

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "B": NEW DELHI

BEFORE N.K. BILLAIYA, ACCOUNTANT MEMBER
AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER

ITA No. 3216/Del/2016
Asstt. Year: 2012-13

Income Tax Officer, Ward 46(1), New Delhi.	Vs.	M/s. Mam Raj Chunni Lal, 5183, Lahori Gate, Delhi – 110 006 PAN AAAFM9668A
(Appellant)		(Respondent)

Cross Objection 270/Del/2016
Asstt. Year: 2012-13

M/s. Mam Raj Chunni Lal, 5183, Lahori Gate, Delhi – 110 006 PAN AAAFM9668A	Vs.	Income Tax Officer, Ward 46(1), New Delhi.
(Appellant)		(Respondent)

Assessee by:	Dr. Rakesh Gupta, Advocate Shri Somil Agarwal, Advocate
Department by :	Shri Vivek Kumar Upadhyay, Sr. DR
Date of Hearing	02/11/2023
Date of pronouncement	12/12/2023

ORDER

PER ASTHA CHANDRA, JM

The appeal filed by the Revenue and cross objection filed by the assessee arise out of the order dated 07.03.2016 of the Ld. Commissioner of Income Tax (Appeals)-16, New Delhi ("**CIT(A)**") pertaining to Assessment Year ("**AY**") 2012-13.

2. The Revenue has raised the following grounds:-

- “1. *The Ld. CIT(A) has erred in deleting the addition of Rs. 3,30,01,250/- made on a/c of surrender of excess stock.*
2. *The Ld. CIT(A) has erred in deleting the addition without considering the vital documents of stock inventory and the trading and profit & loss account prepared during the course of survey proceedings conducted on 27.01.2012 at the business premises of the assessee.*
3. *The Ld. CIT (A) has erred in deleting the addition without considering the statement of one partners and two employees on which the partner categorically surrendered the excess stock found during the survey and the existence of excess stock was supported by two employees in their statement.*
4. *Whether the Ld. CIT(A) was correct in deleting the addition on above amount on the basis of the facts and circumstances of the case?*
5. *The appellant craves leave for reserving the right to amend, modify, alter, add or forego any ground(s) of appeal at any time before or during the hearing of this appeal”*

It is prayed that the order of the CIT (A) being contrary to the facts on record and the settled position of law, be set aside and that of the assessing officer be restored.”

3. The grounds of cross objection filed by the assessee read as under:

- “(1) *THAT the Learned CIT (Appeals) was justified on facts & in law in deleting an addition of Rs. 33001250/- made by the A.O. & the Revenues appeal raising ground Nos. 1 to 4 Of the memo of Appeal are liable to be dismissed.*
- (2) *THAT having regards to the facts & circumstances of the case Learned CIT (A) has Erred in Law on facts in not adjudicating himself the issue of add back of notional interest Of Rs. 1158053/-without made by the A.O., without any basis and by disregarding the Principals of natural justice.*
- (3) *THAT CIT (Appeals) exceeded jurisdiction in remitting back the issue of add back Of Rs. 1158083/- to the A.O., which powers did not vest with him in law & on facts referred to in*

clause (9) of Sub Section (1) of Section (251) of the Income tax Act & Ought to have deleted the addition, after satisfying himself to the effect that the Advances made to persons in preceding A.Y. 2011-12 were towards Business Purposes for procuring Consignment Sales of their Stocks in the following years & duly utilized in earning income by way of Ahrat, Interest charged & other Incidental expenses, duly offered towards Business income & Assessed accordingly in relevant years where earned.

- (4) *THAT Assessee's application dated- 16/05/2016 moved U/S 154 on 16/05/2016, praying Rectification of the relevant portion of the Appellate Order dated-07/03/2016 is pending With the CIT (Appeal).*
- (5) *THAT the Appellant craves leave to add, modify, amend or delete any of the grounds of appeal at the time of hearing and all the above ground are without prejudice to each other."*

4. The facts in brief are that the assessee is a firm engaged in the business of trading and commission agents in Food grains etc. On 27.01.2012 i.e. during the previous year relevant to AY 2012-13 survey under section 133A of the Income Tax Act, 1961 (**the "Act"**) was conducted on two premises of the assessee. During survey Shri Pradeep Kumar, partner surrendered Rs. 3,30,01,250/- on account of excess stock found in survey operation. However, in the return filed on 16.09.2012 for AY 2012-13 the said surrendered undisclosed income was not declared. The case was selected for scrutiny under CASS. Statutory notice under section 143(2) was served and during assessment proceedings the assessee filed details and produced the books of account.

5. The Ld. Assessing Officer (**"AO"**) sought explanation as to why the said admitted undisclosed income be not taxed. The assessee responded by filing letter dated 15.12.2014 reproduced by the Ld. AO in para 3.1 of the assessment order. The assessee summarised its submission as under:-

- (a) *Two **self-contradictory** stock statements were prepared by the Survey Team, one which is dated 27.01.2012 and records the actual physical stock which was found and recorded initially and*

another additional sheet dated 28.01.2012 was subsequently prepared in order to show excessive stock being available with the assessee and pressurize the assessee to make a surrender;

- (b) Statement of the partner of the assessee firm, Sh. Pradeep Kumor, was recorded 27.01.2012 taking cognizance of the stock statement prepared on the next date, i.e. 28.01.2012;*
- (c) The trading account prepared for the period 01.04.2011 to 27.01.2012 by the Survey Team, considers stock allegedly recorded on 28.01.2012;*
- (d) The quantity of stock alleged to have been found in the godown at Alipur, is way beyond the maximum capacity of goods that the godown can hold;*
- (e) One of the partners of the assessee-firm was coerced to surrender an amount of Rs.3,30,01,250 vide statement recorded under section 133A of the Act, being the alleged discrepancy in the stock records maintained by the assessee and the physical stock.*
- (f) Even otherwise, statement recorded during the course of survey under section 133A of the Act has no legal sanctity in the eyes of law and cannot be the basis for drawing any adverse inference against the assessee;*
- (g) No addition even otherwise can be made merely on the basis of a statement, that too when the same stands retracted;*
- (h) Purpose of assessment is to tax correct taxable income and it is the duty of the taxing authorities to correctly assess the tax liability of an assessee by duly following the relevant provisions of law.*

For the aforesaid cumulative reasons, it is respectfully submitted that no addition is called for on account of alleged discrepancy in stock".

6. The explanation of the assessee was not acceptable to the Ld. AO for the reasons given in para 5 of his order and added the admitted amount of Rs. 3,30,01,250/- to the total income of the assessee under section 69 of the Act observing and recording, inter alia the following findings:

- "Keeping in view the above settled legal position, the assessee can not be allowed to retract from the confessional surrender made u/s 133A of the Act.. From the above fact it*

*is amply clear that the assessee has fabricated the whole story just to avoid the payment of legitimate taxes. Whereas, it is crystal clear that assessee is trying to avoid tax liability as a result of surrender by alternate way without any evidence in the form of **Colorable Device**. In the eye of Law and as per provision of the I.T. Act, such type of planning is not acceptable/permissible and there is no recognitions of such dubious means in the Income Tax Act, 1961. The view of the undersigned is strengthen by **the land mark judgment of MCDowell & Co. Ltd. 154ITR 148, wherein it has been held that avoidance of tax thorough colorable device is not permissible.**”*

7. The Ld. AO completed the assessment accordingly on total income of Rs. 3,50,29,250/- on 31.03.2015 including therein the impugned addition of Rs. 3,30,01,250/- among others under section 143(3) of the Act.

8. The assessee challenged the addition of Rs. 3,30,01,250/- on account of excess stock under section 69 and addition of Rs. 11,58,083/- on account of notional interest before the Ld. CIT(A).

9. The Ld. CIT(A) deleted the addition of Rs. 3,30,01,250/- on account of alleged surrender of income by observing and recording his findings as under:-

“The whole case thus depends on one piece of evidence and i.e. the veracity of stock inventory made on 27/01/2012 at 536-537, Seed farm Road, Alipur, Delhi. The scanned copy of the said inventory is as below:-

List of Inventory found at godown of
536-537 Sec 13/14 delhi during
the survey operation u/s 133A in the case of
M/s. Manoj Chandra on 27/1/12

S.No.	Item	Quantity	Rate	Am't
①	Ra 1121 steel	814 bundles	43 PKG	35,00,200
②	1121 steel	986 bundles	38 PKG	37,46,800
③	Basmati	785 bundles	40 / PKG	31,40,000
④	Moong	532 bundles	48 / PKG	25,53,600
⑤	Moong	476 bundles	50 / PKG	23,80,000
⑥	Usad	515 bundles	35 / PKG	18,02,500
⑦	Usad	619 bundles	33 / PKG	20,42,700
⑧	Ashar	712 bundles	35 / PKG	24,92,000
⑨	Ashar	820 bundles	34 / PKG	27,88,000
⑩	DB Rice	910 bundles	32 / PKG	29,12,000
⑪	DB steel	1150 bundles	30 / PKG	34,50,000
⑫	Sugandha steel	13,40 bundles	32 / PKG	42,88,000
⑬	Sugandha steel	14,30 bundles	32 / PKG	45,76,000
⑭	Basmati steel	10,40 bundles	34 / PKG	35,36,000
⑮	Chana	729,13 bundles	32 / PKG	23,33,231
M/s. Manoj Chandra 27/1/12				4,53,41,031

Since the Ld AR has questioned the various veracity of this inventory I decided to peruse the survey folder from the Assessing Officer. Vide letter dated 05/01/2015 the Assessing Officer was asked to file his report on the veracity of the stock inventory prepared on the stock of the survey. The contents of the letter dated 05/01/2015 are as under:-

“The Ld AR of the assessee has challenged the veracity of the stock inventory prepared at the time of survey on the ground that:-

1. Inventory is not signed by any employees.
2. Inventory is not signed by any member of survey party and

3. *The unit of measurement of stock is in quintal where as in all other inventories the unit of measurement of stock is in kilogram.*

Therefore you are directed to appear before undersigned on 18/01/2016 at 11.30 AM alongwith the original survey folder and complete assessment record."

The Assessing Officer, ITO Ward 46(1) appeared before me on 18/01/2016 with the survey folder. The Assessing Officer was made aware of the queries raised by the appellant and he was asked to file the factual report in this regard. The Assessing Officer ITO Ward 46(1) sent his report through JCIT, Range-46 vide his endorsement dated 04/02/2016. The contents of the report are reproduced as under:-

"Kindly refer to your office letter F.No.CIT(A)-16/Delhi/20-15-16/278 dated 05/01/2016 and discussion held on 18/01/2016 on the subject mentioned above.

In this connection, your goodself has directed for factual report on the points mentioned in the letter above. In this regard, it is stated that survey was conducted on 27/1/2012 by the then AO and I was not the member of the survey party. At that time I was not posted in this charge and as such, it is not feasible for me to identify the signature, however the inventory sheet has been received by me and relied upon during assessment is duly signed. Copy of the same is also enclosed herewith for your kind perusal. In view of these circumstances I cannot comment on the said issue raised by the assessee."

The endorsement of the JCIT is reproduced as under:

"Kindly refer to your office letter mentioned subject. F.No. CIT(A)-16/Delhi/20-15-16/278 dated 05/01/2016 on the above 2. In this context, the office is in receipt of letter F.No.ITO/W-46(1)/2015-16/453dated 21/01/2016 along with the report in the above mentioned case for AY 2012-13. The same is forwarded to your goodself for kind perusal and necessary information, please.

I have considered the so called report sent by the Assessing Officer. The report is absolutely silent on the questions or objections raised by the appellant questioning the veracity of stock inventory. The factual report has not reported anything worth reporting. It is disheartening to see that the range head has forwarded the report without any application of mind. In other words the report, submitted by the Assessing Officer, has not been able to rebut any

of the objections, raised by the assessee with respect to the veracity of stock inventory, made on the date of survey.

The Assessing Officer during the assessment proceedings has just brushed aside the report of the valuer regarding storage capacity of the godown at 536-537, Seed farm road, Alipur. I am surprised to see that the said report is rejected on the very irrelevant ground that the payment to the valuer is not reflected in the books of accounts. The storage capacity report has not examined on merit by the Assessing Officer.

So we are at a point where the very basis of addition lacks the genuineness of an evidence. Considering all the facts and circumstances, evidence, report of the Assessing Officer I am of the opinion that the stock inventory on the basis of which the partner Sh Pradeep Kumar partner of the firm had surrendered an income of Rs.3,30,01,250/- on the date of survey on 27/01/2012 has not passed the test of genuineness. Incidentally the partner Sh Pradeep Kumar died on 03/12/2013 at 9.57 AM in Fortis Hospital, Shalimar Bagh, New Delhi of heart attack. The Ld AR has also pointed out that the alleged stock inventory signed by Sh Pramod who has not known to the appellant. Neither has he been identified by the Assessing Officer. Who played foul, how and why is beyond my mandate. But one thing is certain that the surrender by the appellant appears to have been obtained by misleading him. Any disclosure of income cannot be in thin air. It has to be backed by concrete evidence which I am afraid is lacking in this case. Therefore to my mind the addition of Rs.3,30,01,250/- on account of alleged surrendered of income is not sustainable and consequently deleted.”

10. The Revenue is aggrieved and is before the Tribunal and all the grounds relate thereto.

11. As regards addition of Rs. 11,58,083/- on account of notional interest, the Ld. CIT(A) directed the Ld. AO to gather facts and investigate and come to conclusion whether the advances were given for purposes of business or

not and decide accordingly. Aggrieved thereby the assessee filed cross objection before the Tribunal and all grounds relate thereto.

12. Before us, the Ld. AR did not press the cross objection. We therefore dismiss the cross objection filed by the assessee as not pressed.

13. As regards the appeal of the Revenue the Ld. Sr. DR relied on the order of the Ld. AO.

14. The Ld. AR drew our attention to the inventory of stock prepared by the survey team on 27.01.2012 at the two premises, namely Alipur and Naya Bazar as per which goods worth Rs. 1,65,79,774/- and Rs. 11,37,125/- respectively were found and inventorised (pages 5-11 of the Paper Book). The value of goods as per books was, however, Rs. 300,56,680/-. The Ld. AR invited our attention to yet another list appearing at page 19 of the Paper Book as per which the value of stock is shown at Rs. 4,53,41,031/- as on 27.01.2012 but it bears the date 28.01.2012 at the bottom of the page. The Ld. AR contended that this list was not actually prepared during the survey but the impugned addition has been made by the Ld. AO taking into account this list. The veracity of this list has been challenged before the Ld. CIT(A).

15. The Ld. AR further submitted that during the course of appellate proceedings, the Ld. CIT(A) sought clarification from the Ld. AO. The reply given by him and his Range Head has not been found satisfactory by the Ld. CIT(A).

16. According to the Ld. AR Shri Pradeep Kumar, partner was seriously ill at the time of survey. He was made to sign/surrender stocks based on the list prepared on 28.01.2012, though his statement was recorded on 27.01.2012. Shri Pradeep Kumar eventually expired on 03.12.2013.

17. The Ld. AR pointed out that the surrender made by the partner Shri Pradeep Kumar was obtained by coercion at the time of survey. It was retracted on 13.03.2012.

18. The Ld. AR vehemently argued that the impugned addition on account of the value of stock as per the sheet available at page 19 of the Paper Book is not justified and relied on the order of the Ld. CIT(A).

19. We have given careful thought to the submission of the parties and perused the records. It is a case of survey under section 133A of the Act. During survey on 27.01.2012 admittedly the survey team prepared inventory of stock found at the premises of the assessee the value of which aggregated to Rs. 1,77,16,899/- (pages 5-11 of the Paper Book). The statement of Shri Moolchand who worked at Alipur premises as a labourer (Palleydar) and the statement of Shri Anil Kumar Goyal, munim was recorded, copy of which appears at page 1-4 of the Paper Book. The statement of Shri Pradeep Kumar Partner who held 50% share in the assessee firm was also recorded (copy at pages 11-18 of Paper Book). In question No. 15 (page 17 of Paper Book) Shri Pradeep Kumar was told that the stock found at Alipur premises was of Rs. 6,19,20,805/- as against the stock inventorized of Rs. 1,65,79,774/- (page 5-9 of Paper Book) in survey which along with stock found of Rs. 11,37,125/- at Naya Bazar premises totalled to Rs. 6,30,57,930/- whereas as per books of account there is stock of Rs. 3,00,56,680/-. He was asked to explain the difference of Rs. 3,30,01,250/- (Rs. 6,30,57,930- Rs. 3,00,56,680/-) in the value of stock. In answer to the said Q No. 15 Shri Pradeep Kumar replied "the difference I offer as additional income for the FY 2011-12". It is this amount of Rs. 3,30,01,250/- surrendered by Shri Pradeep Kumar which formed the basis of the impugned addition. The Revenue is heavily relying on the aforesaid statement of S/Shri Moolchand, Anil Kumar Goyal and the partner Shri Pradeep Kumar.

20. We have perused the statement of S/Shri Moolchand and Anil Kumar Goyal. There is nothing in their statements which throw any light as to the value of the stock. Since the regular munim who maintained the stock at Alipur was on leave Shri Moolchand assisted the survey team in preparing the stock inventory on 27.01.2012 at Alipur premises where he was working as a labourer for the last eleven or twelve months. He did not get any salary but only labour charges for handling the bags i.e. keeping them in or bringing them out of the premise. The stock inventory prepared by the survey team at Alipur premise on 27.01.2012 was valued at Rs. 1,65,79,744/- and contains his signature, signature of Shri Anil Kumar, signature of partner Shri Pradeep Kumar (with seal of the firm) and two witnesses. Since Shri Anil Kumar who was munim, a regular employee getting salary of Rs. 13,000/- p.m. for attending to accounts work at Naya Bazar premise was present at Alipur premises at the time of survey, his statement was also recorded in which in reply to question No. 3 "How much stock is lying in the godown," he stated "I have no idea about stock and I am doing account work at Naya Bazar". There is no dispute at all in so far as value of stock of Rs. 11,37,125/- found at Naya Bazar premise and inventorised during survey. It is thus obvious that the existence of excess stock which formed the basis of the impugned addition was not supported by the two employees in their statement as alleged by the Revenue in its ground No. 3.

21. Coming to the statement of Shri Pradeep Kumar, partner relied upon by the Revenue surrendering the excess stock, suffice is to quote the finding of the Ld. CIT(A) recorded at page 16 of his appellate order that "one thing is certain that the surrender by the assessee appears to have been obtained by misleading him". At page 19 of the Paper Book is a copy of stock inventory valued at Rs. 4,53,41,031/- prepared on 28.01.2012 and signed by some Parmod. It is this value of Rs. 4,53,41,031/- added to the inventorised stock valued at Rs. 1,65,79,774/- found on 27.01.2012 in survey at Alipur premise coupled with inventorised stock valued at Rs. 11,37,125/- at Naya

Bazar premise in survey on 27.01.2012 totalling in all to Rs. 6,30,57,930/- with which the partner Shri Pradeep Kumar was confronted in question No.15 of the statement. The excess stock surrendered by the partner represents the difference between the said value of Rs. 6,30,57,930/- and value of stock declared as on 27.01.2012 by the assessee as per books at Rs. 3,00,56,680/-.

22. During the assessment proceeding as also appellate proceeding, the assessee challenged the veracity of the stock inventory prepared on 28.01.2012 and signed by some Parmod on grounds that it is not signed by any of the partner of the assessee firm; it bears the name of some Parmod who is not associated with nor related in any manner with the assessee; survey was over on 27.01.2012 but this list bears the date 28.01.2012; the stocks as per the list could not be accommodated in the said premise at Alipur as per the certificate of the registered valuer submitted; inventory prepared at the time of survey on 27.01.2012 shows the weighment in kg whereas the inventory details as per this list shows weighment in quintals. None of these contentions could be assailed by the Ld. AO by bringing on record any convincing and cogent reasons. During appellate proceedings the Ld. CIT(A) gave specific opportunity in writing to the Ld. AO to rebut the above contentions raised by the assessee but the Ld. AO and his Range head JCIT utterly failed to do so. This was very disheartening to the Ld. CIT(A) and in our opinion rightly so.

23. It is now well established that statement surrendering undisclosed income during survey proceedings under section 133A is not conclusive. It can be retracted by explaining or withdrawing admission, if any made in such statement. Assessment of tax cannot be made solely on the basis of such sworn statement made by the assessee under section 133A(3)(iii) of the Act. If no enquiry is made even after retraction to discredit the confessional statement, it is not open to the Ld. AO to rely upon the statement. In the

case at hand, the retracted statement of the partner of the assessee firm is supported by explanation which has not been found to be false.

24. On the facts and in the circumstances of the case set out above, we hold that the impugned addition is not sustainable and the Ld. CIT(A) was perfectly justified in deleting the same. The appeal of the Revenue is devoid of any merit which we hereby reject.

25. In the result, the appeal of the Revenue is dismissed. The cross objection of the assessee is also dismissed as not pressed.

Order pronounced in the open court on 12th December, 2023.

sd/-

**(N.K. BILLAIYA)
ACCOUNTANT MEMBER**

sd/-

**(ASTHA CHANDRA)
JUDICIAL MEMEBR**

Dated: 12/12/2023

Copy forwarded to-

Applicant

Respondent

CIT

CIT (A)

DR:ITAT

ASSISTANT REGISTRAR

ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	

Date on which the fair order comes back to the Sr. PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
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	