.09.2010 wherein stock of Rs.11,41,17,922/- was inventorised as against declared stock of Rs.4,91,06,399/- resulting in unexplained stock of Rs.6,50,11,523/- which the assessee did not consider the same in the return of income filed. A show cause notice was issued by the Assessing Officer and the assessee submitted that the survey team apart from preparing inventories of stock had taken a print out of profit and loss account available as on 6.09.2010 and in this P & L account the closing stock was depicted at Rs.4,91,06,399/- which is the value taken by the survey team which was compared with the figure of stock of inventories by them on 6.09.2010 at Rs.11,41,17,922/-. The assessee submitted that subsequent to survey in the course of audit of accounts undertaken the P & L account for the period 1.04.2010 to 6.09.2010 was prepared after recording all the transactions for this period and in the P & L account the assessee has shown the correct stock as on 6.09.2010 at Rs.6,10,63,622/- and, therefore, there is no discrepancy in the matter of stock inventorised by the survey team on 6.09.2010 and the correct figure of stock has been shown by the assessee on 6.09.2010 in the audited books of account.

14.2 The assessee contended that goods worth Rs.33,82,315/- were received from S.A.M. Overseas, a proprietary concern during the period 2.08.2010 to 31.08.2010 and in the unaudited P & L account taken on 6.09.2010 the said purchases of fabric was not recorded although the said goods have been received in the premises of the assessee by 6.09.2010. Similarly fabric purchased from Dhanlakshmi Export Syndicate on 4.08.2010 and 6.08.2010 though received on the said dates were not recorded in the unaudited P & L account which amounted to Rs.3,43,26,387/-. The assessee also submitted that the survey team inventorised the finished goods lying at customs at Rs.2,36,22,278/- and this was not available at the factory at the time of survey on 6.09.2010 as they have already been dispatched to Bombay Port for export. Therefore, it was submitted that the stock was not depicted in unaudited P & L account. It was submitted that out of goods of stock valued at Rs.2,36,22,278/- stock worth Rs.2,20,51,214/- were converted into sales by 6.09.2010 and is supported by shipping bills, copies of the same were furnished and, therefore, it was contended that the stock to the extent of Rs.2,20,51,214/- could not form part of stock as on 6.09.2010 and was wrongly taken by the survey team.

14.3 The assessee further submitted that in the unaudited P & L account the expenditure on fabrication was shown at Rs.3,53,31,230/- and the audit details show that the actual expenditure incurred up to 6.09.2010 was Rs.56,80,056/- and, therefore, expenditure to the extent of Rs.1,53,48,825/- which related to actual expenditure up to 6.09.2010 was not recorded.

Similarly it was submitted that expenditure in the unaudited P & L account in respect of Dying bills was shown at Rs.2,71,25,037/- and in the audited P & L account it was shown the actual expenditure at Rs.2,87,66,801/- and the difference of Rs.16,41,764/- could not be recorded in the unaudited P & L account and in support the assessee submitted the details of bills for the same.

15. Similarly it was submitted that expenditure in the unaudited P & L account in respect of dying accessories bills was shown at Rs.1,00,25,720/- and in the audited P & L account it was shown the actual expenditure at Rs.1,17,03,688/- and the difference of Rs.16,77,967/- could not be recorded in the unaudited P & L account and in support the assessee submitted the details of bills for the same.

16. Further the assessee contended that the stock which was inventorized at the premises of SAM Design, A-36, Hans Complex, Noida, which is the proprietary concern of Shri Mukesh Sharma at Rs.2,57,46,000/- was over-valued and the correct valuation in terms of stock in quantity and value should have been taken at Rs.1,92,34,153/- and thereby arose excess valuation to the extent of Rs.65,11,846/-. Therefore, it was explained that if all these are considered the stock as on 6.09.2010 was more than what has actually been inventorized by a small margin of Rs.5,08,761/- and, therefore, there can be no addition by way of income from undisclosed sources on account of alleged discrepancy in the stock.

17. However, not convinced with the replies, submissions and evidences furnished by the assessee the Assessing Officer made

addition of Rs.4,29,63,309/- as unexplained stock after giving credit of Rs.2,20,51,214/- which stock was lying with customs warehouse awaiting for shipment. The Assessing Officer treated the balance of Rs.15,71,064/- as part of stock as on 6.09.2010 i.e. the date of survey.

18. The assessee preferred appeal before the Id. CIT (Appeals) and furnished various evidences and the Id. CIT (Appeals) called for remand reports from the Assessing Officer twice. After analyzing the remand reports submitted by the Assessing Officer dated 29.02.2016 and 9.05.2017 restricted the addition to Rs.28,78,632/- and deleted the balance addition of Rs.4,00,84,677/-. The assessee as well as the Revenue both are in appeal on the part relief granted by the Id. CIT (Appeals).

19. The Id. DR submits that there was a survey under section 133A of the Act in the premises of the assessee on 6.09.2010 and the survey team recorded the stock inventories available with the assessee and also recorded a statement from one Shri V. P. Sachdeva, partner of the assessee firm. The survey team also took print out as on 6.09.2010 and Shri V. P. Sachdeva, in his statement offered the difference of stock as per the books and physical stock as income. The Id. DR submits that the print out of the trading and P & L account as on 6.09.2010 whether it is audited or un-audited has no significance. The Id. DR submits that the assessee has not pointed out any difference or any explanation was offered at the time of survey and only at the time of assessment the assessee contended that certain purchases/expenses made and incurred in the month of August were not recorded. The Id. DR submits that

the assessee failed to explain as to why the entries were not made during survey. The ld. DR submits that the Assessing Officer accepted the claim of the assessee that certain stocks were lying in customs warehouse and for that after verifying the details due credit was allowed. The ld. DR submits that the ld. CIT (Appeals) called for remand report. In the first remand report the Assessing Officer did not conduct any enquiries and, therefore, the second remand report was called for wherein the Assessing Officer made certain enquiries and the ld. CIT (Appeals) based on the remand reports of the Assessing Officers restricted the addition to Rs.28,78,632/- which is not correct. The ld. DR submits that since the assessee has not given any proper explanation for the differences in stock the same was rightly treated as unaccounted stock by the Assessing Officer. The ld. DR placed reliance on the following decisions in support of his contentions :-

- (i) Raj Hans Towers (P.) Ltd. Vs. CIT [(2015) 373 ITR 09 (Del)];
- (ii) Pr. CIT Vs. Avinash Kumar Setia [(2017) 395 ITR 235 (Del)];
- (iii) M/s. Pebble Investment & Finance Ltd. Vs. ITO [(2017) TIOL 188 (Bom)] [(SLP dismissed by the Hon'ble Supreme Court vide order dated 5.07.2017 in SLP (Civil) No. 11784/2].

20.1 The ld. Senior Advocate, Shri C. S. Aggarwal, appearing for the assessee submits that on 06.09.2010 a survey u/s 133A of the Income Tax Act had been conducted at the business premises of the assessee firm. The survey team had prepared stock inventories of the stocks found at the various business premises as is tabulated below:-

Sl. No.	Premises	Value	Type of stock	Activity carried out
1.	A -36, Hosiery Complex, Noida	2,57,46,000.00	Unprocessed Fabric (Meters)	Dyeing and printing of fabric
2.	Stock at Customs	2,36,22,278.00	Finished Goods (Pcs)	---
3.	A 38 Sector - 83, Noida	74,52,053.00	WIP (Pcs)	Stitching, finishing and Packing
4.	A-110, Sector - 65, Noida	1,55,22,000.00	WIP (Pcs)	Stitching, finishing and Packing
5.	C-53, Hosiery Complex, Noida	33,06,198.00	WIP (Pcs)	Stitching, finishing and Packing
6.	B-82, Sector 83, Noida	(i) 2,64,66,568.00 (ii) 20,02,825.00	WIP (Pcs) (Accessories)	Finishing, packaging and Storage.
	Total	11,41,17,922.00		

20.2 The survey team apart from the preparing aforesaid inventories had taken with them a printout of the Profit & Loss Account as available on 06.09.2010. The said Profit & Loss Account had been prepared on the basis of entries recorded in the computerised books. In the aforesaid Profit & Loss Account, the closing stock has been reflected at Rs.4,91,06,399/-At the time of survey, several transactions in respect of stocks purchased and received at the factory godown premises and pending scrutiny had not been entered in the computerised books. Likewise even stocks exported had also not been entered as yet in the said books of accounts. Thus there appeared a difference in the value of closing stock of Rs.6,50,11,523/- i.e. the difference between the value of

stocks inventorised and value of closing stock reflected and entered in the Profit and Loss Account on the basis of stocks entered in the purchase account. The survey team had also recorded a statement of Shri V. P. Sachdeva who in answer to question no. 14 (at Pg. 29 30 of PB) had offered a sum of Rs.6,50,11,523/-, for taxation being undisclosed income for the Financial Year 2010-11.

Proceedings before the Assessing Officer

21. The ld. Counsel for the submitted that the assessee firm however filed a return of total income after audit of its account on 30.09.2011, declaring a loss of Rs.84,38,278/-. This return of income had been filed after incorporating all the transactions entered by the firm in the FY 2010-11. The Assessing Officer issued a notice u/s 143(2) of the Income Tax Act on 10.09.2012, which had duly been complied with by the appellant and thereafter on 23.07.2013, a detailed questionnaire had been issued to the assessee firm which had also duly been complied with. In the various submissions made, the assessee had also provided complete details of all the transactions entered by it and also explained that there was no discrepancy in the value of stocks found and inventorised on the date of survey. Thus by implication, it had retracted the statement made by Shri V. P. Sachdeva which had been given by him on complete misconception of facts and was based on the facts projected to him by the survey team. That, during the course of assessment proceedings the assessee had made following written submissions before the learned Assessing Officer and in the aforesaid submissions, it had been submitted that there was no discrepancy in the value of stocks found and the entire

stocks found at the time of survey is fully accounted for. The aforesaid submissions made by the appellant had been supported by the documentary evidences filed at the time of the assessment. It had been submitted that on the date i.e. on 06.09.2010 when the Profit & Loss Account had been prepared from the computerised accounts, certain transactions had remained to be entered in the books of accounts. The various reasons which had lead to non-recording of the transactions had also been explained as is evident from Para 7.1 (Pg. 91 of the PB). It had further been submitted that even the stocks lying in customs had been included in the inventory prepared at the time of survey, despite the fact that the sale thereof had already been recorded in the ledger account of the export sales. It had thus been contended before the learned Assessing Officer that while preparing the inventory of the stocks of an aggregate value of Rs.11,41,17,922/-, there could have been no justification to have included said value of stocks, which had already been reflected as sales but was lying at the custom port. Further as per the books of accounts the stocks reflected aggregated to Rs. 4,29,63,309/-. From this value of stocks, even the stocks which had been sold of an aggregate value of Rs.1,76,08,784/- had not been reduced as the same had not been entered in the books of accounts. It was thus submitted that effectively the stocks on the aforesaid date as per the books of accounts ought to have been reduced by Rs.1.76,08,784/-. This fact is sufficient to demonstrate that there had been non- recording of entries in the books of accounts both in respect of purchase and sales made. The assessee thus contended that there being no discrepancy in the value of stocks as reflected in the books of

accounts and inventoried at the time of survey, and alleged discrepancy be held as fully and wholly explained. The assessee had thus explained the difference by stating as under:

Reconciliation of Stock during the survey proceedings held on 06.09.2010

	Aggregate stock found at the time of survey on 06.09.2010 at various locations of the assessee	---	11,41,17,922
1.	<u>Less:</u> Value of the Finished goods lying with customs stock already sold by the assessee yet included in the stock taken by survey team.	2,36,22,278	
2.	<u>Fabrics Purchased</u> (Local & Central) not entered in the books of accounts on the date of survey (though lying in the godown)	3,43,26,387	
3.	<u>Fabrication expenses</u> not entered on the date of survey (Details are at Pg. 516-517 of PB.	1,53,48,825	
4.	<u>Accessories Purchased</u> (Local & Central) not entered in the Books of Accounts on the date of survey.	16,77,967	
5.	<u>Dying expenses not</u> entered in the Books of Account on the date of survey.	16,41,764	
6.	Difference in fabric stock as inventories by the survey team and actual stock lying at M/S. SAMTEX DESINZ.	65,11,846	8,31,29,067
			3,09,88,855
	<u>Add:</u> Cost of stock exported up to 06.09.2010 and not entered till the date of survey.	1,76,08,784	1,76,08,784
	<u>Less:</u> Value of Stock in hand as per books of account on the date of survey.		4,85,97,639
			4,91,06,399
	Difference in Reconciliation of stock on the date of survey as per accounts at the time of survey after entered in the books of accounts.		5,08,760

Note: In the reframed accounts on the date of survey, the stock in hand after adjustments exceeds by Rs.5,08,760/-which is on account of merely valuation difference. As such, it had been prayed that the declared results, be accepted.

22.1 That in spite of the above submissions made by the assessee from time to time (and duly supported by the necessary documentary evidences), the learned AO, framed an assessment after including in the income, a sum of Rs.4,29.63,309/- instead of Rs.6,50,11,523/-, as had erroneously and on misconception of facts been offered in the statement of Shri V. P. Sachdeva. In other words, the learned AO had allowed only a deduction of Rs.2,20,51,214/-, the value of the sales recorded by the assessee in the books of accounts and was lying at the customs for clearance. This is evident from para 5.1 at Pg. 19 of his order.

22.2 The learned Assessing Officer however in respect of remaining value of stocks of an aggregate value of Rs.4,29,63,309/- had made addition. The findings in respect thereof are recorded in para 5 of his order. It would be seen therefrom that no reason whatsoever has been assigned by the learned AO for making the addition. Infact, he has been kind enough to extract assessee's submission made before him, however he has not found any defect in the said submissions which had been supported by necessary documentary evidence. It is submitted that mere fact certain items of purchases and sales had not yet been reflected/entered in the ledger account by itself was insufficient to conclude that the stocks held by the assessee was either unexplained or unaccounted. It is further submitted that there is no whisper or even an allegation in the order of assessment

that the explanation given by the assessee was either manipulated, non-genuine or is unsupported by any evidence.

22.3 The aforesaid sum of Rs.4,29,63,309/- had been arrived at by him after 'excluding from the value of stocks inventorised of Rs.11,41,17,922/-, a sum of Rs.2,20,51,214/-, the stocks included in the aforesaid value of the stocks lying at port and from the remaining sum of Rs.9,20,66,708/-, AO reduced a sum of stocks reflected in the Profit & Loss Account of Rs.4,91,03,399/-. In other words, he rejected the claims of expenditure incurred by it (which had remained to be entered in the books of accounts) despite the fact the assessee had furnished necessary evidence before him. It is interesting to be noted that in the value of stocks reflected in its Profit & Loss Account, (despite the fact there had been an exports made of stocks of the value of Rs.1,76,08,784/-, which had already been entered) the Assessing Officer did not even exclude the same despite the fact said stock was not available on the date of survey as the same had already been exported. This would have resulted into reduction of stocks from Rs.4,91,06,399/- to Rs.3,14,97,615/-. This fact alone it is submitted as has been highlighted is sufficient to establish that the assessee had not entered certain transactions in the ledger account and as such on account of non-entering of such transactions in the ledger account, the value of stocks (which had been adopted) held on the date of survey as per the books of account was erroneous.

22.4 The Id. Counsel submits that it is also necessary to note that after the assessee had furnished return of income after due audit, the learned AO has accepted not only the results as reflected

in the Profit & Loss account but has also made no adverse comments or rejected the books of accounts maintained by it in the normal course of business. Thus in brief, it is submitted that the claim of the assessee that it had purchased fabrics, incurred fabrication expenses, purchased accessories and certain dying expenses had not been entered, had completely been side tracked and overlooked by the learned Assessing Officer.

22.5 The Id. Counsel submitted that the assessee had also stated that there is a difference in the value of fabric stock as inventorised by the survey team; whereas actual stock was lying at M/S. SAMTEX DESINZ. In fact, it had also been contended that the value of stocks inventorised at A-36, Hosiery Complex, Noida at Rs.2,57,46,000/- was not based on physical verification. The detailed submissions in respect thereof has been extracted by the AO in para 9.3 at Pg. 10 of his order. It had been contended that quantity and value of the stocks lying at the aforesaid premises was only of Rs.1,92,34,153.78 and not of Rs.2,57,46,000/- and thus the difference of Rs.65,11,846/- had erroneously been included in the value of stocks allegedly found at the time of survey, which had been prayed to be excluded. Thus the assessee had highlighted the factual errors in the preparation of stock inventory at the time of survey.

22.6 The learned Assessing Officer apart from the aforesaid addition made of Rs.4,29,63,609/-, also proceeded to frame the assessment after making disallowances of Rs.30,76,482/- representing amount of commission paid to its foreign agents of Rs.3,63,36,223/- and a disallowance of Rs.63,70,992/- out of the claim of interest of Rs.3,63,36,223/- u/s 36(i)(iii) of the Act.

Proceedings before the learned CIT (Appeals)

23.1 The assessee being aggrieved from the aforesaid order of assessment preferred an appeal before the learned CIT(A) and contended that in the absence of any justification given by the learned Assessing Officer for making addition of Rs.4,29,63,309/-, the addition made of the aforesaid sum as also of the two sums disallowed out of claim of expenditure incurred on commission and interest be directed to be deleted. The assessee had along with the memo of appeal had also filed a statement of facts. Further in the course of appellate proceedings, the appellant had made various written submissions, which for the sake of convenience is tabulated here below:

Sl. No.	Date	Pages.
1.	20.10.2015	322-408
2.	20.10.2015	409-410
3.	20.10.2015	411-438
4.	04.12.2015	439-442

23.2 The learned CIT (Appeals) after hearing the appellant and after carefully examining the evidence tendered by the assessee before the ld. Assessing Officer and also before him, directed the learned AO to submit a report after verification.

23.3 The learned Assessing Officer in compliance thereto submitted a remand report on 29.02.2016 (Pg. 1434-1441 of PB-5).

In the Remand Report the learned Assessing Officer (at Pg. 1436-1438 of PB-5) had stated as under:

"Details of Fabrication Expenses not recorded by the assessee on the date of the survey: Rs.1,53,48,825/-"

We have gone through the reconciliation statement submitted by the assessee at page 56 of Volume 4 of the paper book. The assessee has further submitted a copy of his Fabrication ledger account for the period 15.06.2010 to 06.09.2010 at pages 57 to 74 of Volume 4 of the paper book wherein the bills have been accounted for post the date of the survey though the goods relating to the said bills had been received by the assessee from its vendors before the date of the survey. The assessee has further submitted a summary of Fabrication Charges/Expenses at pages 75 to 76 of Volume 4 of the paper book to show a party wise detail of Fabrication Charges reconciliation between the physical stock reported by the survey team and the one noted by them from the Profit & Loss Account taken before commencement of the survey.

In order to verify the claim of the assessee, we proceeded to issue notices u/s 133(6) of the Income Tax Act to the parties whose fabrication bills were reported by the assessee in its reconciliation statement and the aggregate value of whose bills as mentioned by the assessee was in excess of Rs1.00 lakh. The names and addresses of the said parties are as under:

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Sl. No.	Name of the Party.	Address.	Value Transaction Verified.
1.	M/s. A. S. Textiles	B- 29, 1st Floor, Sec. 10, Noida	1,09,196/-
2.	M/s. Abdul Sattar	Vill. Choura Gaon, Sec. 22, Noida	2,39,301/-
3.	M/s. Anamika Enterprises.	C-1, Old Maujpur, (Near Sabzi Mandi, PUNCHAYATGHAR) New Delhi-53.	1,37,929/-
4.	M/s. Aryan Enterprises.	Gadi Road, Village Mamura, Sector-66 Near Ambedkar ITI Institute, Opp Sector 64, Noida.	1,23,170/-
5.	M/s Babli.	Chitra Colony, Bhangel, Ph- II, Noida.	1,59,906/-
6.	M/s Balaji Exports.	111B, DLF Industrial Area, Ph- 1, Faridabad.	1,61,289/-
7.	M/s. Chauhan Enterprises.	Inside Gate, Sharma Market, Salarpur, Bhangel, Noida.	1,37,257/-
8.	M/s Deepak Kaj House.	B-165, New Ashok Nagar, Delhi.	1,27,835/-
9.	M/s Fashion Makers.	C-188, 1st Floor, Sec. 10, Noida.	1,15,974/-
10.	M/s Khaleeq Ahmed Chauhan.	Inside Gate, Sharma Market, Salarpur, Bhangel, Noida.	1,97,807/-
11.	M/s. M. F. Fashion.	G. No.-1, H. No.- 43, Rahul Vihar, Near Y R School, Behind Green Hotel, Ghaziabad.	3.04,317/-
12.	M/s. M. K. Garments Finishers.	A 113, Sec.-20, Noida.	4,39,982/-
13.	M/s. Malik Enterprises.	Village Chigarsi, sector - 63.	2.71,875/-
14.	M/s. Mohan Fab	A-39/40, Shiv Durga Vihar, Lakarpur, Faridabad, Haryana.	2,69,202/-
15.	M/s. N. K. Finishing.	23, VDS Market, Sector 93, Noida.	1,41,320/-
16.	M/s. Pravesh Kaj House.	B-165, New Ashok Nagar, Delhi.	1.80.681/-

17.	M/s. Rajni Kaj Centre.	B-165, New Ashok Nagar, Delhi.	1,94,284/-
18.	Reliance Enterprises.	38/7. Sharma Market, Harola, sector -5, Noida.	1,63,029/-
19.	M/s. SAM Overseas.	B-76, Sector 83, Noida.	49,94,922/-
20.	M/s. Shyamji Computer Embroidery.	341/A/8, St. No. 1, Near Balaji Tent House, Kanti Nagar, Delhi - 11051.	5,02,585/-
21.	M/s. Siddiqui Export.	RZ-802/20, Near Jain Mandir, Tughlakabad Extn., New Delhi.	4,02,770/-
		TOTAL:	93,74,634/-

23.4 All the above stated parties submitted their party account ledger of the assessee for the FY 2010-11 wherein the value and the bill numbers of the fabrics purchased and as claimed by the assessee in its submissions and copies submitted in Volume 4 of the paper book at pages 77 to 477 were verified one by one, in entirety. It was also noted from the Account statements submitted by the above named parties that they were regularly receiving payments from the assessee during the Financial Year 2010-11.

23.5 Further a sum of Rs.52,63,222/- has been claimed by the assessee as in-house tailors payment in its aggregate sum of Rs.1,53,48,825/- towards bills/expenses not accounted for while preparing the reconciliation of physical stock value and the one noted by the survey team. The said amount was kept out of the preview of notices u/s 133(6) of the Act since this sum does not represent sums invoiced by the assessee's

vendors but is spent by the assessee on its own for payments to its in-house labour force. Apart from the above, notices for value Rs.7.10.969/- were not issued to various parties whose aggregate billing as detailed by the assessee in its appeal papers was less than Rs.1.00 lakhs due to the sheer voluminous nature of the transactions involved albeit of very small value."

24.1 From the aforesaid report it is submitted it would be evident that the learned Assessing Officer was satisfied that there was no discrepancy of the value of stocks found at the time of survey. In fact, the discrepancy had occurred only as a result of non-posting the transactions entered by it in its ledger account.

24.2 Similarly, in his remand report dated 29.02.2016 the learned Assessing Officer accepted all the contentions of the assessee that such value of stocks as had been found are well explained and does not represent unexplained stocks. The appellant thus submitted that the Assessing Officer was wholly satisfied not only with the explanation tendered by the assessee but also the claim that all such stocks had physically been received by it from the suppliers before the date of survey but they remained to be entered in the ledger account.

24.3 Similarly he also accepted that no disallowance of any of the two sums of expenditure incurred and disallowed in the order of assessment warrants a disallowance.

25.1 However, the learned CIT (Appeals) again called for remand report directing the learned Assessing Officer (Pg. 1448-1449 of PB 5) to issue summons u/s 131 of the Act to all the parties who had filed their respective confirmation u/s 133(6) of the Act etc. etc. to re-verify the transactions entered by the assessee in its books of accounts (which had remained to be posted).

25.2 In compliance thereto the learned Assessing Officer after complying with his directions had submitted another report dated 09.05.2017, a copy of which appears at Pg. 1458-1515 of PB-5).

25.3 On receipt of the second Remand Report the learned CIT (Appeals) however issued a notice of enhancement on 29.05.2017 (a copy of whereof appears at Pg. 1516-1517 of PB -5). In this notice of enhancement the learned CIT(A) had proposed to add a sum of Rs.2.20.51.214/-, the value of stocks lying at the port despite the sale value whereof had duly been entered in the sale as per ledger.

25.4 In response thereto the assessee had filed its detailed submissions (Pg. 1518-1522 & Pg. 1523-1530 of PB-5). The said submissions filed by the assessee in respect of notice of enhancement had been supported by various annexures copies whereof appears at Pg. 1531 of PB-5.

25.5 In the Second Remand report dated 09.05.2017, inter-alia in respect of unrecorded fabrication expenses of Rs.1,53,48,825/, the leaned AO stated that he had sent notices u/s 133(6) of the Act to 21 parties, the aggregate value of which amounted to

Rs.93,74,631/- who have confirmed the transactions but he additionally stated that the claim of the assessee does not deserves to be accepted. The assessee for the sake of brevity is not extracting the objections of the learned Assessing Officer which are at Pg. 1497-1502 of PB - 5. Further as the proceedings were not closed, the appellant had made following additional submissions after the second remand report was sent by the learned Assessing Officer.

Sl. No.	Date	Pages.
1.	06.08.2018	1944-1951
2.	01.03.2020	1952-1969
3.	17.03.2020	1970-1991

26. Thus in respect of fabrication expenses incurred and claimed during the Financial Year 2010-11 the written submissions made before the learned Assessing Officer and the learned CIT (Appeals) are as under:

Before the learned Assessing Officer

Sl. No.	Date	Pages.
1.	30.01.2014	99.

Before the learned CIT (Appeals)

Sl. No.	Date	Pages.
1.	04.12.2015	439-442
2.	21.11.2017	1672
3.	27.11.2017	1942-1943
4.	06.08.2018	1947
5.	01.03.202	1954-1559
6.	17.03.2020	1984-1986

27. The learned CIT (Appeals) thus after analysing the assessee's submissions and the report of the learned Assessing Officer found that the assessee had been able to establish with sufficient evidence that all the stocks found at the time of survey which had not been entered till the date when the Profit & Loss Account had been prepared from the computerised books of accounts could not be held to be undisclosed stocks, since the assessee has been able to demonstrate with evidence that the discrepancy in the value of stocks had occurred as a result of non-entering of transaction in the ledger account. He thus held that the learned Assessing Officer went wrong without assigning any reason in making addition of Rs.4,29,63,309/-. However, while so doing in respect of the expenditure incurred by the assessee in respect of fabrication expenses' which sums had not been entered in the books of accounts and aggregated to Rs.1,53,48,825/-, he has held that a disallowance of Rs.25.94.306/- is warranted. The findings of the learned CIT (Appeals) are recorded at Pg. 66. The learned CIT (A)

thus effectively sustained the aforesaid disallowance on the ground that since the summons issued to the 14 of the fabricators were not served, the disallowance deserves to be made. It is submitted here itself that the fabricators are of un-organised as they are small dargies and tailors and kept on shifting depending upon their availability for their principals. However, the fact that the said suppliers had fabricated the garments could not have been disputed as it was only after the fabrication, the garments could have been exported and there could have been no export without fabrication. The assessee had made payment to each of them through account payee cheques and that summons were sent to them after a gap of five years, and by then even assessee's firm stopped their business activity.

Submissions before the Hon'ble Tribunal

28. The ld. Counsel for the assessee submitted that the appellant submits that the facts stated above and evidence tendered are adequate enough to establish that the assessee had incurred expenditure on fabrication. It is further added that during the Financial Year 2010-11, the aggregate expenditure incurred by it amounted to Rs.9,11,35,300.40 (Pg. 69 of PB). In fact, till the date of survey u/s 133A of the Act had been undertaken expenditure incurred on fabrication aggregated to Rs.5,06,80,056/- (Pg. 111 of PB). As against the aforesaid expenditure incurred the assessee had entered in the books of accounts till the date of survey i.e. 06.09.2010, an aggregate expenditure of Rs.3,53,31,230.68 (Pg. 109 of PB) and remaining sum of expenditure of Rs.1,53,48,829/- though had been incurred but

had yet to be entered. A complete list of such details as had been furnished both before the learned Assessing Officer and learned CIT (Appeals) itself establishes that such an expenditure incurred is supported by necessary documentary evidence. A copy of the table as furnished is also annexed as Annexure 'A'.

29. It is submitted the aforesaid sum of expenditure of Rs.1,53,48,829/- had been a sum paid for fabrication of the garments exported. The aforesaid sum had been paid to 57 of the fabricators. Such fabricators have been fabricating the garments for the assessee in the preceding years also. In fact, during the instant year, prior to survey and even after survey, such fabricators had been providing their services. It is well known fact that such fabricators are belong to an un-organised sector and also small time tailors. The assessee had led necessary evidences to support that the expenditure incurred and debited should be included in the value of stocks found at the time of survey and said sum had been incurred by it for the purpose of manufacture of garments. The assessee had furnished in respect of the aforesaid fabricators party account ledger wherein the value and the bill nos. of the fabric purchased and claimed by the assessee in its submissions and copies in respect of whereof had been submitted in Vol. 4. In fact, it had duly been verified by the Assessing Officer that the said parties were regularly receiving payments from the assessee during the Financial Year 2010-11. (Pg. 46) of CIT(A)'s order) However, while sending the Second report, the learned Assessing Officer stated that summons had been issued u/s 131 of the Act to 21 parties who had sent the ledger

account in response to the notice. However summons could not be delivered to 14 parties of an aggregate value of Rs.25,94,306/-. In view thereof the learned CIT (Appeals) has held that the said sum deserves to be disallowed.

30.1 It is submitted that the mere fact such of the fabricators were not available after a gap of 6 years when the summons were served to them having regard to the facts of the case may not considered any valid ground to hold that expenditure incurred and supported by necessary evidence could be added to the stocks held by the assessee. It is re-submitted that unless and until the fabric is stitched i.e. fabrication is done, there could have been no export made. It is significant to be noted that the assessee had engaged them for carrying out fabrication activity in the preceding year as well as in the year prior and later to the survey and the expenditure incurred and paid to them has been accepted by the Id. Assessing Officer himself. Thus it is a case of disallowance made without considering this very aspect of the matter namely the fabricators have fabricated assessee's material during this year which have not been held to be non-genuine. The sum thus sustained for making disallowance of Rs.25,94,300/- for the sake of convenience is extracted here below:-

Sl. No	Name and address of fabricator.	Amount of expenditure incurred.	Date and Bill No.	Date of payment.	Mode of payment	Evidences
1	A.S. TEXTILES. B-29, 1st Floor, Sec.-10, Noida.	1,09,196.00	373/ 14.07.2010	26.10.2010	Cheque	1. Respective Bill 2. Copy of Account in our books at Page No- 577 Paper

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						Book-3 Form 16A-Page No-579.
2	ARYAN ENTERPRISES Gadi Gali Village Mamura Sector-66, Near Ambedkar ITI Institute Opp. Sector-64, Noida.	1,23,170.00	152 & 155/ 10.07.2010 & 10.08.2010	01.10.2010 & 02.10.2010	Cheque	1. Respective Bill 2. Copy of Account in our books at Page No- 604 Paper Book-3 Form 16A-Page No-605.
3	BABLI FABRICATOR, Chitra Colony, Bhangel, Ph. - II, Noida.	1,59,905.00	25 to 35/ 15.06.2010 30.06.2010 15.07.2010 30.07.2010 14.08.2010 30.08.2010	06.09.2010 26.10.2010 25.11.2010 27.12.2010 21.01.2011	Cheque	1. Respective Bill 2. Copy of Account in our books at Page No- 614 TO 617 Paper Book-3, Form 16A-Page No-625 to 626.
4	CHAUHAN ENTERPRISES Inside Gate, Sharma Market Salarpur Bhangel, Noida.	1,37,257.00	1160 & 1182/ 28.07.2010 & 30.07.2010	26.10.2010 & 25.11.2010	Cheque	1. Respective Bill 2. Copy of Account in our books at Page No- 641 Paper Book-3, Form 16A-Page No-644.
5	DEEPAK KAJ HOUSE B-165, New Ashok Nagar, Delhi.	1,27,835.00	1024, 1018, 1025/ 30.06.2010 15.07.2010 31.07.2010	06.09.2010 26.10.2010 25.11.2010	Cheque	1. Respective Bill 2. Copy of Account in our books at Page No- 647 to 649 Paper Book-3, Form 16A-Page No-650.
6	FASHION MAKERS C-188 1 st Floor Sec. 10, Noida.	1,15,973.00	181 & 184/ 25.08.2010 & 31.08.2010	27.12.2010	Cheque	1. Respective Bill 2. Copy of Account in our books at Page No- 676 to 677 Paper Book-3, Form 16A-Page No-680.
7	KHALEEQ AHEMAD	1,97,807.00	1306, 1307 1310, 1309	26.10.2010 &	Cheque	1. Respective Bill 2. Copy of

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	CHAUHAN Inside Gate, Sharma Market Salarpur Bhangel, Noida.		1312, 1316 1318, 1326 1325, 1328 1329, 1330 1331, 1332 129 130/ 15.06.2010 30.06.2010 05.07.2010 31.07.2010 20.08.2010 21.08.2010 30.08.2010	10.11.2010		Account in our books at Page No- 706 to 712 Paper Book-3, Form 16A-Page No-721 to 722.
8	MALIK ENTERPRISES Village Chigarsi Sector-63, Noida.	2,71,875.00	10/ 30.06.2010	09.09.2010 2610, 2010 25.02.2011 28.02.2011	Cheque	1. Respective Bill 2. Copy of Account in our books at Page No- 767 to 769 Paper Book-3, Form 16A-Page No-771.
9	MOHAN FAB A-39/40 Shiv Durga Vihar Lakarpur Faridabad Haryana.	2,69,202.00	116 & 123/ 23.06.2010 & 30.08.2010	09.09.2010	Cheque	1. Respective Bill 2. Copy of Account in our books at Page No- 791 to 794 Paper Book-3, Form 16A-Page No-797 to 800.
10	N. K. FINISHING i-24, Sec-9, Noida, G. B. Nagar.	1,41,319.00	207 to 208/ 08.07.2010	26.10.2010 27.10.2010	Cheque	1. Respective Bill 2. Copy of Account in our books at Page No- 801 Paper Book-3, Form 16A - Page No - 805.
11	PRAVESH KAJ HOUSE B-173, New Ashok Nagar, Delhi.	1,80,680.00	204, 205, 207/ 30.06.2010 30.07.2010 31.08.2010	27.12.2010	Cheque	1. Respective Bill 2. Copy of Account in our books at Page No- 830 Paper Book-3, Form 16A-Page No- 833 to 834.
12	RAJNI KAJ CENTRE B-165,	1,94,284.00	223 to 226/ 15.10.2010	06.09.2010 26.10.2010 27.11.2010	Cheque	1. Respective Bill 2. Copy of Account in our

	New Ashok Nagar, Delhi.		15.07.2010 30.07.2010	27.12.2010		books at Page No- 864 to 866 Paper Book-3, Form 16A-Page No-869 to 870.
13	RELIANCE ENTERPRISES	1,63,029.00	164, 75, 74, 86, 90, 95, 315, 301, 91, 339, 333, 349, 358, 365, 362/ 15.06.2010 28.06.2010 29.06.2010 05.07.2010 14.07.2010 15.07.2010 07.08.2010 14.08.2010 26.08.2010 31.08.2010	06.09.2010 & 26.10.2010	Cheque	1. Respective Bill 2. Copy of Account in our books at Page No- 873 to 877 Paper Book-3, Form 16A-Page No-888 to 889.
14	SIDDIQUL EXPORT Rz- 524/24, Tughlakabad Extn., New Delhi - 110 019.	4,02,768.00	100, 101, 109, 110, 108, 112, 114, 120, 113, 116, 115/ 15.06.2010 30.07.2010 14.08.2010 30.08.2010	17.08.2010 06.09.2010 26.10.2011 25.11.2011	Cheque	1. Respective Bill 2. Copy of Account in our books at Page No- 767 to 769 Paper Book-3, Form 16A-Page No-771.
	TOTAL :	2594300.00				

30.2 It is submitted that from the aforesaid table it would be seen that despite the evidences furnished which is of similar nature, yet the learned CIT (Appeals) has upheld the disallowance. It is most humbly submitted that the mere fact the summons could not be delivered by the learned Assessing Officer by itself could be no ground to have upheld the disallowance. Needless to reiterate that

such of the fabricators had been undertaking fabrication activities in the prior period and even in the later period of the same financial year, as is tabulated as Annexure 'B'.

31. Ld. Counsel submitted that at Pg. 49, the learned CIT (Appeals) has referred to figure of Rs.28,33,607 (which includes a sum of Rs.2.84.326/-) for purchase of accessories. The aggregate value of accessories found at the time of survey was Rs.16,77,967. The assessee has furnished a chart at pages 1967 to 1968 (PB-6), which provides the details of expenses incurred on purchase of accessories and the evidence furnished in support of the purchases.

32. The appellant in support of its claim has tabulated fabricator wise details of expenditure incurred and claimed along with the evidence furnished before the learned Assessing Officer on the basis of which he himself in his remand report dated 29.02.2016 had held that the expenditure claimed has been established as genuine.

33. It is thus submitted that it is not denied that the assessee had exported the goods after fabrics purchased by it was fabricated. The fabricated material admittedly been exported outside India. Thus the submission of the assessee is that merely because fabricators to whom the payments made by account payee cheques had not been served at their then addresses available, could not be a ground to disallow the claim of expenditure incurred

34.1 Likewise the assessee had incurred an expenditure of Rs.16,77,967/- for the purchase of accessories. The Assessing Officer out of the suppliers of the accessories had issued summons to 6 of the parties of the expenditure of Rs.10,63,562/-. Out of 6 parties, 2 of the parties of the sum of Rs.2,84,326/- (Page 65 of CIT (Appeals) order) however could not be served with the summons. However the fact said summons could not be served could not be sufficient for the reasons stated above to have disallowed the said sum of expenditure. It is submitted that all the expenditure incurred were paid by account payee cheques. Similar table of expenditure incurred and claimed is tabulated here below:-

Sl. No	Name and address of supplier.	Amount of expenditure incurred.	Date and Bill No.	Date of payment.	Mode of payment.	Evidences.	
1	AVERY DENNISON ACCESSORIES Plot No. 6B, 1 st Main Road, Kiadb, Phase-I, Basnglore.	1,57,183.00	664854, 666328, 666130, 666131, 666132, 666133, 666134, 666129, 666128, 667772, 667769, 667770, 667773, 667776, 667774, 667771, 670252/	17.08.2010 24.08.2010 23.08.2010 27.08.2010 04.09.2010	27.09.2010 11.10.2010 27.11.2010	Cheque	1. Respective Bill 2. Copy of Account in our books at Page No- 1306 to 1318 Paper Book-4.
	HITKARI	1,27,143.00	3354, 3598	16.09.2010	Cheque	1. Respective	

2	ACCESSORIES G-7, Shreejee Complex, Sharma Market, Harola, Noida.		3348, 3602 3421, 3619 3423, 3611 3469, 3600 3450, 3605 3494, 3638 3491, 3662 3507, 3660 3508, 3641 3530, 3670 3531, 3672 3535, 3726 3562, 3700 3576, 3752 3577, 3751 3765/ 14.08.2010 18.08.2010 19.08.2010 20.08.2010 21.08.2010 23.08.2010 25.08.2010 26.08.2010 27.08.2010 28.08.2010 30.08.2010 31.08.2010 01.09.2010			Bill 2. Copy of Account in our books at Page No- 1110 to 1181 Paper Book-4.
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34.2 For the sake of convenience, the assessee is furnishing a chart as **Annexure - 'C'** which provides the details of such suppliers of accessories who had also been supplying accessories in the prior period and even in the later period of the same financial year.

35. Therefore, the ld. Sr. Counsel for the assessee submits that since the CIT (Appeals) analyzed both the remand reports of the Assessing Officer and since the assessee has furnished all the evidences and explanations in support of the claim that there is no

difference in stocks the ld. CIT (Appeals) has rightly deleted the addition of Rs.28,78,632/-. The ld. Sr. Counsel further submits that simply because the summons could not be served on some of the parties there is no justification in sustaining the addition to the extent of Rs.28,78,632/- by the ld. CIT (Appeals). The ld. Sr. Counsel for the assessee in so far as the statement recorded by the survey team from Shri V. P. Sachdeva offering difference in the value of closing stock of Rs.6,50,11,523/- as income of the assessee. It is submitted that the statement recorded under section 133A of the Act during the course of survey has no evidentiary value when the assessee proves with documentary evidences that in fact there is no discrepancy in stocks. The ld. Sr. Counsel submits that as a matter of fact when the survey team took out the P & L account computer of the assessee as on the date of survey on 6.09.2010 there were pending bills to be recorded and the books were unaudited. The ld. Sr. Counsel submits that when the books were audited after recording all the transactions in the books of accounts the assessee explained that there is no discrepancy in stocks and in fact the Assessing Officer accepted that the stock lying with customs authorities in their warehouse was correct and was also given credit while completing the assessment. Therefore, the ld. Sr. Counsel submits that the assessee could prove with proper explanations and the evidences that there is no discrepancy in stocks and in view of this the addition cannot be based merely by the statement given by the partner, Shri V. P. Sachdeva and statement given has no evidentiary value. Reliance was placed on the decision of the Hon'ble Madras High Court in the case of CIT Vs. S. Khader Khan Son [(2008) 300 ITR 157 (Mad)]. The ld. Sr. Counsel

for the assessee submits that the decision of the Hon'ble Madras High Court has also been affirmed by the Hon'ble Supreme Court in CIT Vs. S. Khader Khan Son [(2013) 352 ITR 480 (SC)] by dismissing the appeal of the Revenue.

36. Heard rival submissions, perused the orders of authorities below and the evidences furnished before us. The assessee is a firm engaged in the business of manufacturing and export of ready-made garments filed its return of income on 30.09.2011 declaring loss of Rs.83,38,278/-. A survey was carried out at various business premises belonging to the assessee on 6.09.2010 wherein stock of Rs.11,41,17,922/- was inventorised as against declared stock of Rs.4,91,06,399/- resulting in unexplained stock of Rs.6,50,11,523/- which the assessee did not consider the same in the return of income filed. A show cause notice was issued by the Assessing Officer and the assessee submitted that the survey team apart from preparing inventories of stock had taken a print out of profit and loss account available as on 6.09.2010 and in this P & L account the closing stock was depicted at Rs.4,91,06,399/- which is the value taken by the survey team which was compared with the figure of stock of inventories by them on 6.09.2010 at Rs.11,41,17,922/-. The assessee submitted that subsequent to survey in the course of audit of accounts undertaken the P & L account for the period 1.04.2010 to 6.09.2010 was prepared after recording all the transactions for this period and in the P & L account the assessee has shown the correct stock on 6.09.2010 at Rs.6,10,63,622/- and, therefore, there is no discrepancy in the matter of stock inventorised by the survey team on 6.09.2010 and the correct figure

of stock has been shown by the assessee on 6.09.2010 in the audited books of account.

37.1 We observed that the assessee contended that goods worth Rs.33,82,315/- were received from S.A.M. Overseas, a proprietary concern during the period 2.08.2010 to 31.08.2010 and in the unaudited P & L account taken on 6.09.2010 the said purchases of fabric was not recorded although the said goods have been received in the premises of the assessee by 6.09.2010. Similarly fabric purchased from Dhanlakshmi Export Syndicate on 4.08.2010 and 6.08.2010 though received on the said dates were not recorded in the unaudited P & L account which amounted to Rs.3,43,26,387/- . The assessee also submitted that the survey team inventorised the vinished goods lying at customs at Rs.2,36,22,278/- and this was not available at the factory at the time of survey on 6.09.2010 as they have already been dispatched to Bombay Port for export. Therefore, it was submitted that the stock was not depicted in unaudited P &L account. It was submitted that out of goods of stock valued at Rs.2,36,22,278/- stock worth Rs.20,51,214/- were converted into sales by 6.09.2010 and is supported by shipping bills, copies of the same were furnished and, therefore, it was contended that the stock to the extent of Rs.2,20,51,217/- could not form part of stock as on 6.09.2010 and was wrongly taken by the survey team. The assessee further submitted in the unaudited P & L account the expenditure on fabrication was shown at Rs.3,53,31,230/- and the audit details show that the actual expenditure incurred up to 6.09.2010 was Rs.56,80,056/- and, therefore, expenditure to the extent of Rs.1,53,48,825/- which related to actual expenditure up

to 6.09.2010 was not recorded. Similarly it was submitted that expenditure in the unaudited P & L account in respect of Dying bills was shown at Rs.2,71,25,037/- and in the audited P & L account it was shown the actual expenditure at Rs.2,87,66,801/- and the difference of Rs.16,41,764/- could not be recorded in the unaudited P & L account and in support the assessee submitted the details of bills for the same.

37.2 Similarly the assessee submitted that expenditure in the unaudited P & L account in respect of dying accessories bills was shown at Rs.1,00,25,720/- and in the audited P & L account it was shown the actual expenditure at Rs.1,17,03,688/- and the difference of Rs.16,77,967/- could not be recorded in the unaudited P & L account and in support the assessee submitted the details of bills for the same.

38. Further the assessee contended that the stock which was inventorised at the premises of SAM Design, A-36, Hans Complex, Noida, which is the proprietary concern of Shri Mukesh Sharma at Rs.2,57,46,000/- was over-valued and the correct valuation in terms of stock in quantity and value should have been taken at Rs.1,92,34,153/- and thereby arose excess valuation to the extent of Rs.65,11,846/-. Therefore, it was explained that if all these are considered the stock as on 6.09.2010 was more than what has actually been inventorized by a small margin of Rs.5,08,761/- and, therefore, there can be no addition by way of income from undisclosed sources on account of alleged discrepancy in the stock.

39. However, not convinced with the replies and submissions and the evidences furnished by the assessee the Assessing Officer made addition of Rs.4,29,63,309/- as unexplained stock after giving credit of Rs.2,20,51,214/- which stock was lying with customs warehouse awaiting for shipment. The Assessing Officer treated the balance of Rs.15,71,064/- as part of stock as on 6.09.2010 i.e. the date of survey.

40. The assessee preferred appeal before the Id. CIT (Appeals) and furnished various submissions and evidences and the Id. CIT (Appeals) called for remand reports from the Assessing Officer twice. After analyzing the remand reports submitted by the Assessing Officer dated 29.02.2016 and 9.05.2017 restricted the addition to Rs.28,78,632/- and deleted the balance addition of Rs.4,00,84,677/-.

41. We observe that in the course of proceedings before the Id. CIT (Appeals) the assessee furnished various evidences and submissions justifying the reconciliation of stocks made by the assessee to show that there is no discrepancy in the stocks and, therefore, the addition is not warranted. The Id. CIT (Appeals) called for the remand report vide letter dated 11.01.2016 from the Assessing Officer on the evidences and explanations furnished in the course of hearing before him. The Assessing Officer furnished remand report dated 29.02.2016 after examining the details of fabric purchased (local and central) not recorded by the assessee on the date of survey amounting to Rs.3,43,26,387/- and the details of fabrication expenses not recorded by the assessee on the date of the survey amounting to Rs.1,53,48,825/- and the details of

accessories purchased (local and central) not recorded by the assessee on the date of survey amounting to Rs.16,77,967/- and the details of dying expenses not recorded by the assessee on the date of survey amounting to Rs.16,41,764/-. The ld. CIT (Appeals) however, further vide letter dated 13.05.2016 sought another remand report from the Assessing Officer for conducting further enquiries by issue of summons under section 131 to all the parties who filed their confirmations under section 133(6) of the Act issued by the Assessing Officer. The Assessing Officer submitted remand report dated 9.05.2017 considering both the remand reports and the comments therein the ld. CIT (Appeals) restricted the addition to Rs.28,78,632/-. While restricting the addition as above the ld. CIT (Appeals) has given his findings as under:-

"C) Conclusions in the two remand reports and my comments.

1st remand report.

The following are the relevant extracts of the Assessing Officer's remand report dt. 29.02.2016 containing conclusions of the verifications conducted by him:

Fabric and not recorded by the assessee on the date of the survey:

All the above stated parties submitted their party account ledger of the assessee for the F.Y 2010-11 wherein the value and the bill numbers of the fabrics purchased and as claimed by the assessee in its reconciliation statement were verified, one by one, in entirety from the copies of bills as submitted by the assessee at pages 22 to 55 of volume 4 of the Paper Book. It was noted from the account statements submitted by the above named parties that they were regularly receiving payments from the assessee during the Financial Year 2010-11 against goods supplied.

Purchases from M/S SAM Overseas to study the pattern of deviation:

The earlier years as well as 2 subsequent year accounts of M/s. SAM Overseas, a proprietary firm of Sh. Ved Parkash Sachdev a sister concern of the assessee firm were studied to understand the pattern of transactions between the said party and the assessee and it was observed that the assessee firm was routinely procuring fabrics from its sister firm at market value and routinely making payments against the same, in other words treating it as a vendor. We have evaluated the value of debit as well credit transactions represented by the purchases and payments made by the assessee respectively and summarise as below:

Rs. in Lakhs

Particulars	FY	FY	FY	FY	FY
	2008-09	2009-10	2010-01	2011-12	2012-13
Purchases/Credits	2680.58	3170.79	2346.04	1057.45	160.45
Payment/Debits	1188.55	3187.81	2290.62	2648.14	131.92

We noticed that there has been a regular flow of purchases as well as payments against the said purchases between the two parties and we conclude that there appears to be no question on the genuineness of the transactions between the said parties. Fabrication Expenses not recorded by the assessee on the date of the survey;

Al para (13)(ii) of his remand report the AO in his findings states: "All the above stated parties submitted their party account ledger of the assessee for the F.Y. 2010-11 wherein the value and the bill numbers of the fabrics purchased and as claimed by the assessee in its submissions and copies submitted in Volume 4 of the paper book at pages 77 to 477 were verified, one by one, in entirety. It was also noted from the Account statements submitted by the above named parties that they were regularly receiving payments from the assessee during the FY 2010-11." Accessories purchased not recorded by the assessee on the date of the survey:

All the above stated parties submitted their party account ledger of the assessee for the F.Y. 2010-11 wherein the value and the bill numbers of the fabrication expenses and as claimed by the 4 assessee in its reconciliation statement were verified, one by one, in entirety from copies of bills submitted by the assessee at pages 540 to 832 in Volume 5 of the paper book. It was also noted from the Account statements submitted by the above named

parties that they were regularly receiving payments from the assessee during the FY 2010-11."

Dyeing expenses not recorded by the assessee on the date of the survey:

The above stated party/ M/s Samtex Desinz | submitted their party account ledger of the assessee for the F.Y. 2010-11 wherein the value and the bill numbers of the dyeing expenses and as claimed by the assessee in its reconciliation statement were verified in entirety from copies of bills submitted by the assessee at pages 580 to 536 in Volume 4 of the paper book. It was also noted from the Account statements submitted by the above named parties that they were regularly receiving payments from the assessee during the F.Y. 2010-11."

The Assessing Officer in his remand report dt. 29.02.2016 summarizes his conclusions as under:

- i) all the bills for respective expenses as claimed by the assessee in its reconciliation statements in support of its claim of non recording as on the date of survey were found to be correct and valid;
- ii) the parties with whom the assessee was conducting its business were regularly doing business with it and receiving regular payments from it;
- iii) all the bills were duly verified from the accounts statements so submitted by the parties to whom notices u/s 133(6) were issued. It seems that the Assessing Officer in his remand report dated 29.02.2016 has given very conclusive and explicit findings. In his opinion he conducted all the necessary inquiries entrusted on him and after making all required verifications of the books of accounts, bills etc arrived at these conclusions.

2nd remand report

The following are the relevant paras of the AU's remand report dt. 09.05.2017 containing conclusions of the verifications conducted by her:

- (i) The Assessing Officer has repeatedly, in her remand report dt. 09.05.2017 has stated that the Assessee has constructed, manipulated the books, as is stated at page 29 para 10.5 :

..... only show that the assessee in the meanwhile has constructed, manipulated the books and colored the findings of the survey team to its own benefit.”

(ii) The Assessing Officer has further stated at page 36 para 13.2.1.3 that:

The books of accounts that assessee is presenting today with additional entries which were not present/recorded in books that the partner twice confirmed as updated books written up to date are not the true books of accounts. In fact it appears that these are not manipulated. These no doubt present manipulated picture.”

(iii) The Assessing Officer at page 38 para 13.2.1.7 states:

In view of the undersigned documents produced are simply self created and self serving documents with no evidentiary values. These are construction/afterthought to make the unaccounted stock found during the survey proceedings look like accounted one”

(iv) At page 40 para 13.2.1.12.

The books of the proprietorship SAM Overseas remain open and the assessee has used the same to take bills in order to accommodate the unaccounted stock found. In light of the circumstances enumerated above, it is clear that these bills are nothing but an afterthought and reconstruction.”

(v) Again at page 45 para 13.2.2.9,

“Rather, the response of the parties that have appeared in the remand proceedings appears to be tutored.....All in all the bills that assessee has relied upon as its evidence are just accommodation entries.”

(vi) At page 47 para 13.2.3.6,

The authentic cross verification of which is not possible. On perusal of these bills the observations are also recorded above. It appears the bills produced are just accommodation entries”

(vii) The Assessing Officer at page 49 para 13.2.4.4 states yet again that :

..... These have been generated and entered in the books only to make the unaccounted stock look like accounted one. Such clear afterthought and reconstruction is a systematic design only

to evade the due tax liability that has been determined during the survey."

(viii) At page 55 para 11, the AO once again brings out her contention of the books of accounts being manipulated.

Therefore, it was easiest possible way available with the assessee to manipulate the stock/purchase records....."

(ix) The AO has in para 14.4 of his remand report has stated "The bills were perused and based on the observations made above bills do not appear as genuine proof of the claims that the assessee has made." 5.2 The AO has even objected in para 14.5 of his remand report to payments being made as "staggered sums. It is a decided law that the Assessee knows his business and how to conduct it and that the Revenue cannot make decide on how the Assessee should be running his business.

Comments

The Assessing Officer has deduced, in conclusion to her remand report dt. 09.05.2017, that all evidence provided and relied upon by the Assessee to offer a credible explanation to the discrepancy in stock is constructed and manipulated, but she has not brought any substantial evidence to support her conclusion. From the perusal of the above findings of it is seen that the Assessing Officer clearly couldn't find any material to establish that the bills are bogus and manipulated and thus has based the remand report on own thinking of the case and termed the whole exercise as manipulation. The AO's use of guess work cannot be considered as unfallable evidence, her personal opinion which is formed without any basis and devoid of any solid proof. The AO has not been able to produce even a single evidence in support of her claims of the books being constructed and manipulated. The Assessing Officer has tried in vain to convince in her remand report albeit without offering any kind of support or solid evidence in support of her claims that the Assessee used the time to "construct, manipulate the books and colored the findings of the survey team to its own benefit. The AO could not produce even an iota of evidence in support of her claim on manipulation of books of accounts. The law is settled here as the cases are decided not on presumptions but on evidence. In my opinion the remand report dt. 09.05.2017 of the AO is not only inconclusive but is also devoid of any material substance to prove the claims. Therefore in my opinion the remand report dt. 29.02.2016 is inconclusive as the Assessing Officer who clearly wasn't able to make a case by unearthing evidences but instead tried to reply on presumptions which are not acceptable in the eye of law. The remand report dt. 09.05.2017 is full of assumptions, is presumptive and without any conclusion based on solid evidence.

The Assessing Officer is basing her opinion on the statement of Mr. V. P. Sachdev, partner in the Assessee Firm. The said statement was recorded u/s 133A of the Act, during the course of survey operation on 06.09.2010, which has been held as nonbinding provided an explanation can be offered by the Assessee. In the present case, the Assessee with all supporting evidences has provided full explanation on the discrepancy in actual stock and the book stock noted by the Survey team on the date of the survey. The right of the Assessee to offer explanation cannot be taken away by simply pointing out that unrecorded bills were not mentioned in the statement recorded u/s 133A of the Act. What is important is the fact and the explanation provided and not the timing of recording of the unrecorded bills. Hon'ble Apex Court in the case of Uma Charan Shaw v. CIT 37 ITR 271 SC has observed that A suspicion however strong cannot take the place of evidence.

The Assessing Officer has cited the case of Napar Drugs (P) Ltd. vs DCIT 98 ITD 285 of the Hon'ble Delhi High Court to state.....the fall scope of picture which emerges has to be taken cognizance of However in this case the facts are different, as in this case the Revenue found blank sale deed, share certificates, etc. on the premises which wasn't the case in the Assessee's present case. In the instant case the Survey team discovered stock the bills for which were not recorded by the Assessee at the time of conducting of the survey. The Assessee fault was not having updated his books of accounts as the accounts were not finalized at that time and statutory audit not undertaken. The Hon'ble Court in the cited case said that once a judicial consciousness has been stirred, then it must be taken to its logical conclusion, but the AD could not take it to its logical conclusion.

The other cited case by the Assessing Officer in her remand report is of The Hon'ble Supreme Court in the case of CIT Vs. Durga Prasad More 82 ITR 540 (SC) is relevant in only as much as is being reproduced.

"It is true that an apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real A little probing was sufficient in the present case to show that the apparent was not the real"

This extract reproduced from the above cited case also reiterates that the Assessing Officer should have completed the investigation task at hand instead of just casting a shadow of suspicion on the evidence produced and submitted by the Assessee. Simply by stating that the evidences "appear constructed and manipulated doesn't go to prove that indeed these are.

D] Response to notices u/s 133(6) and Summons u/s 131 and comments on the way the inquiries were conducted by the Assessing Officer during remand proceedings 1st Remand report The appellate authority vide letter dated 11.01.2016 had directed the Assessing Officer to conduct the following:

(I) Verify the contentions made during the assessment proceedings and give a categorical finding about the explanation of the appellant that there was no discrepancy in the stock as per the inventory made by the survey team and the stock as per books.

(ii) On perusal of the explanation, it is seen that an amount of Rs.3,38,02,315/- were purchased from its sister concern M/s SAM Overseas. In this connection, you are directed to make necessary inquiries about the genuineness of claim of purchases of M/s SAM Overseas out of which Rs.3,38,02,315/- was claimed to have been sold to the appellant.

(III) Further, necessary inquiries should also be made about the genuineness of claim from the said party about the following expenses:

- a. Fabrication bills not recorded in unaudited P&L A/c though goods fabricated till 06.09.10 (as per para 12) Rs.1,53,48,825.42
- b. Expenditure on accessories recorded subsequently though material received till 06.09.10 (as per para 13) Rs. 16,77,967.55
- c. Dyeing bills recorded subsequently though material received till 06.09.10 Rs. 16,41,764.05

1.7. The appellant was asked to furnish the details of purchases from M/s SAM Overseas for earlier two years and the next year to study the pattern of deviation if any, and the same angle may be inquired by you during the remand proceedings. The AO conducted in inquiries in the following manner as reported in his remand report dated 29.02.2016.

(1) Details of fabric purchased Local & Central) not recorded by the assessee on the date of the survey : Rs.3,43,26,387/-.

We have gone through the Fabric Reconciliation statement submitted by the assessee on page 21 of Volume 4 of the paper book wherein bills not accounted for as on the date of the Survey, though goods received before the said date have been mentioned to show a reconciliation between the physical stock reported by the survey team and the one noted by them from the Profit & Loss Account taken before commencement of the survey.

In order to verify the genuineness of claim of the assessee, notices u/s 133(6) of the Income Tax Act were issued to M/S SAM Overseas, assessee's

sister concern as well as other parties whose fabric purchase bills were reported by the assessee in its reconciliation statement The names and addresses of the said parties are as under:

S.No	Name of the Party	Address	Value of Transaction Verified (Rs)
1.	M/s SAM Overseas	B-83, Sector 83. Noida-201305. UP.	3.38,02.315/-
2.	M/s. DhanlaxmiExportSyndicate	9, Annamalai, Ground Lay Out, Mettur Road, Opp Bus Stand, Erode-638011.	3,87,888/-
3.	M/s. Dhanlaxmi Impex.	9, Annamalai, Ground Lay Out, Mettur Road, Opp Bus Stand, Erode-638011.	1.36,184/-
		TOTAL :	3,43,26,387/-

(ii) Details of Fabrication Expenses not recorded by the assessee on the date of survey : Rs.1,53,48,825/-

We have gone through the reconciliation statement submitted by the assessee at page 56 of Volume 4 of the paper book The assessee has further submitted a copy of his Fabrication ledge account for the period 15.06.2010 to 06.09.2010 at pages 57 to 74 of Volume 4 of the paper book, wherein the bills have been accounted for post the date of the Survey though the goods relating to the said bills had been received by the assessee from its vendors before the date of the survey The assessee has further submitted a summary of Fabrication Charges/Expenses at pages 75 to 76 of Volume 4 of the paper book to show a party wise detail of Fabrication Charges reconciliation between the physical stock reported by the survey team and the one noted by them from the Profit& Loss Account taken before commencement of the survey.

In order to verify the claim of the assessee we proceeded to issue notices u/s 133(6) of the Income Tax Act to the parties whose fabrication bills were reported by the assessee in its reconciliation statement and the aggregate value of whose bills as mentioned by the assessee was in excess of Rs.1.00 lakh. The names and addresses of the said parties are as under:

S.No	Name of the Party	Address	Value of Transaction Verified
1.	M/s. A.S. Textiles.	B-29, 1 st Floor, Sec. 10, Noida.	1.09,196/-

Cross I.T.A. Nos. 1695/Del/2020 & 169/Del/2021

2.	M/s. Abdul Sattar.	Vill. Choura Gaon, Sec. 22, Noida.	2,39,301/-
3.	M/s. Anamika Enterprises.	C-1, Old Maujpur, (Near Subzi Mandi Panchayatghar)	1.37,929/-
4.	M/s. Aryan Enterprises.	Gadi Road Village Mamura, Sector-66, Near Ambedkar ITI Institute, Opp. Sector-64, Noida.	1.23,170/-
5.	M/s. Babli.	Chitra Colony, Bhangel, PH-II, Noida.	1.59,906/-
6.	M/s. Balaji Exports.	111 B, DLF Industrial Area, Ph.-I, Faridabad.	1.61,289/-
7.	M/s. Chauhan Enterprises.	Inside Gate, Sharma Market, Salarpur, Bhangel, Noida.	1.37.257/-
8.	M/s. Deepak Kaj House.	B-165, New Ashok Nagar, Delhi.	1,27,835/-
9.	M/s. Fashion Makers.	C-188, 1 st Floor, Sec. 10, Noida.	1.15,974/-
10.	M/s. Khaleeq Ahmed Chauhan.	Inside Gate, Sharma Market, Salarpur, Bhangel, Noida.	1.97,807/-
11.	M/s. M.F. Fashion.	G. No. 1, H. No. 43, Rahul Vihar, Near Y R School, Behind Green Hotel, Ghaziabad.	3,04,317/-
12.	M/s. M. K. Garments Finishers.	A-113, Sec. 20, Noida.	4,39,982/-
13.	M/s. Malik Enterprises.	Village Chigarsi, Sector 63. Noida.	2.71.875/-
14.	M/s. Mohan Fab.	A-39/40, Durgavihar, Lakarpur, Faridabad, Haryana.	2.69,202/-
15.	M/s. N. K. Finishing.	23, VDS Market, Sec. 93, Noida.	1.41,320/-
16.	M/s. PraveshKaj House.	B-165, New Ashok Nagar, Delhi.	1.80.681/-
17.	M/s. Rajni Kaj Centre.	B-165, New Ashok Nagar, Delhi.	1,94,284/-
18.	M/s. Reliance Enterprises.	38/7, Sharma Market, Harola, Sec. 5, Noida.	1.63,029/-
19.	M/s. S.A.M. Overseas.	B-76, Sector 83, Noida.	49.94,922/-
20.	M/s. Shyamji Computer Embroidery.	341/A/8, St. No. 1, Near Balaji Tent House, Kanti Nagar, Delhi-51.	5.02.585/-
21.	M/s. Siddiqui Export.	RZ-802/20, Near Jain Mandir, New Delhi.	4,02,770/-

		TOTAL :	93,74,634/-
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(iii) Details of Accessories Purchased Local & Central) not recorded by the assessee on the date of the survey : Rs.16,77,967/-

We have gone through the reconciliation statement submitted by the assessee on pages 537 to 539 of Volume 5 of the paper book wherein bills not accounted for as on the date of the Survey, though received before the said date, have been detailed to show a reconciliation between the physical stock reported by the survey team and the one noted by them from the Profit & Loss Account taken before commencement of the survey.

In order to verify the claim of the assessee, we proceeded to issue notices u/s 133(6) of the Income Tax Act to the parties whose Accessories purchase bills were reported by the assessee in its reconciliation statement and the aggregate value of whose bills as mentioned by the assessee was in excess of Rs.1.00 lakh. The names and addresses of the said parties are as under:

S.No	Name of the Party	Address	Value of Transaction Verified
1.	M/s. Hitkari Accessories.	G-7, Shree Ji Complex, Sharma Market, Harola, Noida.	1.27,143/-
2.	M/s. Digamber Trim Point.	G-5, Shree Krishna Complex, Sharma Market, Harola, Sec. 5, Noida.	2,18,031/-
3.	M/s. Paras Tapes Co. (Regd.)	3797, GaliBarna, Sadar Bazar, Delhi.	2.21,951/-
4.	M/s. Sethi Pooja Buttons.	Shop No. 6, Street No. 9, 1043, Akash Deep Complex, Govindpuri, Kalkaji, Delhi.	1.57.704/-
5.	M/s. KannujiMathu Mal & Sons.	2721, Chowk Rai Ji, Nai Sarak, Roshanpura, Chandni Chowk, Delhi-110006.	1,81,550/-
6.	M/s. Avery Dennison.	Plot No. 6-B, 1 st Main Road, Kiadb, PH-I, Bangalore.	1.57,183/-
		TOTAL :	10,63,564/-

(iv) Details of Dyeing Expenses but not recorded by the assessee on the date of the survey : Rs.16,41,764/-.

We have gone through the reconciliation statement by the assessee on pages 478 to 479 of Volume 4 of the paper book wherein bills not accounted for as on the date of the Survey though received before the said date have been mentioned to show a reconciliation between the physical stock reported by the survey team and the one noted by them from the Profit & Loss Account taken before commencement of the survey.

In order to verify the claim of the assessee, we proceeded to issue notices u/s 133(6) of the Income Tax Act to the parties whose Accessories purchase bills were reported by the assessee in its reconciliation statement. The names and addresses of the said parties are as under:

S.No	Name of the Party	Address	Value of Transaction Verified.
1.	M/s. Samtex Desinz.	A-36, Hosiery Complex, Noida.	16.41,764/-
		TOTAL :	16.41,764/-

Therefore the notices issued by the Assessing Officer u/s 133(6) for conducting inquiries to verify the genuineness of claim of expenses and response to such notices are being summarised under:

S. No.	Particulars	Notice u/s 133(6) Issued to	Response to notice u/s 133(6)
(i)	In Fabric Purchase Expenses 3,43,26,387.00	3 Parties 3,43,26,387.00 1	All 3 Parties 3,43,26,387.00
(ii)	In Fabrication Expenses 1,53,48,829.00	21 Parties (93,74,631.00)	All 21 Parties (93,74,631.00)
(iii)	In Accessories Purchase 16,77,967.00	6 Parties (10,63,562.00)	All 6 Parties (10,63,562.00)
(iv)	In Dyeing Expenses. (16,41,764.00)	1 Party (16,41,764.00)	1 Party (16,41,764.00)

24 remand report

In case of 2nd remand proceedings the appellate authority directed the Assessing Officer to issue summons to all the parties who filed their respective confirmations u/s 133(16) during the 1st remand proceedings. The Assessing Officer issued summons u/s 131 to all such parties and reported the compliances in her remand report 09.05.2017 as under:

Fabric unrecorded bills of Rs.3.43.26.387/-:

Sl. No.	Name of the Party	Address	Transaction Value (Rs.)	Summons Delivery Status
1.	M/s. S.A.M. Overseas (Proprietorship firm of one of the partners)	B-83, Sector 83, Noida-201305, U.P.	3,38,02,315/-	Delivered and party appeared with books of accounts.
2.	M/s. DhanLaxmi Export Syndicate	7, Ottukara Channaiyar Street, Erode-638004. Tamil Nadu.	3,87,888/-	Delivered but not appeared.
3.	M/s. DhanLaxmi Impex.	7, Ottukara Channaiyar Street, Erode-638004. Tamil Nadu.	1,36,184/-	Delivered but not appeared.
		Total	3,43,26,387/-	

It is seen from the above chart that summons to all 3 parties was delivered and thus the identity of all parties was confirmed. Verification and recording of statement for 1 party i.e. M/s S.A.M. Overseas (Prop) was done which constitutes 98.47 % of the bills under reconciliation. The Assessing Officer did not exercise his powers to get the remaining parties to appear on delivery of the summons u/s 131 of the Act. In case of Orissa Corporation Pvt. Ltd. 159 ITR 78 (SC). Hon'ble Supreme Court held that if the assessee discharges its burden that lay on him to provide the details of the parties with whom it had dealt with, then the onus of verification of transactions shifts on the AO to use the machinery available to him to complete the investigation at hand. The Assessee in the case at hand, had discharged its onus and if the AO has failed to carry out and complete the task at hand, he cannot take shelter behind the fact that some parties to whom the summons were delivered did not appear.

Fabrication unrecorded bills: 1.53.48.825/-:

Cross I.T.A. Nos. 1695/Del/2020 & 169/Del/2021

S.No	Name of Party	Address	Transaction Value	Summons Delivery Status
1.	M/s. Balaji Exports.	111B, DLF Industrial Area, PH-I, Faridabad.	1.61,289/-	Summons delivered & party did not appear but made submission in the office.
2.	M/s. Reliance Enterprises.	38/7, Sharma Market, Harola, Sec. 5, Noida.	1,63.029/-	Summons not delivered.
3.	M/s. S.A.M. Overseas.	B-76, Sector 83, Noida.	49,94,922/-	Summons delivered & party appeared with books of accounts
4.	M/s. Shyamji Computer Embroidery.	341/A/8, St. No. 1, Near Balaji Tent House, Kanti Nagar, Delhi-51.	5.02,585-	Summons delivered & party appeared with books of accounts
5.	M/s. Anamika Enterprises.	C-1, Old Maujpur, (Near Subzi Mandi Punchayat Ghar) New Delhi-53.	1.37,929/-	Summons delivered but party did not appear.
6.	M/s. Deepak Kaj House.	B-700, 1 st Floor, New Ashok Nagar, Delhi-96.	1,27,835/-	Summons not delivered.
7.	M/s. M. F. Fashion.	G. No. 1, H. No. 43, Rahul Vihar, Near Y R School, Behind Green Hotel, Ghaziabad.	3,04,317/-	Summons delivered but party did not appear.
8.	M/s. M. K. Garments Finishers.	A-113, Sec. 20, Noida.	4,39,982/-	Summons delivered & party did not appear with books of accounts but submissions received by post.
9.	M/s. Pravesh Kaj House.	B-700, 4 th Floor, New Ashok Nagar, Delhi-96.	1.80.681/-	Summons not delivered.
10.	M/s. Malik Enterprises.	B-206, Gali No. 6, Hardev Puri, Shahdara, Delhi-93.	2.71.875/-	Summons not delivered.

Cross I.T.A. Nos. 1695/Del/2020 & 169/Del/2021

11.	M/s. Rajni Kaj Centre.	B-615, 1 st Floor, New Ashok Nagar, Delhi-96.	1.94.284/-	Summons not delivered.
12.	M/s. A. S. Textiles.	B-29, 1 st Floor, Sec. 10, Noida.	1.09.196/-	Summons not delivered, with remark no such person.
13.	M/s. Abdul Sattar.	B-18, 2 nd Floor, Sector : 64, Noida.	2.39.301/-	Summons delivered, party appeared.
14.	M/s. Aryan Enterprises.	Gadi Road, Village Mamura, Sector : 66, Near Ambedkar ITI Institute, Opp. Sec. 44, Noida.	1.23,170-	Summons not delivered.
15.	M/s. Babli.	Chitra Colony, Bhangel, PH-II, Noida.	1.59,906/-	Summons not delivered.
16.	M/s. Chauhan Enterprises.	Inside Gate, Sharma Market, Salarpur, Bhangel, Noida.	1,37,257/-	Summons not delivered.
17.	M/s. Fashion makers.	C-188, 1 st Floor, Sec. 10, Noida.	1,15,974/-	Summons not delivered.
18.	M/s. Khaleeq Ahmed Chauhan.	Inside Gate, Sharma Market, Salarpur, Bhangel, Noida.	1,97,807/-	Summons not delivered.
19.	M/s. Mohan Fab.	39/40, Shiv Durga Vihar, Lakkarpur, Near Lakkarpur Railway Crossing, Faridabad-121009, Haryana.	2.69.202/-	Summons not delivered.
20.	M/s. N. K. Finishing.	23, VDS Market, Sector : 93, Noida.	1.41.320/-	Summons not delivered.
21.	M/s. Siddiqui Export.	RZ-2077/27, Basement, New Pahari Tughlakabad, Extn., New Delhi.	4.02.770/-	Summons not delivered.
		TOTAL :	93,74,631/-	

Out of the unrecorded sums of Rs.1,53,48,825/-, summons u/s 131 of the Act were issued to 21 parties whose unrecorded transactions as claimed by the Assessee aggregated to Rs.93,74,631/-. Summons were delivered to 7 parties whose transactions aggregated to a sum of Rs.67,80,325/-. The unrecorded bills with rest of the 14 parties aggregated to a sum of Rs.25,94,306/-.The AO did not take the investigation to its logical end and therefore it cannot be held against the Assessee, as has been held by the Hon'ble Supreme Court in the case of Orissa Corporation Pvt. Ltd. 159 ITR 78 (SC) where it was held that "the index numbers of the parties was in the file of the Revenue. The Revenue, apart from issuing notices under section 131 at the instance of the assessee, did not pursue the matter further..... In those circumstances, the assessee could not do any further..... Instead of his own inability to perform the duty assigned to him was attributed by the AO in drawing adverse view in the matter against the assessee."

Accessories unrecorded billsRs.16.77.9671:

S.No	Name of Party	Address	Transaction Value	Summons Delivery Status
1.	M/s. Digamber Trim Point.	G-5, Shree Ji Complex, Sharma Market, Harola, Noida.	2.18,031/-	Summons delivered & party appeared with books of accounts
2.	M/s. Paras Tapes Co. (Regd.)	3797, Gali Barna, Sadar Bazar, Delhi.	2,21.951/-	Summons delivered & party submitted for adjournment.
3.	M/s. KannuJiMathu Mal & Sons.	2721, Chowk Raiji, Nai Sarak, Roshanpur, Chandni Chowk, Delhi-6	1,81,550/-	Summons delivered & party appeared with books of accounts
4.	M/s. Sethi Pooja Buttons.	Shop No. 6, Street No. 9, 1043, Akashdeep Complex, Govindpuri, Kalkaji, Delhi.	1,57,704/-	Summons delivered but party did not appear.
5.	M/s. Avery Dennison.	Plot No. 6B, 1 st Main Road, Kiadb, Ph.I, Bangalore.	1.57,183/-	Summons not delivered.
6.	M/s. Hitkari Accessories.	G-7, Shree Ji Complex, Sharma Market, Harola, Noida.	1,27,143/-	Summons not delivered.

		TOTAL :	10,63,562/-	
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Out of the unrecorded sums of Rs16,77,967/-summons u/s 131 of the Act were issued to 6 parties whose unrecorded transactions as claimed by the Assessee aggregated to Rs.10,63,562/-. Summons were delivered to 4 parties whose transactions aggregated to a sum of Rs.7,79,236/-. The unrecorded bills with rest of the 2 parties aggregated to a sum of Rs.2,84,326/-The AO could have used the Revenue machinery available to get the transactions verified but did little other than issuing summons u/s 131 of the Act, which cannot be held against the Assessee, as has been held by the Hon'ble Supreme Court in the case of Orissa Corporation Pvt Ltd. 159 ITR 78 (SC), where it was held that the index numbers of the parties was in the file of the Revenue. The Revenue, apart from issuing notices under section 131 at the instance of the assessee did not pursue the matter further in those circumstances the assessee could not do any further.....Instead of his own inability to perform the duty assigned to him was attributed by the Assessing Officer in drawing adverse view in the matter against the assessee."

Dying Expenses unrecorded bills: Rs.16.41.764/:

S.No	Name of Party	Address	Transaction Value	Summons Delivery Status
1.	M/s. Samtex Desinz.	A-36, Hosiery Complex, Noida.	16.41,764/ -	Summons delivered & party appeared with books of accounts
		TOTAL :	16.41,764/ -	

Summons u/s 131 of the Act was issued to the sole party as mentioned above for verification which delivered and the party appeared in response to record its statement.

Therefore the notices issued by the AO u/s 131 for conducting inquiries to verify the genuineness of claim of expenses and response to such notices are being summarised under:

S.No	Particulars	Summons u/s 131 served and party complied.	Summons u/s 131 served and party did not comply.	Summons u/s not served.

Cross I.T.A. Nos. 1695/Del/2020 & 169/Del/2021

(i)	Fabric Purchase Expenses (total 3,43,26,387) Summon u/s 131 issued to 3 parties (3,43,26,387)	1 party M/s. SAM Overseas 3,38,02,315/-	2 parties. (5,24,072)	NIL
(ii)	Fabrication Expenses (total 1,53,48,829) Summon u/s 131 issued to 21 parties (93,74,631)	5 parties. (63,38,079)	2 parties. (44,22,46)	14 parties. (25,94,306)
(iii)	Accessories Purchase Expenses (total 16,77,967) Summon u/s 131 issued to 6 parties (10,63,562)	2 parties. (3,99,581)	2 parties. (3,79,655)	2 parties. (2,84,326)
(iv)	Dyeing Expenses (total 16,41,764) Summon u/s 131 issued to 1 party (16,41,764)	1 party M/s. Samtex Desinz (16,41,764/-)	NIL	NIL
			TOTAL :	28.78,632/-

Total such cases where summons u/s 131 could not be served and which can be said that the assessee did not discharge its onus is Rs.28,78,632/-.

From the details of the parties and their compliance to notices u/s 133(6) and summons u/s 131 it seen that out of the total amount to be verified as unexplained stock was Rs.4,29,63,309/- 2 business entities belonging to the Assessee's business group alone accounted for 94.12% and in both of these cases, not only compliance u/s 131(1) of the Act was carried out by both these parties, their books of accounts for AY 2010-11 were produced along with other documents, but also the statements of the authorised person recorded by the Assessing Officer.

S.No	Name of the Party	Transaction Nature	Amount (Rs.)
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1.	M/s. S.A.M. Overseas, Prop of Mr. Ved Prakash Sachdev	Fabric Expenses.	3,38,02,315.00
2.	M/s. S.A.M. Overseas, Prop of Mr. Ved Prakash Sachdev	Fabrication Expenses.	49,94,922.00
3.	M/s. Samtex Desinz Prop of Mr. Mukesh Sharma.	Dyeing & Printing Expenses.	16,41,764.00
		TOTAL :	4,04,39,001.00

In case of Orissa Corporation Pvt. Ltd. 159 ITR 78 SC), Hon'ble Supreme Court held that if the assessee discharges its burden that lay on him to provide the details of the parties with whom it had dealt with, then the onus of verification of transactions shifts on the Assessing Officer to use the machinery available to him to complete the investigation at hand. The Assessee in the case at hand, had discharged its onus and if the Assessing Officer has failed to carry out and complete the task at hand, he cannot take shelter behind the fact that some parties to whom the summons were delivered did not appear.

The assessee having discharged its onus, it was upon the Assessing Officer to bring material or evidence to discredit the same. In the present case it is evident from the conclusions drawn in the 2nd remand report that no adverse material is available with the Assessing Officer. The AO has drawn adverse inference as he did not receive reply parties in response to summons issued by u/s 131. No adverse inference can be drawn against the assessee merely because reply has not been received by the AO in response to summons. The AO cannot draw adverse inference merely because reply has not been received. Submission of the reply in an independent enquiry being carried out by the AO by issue of summons, from the person concerned directly is not in the hands of the assessee. The Assessing Officer may be justified in certain circumstances when notice is not served or when an adverse reply is received but merely non-receipt of reply can't be a justification for drawing adverse inference. In the present case during the 2nd remand proceedings the AO, apart from issuing notices under section 131, did not pursue the matter further. In those circumstances the assessee could not do anything further.

Though the strict rule of evidence are not applicable to the income tax proceedings but at the same time it does not mean that no evidences are required Supreme Court in the case of Dhakeshwari Cotton Mills Ltd. vs. CIT 26 ITR 775 (SC) where the Hon'ble Court has held as under: "As regards the second contention, we are in entire agreement with the learned Solicitor-General when he says that the Income tax Officer is not fettered by technical rules of evidence and pleadings and that he is entitled to act on material which may not be accepted as evidence in a court of law but there the agreement ends; because it is equally clear that in making the assessment under sub-section 3) of Section 23 of the Act, the Income-tax Officer is not entitled to make a pure guess and make an assessment without reference to any evidence or any material at all. There must be something more than bare suspicion to support the assessment under Section 23(3).

In view of the above discussions and respectfully followings the decisions of Hon'ble Supreme Court in case of Orissa Corporation Pvt. Ltd. 159 ITR 78 (SC) and in the case of Dhakeshwari Cotton Mills Ltd. vs. CIT 26 ITR 775 (SC, I am of the opinion that only to the extent to such cases where summons u/s 131 could not be served and for which it can be said that the assessee did not discharge its onus, can be taken as expenses non verifiable. Therefore the addition in respect of unexplained stock is restricted to Rs.28,78,632/- and the ground no. 2 is partly allowed.

9. Ground no 4 pertains to the denial of opportunity of being heard. From perusal of the assessment order it seen that Shri Maneesh Mehra, CA and AR appeared on behalf of the assessee on various dates and the information called for has been filed and the case was discussed with him. Therefore, there is no merit in the claim of the appellant that the opportunities were not given. Hence the claim of the appellant is rejected and this ground of is dismissed. “

43.1 The Id. CIT (Appeals) has passed a well-reasoned order on appreciating the evidences and explanations submitted by the assessee and both the remand reports sent by the Assessing Officer. In so far as the evidentiary value of the statement recorded by the survey party wherein Shri V. P. Sachdeva admitted in his statement the income due to discrepancy in stocks is concerned we observe that when the statement was recorded by the survey team on

6.09.2010 the books were incomplete, the books were not audited, various bills were pending for accounting. After the survey the assessee got its books audited wherein all the bills were accounted for and the stocks were reconciled. The assessee has furnished its explanation along with complete evidences and submitted that there is minimal discrepancy in stocks to the extent of Rs.5,08,760/- and this was also explained that it was only on account of mere valuation difference. Therefore, since the assessee has given its explanation along with evidences to prove that there is no discrepancy in stocks the addition cannot be made merely based on a statement given during survey operations under section 133A of the Act in the course of survey.

43.2 The Hon'ble Madras High Court in the case of CIT Vs. S. Khader Khan Son (supra) held that the statement given in the course of survey is not a conclusive piece of evidence and addition cannot be made based on the statement of partner during survey proceedings recording undisclosed income of the firm when it was subsequently retracted.

43.3 The Hon'ble High Court also explained the difference between sections 133A and 134 of the Act and held as under:-

“4. In the instant case, there was a survey operation conducted under [Section 133A](#) of the Act in the assessee's premises and a statement was recorded from one of the partner. Assuming there were discrepancies and irregularities in the books of accounts maintained by the assessee, an offer of additional income for the respective assessment years was made by the parnter of the firm. But, such statement, in view of the scope and ambit of the materials collected during the course of survey action under [Section 133A](#) shall not have any evidentiary value, as rightly held by the Commissioner and the Tribunal,

since such statement was not attached to the provisions of [Section 133A](#) of the Act. It could not be said solely on the basis of the statement given by one of the partner of the assessee-firm that the disclosed income was assessable as lawful income of the assessee. Since there was no material on record to prove the existence of such disclosed income or earning of such income in the hands of the assessee, it could not be said that the Revenue had lost lawful tax payable by the assessee.

5.1. In the decision in [Pullangode Rubber Produce Co. Ltd. v. State of Kerala](#) [(1973) 91 I.T.R. 18], the Apex Court held that an admission is extremely an important piece of evidence but it cannot be said that it is conclusive and it is open to the person who made the admission to show that it is incorrect.

5.2. Where a survey was conducted in the premises of the assessee, a medical practitioner, and a statement was recorded from him, in which the assessee surrendered additional income and pursuant to the same, the assessing officer reopened the assessment, but during the course of which the assessee retracted the additional income offered and contended that the statement was the result of duress, which was not accepted by the assessing officer and also by the Tribunal holding that the statement is valid and that it was made without duress, a Division Bench of the Allahabad High Court The Allahabad High Court in [Dr.S.C.Gupta v. Commissioner of Income-tax](#) [(2001) 248 I.T.R. 782], of course, placing reliance on the decision of the Apex Court in [Pullangode Rubber Produce Co. Ltd. v. State of Kerala](#) [(1973) 91 I.T.R. 18] held that the burden that was laid on the assessee to establish that the admission made in the statement at the time of survey was wrong and that there was no additional income was not even attempted to be discharged and thus, the order of the Tribunal was based on facts and no question of law arose from it.

5.3. A power to examine a person on oath is specifically conferred on the authorities only under [Section 132\(4\)](#) of the Act in the course of any search or seizure. Thus, the [Income-tax Act](#), whenever it thought fit and necessary to confer such power to examine a person on oath, has expressly provided for it, whereas [section 133A](#) does not empower any Income-tax Officer to examine any person on oath. Thus, in contradistinction to the power under [section 133A](#), [section 132\(4\)](#) of the Income-tax Act enables the authorised officer to

examine a person on oath and any statement made by such person during such examination can also be used in evidence under the [Income-tax Act](#). On the other hand, whatever statement recorded under [section 133A](#) of the Act is not given an evidentiary value, vide a decision of the Kerala High Court in [Paul Mathews and Sons v. Commissioner of Income-tax](#) [(2003) 263 I.T.R. 101].

5.4. The scope of [Sections 132\(4\)](#) and [133A](#) also came up for consideration before the Kerala High Court in [Paul Mathews and Sons v. Commissioner of Income-tax](#) [(2003) 263 I.T.R. 101]. In the said case, the assessee therein made an attempt to draw a distinction between the two provisions, viz., [Sections 132\(4\)](#) and [133A](#). According to the assessee, there is no provision to administer oath or to take any sworn statement and that a mere admission or an acquiescence cannot be a foundation for an assessment and that any statement given during a survey has no effect as an "admission" nor can it be a statement on oath. According to the assessee, his statement during the survey with reference to any books of account can hardly be the basis for any assessment. It was also contended on behalf of the assessee that any material collected or any statement recorded during the survey under [Section 133A](#) cannot be put against the assessee, as the same has no evidentiary value. The Division Bench of the Kerala High Court, appreciating the stand taken by the assessee and after referring to [Section 133A](#) of the Act, held as hereunder:

".. we find that the power to examine a person on oath is specifically conferred on the authorised officer only under [section 132\(4\)](#) of the Income-tax Act in the course of any search or seizure. Thus, the [Income-tax Act](#), whenever it thought fit and necessary to confer such power to examine a person on oath, the same has been expressly provided whereas [section 133A](#) does not empower any Income-tax Officer to examine any person on oath. Thus, in contradistinction to the power under [section 133A](#), [section 132\(4\)](#) of the Income-tax Act enables the authorised officer to examine a person on oath and any statement made by such person during such examination can also be used in evidence under the [Income-tax Act](#). On the other hand, whatever statement is recorded under [section 133A](#) of the Income-tax Act it is not given any evidentiary value obviously for the reason that the officer is not authorised to administer oath and to take any sworn statement which alone has evidentiary value

as contemplated under law. Therefore, the statement elicited during the survey operation has no evidentiary value and the Income-tax Officer was well aware of this."

(emphasis supplied)

5.5. Similarly, when the issue, whether the expression "such other materials or information as are available with the Assessing Officer" in [Section 158BB](#) of the Income-tax Act, 1961, would include the materials gathered during the survey operation under [Section 133A](#), came up for consideration before this Court in [Commissioner of Income-tax v. G.K.Senniappan](#) [(2006) 284 I.T.R. 220], a Division Bench of this Court, in which one of us was a party (P.P.S.JANARTHANA RAJA, J.), answered the question in the affirmative, against the Revenue and in favour of the assessee, holding that the materials collected during the survey under [Section 133A](#) cannot be taken into consideration while determining the undisclosed income in respect of block assessment as per [section 158BB](#), as the same has no evidentiary value.

5.6. Again, when an identical question whether the material found in the course of survey in the premises of the builder could be used in the block assessment of the assessee, came up for consideration before this Division Bench in an unreported case in T.C.(A) No.2620 of 2006, this Court, by order dated 22.11.2006, of course, following the earlier decision of this Court in G.K.Senniappan's case reported in (2006) 284 I.T.R. 220, while confirming the order of the Tribunal, answered the question in favour of the assessee, in limine.

6. What is more relevant, in the instant case, is that the attention of the Commissioner and the Tribunal was rightly invited to the circular of the Central Board of Direct Taxes dated 10.3.2003 with regard to the confession of additional income during the course of search and seizure and survey operations. The said circular dated 10.3.2003 reads as follows:

" Instances have come to the notice of the Board wher assessees have claimed that they have been forced to confess the undisclosed income during the course of the search & seizure and survey operations. Such confessions, if not based upon credible evidence, are later retracted by the concerned assessees while filing returns of income. In these circumstances, on confessions during the course of search &

seizure and survey operations do not serve any useful purpose. It is, therefore, advised that there should be focus and concentration on collection of evidence of income which leads to information on what has not been disclosed or is not likely to be disclosed before the Income-tax Department. Similarly, while recording statement during the course of search & seizure and survey operations no attempt should be made to obtain confession as to the undisclosed income. Any action on the contrary shall be viewed adversely.

Further, in respect of pending assessment proceedings also, assessing officers should rely upon the evidences/materials gathered during the course of search/survey operations or thereafter while framing the relevant assessment orders."

7. From the foregoing discussion, the following principles can be culled out:-

(i) An admission is extremely an important piece of evidence but it cannot be said that it is conclusive and it is open to the person who made the admission to show that it is incorrect and that the assessee should be given a proper opportunity to show that the books of accounts do not correctly disclose the correct state of facts, vide decision of the Apex Court in [Pullangode Rubber Produce Co. Ltd. v. State of Kerala](#) [(1973) 91 I.T.R. 18];

(ii) In contradistinction to the power under [section 133A](#), [section 132\(4\)](#) of the Income-tax Act enables the authorised officer to examine a person on oath and any statement made by such person during such examination can also be used in evidence under the [Income-tax Act](#). On the other hand, whatever statement is recorded under [section 133A](#) of the Income-tax Act it is not given any evidentiary value obviously for the reason that the officer is not authorised to administer oath and to take any sworn statement which alone has evidentiary value as contemplated under law, vide [Paul Mathews and Sons v. Commissioner of Income-tax](#) [(2003) 263 I.T.R. 101];

(iii) The expression "such other materials or information as are available with the Assessing Officer" contained in [Section 158BB](#) of the Income-tax Act, 1961, would include the materials gathered during the survey operation under [Section 133A](#),

vide [Commissioner of Income-tax v. G.K.Senniappan](#) [(2006) 284 I.T.R. 220];

(iv) The material or information found in the course of survey proceeding could not be a basis for making any addition in the block assessment, vide decision of this Court in T.C.(A) No.2620 of 2006 (between [Commissioner of Income-tax v. S.Ajit Kumar](#));

(v) Finally, the word "may" used in [Section 133A](#) (3)(iii) of the Act, viz., "record the statement of any person which may be useful for, or relevant to, any proceeding under this Act, as already extracted above, makes it clear that the materials collected and the statement recorded during the survey under [Section 133A](#) are not conclusive piece of evidence by itself.

8. For all these reasons, particularly, when the Commissioner and the Tribunal followed the circular of the Central Board of Direct Taxes dated 10.3.2003, extracted above, for arriving at the conclusion that the materials collected and the statement obtained under [Section 133A](#) would not automatically bind upon the assessee, we do not see any reason to interfere with the order of the Tribunal.

Accordingly, finding no substantial question of law arises for consideration, the tax case appeal stands dismissed."

44. As could be seen from the above the Hon'ble High Court observed that the Id. CIT (Appeals) and also the Tribunal rightly invited to the Circular of CBDT dated 10.03.2003 wherein it was clarified that the contentions made during search, seizure and survey operations do not serve any useful purpose if such contentions are not based upon credible evidence collected in the course of search and survey operations. This decision of the Hon'ble Madras High Court has also been upheld by the Hon'ble Supreme Court in CIT Vs. S. Khader Khan Son (supra) wherein the

Hon'ble apex court dismissed the civil appeal filed by the Revenue.

45.1 Therefore, we hold that addition on account of undisclosed difference in stock discrepancy cannot be made merely on the basis of the statement given by the partner at the time of survey without any corroborative evidences found in the course of survey. In this case the assessee explained that there is no discrepancy in stock along with various evidences and explanations and, therefore, the Id. CIT (Appeals) has rightly deleted the addition of Rs.4,00,84,677/- (4,29,63,309 - 28,78,632). Thus, the order of the Id. CIT (Appeals) is sustained to this extent. Ground No. 2 of grounds of appeal of Revenue is rejected.

45.2 The case laws relied by the Id. DR have no application to the facts of the assessee's case and they are distinguishable on facts. In the case laws relied on by the Id. DR the assessee did not give any satisfactory explanation regarding surrendered income in the course of survey proceedings. The bonafide of the assessee in giving the explanations were doubted in the absence of any satisfactory explanation. In the case on hand the assessee could prove that there is no discrepancy in stocks with abundance of evidences with proper explanations and in fact the Assessing Officer in the course of assessment proceedings also accepted part of the explanation of the assessee that the stocks lying with customs warehouse were also considered as closing stock at the time of recording the statement during survey operation on 6.09.2010. Thus, the case laws relied on by the Id. DR have no application to the facts of the assessee's case.

46.1 Coming to the balance addition of Rs.28,78,632/- sustained by the Id. CIT (Appeals) we observe that the Id. CIT (Appeals) sustained the addition which comprises as under:-

(a) Out of fabricated expenses	Rs.25,94,306
(b) Out of accessories purchased	<u>Rs. 2,84,326</u>
Total :	<u>Rs.28,78,632</u>

46.2 We observe that the expenses incurred for fabrication which was given on job work by the assessee sustained by the Id. CIT (Appeals) only for the reason that the summons issued were not served on the parties. Merely because the summons could not be served, in our opinion, the addition cannot be sustained. The assessee in respect of these fabrication expenses furnished copies of bills, copies of ledger account, copy of Form 16A issued to the fabricators wherein the assessee has deducted TDS and remitted to the Govt. account. All these evidences cannot be brushed aside simply because the summons issued to the parties could not be served. There may be various reasons for non-service of summons on the parties. The assessment year involved in this case is 2011-12 and the financial year is 2010-11. The summons were issued in the year 2017 in the course of remand proceedings to the parties whereby there is a considerable gap of time and the parties might have moved out or closed down their business. Therefore, simply because the summons could not be served the fabrication expenses incurred by the assessee cannot be treated as not proved. Thus, allowing ground No. 2 of grounds of appeal of the assessee, we direct the Assessing Officer to delete the addition of Rs.28,78,632/- sustained by the Id. CIT (Appeals).

47. Coming to assessee's appeal the only ground left for adjudication is in respect of sustaining the disallowance of Rs.30,76,482/- being the commission paid to foreign agents. In the course of assessment proceedings the Assessing Officer noticed that the assessee has debited an amount of Rs.30,76,482/- on account of export commission paid. The assessee was required as to why TDS on over-seas commission has not been deducted and why it should not be considered as assessee in default for non-deduction of TDS as per the provisions of section 195 of the Act. The assessee submitted that the export commission paid outside India for procuring sales is not taxable in India and, therefore, the provisions of section 195 of the Act have no application. However, the Assessing Officer relying on the decision in the case of Transmission Corporation of India Vs. CIT [239 ITR 587 (SC)] and V. Acz. Pvt. Ltd. Vs. CIT [189 taxmann.com 232 (Del)] held the assessee was liable to deduct TDS on export commission paid to non-resident/outside and since the assessee did not deduct TDS as per provisions of section 195 of the Act the payment of export commission was disallowed by the Assessing Officer.

48. On appeal the Id. CIT (Appeals) held that in the case of Shell India Markets Pvt. Ltd., Perfetti Van Melle Holding and SKF Boiler & Driers Pvt. Ltd., the AAR ruled that the payment for export/consulting services rendered by over-seas companies will be taxable as FTS and accordingly the disallowance was sustained.

49. Before us the Id. Sr. Counsel for the assessee submits that the assessee had incurred an aggregate expenditure of

Rs.30,76,482/- towards payment of commission to its foreign agents as under:-

(i)	Mr. Robert Eis, USA	Rs. 8,88,550.00
(ii)	Mr. Dinesh Canada	Rs. 9,01,000.00
(iii)	M/s. Asesorias, Chile	Rs. 12.23.016.57
(iv)	M/s. Rita SARL, France	Rs. 63.916.00
		Rs. 30.76.482.57

50.1 The Id. Sr. Counsel submits that during the course of assessment proceedings the Ld. Assessing Officer vide his notice dated 30.01.2014 had however directed the assessee to show cause why the expenditure incurred and claimed as commission be not disallowed, since the assessee had failed to deduct the tax at source as provided u/s 40(a)(i) of the Income Tax Act.

50.2 In response thereto, it had been submitted by the assessee vide its submissions dated 05.02.2014 (P. 317-321) that the said sum of expenditure incurred is not a sum chargeable to tax in India and also that none of the payees had a PE in India and as such the sum of expenditure incurred and claimed does not fall within the ambit of section 40(a)(i) of the Act. The appellant had submitted that the amount of the expenditure incurred was neither royalty nor was a fee for technical services within the meaning of Explanation below the section. In support it had relied upon the following judgments:-

- (1) CIT s. Cooper Engineering Ltd. [68 ITR 457 (Bom.)]
- (ii) Vijay Ship Breaking Corporation vs. CIT [314 ITR 309 (SC)]
- (iii) Al Nisr Publishing [239 ITR 879 (AAR)]
- (iv) British Gas India Pvt. Ltd. in Re. [287 ITR 421],
[239 ITR 879 (AAR)]

50.3 It is submitted that the aforesaid 'persons' to whom the commission had been paid are non-residents and does not have a PE in India. In fact it had been contended that the expenditure as had been incurred was for services rendered outside India.

50.4 However, the Assessing Officer in Para 6.6 of his order held that, commission paid to non-resident is an income deemed to accrue or arise in India within the meaning of section 9 of the Act and thus the assessee was liable to have deducted the tax at source on the expenditure incurred as commission paid by it to the non-residents.

51. On appeal the learned CIT (Appeals) has confirmed the findings of the learned Assessing Officer in para 7.7 at Pg. 28 of his order. He has held that after considering the assessee's submission dated 01.03.2020 (Pg. 1952 to 1969 of PB) and 17.03.2020 (Pg. 1970 to 1991 of PB) since the assessee has not produced any agreement entered by it with outsiders/non-resident agents to whom the commission had been paid was subject to deduction of tax at source. In support he relied upon the order of the AAR in the cases of:

- (i) Shell India Markets Pvt. Ltd. (2012)

(ii) Perfetti Van Melle Holding (2012)

(iii) SKF Boilers & Driers Pvt. Ltd. (2010)

He held that the provisions of section 9 of the Act would squarely come into force as soon as any export commission is paid or becomes due.

52.1 The Id. Counsel submits that the facts of the instant case would show that the assessee had incurred the expenditure outside India. The nature of the expenditure incurred is stated in the agreement entered by the assessee with the aforesaid persons to whom the commission had been paid. In fact the findings of the learned CIT (Appeals) in his order at Pg. 28 (para 7.7) is factually incorrect. The copies of agreements with the agents have been placed in the Paper Book as are tabulated below:-

1.	Mr. Robert Edis, USA	Pg. 434
2.	Mr. Dinesh Canada	Pg. 435
3.	M/s. Aseorias, Chile	Pg. 436
4.	M/s. Rita SARL, France	Pg. 438

52.2 It would be seen from the aforesaid agreement entered that Mr. Robert Edis, USA had been engaged to develop business avenues in the line of readymade garments and other related accessories and that he was required to visit the offices of the clients/buyers so identified to book orders. It is submitted that the aforesaid services are not technical services and the Assessing

Officer thus erred in having concluded in the order of assessment that expenditure incurred was since for technical services rendered outside India, is an income deemed to accrued and arise in India and was thus chargeable to tax.

52.3 The assessee-appellant had relied on the judgment of the Apex Court in the case of CIT vs. Toshoku, [125 ITR 525] wherein it had been held that commission amount earned by non-resident persons for the services rendered outside India cannot be deemed to be income which had either accrued or arose in India. The assessee had also relied upon the following judgments:

- (a) Corborandum & Co. Vs. CIT [108 ITR 335 (SC)]
- (b) Ind. Telesoft Pvt. Ltd. [267 ITR 725 (AAR)]

52.4 Thus the core question is whether the services rendered by the commission agents could be regarded as technical service fee as defined in Explanation (2) of section 9(1)(vii) of the Act which reads as under:

9. (1) The following incomes shall be deemed to accrue or arise in India:-

.....

(vii) income by way of fees for technical services payable by -

- (a) the Government or
- (b) a person who is a resident, except where the fees are payable in respect of services utilised in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or

(c) a person who is a non-resident where the fees are payable in respect of services utilised in a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India:

Provided that nothing contained in this clause shall apply in relation to any income by way of fees for technical services payable in pursuance of an agreement made before the 1st day of April 1976, and approved by the Central Government]

Explanation 1 For the purposes of the foregoing proviso, an agreement made on or after the 1st day of April, 1976 shall be deemed to have been made before that date if the agreement is made in accordance with proposals approved by the Central Government before that date]

Explanation 2. - For the purposes of this clause "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries".

52.5 Ld. Counsel submits that Explanation (2) as extracted above, shows that for the purpose of clause (vii) of section 9(1) fee for technical services means any consideration for the rendering of any managerial, technical and consultancy services. In the instant case the services rendered are neither managerial as the agents were not appointed to manage the assessee's business nor in any manner can be regarded as of rendering any technical services or could be regarded as consultancy service. The services were purely rendered for the purpose of assessing the assessee for procurement of its business. The assessee is manufacturer of garments and supplies

are made by it from the activities carried out by it in India. It makes merely supplies outside India and thus it is submitted that the learned Assessing Officer and learned CIT (Appeals) both have failed to appreciate that the sum on which it has incurred expenditure are not fee for technical services within the meaning of Explanation (2) of section 9(1)(vii) of the Act. Further reliance is placed on the following judicial pronouncements:

- i. Digi Drives (P.) Ltd. VS. Assistant Commissioner of Income Tax [(2021) 123 taxmann.com 4 (Delhi-Trib)] wherein it was held that mere rendering of service of procurement of export orders by a non-resident company for Indian company does not fall in category of managerial/consultancy services as explained in Explanation 2 to section 9(1)(vii).
- ii. Pure Software (P) Ltd. vs. Income-tax Officer [(2019) 109 taxmann.com 95 (Delhi-Trib.)] wherein it was held that payment made by assessee-company to foreign entities for rendering sales procurement services abroad, could not be regarded as royalty or fee for technical services and, thus, said payment was not taxable in India.
- iii. Rajinder Kumar Aggarwal (HUF) Vs. Deputy Commissioner of Income-tax [(2021) 131 taxmann.com 252 (Delhi-Trib.)]
- iv. Deputy Commissioner of Income-tax Vs. JLC Electromet (P.) Ltd. [(2022) 140 taxmann.com 350 (Jaipur-Trib.)]
- v. Deputy Commissioner of Income-tax Vs. Mc Fills Enterprise (P). Ltd. [(2019) 101 taxmann.com 212 (Ahmedabad-Trib)].

52.6 While concluding with the aforesaid submissions, the assessee-appellant seeks to rely upon the recent decision of the Income Tax Appellate Tribunal Delhi Bench in the case of Apurva Goswami vs. DDIT, Chandigarh reported in [196 ITD 10] wherein it was held that commission payments made by assessee

to non-resident agents/service providers for rendering services like sales promotion, marketing publicity and procuring sales order etc. was not FTS but business profit and in absence of permanent establishment of these service providers in India, such commission payments were not taxable in India.

53. In fact the learned Assessing Officer in his remand report dated 29.02.2016 at Pg. 1440 had admitted that the expenditure incurred is allowable expenditure. The said report reads as under:-

"(C) Foreign Commission disallowed u/s 40(a)(i): Rs. 30,76,4827-

We have examined the additional evidence submitted by the assessee in the form of the copies of the agreements between the overseas agents and the assessee. The language as contained in the said agreements is indicating of a simple arrangements between the assessee and its agents wherein they are not charging a fee from the assessee for any Technical Services. They are merely responsible for identifying new buyers and introducing these buyers to the assessee.

We confirm from the note sheets prepared during the course of the assessment for AY 2011-12 that no query was raised to the assessee to produce copies of the said agreements.

The claim of the assessee as supported by the copies of the Agency Agreement is verified. We accept on merits and claim of the assessee."

54. In view of the aforesaid, it is submitted that since in the case of the assessee, supplies of the accessories has been received by the appellant and further since the appellant has furnished the copy of the invoices, ledger account of the parties in its books of account and further the payment has also been made

by account payee cheques, as such, merely because the suppliers has not replied to the summons cannot be a ground to disallow the expenditure.

55. The ld. DR supports the orders of the authorities below.

56. Heard rival submissions perused the orders of the authorities below. We observe that the assessee in fact furnished copies of agreement before the ld. CIT (Appeals) by way of additional evidence. Copies of the agreements were also placed before us. On perusal of the copies of agreements entered into by the assessee with non-resident agents we observe that the agents were appointed as selling agents of the assessee over-seas for the purpose of procuring orders, arrange for sample approvals, follow up on payments, to do liasoning with buyers and to do other works as are incidental to the above. We observe that the agents are paid equivalent to certain percentage in some cases 5% and in in some cases 7% of FOB value of each order. We observe that the agreements did not provide for any technical services to the assessee except for procuring orders for which certain percentage of commission on value of orders was paid. In other words, what was paid by the assessee was simply a commission to the non-resident agents and their income is not chargeable to tax in India. Therefore, the observation of the ld. CIT (Appeals) that the commission paid to foreign agents has to be taxed as FTS is not sustainable.

57. We observe that in the case of D. G. Drive Vs. ACIT (supra) the Delhi Tribunal held that mere rendering of service of procurement of orders by a non-resident company for Indian company does not fall in the category/consultancy services as explained in Explanation (2) to section 9(1)(vii). We also observe that in the case of Pure Software Pvt. Ltd. (supra) the co-ordinate bench of the Delhi Tribunal held that payment made by the assessee to foreign entities for rendering sales procurement abroad could not be regarded as royalty or fees for technical services and thus the said payment was not taxable in India.

58. Further we also observe that the Assessing Officer in his remand report dated 29.02.2016 observed as under:-

"(C) Foreign Commission disallowed u/s 40(a)(i): 30,76,4827- Rs.

We have examined the additional evidence submitted by the assessee in the form of the copies of the agreements between the overseas agents and the assessee. The language as contained in the said agreements is indicating of a simple arrangements between the assessee and its agents wherein they are not charging a fee from the assessee for any Technical Services. They are merely responsible for identifying new buyers and introducing these buyers to the assessee.

We confirm from the note sheets prepared during the course of the assessment for AY 2011-12 that no query was raised to the assessee to produce copies of the said agreements.

The claim of the assessee as supported by the copies of the Agency Agreement is verified. We accept on merits and claim of the assessee."

59. Thus, the Assessing Officer in the remand proceedings also examined the agreements and commented that the language as contained in the said agreement is indicative of simple arrangement between the assessee and its agents wherein they are not charging a fee for any technical services, but they are merely responsible for identifying new buyers and introducing these buyers to the assessee.

60. In view of the above, we hold that the commission paid to non-resident for procuring sales cannot be said to be fee paid for any technical services within the meaning of Explanation (2) to section 9(1)(vii) of the Act. Thus, we reverse the order of the Id. CIT (Appeals) on this issue and direct the Assessing Officer to delete the disallowance of Rs.30,76,482/- made under section 195 of the Act for non-deduction of TDS. Ground No. 1 of grounds of appeal of the assessee is allowed.

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

Order pronounced in the open court on : 22/06/2023.

Sd/-
(G. S. PANNU)
PRESIDENT

Sd/-
(C. N. PRASAD)
JUDICIAL MEMBER

Dated : 22/06/2023.

MEHTA

Copy forwarded to :

1. Appellants;

2. Respondents;
3. CIT
4. CIT (Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi.

Date of dictation	07.06.2023
Date on which the typed draft is placed before the dictating member	19.06.2023
Date on which the typed draft is placed before the other member	22.06.2023
Date on which the approved draft comes to the Sr. PS/ PS	22.06.2023
Date on which the fair order is placed before the dictating member for pronouncement	22.06.2023
Date on which the fair order comes back to the Sr. PS/ PS	22.06.2023
Date on which the final order is uploaded on the website of ITAT	22.06.2023
Date on which the file goes to the Bench Clerk	22.06.2023
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the order	