

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G": NEW DELHI
BEFORE SHRI H.S.SIDHU, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER**

ITA No.4127/Del/2014
(Assessment Year: 2010-11)

Sanjay Jain, C/o. Raj Kumar & Associates, CA, 4435/7, Ansari Road, Daryaganj, New Delhi PAN:AAIPJ5228R	Vs.	JCIT, Range-28, New Delhi
(Appellant)		(Respondent)

Assessee by :	Sh. Raj Kr. Gupta, CA Sh. Sumit Goyal, Ca
Revenue by:	Sh. NK Bansal, Sr. DR
Date of Hearing	03/05/2017
Date of pronouncement	04/05/2017

ORDER

PER PRASHANT MAHARISHI, A. M.

1. This appeal is preferred by the assessee raising following grounds of appeal against the order of the Ld. CIT (A) – XXV, New Delhi dated 28th of May 2014 as under:-

- “1A. That under the facts and circumstances, both the lower authorities erred **in law** as well as on merits in making and sustaining the addition of Rs. 43,32,048/- by disallowing the loss on trading of silver.
- B. That **without prejudice**, under the facts and circumstances, the statement recorded on oath during survey u/s. 133 A cannot be taken as an evidence against the assessee.
- C. That the addition of Rs. 43,32,0487- is the result of wrong assumptions, wrong presumptions, wrong facts as taken by AO and without appreciating the facts and the contentions correctly.
2. That under the facts and circumstances, there is absolutely no justification for ad - hoc disallowance of Rs. 72,5417- calculated @15% out of following expenses on the ground of "**possibility of personal element in these expenditures cannot be ruled out**".

S.no.	Expense	Total Amount
1.	Car running	181443
2.	Telephone expenses	94175/-
3.	Traveling expenses	176782/-

4.	Vehicle	312117-
	Grand total	4,83,6117-
	15%	72,5417-

2. The brief facts of the cases are that, assessee is an individual who is engaged in the trading of ferrous and nonferrous metal and allied goods under the name and style of M/s Athma Steel venture. He filed its return of income on 24/09/2010 declaring total income of Rs. 16129390/-. A survey proceeding under section 133A was conducted by the income tax Department at the two business premises of the assessee on 9/2/2010. During the course of survey physical stock of Rs. 87934107/- was found against the book stock of Rs. 69034107/- resulting into excess stock of Rs. 18900000/-. The assessee offered the same along with the excess cash found of Rs. 6,20,000/- as his income. The assessment under section 143 (3) of the income tax act was framed on 26th of March 2013 at total income of Rs. 20533979/-. The assessing officer made an addition of Rs. 4332048/- on account of loss incurred on sale of stock of silver bar and Rs. 72541/- on account of disallowance of various expenditure on estimated basis. The assessee aggrieved with the order of the Ld. assessing officer preferred an appeal before the Ld. CIT (A) who by the order dated 28/05/2014 confirmed the finding of the Ld. assessing officer. Therefore aggrieved with the order of the Ld. CIT (A) the assessee is in appeal before us.
3. The first ground of appeal is with respect to the disallowance of loss of Rs. 4332048/- on account of trading of silver. The brief facts of the case is that during the course of survey proceedings under section 133A of the income tax act, revenue found excess stock of silver bar weighing 720 KG which was valued at Rs. 26250 per KG which was accepted by the assessee and offered a sum of Rs. 18900000/- as income of the assessee. The above income was offered in answer to question No. 20 of the statement recorded of the assessee on 09/02/2010. The assessee was asked that as per the stock register of the proprietary concern the closing stock of silver as on the date is of 33.397 kg however, on physical verification, actual stock found of the Silver of 753.397 kg., Therefore there is a discrepancy of stock of Rs. 720 kg. In response to the question, the assessee answered that he is unable to explain the discrepancy of 720 kg of silver. However, to buy peace

of mind and to avoid all litigations, he offered 720 kilograms of silver at rates prevailing on that day at the rate of Rs. 26250/- per kilograms offered the sum of Rs. 18900000/- as extra income for the financial year 2009 -10, subject to that no penalty prosecution under the income tax act, 1961 are initiated. Subsequently, the stock was accounted for by the assessee in its books of account and sold it after survey. The Ld. assessing officer noted that the sale bill issued by the assessee on account of sale of 720 KG of silver were of 80% purity whereas in survey proceedings and as per previous purchase bill assessee is always dealing in hundred percent purity of silver bar. Obviously, the assessee incurred resultant loss on sale of the silver. The assessee was asked to explain the reason for such losses and assessee vide letter dated 14/03/2013 submitted that the silver bar arrived in the shop before survey took place on the same day. There was one bill of silver purchase vide bill number T000496 dated 09.02.2010 in which the silver of hundred percent purity was purchased at the rate of 26250 per KG and the Department valued other stock of silver also at the same rate without checking the purity of the silver bar. Therefore, the assessee incurred losses; the Department overvalued the silver bar whereas the goods were sold at a lower value due to the impurity of the silver bars. The Ld. assessing officer rejected the contention of the assessee because of the reason that the assessee had himself admitted in the statement recorded during the survey proceedings that the value of the silver bar are Rs 250 per KG. Therefore, the contention of the assessee that silver bar is of 80% purity is not tenable and therefore the addition of Rs. 4332048/- on account of sale of silver bar of lesser purity was made in the hands of the assessee. Before Ld. CIT (A) assessee contended the same argument which was rejected by him vide para No. 4 of his order. He confirmed the disallowance for several reasons as under:-

"4.00. I have given my thoughtful consideration to the grounds of appeal filed by the appellant, the submissions made and the pleas and arguments advanced by the appellant during the course of appellate proceedings. The assessment order was also meticulously gone through. Before deciding the issue at stake the following principles evolved by the Hon'ble Courts deserve mention:-

- (i) Where an assessee sets up a claim for a particular deduction Tribunal computation of his income, but is unable to establish necessary facts in this regard, the department would be justified in disallowing the claim.*

- (ii) Where the assessee fails to convince the AO that the expenses incurred or losses incurred were in the course of the business the department would be justified in disallowing the claim of the assessee for a deduction.
- (iii) The burden of proving the necessary fact in order to entitle the assessee to **claim exemption is on the assessee.**
- (iv) It is for the tax payer to establish by evidence that a particular amount is deductible.
- (v) The appellant must be able to substantiate loss by evidence because it is the onus of the appellant to prove the losses. Where the evidence was insufficient to prove the loss, it was held that the loss had been rightly disallowed,
- (vi) Loss must be genuine and must be proved, (vii) Loss of stock held illegally has been found to be inadmissible unless business is found to be illegal,
- (viii) The loss should spring directly from the carrying on of the business and incidental to it. It is not enough if it has some connection with the business. It must have been incurred in carrying out an operation of the business and incidental to that operation.
- (ix) Direct and proximate connection must be there between the business operation and the loss.

Having regard to the aforesaid principles enunciated by various courts the appellant was found to be wanting in several respects in relation to the claim of loss of Rs 43,32,0487- on account of sale of silver bars of lesser purity purportedly which are enumerated below: -

- (a) Proof of purchase of silver having 80% purity indicating the mode of payment i.e. cash or cheque was not furnished.
- (b) Vouchers of silver bars having 80% purity were not furnished by the appellant,
- (c) As per the inventory prepared by the survey party no details/ documents attesting recovery of silver bars of 80% purity were found at the time of survey.
- (d) The time taken b)' the appellant to retract/resile from the statements confirming presence of silver bars of 100% purity is conspicuously too long to be believed. The reason why the appellant wailed so long was also not made clear by the appellant. Thus there was considerable lapse of time which could not be described as reasonable.
- (e) No proof to the effect that the said silver bars of 80% purity sold in a very short time after survey were the ones which were found in the course of survey on 9/2/2010. In other words no reasonable nexus was shown between the silver bars of 80% purity sold and those **found** during the survey.
- (f) The survey party did not stumble upon any distinctive marks etc on any of the silver bars found during survey which could distinguish any one from the other in the matter of purity. The presence of 80% silver bars is intriguing.
- (g) There was no plausible explanation as to why the survey party was not apprised of the presence of 80% purity silver bars while

- the valuation was being done by them, which must have been done with the appellant's assistance.*
- (h) No proof to the effect that the silver was received on the same date on which the survey took place also furnished.*
 - (i) The reason why the goods received on the date of survey were not subject to the routine check was also not explained.*
 - (j) How come that a dealer selling 100% purity silver (the appellant) was duped by some regular supplier with impunity and without the threat of any adverse legal consequences, is a matter which renders the explanations of the appellant vulnerable. Why no case was filed against the supplier who deceived the appellant by supplying silver of 80% purity raises a big question.*
 - (k) The survey report does not indicate any receipts of silver bars on the date of survey.*
 - (l) There was no satisfactory explanation as to why the survey party was not told the correct quality content of silver on the date of survey itself and how the survey party took 100% to be the purify of the same silver now being claimed as having 80% purity content only as against 100%.*
 - (l) It was the first time that the appellant had been deceived in such a fashion from one of its regular suppliers.*

Thus, from the above, it was discernible that the loss of Rs 43,32,048/- was not really incident the trade. The alleged receipt of silver bars having 80% purity was not in the course of ordinary commercial trading in as much as no product businessman would spare a person deceiving him in such a fashion. The deficiency in the quality of the product leading to loss was therefore a fictitious and not a real loss. The loss did not spring directly to the appellant from the carrying out of an operation of the business. For the reasons cited supra, the loss is held to be manipulated."

4. Aggrieved by the order of the Ld. CIT (A) the assessee is in appeal before us.
5. The Ld. authorized representative submitted that that at the time of survey only one purchase on 09/02/2010 of 33.397 KG of hundred percent purity was found and the balance 720 KG was not supported by any evidences. He submitted that actually there were 25 slips of 'Dharam Kanta' based on which the above quantity was determined and during the course of survey, the rate was also taken of Rs. 26250/- based on the bill found during the course of survey for accounted goods. He submitted that there is no mention on any of the documents of the survey or on the slips what was the purity level of the 720 KG of the silver found. He further submitted that the revenue neither checked purity of purchase of 720 KG and nor it was certified by the authorized valuer. He submitted that the assessee was new in this trade and as it was the 1st day of his trading, he did not get the purity checked and presumed the purity of 720 KG at hundred percent. He further referred to page No. 7 of the paper book wherein the inventory detail

of 720 KG of silver was made by revenue and also the various 'Dharam Kanta' slips and submitted that there is no mention of purity of the silver. As the amount of stock was declared and found during the course of survey it was necessary to be sold because the assessee is a Trader in that particular commodity, he submitted that subsequently the assessee has sold 720 KG of silver and out of which 59.24 KG was of hundred percent purity and balance of 660.760 KG was of about 80% purity. He submitted the copies of the bills of sale of the silver at page No. 12, 13, 15 -20 of paper book and submitted that all the sales have been made to the registered dealers after charging 1% VAT and the payments have also been received through banking channel. He further mentioned that the purity is also duly mentioned on sale invoices submitted by the assessee and accepted by the purchasers. It was also his contention that there was no material with the Ld. assessing officer to prove that the purity of 660.760 KG of the silver was not 80%, but 100 percent. He further submitted that rate of the silver changes on day-to-day basis and is not stagnant and therefore the rate of the silver also has changed substantially after the date of survey. He further submitted that the Ld. assessing officer has grossly erred in noting that assessee has sold 720 kg of gold, which is of hundred percent purity but the correct figures that the assessee has sold 59.240 KG of the silver at the rate of hundred percent purity and the balance of 660.760 KG at 80% purity. He further submitted that the Ld. AO and Id CIT(A) has not perused the facts of the case in proper perspective. Naturally, at the time of survey there were no bills otherwise; they would have been accounted for in the books of accounts. It was further his submission that the Ld. CIT(A) has stated that the survey party did not stumble upon any distinctive marks etc on any of the silver bars found during survey, which could distinguish anyone from the other in the matter of purity, and therefore the presence of 80% of silver bar is incorrect. For this is submitted that it would have been the duty of the revenue and assessee cannot be punished for the same. Regarding the argument of the Ld. CIT(A) that there was no plausible explanation as to why the survey party was not appraised of the presence of 80% purity in silver bars he submitted that assessee has already submitted that he was new in the silver trading, therefore it was not possible for him to make a distinction

between 100 percent purity and 80% purity at that particular moment of time. In view of this, he submitted that that loss disallowed by the Ld. assessing officer and confirmed by the Ld. CIT (A) is erroneous.

6. Ld. departmental representative vehemently contested the claim of the assessee and submitted that the reasons given by the Ld. CIT (A) at para No. 4 of the order are exhaustively disproving the loss claimed by the assessee. He further referred to the statement of the assessee wherein assessee himself has disclosed 720 kg of the silver at the rate of Rs. 26250/- per kilogram which was for the hundred percent purity of the silver. Therefore, he vehemently supported the order of the lower authorities in disallowing the loss of Rs. 4332048/- .
7. We have carefully considered the rival contentions and perused the orders of lower authorities. The undisputed facts remains that during the course of survey at the business premises of the assessee on 09/02/2010 excess of 720 kg of silver was found and on being confronted the assessee disclosed in his statement under section 133A (3) (iii) of the act recorded on 09/02/2010, as his income comprising of 720 kg of the silver at the rates applicable on that date of survey of Rs. 26250/- per kilogram valuing at Rs. 1.89 crores. The assessee disclosed this sum as extra income for the financial year 2009-10, i.e. AY 2010-11. The above disclosure was on account of impounding of 25 slips of "Dharam Kanta" all dated 09/02/2010. Inventory of such goods was placed at page No. 7 of the paper book along with photocopies of those slips at page No. 8 to 11 of the paper book. Admittedly on 09/02/2010 assessee accounted purchase of silver of 33.397 KG at the rate of 26249.99 per KG and on application of that rate on the unaccounted stock of 720 KG the unaccounted income of the assessee was determined at Rs. 1.89 crores and same was disclosed and owned by the assessee during the course of survey. Subsequently, the above stock of 720 kg was sold. Out of the 720 KG, 59.24 KG was sold at hundred percent purity and 660.760 KG is sold at 80% purity. The assessee submitted the copies of the bill of sale of silver and in all the bills assessee has mentioned percentage of purity of the silver sold. The sales was made to various parties which are based in New Delhi as complete address of those buyers are mentioned on the bill along with their TIN No. and further assessee has collected VAT at the rate of 1%. The Ld. AO

has disallowed the loss arising to the assessee only for the reason that assessee himself has disclosed the income of excess stock of the silver bar at the rate of Rs. 26250/- per KG of 100 percent purity. We have carefully perused the statement of the assessee, which is placed at page No. 1 to 5 of the paper book and also examined the question No. 20 and its answer given by the assessee. On reading of the above question and its answer, we do not find that assessee has stated that excess stock found is of hundred percent purity. Further more in the 25 slips and consequent inventory prepared which are placed at page No. 7 to 11 of the paper book, based on which the quantity of 720 KG is determined also do not show about the percentage of purity of silver. Of course, on 09/02/2010, assessee has purchased silver of 33.397 KG at the rate of Rs. 26250 per KG, which is accounted for in the books of accounts of the assessee, and rates of disclosure are taken based on that bill. However, that does not prove that the silver of 720 KG found during the course of the survey was of hundred percent purity. Further, the inventory is also not certified by the authorized value to reach at conclusion that what was the purity of the goods found during the course of survey. Therefore, merely because the rate of the disclosure for excess stock found is taken from one of the bills of purchase of silver which was of hundred percent purity, it cannot be said that the goods found was also of the hundred percent purity. The assessee himself has stated that this is his 1st year of the business of trading of silver, which was not controverted by the revenue at any stage of the proceedings, therefore, merely based on the statement of the assessee percentage of the purity of the silver found during the course of survey cannot be determined. Admittedly, nowhere during the course of survey the impounded slips show what the purity of those goods was. The assessee has submitted the complete details of the sale of the goods stating the name, address and TIN of the buyers, if the revenue has any doubt about the actual sale price or purity of the goods, then necessary enquiry should have been made from such buyers to ascertain the correctness of the claim of the assessee. The revenue has not done this exercise. Further, coming to the order of the Ld. CIT(A) we do not agree with the reasons given by him for confirmation of the addition/disallowances as the assessee has disclosed the income arising out of unaccounted stock. Naturally, there are no purchase bills of those goods and therefore holding

that assessee has not shown the purity of the Silver purchased cannot be used against the assessee. As the stocks were unaccounted, there was no question of having purchase bills of that stock. Furthermore, the 25 slips found also do not show percentage of the purity. The preparation of inventory of the excess good found also does not indicate the purity of the silver. According to the provisions of section 133A (3) (ii) it is the duty of the income tax authority to make an inventory of stock checked or verified by them, if they have not mentioned the percentage of purity or has not put any Mark on the silver found, then assessee cannot be blamed. Even otherwise, if there would have been doubt in the mind of the Ld. assessing officer about the purity of the silver he could have exercised powers bestowed upon him under the income tax act to examine the buyers to verify the correctness of the claim of the assessee. Further, it is incorrect to say that assessee has retracted from the statement. It emerges from the arguments of the revenue that the sales shown by the assessee is incorrect, however, without examination of the sales made by the assessee, it cannot be substantiated. It may also be possible that Goods found during the course of survey were of 80% purity and erroneously the rates have been taken for 100% purity. Furthermore, the Ld. CIT appeal has also held that the survey report does not indicate any receipt of silver bars on the date of the survey. It was also mentioned by him that there was no satisfactory explanation as to why the survey party was not told the correct quality content of silver on the date of survey itself, we are not inclined to accept these finding in view of the weighing slip found all dated 09/02/2010. Furthermore, it is the duty of the income tax authority to make an inventory of stock. It is a matter of common knowledge that silver is traded based on the purity it contains; therefore, the income tax authority conducting the survey should have determined the purity at the time of working out the undisclosed income by calling the valuer, which revenue has failed to do. Further, during the course of assessment proceedings also, the Ld. assessing officer has failed to examine the buyers with respect to the purity of the goods they have purchased from assessee. In view of this we are of the opinion that disallowance of the loss by the Ld. assessing officer on account of sale of silver is based on conjectures and surmises when assessee has supported its sale by name, address and TIN No of the

buyers who have paid assessee by cheques. In view of this, we direct the Ld. assessing officer to delete that addition of Rs. 4332048/- on account of loss on trading of silver. Reversing the order of the Ld. CIT (A) we allow ground No. 1 of the appeal of the assessee.

8. Ground No. 2 of the appeal of the assessee is against disallowance of 15% out of the total expenses of Rs. 483611/- on account of car running, telephone expenses, travelling expenses and vehicle expenses. The Ld. assessing officer has made above disallowances as assessee has not maintained and produced the logbook and complete records or proof of the claim of such expenses. Therefore, on the possibility of the personal element in this expenditure, Ld. assessing officer estimated 15% of such expenditure as not incurred wholly and exclusively for the purposes of the business and disallowed. On appeal before the Ld. CIT (A), he confirmed the disallowance.
9. The Ld. authorised representative submitted before us that the assessee has incurred those expenditure wholly and exclusively for the purposes of the business and they are comparable with previous year. It was further submitted that the accounts of the assessee are audited and assessee is also assessed to income tax under section 143 (3) of the act for the previous year.
10. Ld. departmental representative relied upon the orders of the lower authorities.
11. We have carefully considered the rival contentions and also perused the orders of the lower authorities. The assessee has placed assessment order under section 143(3) of the income tax act for assessment year 2009-10 wherein 1/5th of the total expenses incurred by the assessee on account of telephone expenses, travelling expenses were disallowed and not agitated by the assessee. In view of this we direct the Ld. assessing officer to restrict disallowance of 15% of telephone expenses and travelling expenses totaling to Rs. 270957/- i.e. Rs 40643/- against disallowance made by the Ld. assessing officer of Rs. 72541/-. In view of this ground, No. 2 of the appeal of the assessee is partly allowed.

12. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on 04/05/2017.

-Sd/-

**(H.S.SIDHU)
JUDICIAL MEMBER**

-Sd/-

**(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER**

Dated: 04/05/2017

A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi