



IN THE INCOME TAX APPELLATE TRIBUNAL
LUCKNOW BENCH "B", LUCKNOW

BEFORE SHRI . T.S. KAPOOR, ACCOUNTANT MEMBER
AND SHRI PARTHA SARATHI CHAUDHURY, JUDICIAL MEMBER

ITA No.394/LKW/2018
Assessment Year: 2015-16

M/s Habib Tannery Pvt. Ltd. 150 Ft. Road, Jajmau Kanpur	v.	DCIT-6 Kanpur
TAN/PAN:AAACH4129E		
(Appellant)		(Respondent)

S.P. No.18/LKW/2018
[In ITA No.394/LKW/2018]
Assessment Year: 2015-16

M/s Habib Tannery Pvt. Ltd. 150 Ft. Road, Jajmau Kanpur	v.	DCIT-6 Kanpur
TAN/PAN:AAACH4129E		
(Applicant)		(Respondent)

Assessee by:	Shri Rakesh Garg, Advocate		
Department by:	Shri C. K. Singh, D.R.		
Date of hearing:	20	11	2018
Date of pronouncement:	30	11	2018

ORDER

PER PARTHA SARATHI CHAUDHURY, J.M:

The assessee has filed this appeal and stay petition and at the time of hearing Id. A.R. of the assessee submitted before the Bench that if the appeal of the assessee is heard on priority, he will not press for the stay petition.

2. We have perused the grounds of appeal and the stay petition filed by the assessee and in the interest of justice, we proceed to dispose of the appeal on priority, therefore, the stay petition filed by the assessee is dismissed as not pressed. In the appeal filed by the

assessee in ITA No.394/LKW/2018 arises from the order passed by the Id. CIT(A)-II, Kanpur dated 11/4/2018, as per the following grounds of appeal:-

1. Because the CIT(A) has erred on facts and in law in not appreciating the facts and circumstances of the case and has arbitrarily upheld the addition of Rs.1 crore on account of undisclosed income alleged to have been surrendered at the time of survey, which addition being contrary to facts, bad in law be deleted.
 2. Because the CIT(A) has failed to appreciate that the addition of Rs.1 crore, alleged to have been made on the basis of statement recorded at the time of survey which has been retracted and there being no other evidence either direct or circumstantial or any material on record, has erred in upholding the addition of Rs.1 crore which is bad in law and be deleted.
 3. Because the CIT(A) has failed to appreciate that mere surrender at the time of survey without any cogent material in support of the same would not make the surrender enforceable nor the addition is sustainable, the addition made is bad in law and be deleted.
 4. Because the CIT(A) has failed to appreciate and consider the explanation as well as Paper Book filed during the course of hearing, and the failure to do so is against the principle of natural justice, the addition of Rs.1 crore made by the Assessing Officer and upheld by the CIT(A) be deleted.
3. The crux of grievance is the addition of Rs.1 crore being upheld by the Id. CIT(A). The brief facts on record are that assessee-company is engaged in manufacturing of Hides and its sales. Assessee-company has maintained books of account on mercantile basis in its

business. These books of account have been audited under section 44AB of the Act and tax audit report has been filed by the assessee. The books of accounts, bills, vouchers, bank statements, etc. were produced during the course of assessment proceedings and examined. Assessee filed its return of income declaring total income of Rs.12,69,300/- on 23/9/2015. A survey under section 133A of the Act was conducted on 19.02.2015 at the business premises of the assessee company. During the course of survey, statement on oath of one of the Directors was recorded wherein he was forced to surrender Rs.1 crore being the amount in different denominations on different dates as advance given for the purpose of purchase of land. The amounts were entered on different pages of a pad of spiral binding. Assessee thereafter retracted his statement as well as surrendered amount soon after survey. This act of retraction can be gathered from the fact that assessee did not include the amount surrendered in its return of income. The Assessing Officer made addition of Rs.1 crore on the basis of statement on oath of the assessee. Before the Id. CIT(A) assessee filed detailed written submission, which is as under:-

"The survey was conducted on 19.02.2015 under section 133-A of the Income Tax Act, 1961, at the business premises of the assessee in which statement of one of the Directors Aslam Saeed was recorded on oath at very late hours say about in the mid night under undue pressure. On 23.02.2015 the assessee retracted and stated that the statement of one of the Director Aslam Saeed recorded under duress and undue pressure and therefore, should not be relied upon. As a matter of fact, nothing discriminating was noticed in the books of account maintained by the assessee's company. In this statement, it has been mentioned that certain loose papers were recovered from the cabin of the Director which related to some property transactions. In lieu of these papers, a sum of Rs.1,00,00,000/- was asked to be

surrendered as additional income for the assessment year 2015-2016. Reference be made to question No. 9 onward of the statement dated 19.02.2015. The same relates to the papers recovered and surrender made. Copy of statement recorded is available at page 11-12, so this second statement recorded on 11.03.2015 at page 13 to 15. It is submitted that all these papers are dumps papers, in as much as. except for the date and amount, there are no details as to whether these amounts relate to any payment received or made, even property number is not mentioned on the paper as also the name of person. It may not be out of place to mention that no land has been purchased either before or after the date of survey or uptill now. If a reference is made to the loose papers, it would clearly reflect that the entire writing on the papers is by one single pen and at one stretch only.

The Director of the company was forced to make a declaration of Rs.1,00,00,000/- and to offer it as income for the year under consideration. Not only this, soon after the survey, when the survey proceedings closed, the assessee was again summoned by issue of notice u/s.131 of the Act, and his statement was again recorded, in re-confirmation of the statement already recorded on 19.02.2015. It may be worthwhile to mention that it the time when the second statement was recorded on 22.02.2015. It is difficult to under-stand that in what context the said statement was recorded. The assessee on its part has already rebutted and refuted the earlier statement recorded on 19.02.2015. WHEN the second statement was recorded the assessment proceedings for assessment year 2012-2013 were going on and completed the assessment on 31.03.2015 wherein the books of account produced have all been accepted and no discrepancy in the same has been found. The income Returned has been accepted.

MOREOVER, in absence of any discrepancy in the books of account, and there being no discrepancy in respect of stock and cash balance. It is difficult to under stand as to from where a sum

of Rs. 1,00,00,000/- could have been generated. This goes to supplement the statement that the surrender was forced to be made.

EVEN without prejudice to the above, the papers have been recovered from the cabin of the Director and in such circumstances, the papers can not be related to the company. The papers do not carry the company's logo, nor there is any other transaction mentioned on the same. Even the name of the seller of land is, nor the details of property have been mentioned on the papers seized. In such circumstances, the sum of Rs.1,00,00,000/- forced to be surrendered is on account of undue pressure on mid-night of 19.02.2015, can not be said to be the income of the assessee company.

MOREOVER,matter that at the time of survey/search, a tremendous pressure is on the Department to forcing the tax payer to make some surrender.

MOREOVER, the statement recorded at the time of survey have no evidentiary value, in as much as, it is a statement recorded an oath and as per the provisions of the Act, no statement on oath can be recorded at the time of survey u/s. 133-A of the Act. Statement on oath can only be recorded during the course of any proceedings which are pending before the Assessing Officer or any authority or during the course of search and seizure, where there are separate provisions.

EVEN the statement recorded at the time of survey an 19.02.2015 is incomplete, in as much as, if the surrender related to advance for purchase of land, the next obvious query should have been as to whom the advance has been given and also, the details of the property for which the advance has been given, should have been extracted from the person whose statement has been recorded in absence of the said queries, the statement as well as surrender

leads us no where. In view the above, the addition made by the Assessing Officer is bad in law and therefore, kindly be deleted."

4. The Id. CIT(A) after considering the facts of the case, submissions of the assessee and the assessment order, confirmed the addition made by the Assessing Officer for various reasons as appearing in his order, which is on record. Being further aggrieved, assessee had preferred this appeal before us and the Id. A.R. of the assessee vehemently argued that addition made by the Assessing Officer was only on the basis of loose documents found during the course of survey and that there was no circumstantial or direct evidence in connection with the surrender made by the assessee. The Assessing Officer has not brought any material on record to show that for which land the amount was advanced; to whom advance was made and whether at all land was purchased by the assessee or not. Assessee on his part has denied giving any advance or buying any land. Even during assessment proceedings no query has been raised in this context. The Id. A.R. of the assessee further submitted that no addition may be made merely on the basis of statement recorded under section 133A of the Act without any corroborating evidence. A pad which contained loose papers does not bear the name of the assessee-company. No name of person to whom advance has been made is mentioned therein. There is no detail of any land purchased. In such circumstances, Id. A.R. of the assessee submitted that these are dump papers and addition cannot be made only on the basis of statement recorded under section 133A of the Act. Id. A.R. of the assessee placed strong reliance on the following judicial pronouncements:-

1. Texraj Realty Pvt. Ltd. vs. DCIT in ITA No.3520/Ahd/2015, order dated 16/11/2017.
2. CIT vs. S Khader Khan Son, 25 taxmann.com 413 (SC).

3. Shri Amod Shivlal Shah vs. ACIT, Mumbai in ITA No.795/Mum/2015, order dated 23/2/2018.
4. ACIT vs. Oriental Decorators in ITA No.820/Mum/2015, order dated 5/1/2018.
5. Manjit Singh vs. ACIT, 85 taxmann.com 210 (Amritsar Tribunal).

5. The Id. D.R., on the other hand, relied on the orders of the authorities below.

6. We have perused the case record and heard the rival contentions. In this case, the undisputed fact is that in the survey conducted at the business premises of the assessee a writing pad was found wherein certain amounts were mentioned which, as per record, has been marked as Diary BK-4. The contention of the Id. A.R. of the assessee is that addition was made solely on the basis of statement of the assessee recorded under section 133A of the Act and on the basis of the amount mentioned on those loose papers assembled as Diary BK-4. There is no corroborating material or supporting evidence to establish that these transactions pertain to the assessee or that assessee has purchased land. Taking into consideration arguments of the Id. A.R. of the assessee and in order to determine the genuineness, in the previous hearing we had directed the Id. D.R. to bring the original record of the case and to depose before the Bench whether addition was solely made on the basis of those loose papers or whether there was some corroborating and supporting evidences in favour of the Revenue to make such addition and to submit it before us on the next date of hearing. The Id. D.R. conceded that on the confession and statement recorded by the assessee entire addition was made, however, nothing in the file to suggest that any corroborating material was present to

strengthen the case of the Revenue. On perusal of materials on record, even in the assessment proceedings also, no query has been raised in this context.

7. In the case of Texraj Realty Pvt. Ltd. vs. DCIT (supra), it has been held by the Ahmedabad Bench of the Tribunal that it is pertinent to observe that when explanation or a defence of an assessee based on number of facts supported by evidence and circumstances required consideration whether explanation is sound or not must be determined not by considering the weight to be attached to each single fact in isolation but by assessing the cumulative effect of all the facts in their setting as a whole. If we make an analysis of all the facts in their setting as a whole, then it would reveal that Revenue failed to bring corroborative evidence on record for demonstrating the alleged receipt of on-money by the assessee.

8. Similarly, Mumbai Bench of the Tribunal in the case of Shri Amod Shivlal Shah vs. ACIT (supra) referring to the observations of the Hon'ble Apex Court in CIT vs. S Khader Khan Son's case (supra) held that statement u/s 133A of the Act would not have any evidentiary value. In fact, as per the Hon'ble Supreme Court, such a statement made at the time of survey could not be sole basis for assessing income in the hands of the assessee. On this aspect, we may also refer to the Circular of CBDT no. 286/2/2003 (Inv.)II dated 10.03.2003, wherein it has been observed that the assessments ought not be based merely on the confession obtained at the time of search and seizure and survey operations, but should be based on the evidences/ material gathered during the course of search/survey operations or thereafter, while framing the relevant assessments. In the present case, apart from the statement at the time of survey, there is no material referred to, which has been obtained during the survey, which supports the estimation of

income from the project at Rs. 1,00,00,000/-. In fact, the assessment order does not bring out any material other than the statement of the assessee, which the Assessing Officer gathered during the assessment proceedings which could negate the income deduced by the assessee in its return of income.

9. In the case of ACIT vs. Oriental Decorators (supra), ITAT Mumbai Bench has held that what is relevant under these circumstances is to see whether the additions can be made independent of the retracted statement based on incriminating material on record and if it is so possible then there is no need to rely on the retracted statement. The said statement can be used as an aid for making additions based on incriminating material on record and if the additions can be independently sustained based on incriminating material on record, then there is no need to call for the forced confessional statement in aid which stood retracted.

10. In the instant case of the assessee, Assessing Officer and even Id. CIT(A) whose powers are co-terminus with that of the Assessing Officer has not conducted any specific enquiry neither at the time of survey or post-survey nor any verification was carried out so as to bring forth other independent materials on record to corroborate and justify alleged transactions found in the diary BK-4. The aforesaid judicial pronouncements brings out the legal principle very clearly that addition cannot be made solely on the basis of statement of the assessee recorded under section 133A of the Act in the absence of corroborating evidences and materials on record.

11. Amritsar Bench of the Tribunal in the case of Manjit Singh vs. ACIT (supra) has held that there was no material with the Department on the basis of which the addition in excess of the physical stock found during the survey can be made specially keeping in view the fact that

assessee had reiterated from the statement recorded during survey proceedings within a period of six days only. The surrender letter itself cannot be relied to make addition in the absence of other corroborated material. Thus, addition made by Assessing Officer was to be deleted.

12. The aforementioned case laws, in our humble opinion, establishes the legal principle in crystal clear manner that statement recorded under section 133A cannot be given evidentiary value and the only basis for addition by the Assessing Officer is the statement of the assessee without any corroborating material or documentary evidence on record, such addition is not permissible within the ambit of taxing statute, especially keeping in view the CBDT Instruction dated 10/3/2003 which was once again brought on record by ITAT Mumbai Bench in the case of Shri Amod Shivlal Shah vs. ACIT (supra). There has to be circumstantial evidences or other corroborating materials to support the allegations raised by the Revenue. The subordinate Authorities have not conducted specific exercise to verify the contents in the impugned diary BK-4. That is evident from the assessment order. The Assessing Officer made the addition of Rs.1 crore because the said amount was surrendered by statement on oath at the time of survey, by one of the Directors of the assessee-company and further that the said amount of Rs.1 crore was not included in the return of income filed when there were some amounts mentioned in the diary BK-4. First, Assessing Officer failed to establish what is the nexus between the amount mentioned in BK-4 and the surrendered amount and whether such surrendering of the amount protects the Revenue from tax evasion to the extent of the amounts mentioned in the diary BK-4, no such finding was given by the Assessing Officer. The order of the Assessing Officer is also silent as to what immovable property was purchased by using the amounts mentioned in diary BK-4. No detail of any immovable property comes out in the assessment order. There is no

mention to whom the amounts were paid. The Id. CIT(A), whose powers are co-terminus with that of the Assessing Officer, also did not conduct any enquiry as regards the aforesaid issues. The Id. D.R. also by examining the original records brought in during the course of hearing on 20/11/2018 deposed before the Bench that nothing in the file suggests that the addition was supported by corroborating evidences. In our considered view, in these circumstances, such addition cannot be sustained. Therefore, in view of the factual and legal analysis in this case, we set aside the order of the Id. CIT(A) and allow the grounds of appeal of the assessee.

13. In the result, appeal of the assessee is allowed and stay petition of the assessee is dismissed.

Order pronounced in the open Court on 30/11/2018.

Sd/-
[T.S. KAPOOR]
ACCOUNTANT MEMBER

Sd/-
[PARTHA SARATHI CHAUDHURY]
JUDICIAL MEMBER

DATED:30th November, 2018

JJ:2011

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

By order

Assistant Registrar