

**IN THE INCOME TAX APPELLATE TRIBUNAL
LUCKNOW 'B' BENCH, LUCKNOW**

**BEFORE SH. SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER
AND
SH. NIKHIL CHOUDHARY, ACCOUNTANT MEMBER**

ITA No.214/Lkw/2020
A.Y.- 2015-16

M/s Arun Kumar & Brothers, Bazar Katra Town, Bisalpur, Pilibhit, U.P.	vs.	DCIT, Circle-2, Bareilly
PAN:AALFA2839C		
(Appellant)		(Respondent)

Assessee by:	Sh. P.K. Kapoor, C.A.
Revenue by:	Sh. Sunil Kumar Rajwanshi, Addl. CIT DR
Date of hearing:	20.08.2024
Date of pronouncement:	25.10.2024

ORDER

PER SH. NIKHIL CHOUDHARY, ACCOUNTANT MEMBER:

This is an appeal against the order of the Id. CIT(A), Bareilly under section 250 of the Income Tax Act, partly sustaining an addition made by the Id. Assessing Officer, vide his earlier order dated 23.12.2017 under section 143(3) of the Income Tax Act. The grounds of appeal are as under:-

"1. On the facts and circumstances of the case, the order passed by the learned CIT(A) is bad both in the eye of law and on facts.

2. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the action of Assessing Officer (A.O.) in adding a sum of Rs. 4,94,936/- to the income of the assessee as there was no difference in cash as counted by the survey team and as per books.

3. On the fact and circumstances of the case, the assessment order being passed in violation of the principles of natural justice.

4. On facts of the case, there is no concealment of income. Hence, 4 initiation of penalty proceedings is also against law.

5. Any other ground that may be taken during the course of appellate proceedings."

2. The facts of the case are that the assessee filed a return of income for the assessment year 2015-16 declaring a total income of Rs.75,29,710/-. A survey under section 133A of the Income Tax Act was conducted on the business premises of the assessee on 5.02.2015. During the course of survey, a statement on oath of Shri Vishal Agarwal S/o Shri Arun Kumar Agarwal was recorded. Shri Vishal Kumar Agarwal is the son of one of the partners of the firm, though not a partner himself. In the answer to question number 7, wherein he was asked to explain the difference between the sum of Rs.4,00,000/-, which he had stated at the commencement of survey to be the cash in hand, and the sum of Rs.8,94,936/-, which were found on the premises during the course of survey, Shri Vishal Agarwal surrendered the sum of Rs.4,94,936/- saying that he was unable to explain it and therefore, he agreed to offer it for tax. Before the Id. AO, the assessee submitted that the difference in cash worked out by the survey team did not exist at all, because the cash found was in consonance with its books of accounts. However, relying upon the statement of Shri Vishal Agarwal, the Id. AO held that the amount had been voluntarily surrendered as Shri Vishal Agarwal was unable to explain the difference of cash found and available with the assessee. Hence, he rejected the plea of the assessee and added back a sum of Rs.4,94,936/- on this account.

3. Aggrieved with this, among other additions, the assessee went to the Id. CIT(A). The Id. CIT(A), in considering the surrender of stock made by Shri Vishal Agarwal on the basis of difference in value of jewellery found and that estimated by the registered valuer, held in paragraph nos. 5.3 to 5.6 of his order, that any statement recorded under section 133A had no evidentiary value; that section 133A did not empower any ITO to examine any person on oath; in this case, the statement under section 133A was not recorded of any of the partners of the assessee firm but of the son of the partner, as a result of which it had even less evidentiary value and;

that the statement recorded of the registered valuer had not been confronted to the assessee. Therefore, on this logic and reasoning, the Id. CIT(A) held that the valuation of closing stock on the date of survey was erroneous and no addition on account of difference in stock could be made on the basis of the surrender made by Shri Vishal Agarwal. However, in the same order, the Id. CIT(A) did not accept the submission of the assessee that the surrender with regard to difference in cash was not on account of any difference with the books of accounts, but on account of a guesstimate by the son of the partner, at the commencement of survey and the actual cash found, which tallied with the books of the assessee firm. The Id. CIT(A) held that there was excess cash viz a viz books of accounts, of Rs.4,94,936/- and this addition was not made on the basis of the statement, but on account of discrepancy found during the survey. Thus, he dismissed the appeal of the assessee on this ground.

4. The assessee is aggrieved at this dismissal of its appeal on this issue and has accordingly come before us in appeal. Shri P.K. Kapoor, C.A. (hereinafter referred to as the Ld AR) argued the case on behalf of the assessee. It was submitted that the assessee was a partnership firm running the business under the name and style, "M/s Arun Kumar & Brothers" at Chhota Chauraha, Bisalpur, District-Pilibhit. The two partners having 50% of shares each were Shri Arun Kumar Agarwal and Smt. Sharda Rani. During the course of survey operation, Shri Vishal Agarwal, who was the son of Shri Arun Kumar Agarwal was present. His statement was recorded and he surrendered an income of Rs.1,30,00,000/- of which Rs.4,94,936/- was surrendered on account of difference in cash found. It was however submitted that the partners of the firm were not present during the survey. Our attention was also invited to page 2 of submissions filed before the Id. CIT Bareilly on 16.02.2015, wherein the assessee had informed the Id. CIT, that there was no difference in the cash found and the cash as reflected in the books of accounts. It had further been submitted, that the statement that had been recorded, was not that of any partner of

the firm, but that of Shri Vishal Agarwal and, when he was asked regarding the cash in hand, he said that it was approximately Rs.4,00,000/-, but the actual cash counted by the survey team was Rs.8,94,936/-. Since, Shri Vishal Agarwal could not explain this and was quite disturbed with such a big team of Income Tax along with police, he came under pressure and surrendered entire stock, at its valuation by the departmental valuer, and the difference between the cash as recorded in his statement and the actual cash in hand at the premises. However, after the survey, it was discovered that the cash in hand, as counted by the survey team was in agreement with the books of accounts maintained by the firm at Rs.8,94,936/-. Thus, the surrender of cash was wrongly done and was on account of inadvertent mistake. It was submitted that these facts had been brought to the knowledge of the Id. CIT(A) and it was pointed out that the statement of the son of the partner was being used against the assessee. Furthermore, it was also pointed out that the books of accounts had not been rejected by the Id. AO. It had also been submitted that the statement elicited during the survey operation had no evidentiary value and could not be the basis for making addition and furthermore, the books of accounts had been produced before the Id. AO and Id. AO had not pointed out any defects in the entries therein. However, the Id. CIT(A) had failed to consider these aspects and had incorrectly assumed, that there was a difference between the cash recorded in the books and the cash discovered during the survey. On the other hand, Shri Sunil Kumar Rajwanshi, Id. Sr. DR stated that the Id. CIT(A) had duly considered the submissions of the assessee and rejected them on the grounds that the addition had not been made on account of the statement but on account of difference between the cash found and the cash as recorded in the books of accounts.

5. We have duly considered the submissions of both parties. Ongoing through the statement of Shri Vishal Agarwal, we find that in question number 7, Shri Vishal Agarwal was asked that, at the beginning of the survey, he had stated that there were cash of Rs. 4,00,000/- but, in fact, cash of Rs.8,94,436/- had been found and he

was unable to explain the difference of Rs.4,94,936/- therefore, he accepted that the same was undisclosed in the financial year 2014-15 and surrendered the same for tax. We observe that this statement does not make any reference to a discrepancy between the books of accounts of the assessee firm and the cash found, but rather makes a reference to the difference in cash stated to be available by Shri Vishal Agarwal and the cash found. As already discussed very elaborately by the Id. CIT(A) in paragraph nos. 5.3 and 5.4 of his order, the law is well settled that any statement recorded under section 133A has no evidentiary value and the officer recording statement is not authorized to administer any oath or to take any sworn statement while proceeding to record the statement under section 133A. Therefore, any material collected and any statement recorded during a survey under section 133A cannot be said to be conclusive evidence in itself and no addition can be made on the basis of such statement. In the instant case, the statement had not been recorded of any of the partners of the firm, but that of the son of a partner. Since, Shri Vishal Agarwal, was not authorized to make any surrender on behalf of the firm, his statement would have no evidentiary value whatsoever. We further observe that the conclusion reached by the Id. CIT(A), that the additions were made not on account of statement of Shri Vishal Agarwal but on account of discrepancy in the stock of cash found and cash recorded in the books of accounts, is not borne out from a perusal of the assessment order or the said statement wherein the Id. AO seems to have made the addition solely on account of the, "voluntary surrender" made by Shri Vishal Agarwal. Even the written statement filed by Shri Vishal Agarwal disclosing the additional income, simply speaks of a difference in cash but does not mention anything about the difference being on account of what was recorded in the books of accounts. Thus, there does not appear to be any material on record, to justify the conclusion that there was a difference between the cash found during the survey and the cash as recorded in the books of accounts. We further observe that the books of accounts were produced before the Id. AO and have not been rejected by him in this regard. Since, there can be no addition on the basis of the statement of

Shri Vishal Agarwal, we hereby delete the addition of Rs.4,96,936/- made on account of alleged difference in cash.

6. In the result, the appeal of the assessee is allowed.

Order pronounced on 25.10.2024 at Allahabad, U.P.

Sd/-

**[SUDHANSHU SRIVASTAVA]
JUDICIAL MEMBER**

Sd/-

**[NIKHIL CHOUDHARY]
ACCOUNTANT MEMBER**

DATED: 25/10/2024

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Copy forwarded to:

1. Appellant -
2. Respondent -
3. CIT DR , ITAT,
4. CIT,
5. The CIT(A)

By order
Sr. P.S.