

आयकर अपीलिय अधिकरण, जयपुर न्यायपीठ, जयपुर  
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री भागचंद, लेखा सदस्य एवं श्री कुल भारत, न्यायिक सदस्य के समक्ष  
BEFORE: SHRI BHAGCHAND, AM & SHRI KUL BHARAT, JM

आयकर अपील सं./ITA No. 311/JP/2015  
निर्धारण वर्ष / Assessment Year : 2009-10

Satish Chand Agarwal, Prop.- M/s Sumit Medical Hall, Subhash Nagar, Tonk.	बनाम Vs.	I.T.O., Ward- Tonk.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ABPPA 5989 E		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Manish Agarwal (CA)  
राजस्व की ओर से / Revenue by : Shri J.C. Kulhari (JCIT)

सुनवाई की तारीख / Date of Hearing : 11/04/2018  
उदघोषणा की तारीख / Date of Pronouncement : 12/04/2018

आदेश / ORDER

PER: BHAGCHAND, A.M.

This is an appeal filed by the assessee emanates from the order of the Id. CIT(A)-III, Jaipur dated 28/02/2014 for the A.Y. 2009-10.

2. It is noticed by the Bench that there is delay of 331 days in filing the appeal, for which the assessee has filed an application for condonation of delay. The Id AR of the assessee has prayed to condone the delay. The Id DR has raised objection on submission of Id. AR to condone the delay. After hearing on condonation of delay, we are of the view that the assessee was having sufficient cause for not filing the

appeal on time, therefore, in the interest of justice and equity, we condone the delay and admit the appeal.

3. The assessee is an individual and engaged in wholesale and retail trading of medicines under the name and style M/s Sumit Medical Hall at Tonk. A survey U/s 133A of the Income Tax Act, 1961 (in short the Act) was carried out on 10/07/2008 at the business premises of the assessee and during the survey, statement was recorded U/s 133A of the Act wherein the assessee surrendered amount of Rs. 60,09,418/-. The assessee claims that this statement was obtained from the assessee by the survey officials on various issues. The assessee did not disclose the surrendered amount in the return of income. The return was filed declaring total income of Rs. 4,23,780/-. In the assessment proceedings U/s 143(3) of the Act, the income was assessed at Rs. 68,92,550/-. The Id. CIT(A) has confirmed the addition of Rs. 60,09,418/- on the basis of statement recorded during the survey operation and granted part relief to the assessee from the trading addition made after rejecting books of account by invoking the provisions of Section 145(3) of the Act.

4. Now the assessee is in appeal before the ITAT by taking following grounds of appeal:

- “1. On the facts and in the circumstances of the case the Ld. CIT(A) has grossly erred in upholding the addition of Rs.8,04,155/- made on account of excess cash found during the course of survey arbitrarily without appreciating the reconciliation submitted, thus the addition of Rs.8,04,155/- confirmed by Ld. CIT(A) deserves to be deleted.*
- 1.1 That the Ld. CIT(A) has further erred in ignoring the fact that the assessee had submitted vital evidences during the course of assessment proceedings wherein cash as per books of accounts and that found during the course of survey is in parity. Hence the addition of Rs.8,04,155/- so confirmed deserves to be deleted.*
  - 1.2 That the Ld. CIT(A) has further erred in ignoring the statements recorded during the course of survey wherein the assessee has categorically stated that the books of accounts as on date of survey were not complete and various entries were to be made to arrive at the figure of cash in hand. Hence the addition of Rs.8,04,155/- so confirmed deserves to be deleted.*
- 2. On the facts and in the circumstances of the case, the Ld. CIT(A) has grossly erred in j upholding the addition of Rs.10,00,000/- made on account of unaccounted advance arbitrarily without considering the submission made and evidences adduced. Hence the addition of Rs.10,00,000/- so confirmed deserves to be deleted.*
- 3. On the facts and in the circumstances of the case, the Ld. CIT(A) has grossly erred in confirming the action of Ld. Assessing Officer in making an addition of Rs.13,62,000/- on account of unaccounted debtors arbitrarily, thus the addition so confirmed deserves to be deleted.*
- 3.1. That the Ld. C1T(A) has further erred in ignoring the contention of the appellant that the paper is written in a single ink in a day and is a dumb document. Hence the addition of Rs.13.62 lacs so confirmed deserves to be deleted.*
- 4. On the facts and in the circumstances of the case, the Ld. C1T(A) has grossly erred in upholding the addition of Rs.28,43,039/- made on account of alleged excess stock found during the course of survey arbitrarily. Thus, the addition so sustained deserves to be deleted.*

- 4.1 *That the Ld. CIT(A) has further erred in upholding the addition of Rs.28,43,039/- on account of alleged excess stock solely by borrowing the observations of Ld. AO wherein he has relied upon the forced statement made by the assessee and without bringing on record any material evidence in support of his contention. Hence the addition of Rs.28,43,039/- so sustained deserves to be deleted.*
5. *On the facts and in the circumstances of the case, the Ld. CIT(A) has grossly erred in ignoring the fact that all the additions (challenged under grounds of appeal nos. 01 to 4.1) have been made by Ld. AO solely on the basis of statements of assessee recorded on oath during the course of survey u/s 133A conducted at the business premises of assessee and without referring to any other material. Thus, all these additions deserve to be deleted in as much as these additions have been made by ignoring the well established law that no statements can be recorded on oath during the course of survey and if recorded, cannot be relied upon for the purpose of making additions.*
6. *On the facts and in the circumstances of the case the Ld. CIT(A) has grossly erred in confirming the action of Ld. AO of invoking the provisions of section 145(3) arbitrarily.*
- 6.1 *That the Ld. CIT(A) has further erred in confirming the action of Ld. Assessing Officer in varying the turnover declared by the assessee from Rs.1,70,05,305/- to Rs.1,80,00,000/- without bringing on record any adverse material to support his contention. Hence the turnover as declared by the assessee deserves to be accepted.*
- 6.2 *That the Ld. CIT(A) has further erred in confirming the addition of Rs. 1,42,778/- by applying the G.P. rate at 13.24% instead of 13.17% declared by the assessee. Hence addition of Rs.1,42,778/- so made deserves to be deleted.*
7. *Without prejudice to grounds of appeal No. 1 to 6.2 above and in the alternative, the benefit of telescoping and set off of the addition made into each other ought to have been allowed on the additions/ disallowances finally upheld by the appellate order.*

8. *That the appellant craves the right to add, delete, amend or abandon any of the grounds of this appeal at the time or before the actual hearing of the case."*

5. While pleading on behalf of the assessee regarding grounds No. 1 to 5 of the appeal, the Id AR has submitted that the survey team recorded the statement on oath which is not as per law as no statement can be recorded on oath U/s 133A of the Act on oath. Further he also submitted that this statement was not voluntarily but obtained by the survey team officials. He has submitted that once the assessee has reconciled the issues on which the survey team obtained the admission then no addition can be made only on the basis of statement so obtained during survey. The A.O. has not taken any pain to further investigate the issues and pin point any discrepancy in the audited book on these issues. He has submitted that the cash found of Rs. 8,04,379/- was as per the books and the assessee has submitted updated cash books before the A.O. during the assessment proceedings wherein he has not found any fault. He had not pointed out any defect in cash book. Ld AR has also submitted that the excess stock was also reconciled. The survey team has valued the excess stock by taking MRP while the assessee purchased goods at much lesser price. He also submitted that the old outdated medicines had also been taken into account. He submitted that the assessee has submitted a chart placed

at page No. 101 & 102 of the paper book (Annex-A) and page 103 (Annex-B) to establish these facts that the survey team has valued the stock on MRP and purchase price is much less to that but A.O. has not considered the same. He has drawn our attention to page Nos. 101 and 102 of the paper book wherein around 68 examples have been mentioned of difference in MRP and purchase price. The A.O. has failed to even verify such claim of the assessee. He also submitted that the addition of Rs. 10.00 lacs made for the advances given to Shri Pawan Kumar is also not established by the facts as there was no signature of Shri Pawan Kumar on the paper. Further the A.O. recorded statement of Shri Pawan Kumar but he was not asked any question in this regard. Ld. A.R. further submitted that the A.O. has not verified even a single so called debtors and simply made the addition of Rs. 13,62,000/-. The assessee has not disclosed the amount in return of income and retracted from the statement recorded during survey, then the A.O. must have proceed further to establish his case. Once the assessee is retracted from the statement recorded by the survey team, then the A.O. was duty bound to investigate the issue further to make the addition. He also submitted that all the additions made by the A.O. were based on the statement recorded during the survey and such statement has no evidentiary value in view of the decision of Hon'ble

Supreme Court in the case of CIT Vs S.Khader Khan Son 300 ITR 157 (SC). He has also relied on the decision of Hon'ble Kerela High Court in the case of Paul Mathews and Sons Vs CIT 263 ITR 101 (Ker) and he pleaded to delete the addition in all these grounds.

6. On the other hand, the Id DR has vehemently supported the orders of the authorities below. The Id DR has relied on the decision of Hon'ble Bombay High Court in the case of Dr. Dinesh Jain Vs ITO 45 taxmann.com 442 (Bom) and the decision of Hon'ble Rajasthan High Court in the case of Rameshwar Lal Mali Vs CIT 132 Taxman 629 (Raj).

7. The Bench have heard both the sides on these issues. We have also gone through the case laws relied upon. The Hon'ble Supreme Court in the case of CIT Vs. S. Khader Khan Son cited (supra) has held that an admission is an extremely 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 account do not correctly disclose the correct state of facts. In this case, the assessee made statement during the survey and surrendered Rs. 60,09,418/- on account of excess cash, Rs. 8,04,155/- unaccounted debtors, Rs. 13,62,000/- excess stock, Rs. 28,43,409/- and on account

of advance of Rs. 10.00 lacs to Shri Pawan Kumar. The assessee has not disclosed these amounts in the return of income and retracted from statement. In such a situation, it is the duty of the Assessing Officer to investigate the issues further and establish on each and every issue on which the surrender was made to establish the correctness of undisclosed amount by making further enquiries. The A.O. has failed to do so. He has simply made the addition on the basis of statement made during the survey which assessee had not honoured. The Hon'ble Kerala High Court in the case of Paul Mathews & Sons (supra) has also held that Section 133A(3)(iii) enable the authority to record the statement of any person which may be useful for, or relevant to, any proceeding under the Act. Section 133A, however, enables the income tax authority only to record any statement of any person which may be useful, but does not authorize taking any sworn statement. Thus, it is trite law that Section 133A does not empower any Income tax authority to examine any person on oath and then use it as evidence to make addition. In such a situation, no addition can be made or sustained only on the basis of the statement recorded during the survey U/s 133A of the Act. Once the assessee has retracted from the statement then it was on the A.O. to establish beyond any doubt the issues on which the addition has been made. Once the assessee has submitted up to date

cash book and stock register then it was duty of the Assessing Officer to pin point the defects in such books of account particularly with regard to the issues, on which the statement was recorded during the survey. Further in the case of Shri Pawan Kumar, even the Assessing Officer recorded his statement but he has not asked any question with regard to amount of advance of Rs. 10.00 lacs for which the addition has been made only on the basis of a piece of paper, which was not signed by Shri Pawan Kumar. Similarly in the case of debtors, once the assessee has retracted then it was the duty of the Assessing Officer to examine these debtors to establish the truthfulness of the debt. The Id DR has relied on the decision of Hon'ble Bombay High Court in the case of Dr. Dinesh Jain Vs. ITO (Supra) and decisions of Hon'ble Rajasthan High Court in the case of Rameshwar Lal Mali Vs CIT (supra), we have considered the facts and law involved in these cases and we find that the facts are at variation from these cases, therefore, the ratio laid down in these cases are not applicable to the assessee's case. Considering all these aspects, we find no merit in sustaining the addition only based on the statement recorded during the course of survey. Hence grounds No. 1 to 5 of the appeal are allowed.

8. In the grounds No. 6, 6.1 and 6.2 the issue is regarding sustain the part addition by invoking the provisions of Section 145(3) of the Act

and estimating the turnover and G.P.. The Id. CIT(A) has dealt the issue by holding as under:

“9.3 I have carefully considered the findings of the A.O. as also the submission of the appellant. It may be noted that the A.O. has rejected the books of accounts by applying provisions of sec. 145(3) of IT Act and after rejection of books of accounts estimated the sales for Rs. 180 lacs as against declared sale of Rs. 17005305/-. The A.O. applied G.P. rate of 15% as against G.P. rate of 13.17% shown by the appellant and accordingly trading addition of Rs. 459578/- was made. The A.O. applied provisions of sec. 145(3) because of the reasons that the assessee was involved in sales/purchases outside books of accounts as also that the books of accounts were found to be incomplete and excess stock was also found. On the other hand the appellant case is that the A.O. has not pointed out any specific defects in the books of accounts and that even estimation of profit by applying 15% was not justified as such profit should be estimated on the basis of profit shown in the past year. For such submission the appellant has also placed reliance on various case laws. In this connection it may be noted that as far as rejection of books of accounts is concerned, the same was justified in as much as the books of accounts were maintained by the assessee were not complete and it is fact that cash was found excess as also stock was found excess. It is also noted that the assessee himself admitted that part of the sales/purchases are being made in unaccounted manner. As regards estimation of profit, after invoking the provisions of sec. 145(3) of IT Act, it may be stated that it is a settled law that even after invoking the provisions of sec. 145(3), the AO is not empowered to assess the income at whatever figures he wants and the AO is supposed to make an honest estimation either based on the past

*history of the appellant's own case or on the basis of any comparable case. For such proposition reliance is placed on the following case laws:*

- i) M/s Brijbhushan Lai Pradhuman Kuamr vs. CIT, 115 ITR 524*
- ii) Shree Shankar Khandsari Sugar Mills vs. CIT, 193 ITR 669*
- iii) CIT vs Dr. A.P. Bahel 2 DTR 387 (Raj)*
- iv) CIT vs. Suresh Marbles Pvt. Ltd. 18 DTR 118 (Raj)*
- v) Shri Ram Jhanwar vs. ITO 98 TTJ, ITAT, Jodhpur*
- vi) Ajay Goyal vs. ITO 99 TTJ, ITAT, Jodhpur.*

*In this connection it may be noted that in the immediate preceding year the appellant has shown G.P. rate of 13.24%. Therefore it will be fair and reasonable to apply G.P. rate of 13.24% on estimated sales of Rs. 1800000/- and accordingly the gross profit is arrived at 2383200/- as against G.P. rate shown by the assessee for Rs. 2240422/-. Accordingly trading addition of Rs. 142778/- is made. The appellant gets relief of Rs. 316800/-. The ground of appeal is partly allowed."*

9. After hearing both the sides, we find no merits in the pleadings of the assessee, therefore, we sustain the order of the Id. CIT(A) on this issue.

10. In ground No. 7 of the appeal, the assessee had alternatively pleaded to give benefit of telescoping. Since the addition on all four issues raised in grounds No. 1 to 5 are not sustained, hence no scope for any teliscopy.

11. Ground No. 8 of the appeal are general in nature and does not require any adjudication.

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

Order pronounced in the open court on 12/04/2018.

Sd/-  
(कुल भारत)  
(Kul Bharat)  
न्यायिक सदस्य / Judicial Member

Sd/-  
(भागचंद)  
(BHAGCHAND)  
लेखा सदस्य / Accountant Member

जयपुर / Jaipur  
दिनांक / Dated:- 12<sup>th</sup> April, 2018

\*Ranjan

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- Shri Satish Chand Agarwal, Tonk.
2. प्रत्यर्थी / The Respondent- The ITO, Ward- Tonk.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 311/JP/2015)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar