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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **DECIDED ON: 27.01.2015**

\+ ITA 24/2015
C.M. No.621/2015

RAJ HANS TOWERS PVT. LTD. ..... Appellant
Through: Mr. R.P. Garg, Advocate.

versus

COMMISSIONER OF INCOME TAX-V ..... Respondent
Through: None.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.K. GAUBA

S.RAVINDRA BHAT, J. (OPEN COURT)

1. Since 23.01.2015 was declared holiday, this matter is being taken up today, i.e., 27.01.2015.

2. The assessee in this appeal under Section 260A urges that the impugned order of the Income Tax Appellate Tribunal (hereafter referred to as ITAT) requires interference. It is aggrieved by an order of the ITAT dated 12.06.2014 in ITA Nos.4922/del/2011 and 4257/Del/2011. The question of law sought to be urged is whether, in the circumstances, the addition of Rs.63,33,260/- is legally sustainable.

3. The assessee engaged itself in real estate and constructions activities. It was subjected to survey operation under Section 133A of the Income Tax Act. During the course of survey, the statement of one of its Directors was recorded, wherein he disclosed that a sum of

Rs.15,00,55,000/- is an additional income outside the regular books of accounts and furnished details in this regard. These amounts were split into three parts and have been reflected in a tabular statement in paragraph 6 of the impugned order. The assessee had not disclosed this income in its returns, but declared it at the time of survey. It was asked to show cause why the said unaccounted amount, disclosed by Mr. Goyal on its behalf, should not be added back to the total income. The assessee alleged that the surrendered amounts were not voluntary and *bona fide* and the same was obtained in illegal and arbitrary manner, and in the absence of any evidence or material in relation to the surrender, the surrender made during the course of survey was also retracted. The Assessing Officer, however, rejected the explanation and added back the amounts. The CIT (A) gave partial relief by taking into account the debit entries from the gross receipts, thus reducing the total taxable income.

4. The assessee appealed; the Revenue too cross appealed. The assessee's appeals were rejected. In support of its appeal, reliance was placed upon three decisions of this Court in *CIT v. Anil Bhalla* (2010) 322 ITR 191 (Delhi), *CIT v. Dhingra Metal Works* (2010) 328 ITR 384 (Delhi) and *CIT v. Akme Projects (judgment of this Court in ITA 596/2012, dated 2.5.2013)*. It is contended that the Revenue could not have included the amount merely on the basis of some rough noting and brought them to tax. Counsel particularly relied upon the decision in *Dhingra Metal Works (supra)* to say that the material which the Revenue comes by, during the course of survey, can at best be used in the order and cannot be considered as a conclusive piece of

evidence by itself. Likewise, it was submitted that the other decisions have emphasised that in the absence of corroborative objective material, the Revenue authorities cannot rely exclusively upon the materials gathered during the course of survey to hold them to be receipts.

5. In *Dhingra Metals*, the Court no doubt noticed that unlike Section 132 (4), Section 133A (3) (iii) merely enables the AO to use its discretion to record a statement, but does not empower the AO to take a sworn statement on oath. The existence of that discretion was highlighted to say that the recording of a statement is not compulsory, and, therefore, that the statement obviously lacks evidentiary value. Consequently, adverse inferences cannot be drawn from the statement and due regard is to be given to the explanations offered as well as the existence or otherwise of other materials. The Court then went on to hold as follows in the facts and circumstances of that case:

> *"16. Since in the present case, the respondent-assessee has been able to explain the discrepancy in the stock found during the course of survey by production of relevant record including the excise register of its associate company, namely, M/s. D.M.W.P. Ltd., we are of the opinion that the AO could not have made the aforesaid addition solely on the basis of the statement made on behalf of the respondent-assessee during the course of survey."*

6. We notice that in *Anil Bhalla (supra)*, the Court was concerned with search and seizure operations. It dealt with an addition made under Section 69C of the Act. The Court apparently - as is evident from a plain reading of the text of the judgment - takes note of Section 132 (4A), which raises a presumption as to certain facts. Besides, we

notice that the judgment has briefly touched upon and dealt with the facts of the case. Likewise, in *Akme (supra)* too, the Court refused to draw into any discussion considering concurrent nature of the findings and did not frame the question of law.

7. We notice that Section 132 (4) also enables the AO to use his discretion as is evident from the term "may". The discussion in *Dhingra Metals*, as is evident from paragraph 11 of the judgment, is upon the evidentiary value of the statement recorded in the course of a search and seizure operation. The Court had occasion to interpret Section 133(A). That was not a case where the Court analysed Section 132 (4) or dealt with the presumption enabled under that provision. In the present case, the extent of amounts which the AO took into consideration in adding back on the basis of the receipts and rough jottings was Rs.1,11,12,860/-. The assessee's Director stated this in the course of survey in the statement recorded by the Revenue. Though the assessee claims - in the reply to the questionnaire given to it on 27.11.2010 - that the statement was not voluntary and the surrender was not binding, we notice that the reply dated 21.12.2010 itself does not give the date when such retraction letter was given to the assessee.

8. This Court is of the opinion that in the circumstances of the case, the approach of the CIT - as affirmed by the ITAT - cannot be faulted. The discretion vested in the Revenue authorities in content and character is not radically different in the case of a survey or in the case of search and seizure operations as is evident from a plain reading of Section 133A (3) and 132(4). Whereas the latter uses the expression

"may examine on oath", the former says that the authority "may record statement which may be useful for, or relevant to" in proceedings under the Act. This provision, Section 133A (3) had undergone further amendment inasmuch as the Revenue is precluded from taking any action under Section 133A (3) (ia) or Section 133A (3) (ii), i.e., from impounding and taking into custody any books of account, etc. or making an inventory of any cash, stock or other valuable item verified by him while acting under Section 133 (2A) by the Finance Act 2 of 2014. The obvious inference, therefore, is that in respect of statement which fall in Section 133A (3) (iii), the discretion to use it as a relevant material continues.

9. This Court is conscious that in *Dhingra Metal*, the Division Bench used the expression "conclusive evidence". Now, that expression has to be understood in its common parlance and not in a legal sense, i.e., it cannot be understood to mean something which is to be proved beyond reasonable doubt. Such burden does not arise and cannot be expected to be discharged by the Revenue. Instead, the reference to the presumption under Section 132 (4A) refers to presumption of fact of the genre Section 114 of the Evidence Act deals with it. Likewise, the relevance and admissibility follow the same train of thought conceptually, when one comes to Section 133A (3) (iii). All that this provision enables to the authority concerned to do is to draw an adverse inference by relying upon materials which are seized, or dealt with in the course of the survey.

10. In the present case, the admitted facts are that during the survey, a Director of the assessee - who was duly authorized to make a

statement about the materials and the undisclosed income, did so on 20.11.2007. The Company did not retract it immediately or any time before the show cause was issued to it. For the first time, in reply to the show cause notice it faintly urged that the statement was not voluntary and sought to retract it. The reply, a copy of which has been placed on record, undoubtedly makes reference to some previous letter retracting the statement. Learned counsel urged that that letter was written on 21.12.2007. However, the actual reply to the show cause notice is silent as to the date. This itself casts doubt as to whether the retraction was in fact made or was claimed as an afterthought.

11. Furthermore, this Court is of the opinion that in the circumstances of the case both the CIT (A) and ITAT were correct in adding back the amount of Rs.63,33,260/- after adjusting the expenditure indicated. The explanation given by the assessee, in the course of the appellate proceedings, that the surrender was in respect of a certain portion of the receipt which had remained undisclosed or that some parts of it were supported by the books, is nowhere borne out as a matter of fact, in any of the contentions raised by it before the lower authorities. For these reasons, this Court is of the opinion that no substantial question of law arises. The appeal is accordingly dismissed.

S. RAVINDRA BHAT, J

R.K. GAUBA, J

JANUARY 27, 2015*/vikas/*