

B-527 to 540
23/11/8

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'B' : NEW DELHI

BEFORE SHRI SHRI DEEPAK R. SHAH, ACCOUNTANT MEMBER
AND SHRI RAJPAL YADAV JUDICIAL MEMBER

ITA Nos.2247; 2248; 2249; 2250; 2251; 2252; &
2253/DEL/2009

A.Y.: 2000-2001; 2001-2002; 2002-2003; 2003-
2004; 2004-2005; 2005-2006; & 2006-2007

Asstt. Commissioner of Income-tax Central Circle-17, New Delhi. Vs. Shri Chetan Das Lachman Das, 5162, Kolhapur Road, Delhi.

ITA Nos. 2673; 2674; 2675; 2676; 2677; 2678; &
2679/DEL/2009

A.Y.: 2000-2001; 2001-2002; 2002-2003; 2003-2004;
2004-2005; 2005-2006; & 2006-2007

Shri Chetan Das Lachman Das, ACIT, CC-17, 5162, Kolhapur Road, Delhi. Vs. New Delhi.

PAN: AAAFC0095K

(APPELLANTS)

.. (RESPONDENTS)

Assessee by :
Department by:

Shri Kapil Goel, CA
Shri Stephen George, CIT-
DR and Shri Manish Gupta,
Sr. DR

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ORDERPER BENCH

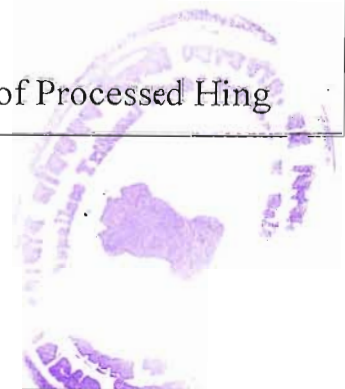
These cross appeals have been instituted respectively by the assessee and revenue against the orders of Ld CIT(Appeals)-II, New Delhi dated 27/03/2009 in Appeals against assessment orders framed u/s 153A read with section 143(3) of the Income Tax Act, 1961 (Act). Since common issues are involved in all these appeals, therefore, we have heard them together and deem it appropriate to dispose off them by this common order.

2. Brief facts relating to these common appeals are noted hereinafter. There was a search u/s 132 of the Income Tax Act (the Act) on assessee on 13/12/2005. Pursuant to same, assessments for assessment years 2000-2001 to 2006-2007 u/s 153A has been framed. The assessee is engaged in sale/purchase business of Hing and other items such as Zeera etc.

3. The chart for various additions as made by the AO and respectively disputed by assessee and revenue, vis-à-vis orders of Ld CIT(A), is produced below:

Additions by Assessing Officer	AO's additions as sustained by Ld CIT(A)
Assessment Year 2000-2001	
Rs. 40,12,470 on a/c of understatement of sale consideration	Rs. 57,339 on a/c of understatement of sale consideration
Rs. 105,69,359 on a/c of	202,179 on a/c of Processed Hing

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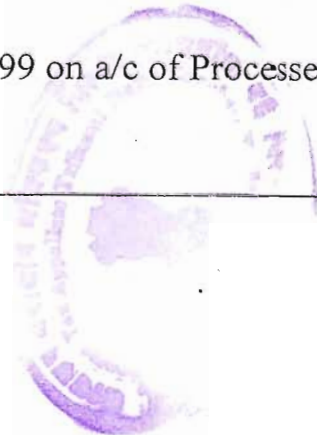


processed Hing Rs. 500,000 on a/c of out of books expenses	
Assessment Year 2001-2002	
Rs. 44,59,659 on a/c of understatement of sale consideration Rs. 114,75,914 on a/c of processed Hing Rs. 500,000 on a/c of out of books expense 292,000 depreciation on car	Rs. 58,008 on a/c of understatement of sale consideration 198,075 on a/c of Processed Hing
Assessment Year 2002-2003	
Rs. 68,10,158 on a/c of understatement of sale consideration Rs. 102,93,262 on a/c of processed Hing Rs. 500,000 on a/c of out of books expense 526,000 depreciation on car	Rs. 804,547 on a/c of understatement of sale consideration Rs. 212,138 on a/c of Processed Hing
Assessment Year 2003-2004	
Rs. 89,81,169 on a/c of understatement of sale consideration Rs. 137,45,163 on a/c of processed Hing	Rs. 259,767 on a/c of understatement of sale consideration Rs. 174,210 on a/c of Processed Hing

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Rs. 500,000 on a/c of out of books expense	
420,000 depreciation on car	
Assessment Year 2004-2005	
Rs. 73,58,074 on a/c of understatement of sale consideration	Rs. 145,448 on a/c of understatement of sale consideration
Rs. 132,07,596 on a/c of processed Hing	Rs. 593,338 on a/c of Processed Hing
Rs. 500,000 on a/c of out of books expense	
522,200 depreciation on car	
Assessment Year 2005-2006	
Rs. 2,22,40,033 on a/c of understatement of sale consideration	Rs. 19,37,834 on a/c of understatement of sale consideration
Rs. 136,92,746 on a/c of processed Hing	
Rs. 500,000 on a/c of out of books expense	
602,000 depreciation on car	
Assessment Year 2006-2007	
Rs. 2,22,40,033 on a/c of understatement of sale consideration	Rs. 16,47,167 on a/c of understatement of sale consideration
Rs. 136,92,746 on a/c of processed Hing	Rs 48,399 on a/c of Processed Hing

Rs. 500,000 on a/c of out of books expense 361,000 depreciation on car	
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4. In aforesaid connection, revenue has disputed additions deleted by Ld CIT(A) and assessee has disputed additions sustained by Ld CIT(A), in their respective grounds of appeal. Further assessee has also challenged before us the legal validity of subject assessments u/s 153A of the Act.

5. On legal ground, submission of assessee, as reproduced from Ld CIT(A), in his order (A.Y. 2000-2001; page 2/3) is as follows:

“Aggrieved by the A.O.'s order, the assessee preferred this appeal and filed written submissions and argued the case. The assessee has taken (he ground that there is no search u/s 132 and hence the assessment is illegal. It is the claim of the revenue that official and residential premises were searched. But since it is a case of the firm, question of any residential premises does not arise. There was no search at the office premises. As per evidence there was only survey at the office premises on 13/12/2005 and hence in the absence of any search there cannot be any 153A assessment and hence this assessment is invalid. The firm consists of two partners namely Anil Bhatia (HUF) and Sanjay Bhatia (HUF). There is a panchnama of 31B/2 Rajpur Road Delhi where the name of Lachhman Das Bhatia, Sanjay Bhatia, Anil Bhatia has been given, In the panchnama there is a mention of the name of Chetan Das Lachhman Das. But it has no where been stated that, search is in the name of firm or there is a search in the case of the firm. M/s Chetan Das Lachhman Das 31B/2 has no relation with the firm Chetan Das Lachhman Das since this is neither residential nor business address of Chetan Das Lachhman Das. 31B/2 is neither godown nor the branch office of the firm. This address

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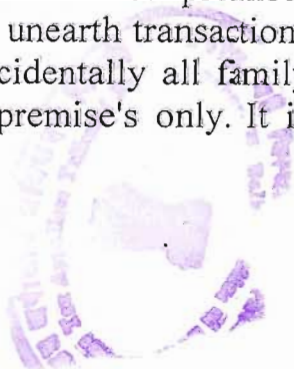


is also not included anywhere in the sale tax record of the firm. This is only residence of Lachhman Das and his two sons Anil Bhatia and Sanjay Bhatia. To repeat it has nothing to do with the partnership firm M/s Chetan Das Lachhman Das or its partners and in the circumstances it is submitted that there is no search in the case of assessee firm. There is no warrant in the case of the firm and hence there cannot be any such 153A assessment and therefore the same is illegal void and hence merits quashing. For an assessment u/s 153A, the pre-requisite is the warrant of search and then its execution. In this case there is no warrant of search in the case of firm and then even if there is, no execution in the case of the firm. The panchnama as per copy enclosed would prove and support my contention that there is no warrant and no execution in the case of the present assessee firm and hence the present assessment is illegal invalid and ab-initio void and must be quashed.”

In aforesaid connection, Ld CIT(A)'s order adjudicating assessee's legal contentions held as follows:

“I have considered the elaborate submissions of the appellant as well as contention of the A.O. on the issues raised in the impugned order. In respect of legal ground raised about search U/s 132 is concerned, the facts were examined and found that there exists Warrant of Authorization in appellant's case along with others. The basic objection of the appellant is that the status of the assessee is not mentioned in the Warrant along with assessee's name. On the contrary, it is written as M/s Chetan Dass Lachman Dass. Such nomenclature signifies only inanimate person only. It is not the case of assessee that there exists an individual by that name. There is no precondition to search residential/business premises of person against whom the Warrant is issued. Warrant of Authorization is issued to search any premises, not necessarily of such person, to unearth unaccounted assets or books of accounts of such person in whose case search warrant is issued. In this case premises bearing No 31 B/2 is subjected to search to unearth transactions relating to appellant along with others. Incidentally all family members of partners are residing in this premise's only. It is

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strange as well as surprising to hear from assessee that it has no relation to this premises. Considering all these facts the legal ground raised does not survive, accordingly rejected. Also rejected the other ground of non approval of JCIT as such approval as contemplated under Law is very much available”

6. Before us, Ld counsel for assessee, reiterating the contentions placed before Ld CIT(A) submitted as under:

- a) That assessee is a firm consisting of partners being Anil Kumar Bhatia HUF and Sanjay Bhatia HUF.
- b) That search u/s 132 has been conducted on residential premises of karta's of partners of assessee firm viz. 31-B/2 Rajpur Road New Delhi.
- c) That no search u/s 132 has been conducted on any of the premises belonging to assessee firm much less on its partners/HUF'S.
- d) That on date of search on 13/12/2005, a survey u/s 133A was conducted on assessee-firm premises, which never got converted into search, supports that revenue never intended to conduct search on assessee-firm.
- e) That since firm is an artificial taxable entity different from its partners u/s 2(7) of the Act dealing with definition of person, mere search on residential premises of Karta's of Partner/HUF's cannot be translated/equated into search conducted on firm, irrespective of something is found from said residential premises belonging to firm.
- f) Search u/s 132 is both assessee and premises specific and documents found from residential premises of karta's of





partners could have been processed u/s 153C of the Act (if at all required).

g) Mere issuance of warrant in the name of the firm could not give jurisdiction u/s 153A as it satisfies only one legal requirement thereof viz. initiation of search u/s 132, whereas section 153A further requires satisfaction of condition of "conduct of search", for which search must have been conducted on premises belonging to the firm.

h) Reliance was placed on following rulings:

- i. Mumbai ITAT ruling in the case of J.M.Trading corporation 20 SOT 489;
- ii. CAL HC ruling in the case of K.R.Modi 272 ITR 587;
- iii. Kamdhenu sweets Allahabad High Court; &
- iv. Tirupati Oil 248 ITR 194 Bombay High Court

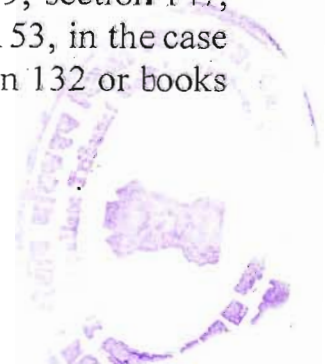
7. In reply, Ld DR while accepting the factual position pressed by ld AR, relied on the Kerala High Court ruling reported at 317 ITR 291 Swiss Times case.

8. We have considered the relevant facts, arguments advanced and the decisions cited. The assessee primarily challenges the action of the Assessing Officer in framing assessment under section 153A of the Act.

Section 153A of the Act is extracted hereunder:-

“153A. Assessment in case of search or requisition.

Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, in the case of a person where a search is initiated under section 132 or books

of account, other documents or any assets are requisitioned under section 132A after the 31st day of May, 2003, the Assessing Officer shall –

(a) issue notice to such person requiring him to furnish within such period, as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years referred to in clause (b), in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139;

(b) assess or reassess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made :

Provided that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years:

Provided further that assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years referred to in this section pending on the date of initiation of the search under section 132 or making of requisition under section 132A, as the case may be, shall abate.

(2) If any proceeding initiated or any order of assessment or reassessment made under sub-section (1) has been annulled in appeal or any other legal proceeding, then, notwithstanding anything contained in sub-section (1) or section 153, the assessment or reassessment relating to any assessment year which has abated under the second proviso to sub-section (1), shall stand revived with effect from the date of receipt of the order of such annulment by the Commissioner:

Provided that such revival shall cease to have effect, if such order of annulment is set aside.

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Explanation: For the removal of doubts, it is hereby declared that,

(i) save as otherwise provided in this section, section 153B and section 153C, all other provisions of this Act shall apply to the assessment made under this section;

(ii) in an assessment or reassessment made in respect of an assessment year under this section, the tax shall be chargeable at the rate or rates as applicable to such assessment year.

On the reading of section 153A it is clear that for framing assessment u/s 153A, what is relevant is that a search is initiated u/s. 132 and is also conducted in the case of any person. There is no dispute to the fact that the search under sec.132 was conducted by issuing of a warrant of authorization by competent authority under sec. 132 of the Act. The warrant of authorization was also clear as to where the search is conducted i.e. the premises of the partners of the assessee firm herein. Section 132(1) empowers the authorized person stated therein where in consequence of information in his possession, has reason to believe that any person will either not produce any books of account or would not produce any document or is in possession of any money, bullion or valuable article or thing etc. which has not been or would not be disclosed, then the authorized person may ^{authorize} any of his Income-tax authorities stated therein to enter and search any building, place, vessel, vehicle or aircraft etc. where he has reason to suspect that such documents, other document, money, bullion, jewellery or

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other valuable articles or things are kept. Thus in view of the information in possession of the authorized person who has reason to believe that the desired material will be found, he has authorized his authorized officer to search the residential premises of the partners of the assessee firm. It is also different fact that a survey is also conducted at the business premises of the assessee firm also. However, the fact remains that certain materials were found at the residential premises of partners of the assessee firm relating to the firm itself. It is not the case of the assessee that only the material found during the survey is used against it for framing assessment under section 153A of the Act. Since the requisite condition for having conducted search in the name of the assessee under section 132 is complied with and for which the warrant of authorization specifically authorized to search the residential premises of the partners of the assessee firm wherein the materials relating to the assessee firm were found, we are of the opinion that the Assessing Officer was justified in assuming jurisdiction for framing assessment under sec. 153A of the Act for the Assessment Years stated in section 153A of the Act.

8.1 The case laws relied upon by the learned counsel for the assessee are all distinguishable on facts. We agree that for framing assessment under sec. 153A it is not sufficient that a search is only initiated but such search should





have also been conducted. The fact that the decisions relied upon by the learned counsel for the assessee are distinguishable on facts has been admitted by the counsel for the assessee during the course of hearing itself and hence, we do not propose to deal with the same in this order. Suffice it to say that the Assessing Officer rightly assumed jurisdiction for framing assessment under section 153A of the Act in view of the facts of the present case as narrated hereinabove. Accordingly the legal plea raised on behalf of the assessee is required to be dismissed.

9. As regards merits of additions made by the A.O., the relevant extract from Ld CIT(A)'s order (A.Y.2000-2001), containing submissions of assessee is extracted here in:

“Assessment has been completed based on doubt and suspicion. The books of account etc were available with the AO in the computer and therefore the assessee was never called to bring such books of account. On the contrary the AO is making an allegation that the assessee did not cooperate. The entire assessment smacks of estimate and doubt. It is stated that Hing has been under invoiced. According to the AO the rate are higher than the actual sale bills. This is again a suspicion without any supporting or corroborating evidence. No enquiry has been made from the buyers. But be chat as it may be such bills are of 2005 and whereas the present assessment is for the assessment year 2000-01 relevant to the period 1/4/1999 to 31/3/2000. Then most important point is that the papers on which reliance is placed and are made the basis of addition are not assessee's. Appellant is not concerned with others. Such persons were not called and investigation made. Nothing has been proved or examined. These papers by itself cannot be used for any legal addition. These may give rise to doubt and starting



point for examination but by itself cannot be made the basis for addition. Then similar is the position with regard to "Gracious Port folio" particularly when admittedly there are several types and quality of Hing. The assessee was not given any details of Gracious and neither produced nor cross examined. Even the assessment order does contain details of Gracious.

That the AO has applied gross profit rate of 25% on sale of 9450 kg of sale of Hing by applying sale value at the rate of 2000 per kg. In this way the AO have adopted the sale price of such Hing at the rate of 2000 per kg which according to him come to Rs. 1,89,00,000/- as against declared sale of 28,50,117/-. By reducing the later from the former the AO says that there is difference of 1,60,49,883/- and by applying G.P. rate of 25% of this amount the AO says Rs. 40,12,470/- is the income of assessee which has not been declared. The whole assessment has been made on arbitrary basis suspicion at the cost of real entries in the books in the possession of the AO herself and only with a view to make addition whether warranted or not. The assessment is therefore perverse. The Delhi High Court very recently in the case of SMC Share Brokers has said that no reliance can be placed without cross examination.

Before doing this exercise, the AO has given details of G.P. and net profit rate from the assessment year 2000-01 to 2006-07 where the G.P. rate varies from 11.54% to 15 %. In 2001-01 it has been 11.54% whereas in 2006-07 it was 15 %. It was always less than 11.54% in other years except in assessment year 2006-07. Similarly the N.P. Rate varied from 3.9% to 2.5 % and it is always less than the assessment year 2000-01 except in assessment year 2002-03. On the basis of such G.P. rate and N.P. rate the AO says that there is a possibility of manipulation. The legislature does not provide any such kind of addition on the basis of possibility.

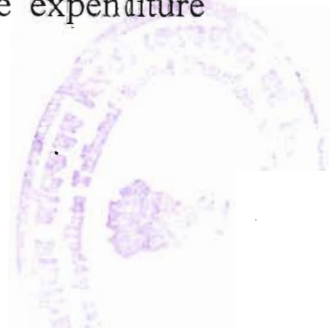
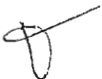
The AO has given no valid reasons for making an addition for Rs. 40,12,570/-.The AO says that there were certain bills found



where two rates have been given e.g. 100/300. The AO says that the Hing has been sold at the rate of 300 whereas the bills have been prepared at the rate of 100. The details of all such bills have been given on page 2 to 4 of the assessment order where the maximum rate is 4100 and the minimum rate is 100. AO opines that the lower one is rate meant for issuing sale bills while the higher is actual rate of sale of Hing. This assessment order does not show any thermometer or barometer to support the arbitrary conclusion of the AO in the assessment order except the rule of estimation. Accordingly it is pleaded to delete the addition of estimated profit on estimated turnover.

The AO treats the quantity of compound Hing sold as true correct and genuine as per books. But he does not believe and rely on the amount of sale price which means that he relies on one part of the transaction and does not rely on the other part of the same transaction. He also believes and rely the quantity of compound Hing produced. But without any reason, without any basis the AO states that he was going to treat the sale price of compound Hing higher and in this way the AO makes an addition of Rs. 1,05,69,539/- on account of under invoicing of the sale of compound Hing. To repeat the AO believes everything but does not believe the sale price as genuine and that to without any basis support or any corroborative evidence and also without any enquiry and investigation. For the same reason stated above this arbitrary addition need to be deleted.

The AO states that the assessee had incurred expenditure of Rs. 5 lacs in processing of Hing and according to the AO such expenditure is out of the books of account. But this is not correct since the processing expenses have been debited. There is no basis or evidence for arriving at the amount of Rs. 5 lacs. Para 07 of the last page of the assessment order and the addition made as per the last page are different. There is no basis of suppression of input, output ratio. This is again based on idea, estimate, assumption and presumption. Hence this addition is also out of the scope of the Income tax Act. As per the provision of section 69C without identifying the expenditure

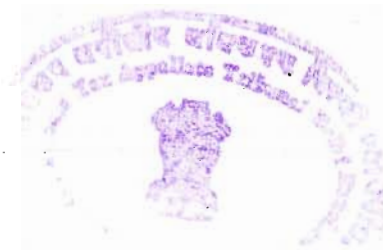


there cannot be any addition estimate on assumed and presumed expenditure.”

9.1 The Ld CIT(A)'s order disposing of the matter on merits is reproduced hereinbelow:

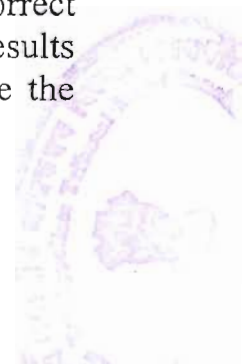
“As far as facts, primarily the assessing officer proceeded on the ground of variations in respect of gross profit/net profit declared by the appellant over the years commencing from A.Y. 2000-01 to 2006-07. It is observed that there is a possibility of manipulation in respect of profit element declared by the assessee in all these years. She also placed reliance on the evidences found from the assessee in the course of action u/s 132 and the nature of evidences have been extensively discussed in the impugned assessment order. Based on the material found, the A.O. estimated the turnover of Hing by relying on the statement of Mr. J.K.Khan alias Tainu, a broker that the value of import of hing is between Rs. 1500 /- to Rs.1700 /- per kg and the sale value in the local market is around Rs.3000/- per kg. Accordingly she has re-determined the sale value at Rs.2000/- per kg on the quantity sold by the assessee as declared in the books. Thereby the difference between estimated sale value and sales as per books is arrived, and computed the gross profit @ 25% by making reference to M/s Gracious Portfolio (P) Ltd. Accordingly addition of Rs, 40,12,470/- was made on account of suppression of hing for the current year. I have gone through the material relied on by the A.O. in respect of page No. 19 to 26 as referred in the assessment order. There is no doubt that all these are relating to assessee firm only. But the values mentioned therein are in terms of kattas but not in kilograms as assumed by the A.O. Hence no serious consideration can be given to some of the papers recovered from the assessee. As far as adoption of sale value at Rs. 2000/- per kg is concerned it has been done in arbitrary manner. There is no basis to adopt such value for all seven years taken up for re-computation consequent to search. It is common knowledge in this field of business the rates are fluctuating depends on international market conditions. It is not

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known for which year the value was referred to by the so called broker. Further it is very unlikely that the rate is constant for such a long period. The material referred to by AO does not mention about per kg value, rather it refers to katta which means multiples of kilograms to say anything from 15 to 30kgs. Hence those sale bills do not support AO. The AO purely proceeded on assumptions and conjectures to estimate the sale value. But no cogent material has been brought on record to do so. Basing on such assumptions it is not possible to re-compute the sales turnover -of the assessee. That exercise of re-computation turnover cannot stand under the Law. Even assuming that, the sale value is much higher than the value disclosed by the appellant in the books, still the purchase value also to be reckoned while adopting profit element. In a case of suppression of sales, the possibility of unaccounted purchases also cannot be ruled out altogether. Basing on a few days of sale particulars the entire turnover could not have been computed that to for so many years. Further the A.O. noted in (he assessment order the rates of gross profit and net profit for various years. It is to be noted that this represents combined rate of profit in respect of various items like hing, badam, black pepper, lough, mulathi, pista, kali mirch, zeera, guldani etc. It is not possible to have standard rate of gross profit for all these items. It varies from time to time depending upon the international market as well as the local market. It is not correct to standardise a particular rate for all items dealt by assessee in these years.

Nevertheless, there is evidence in the form of suppression of profit element in respect of some sales made for which evidences are recovered from the assessee during search. Assessee did record two rates on the papers found whereas on the sale bills it accounted for only the lower rate. Even though these papers are relating to Nov.2005, but it reiterates the fact of assessee's conduct in suppressing the profit rate disclosed in the books. The fact of such practice was also admitted by the partners during search. Such established practice followed by the appellant would not allow the correct profits as per books of accounts. Thereby the book results deserve to be rejected. Hence it is reasonable to estimate the



profit rate by considering various issues. Perusal of accounts reveals that considerable amount of personal expenses like telephone, vehicle, extending liberal financial assistance to family members of partners etc are being accounted for in assessee's business. Further every member of family of partners are engaged in similar business as that of appellant. Most of common expenses are debited in assessee's accounts only. The facts the current case duly invites invoking of provisions of section 145 as it was conclusively proved that the assessee is indulged in recording lower sale prices than actually received. Hence by rejecting the book results, which does not give correct profits, estimation of reasonable profits is necessary in the instant case.

During the year the assessee has disclosed sale of hing kabuli at Rs. 34,24,081/- and the gross profit disclosed is Rs. 6,27,477/- @ 18%. However considering the above discrepancies noted as well as expenses under telephone, car which has personal element, it is reasonably estimated the gross profit at 20% on Rs. 34,24,081/- which comes to Rs. 6,84,816/-. Thereby difference of Rs. 57,339/- is directed to be assessed as difference in gross profit and delete the addition of Rs. 40,12,470/- made by the A.O on account of turnover.

As far as addition of Rs. 1,05,69,539/- on account of difference in the sale value of hing compound is concerned, I have considered submissions of the both. The A.O. purely proceeded to make the above estimated addition on the basis of assumptions only. There is no record of evidence to show that the assessee had produced the alleged quantity of hing compound and sold in the market. She has estimated on the belief that there is production of 10 to 25 kgs of hing compound out of 1 kg of pure hing. The A.O. also proceeded on the ground that there is no manufacturing account has been shown by the assessee for the production of a compound and accordingly estimated the same by taking the value at Rs. 500/- per k.g. By taking this value she has computed the total sales at Rs. 1,30,49,500/- as against Rs. 24,79,961/- disclosed by the appellant. The above addition has no basis at all. There is no

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support either for turnover or for rate taken up for valuation. The A.O. has simply assumed the production rate and proceeded to estimate the value without bringing on record any cogent evidences. It is difficult to sustain the estimated turnover computed by the A.O. without any record of evidences. Accordingly, the same is directed to be deleted. However, as held in the above paragraphs there is tendency on the part of the assessee to suppress the profit rate on the sales made in respect of hing compound also. During the year on a turnover of Rs. 24,79,961/- declared gross profit of Rs. 2,93,813/- @ 11.8%. As already decided in respect of hing, the same rate of G.P. is taken in this case also i.e @ 20% which comes to Rs. 4,95,992/-. Thereby the difference of Rs. 2,02,179/- is directed to be assessed as income of the assessee in respect of hing compound which represents difference in the gross profit disclosed in the books by the assessee. Accordingly the A.O. is directed to delete the addition of Rs. 1,05,69,539/- which represents the estimated sale value on hing compound and add the amount of Rs 2,02,179/-, being the additional profits on hing compound.

The last addition is in respect of Rs. 5,00,000/- which is estimated as expenses in respect of processing of hing. It is the case of the A.O. that the appellant did not show any expenditure which can be attributed to the manufacturing activity of the hing compound. I have examined the audit report of the assessee and found that the assessee has duly recorded the expenditure in respect of gum, starch etc. for processing the hing to manufacture hing compound. It is not correct to state that there is no expenditure incurred for this purpose. By not recording these expenditure separately, it cannot be assumed that no expenses whatever has been recorded for the purpose. There is no base at all for the A.O. to estimate a sum of Rs. 5 lakh which is attributable to the processing charges of hing compound. Such estimated additions need some material/evidence to proceed with. There is complete lack of such evidence in the current case. Hence the addition of Rs. 5 lakh is directed to be deleted. Accordingly, the A.O. is directed



to re-compute the total income of the assessee as per above directions.”

10. Since grounds for additions - deletion and sustenance by Ld CIT-A are broadly similar in its orders for AY 2000-2001 to AY 2006-2007, hence all are considered in this common order. Apropos sustenance of addition, Ld Counsel reiterated the submissions placed before CIT(A) and urged before us that when once it is concluded that there is no corroboration to loose paper of Nov 2005 as found during search and once it is concluded by Ld CIT(A) that said papers do not speak of anything on its own and do not warrant any serious consideration, said finding needs to be taken to logical end and whole addition deserved to be deleted. Apropos subject loose papers (Assessee's Paper Book Page 84 to 92 Vol II and asst order Page 3-4 for AY 2000-2001), Ld counsel invited our attention specifically to its submission placed before Ld CIT(A) that said two rates only reflect business exigency (being written on cover of box of hing on customer's say so that it can recover higher price from subsequent retail sale).

10.1 In reply, Ld DR placed reliance on SC ruling in the case of H.M.Eusuf Ali (90 ITR 271) so as to contend that estimation of turnover for longer period/whole year etc can be done on basis of subject loose papers and supported the findings of Ld AO in assessment order.

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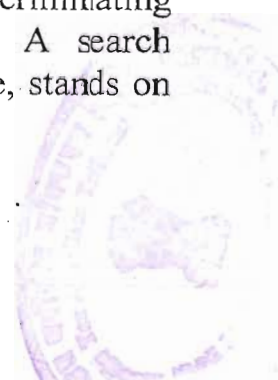


11. We have given our careful consideration to rival submissions and perused the record. The sole reliance for addition by AO is that assessee is charging differential rates, one for billing and other for actual realization. However, it is to be noted that for excess pricing in loose papers, no further corroborative material is found to suggest that actual price realized is much more than as stated in bills raised by the assessee. The sales prices are realized by account payee cheques and all the parties are identifiable. No enquiry at all is conducted with any of the customer before concluding that actual price realized is much more than billed. No excess cash/assets are found to suggest so. Therefore there is no basis to adopt higher turnover or excess price realization. The addition in this behalf are rightly deleted by Ld CIT(A).

12. The principle applicable to aforesaid scenario has been aptly described in Allahabad ITAT ruling in Dr RML Mehrotra case (64 TTJ 259) which has been affirmed on 2/9/2009 by Allahabad High Court in I.T.R 88 of 2000 (Assessee's Paper Book Vol 2 – Pages 44 to 47) with detailed reference to SC ruling in H.M. Eusuf Ali (90 ITR 271).

ITAT Allahabad extract- in aforesaid case held as: from 64 TTJ 259:

"One should not forget that it is a search case in which a search party is supposed and expected to find out all the incriminating documents, material as also undisclosed assets. A search assessment, much less a block assessment, therefore, stands on



a footing different than a normal assessment much less an assessment based on the best judgment of an AO. During search, firstly, no other diary or other record comparable to the note book marked as "B-1/23" were found by the search party for the remaining period, which normally would have been, were it being maintained and kept. Though such a record could have been destroyed also from time to time, but in such a situation also, if the assessee had actually made a fortune of similar receipts in respect of the remaining part of the year, they must be reflected by certain assets, movable or immovable ought to have been found during the course of search. No such assets, despite the extreme step of search which amounts to a serious invasion on the rights of subjects and which is perhaps the last weapon in the arsenal of the Department, were found, which could be attributed to any such patently hypothetical receipts. In view of this the multiplication formula adopted by the AO was not valid—CST vs. H.M. Esufali, H.M. Abdulali 1973 CTR (SC) 317 : (1973) 90 ITR 271 (SC) distinguished."

Hon'ble All High Court while approving aforesaid ITAT ruling held:

"The Income Tax Appellate Tribunal, Allahabad has referred the following two questions under Section 256(1) of the Income Tax Act, 1961 (hereinafter referred to as the Act) for opinion of this Court:

"1. Whether on the facts and circumstances of the case, the Ld. Tribunal was correct in law in holding that in a block assessment there is no scope of an assessment based on best judgment of an Assessing Officer and that the ratio of the Apex Court's judgment in the case of C.S.T. vs. H.M. Esufali H.M. Abdul Ali will not apply to it?

2. Whether, on the facts and circumstances of the case, the learned Tribunal was justified in holding that since no hidden assets, movable or immovable, had been found, the assessee could not be expected to have made a fortune of unaccounted professional receipts?" HELD:

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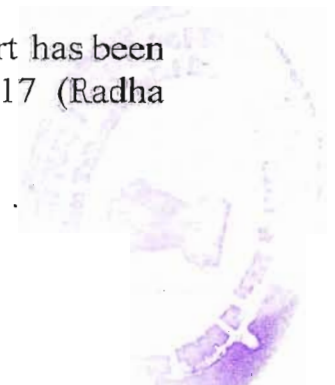


A search assessment, much less a block assessment, therefore, stands on a footing different than a normal assessment much less an assessment based on the best judgment of an Assessing Officer. It is for this reason that the ratio of the Apex Court decision reported in the case of H.M. Eusufali H.M. Abdulali (supra) would not come for the rescue of the department, as there it was a sales-tax matter and a best judgment assessment was required to be made. The material that the Sales-tax Officer was possessed of was the figure of 19 days sale by the assessee not entered in their books of accounting. The Supreme Court held that in such situation it was not possible for the officer to find out precisely the turnover suppressed and he could only embark on estimating the suppressed turnover on the basis of the material before him, in which some amount of guess work was inevitable. In contradistinction to these facts, in the present case the assessee was searched (emphasis provided). During this search firstly, no other diary or other record comparable to the note book marked as "B-1/23" were found by the search party for the remaining period, which normally would have been, were it being maintained and kept. We are conscious that such a record have been destroyed also from time to time. But in such a situation also, if the assessee had actually made a fortune of similar receipts in respect of the remaining part of the year, they must be reflected by certain assets, movable or immovable ought to have been found during the course of search. No such assets, despite the extreme step of search which amounts to a serious invasion on the rights of subjects and which is perhaps the last weapon in the arsenal of the department, were found, which could be attributed to any such hypothetical receipts. In view of this we are unable to concur with the department to the multiplication formula adopted by the learned Assessing Officer.

Accordingly, we answer the questions referred to us in the affirmative i.e. in favour of the assessee and against the Revenue. However, there shall be no order as to costs."

Aforesaid ITAT ruling since affirmed by High Court has been followed by another ITAT ruling in 101 TTJ 1017 (Radha

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Rani- Jaipur Bench) to infer that inference on basis of the loose documents is not possible for unrelated period and further Bilaspur Bench ITAT ruling reported at 8 DTR 14/Para 13.2/14/1, has distinguished directly the SC ruling in 90 ITR 271 to hold that no inference merely on basis of loose papers found during search/survey is possible until and unless they are corroborated from requisite enquiry.

12.1 Further, we find from facts of instant case, SC ruling in 90 ITR 271 is not applicable and distinguishable because of:

a) Besides loose material found, no evidence is found that actual turnover of assessee is much more than declared turnover. To estimate turnover higher than declared, primarily evidence on record should suggest that actual turnover is not correct and not by inference it needs to be estimated.

b) Since in present case, undisputedly, no independent enquiry at any time from any of the purchasers of the assessee has been done either by AO or Ld CIT(A), to find out whether there is any understatement of sale consideration, although subject loose papers may be sufficient for invoking/arousing suspicion and enquiry but, same in our opinion, is not sufficient to draw the conclusions.

c) Since it is well settled that even though loose papers are not properly explained by assessee, if nothing



corroborative/material is found to substantiate the contents of loose papers, no addition on mere loose papers can be made. For this purpose reference can be made to decision of Hon'ble P&H High Court in (184 Taxman 6) Atam Valves; and of Guj High Court in CIT vs. Maulikkumar K. Shah (307 ITR 137).

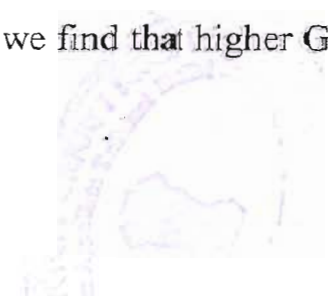
d) Since CIT(A) himself has concluded at one place that no serious consideration can be given to subject loose papers, same in our opinion is sufficient to conclude that there is nothing more in revenue's kitty apart from those/said loose papers pertaining to Nov 2005 (financial year 2005-2006) to support suppression of sales receipts on part of assessee firm.

e) The Jurisdictional Delhi High Court in Anand Kumar Deepak Kumar (294 ITR 497) on 25/8/2006 has held as under:

“..Merely because there were some discrepancies in the pre-search period, it cannot lead to any presumption that the discrepancies would have continued in the post-search period particularly when there was factually no evidence at all as found by both the authorities below to support such a view...”

12.2 On basis of aforesaid discussion, we find merit in contentions of Ld AR and dismiss the appeals of revenue.

13. As regards appeal of assessee, additions are sustained by CIT(A) on account of estimate of higher GP Rate. In this regard we find that higher GP



is estimated not because books of accounts are not reliable or that any evidence is found to suggest that:

- i) sales is suppressed or
- ii) purchases are inflated or
- iii) stock is not correctly valued

If nothing of these sorts is found, neither books results could have been rejected nor could higher GP be estimated. The higher GP is estimated because of possibility of personal expenses being claimed. That by itself may call for disallowance of such expenses but not whole sale rejection of accounts or estimate of GP. We therefore delete the additions as sustained by CIT(A).

14. In the result, the appeals of the assessee are ^{Part 12} allowed and that of revenue are dismissed.

Pronounced in the open court on 20th November, 2009.


(RAJPAL YADAV)
JUDICIAL MEMBER


(DEEPAK R. SHAH)
ACCOUNTANT MEMBER

Dated: 20th November, 2009.

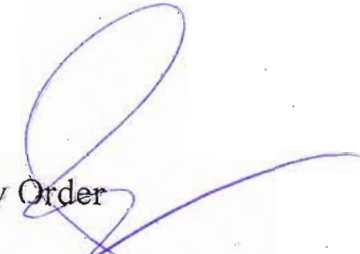
Copy of the order forwarded to:-

- 1. Appellant
- 2. Respondent *By hand*
- 3. CIT
- 4. CIT(A)
- 5. DR

*mg

By Order

Deputy Registrar, ITAT.


Assistant Registrar
नायकर अपीलीय अधिकरण
Income Tax Appellate Tribunal
दिल्ली पीठ, नई दिल्ली
Delhi Bench, New Delhi