

THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 18.04.2012

+ **ITA 283/2011 & ITA 343/2011**

THE COMMISSIONER OF INCOME TAX-II ... Appellant

versus

JINDAL DYECHEM INDUSTRIES PVT LTD ... Respondent

Advocates who appeared in this case:

For the Appellant : Mr Sanjeev Sabharwal

For the Respondent : Mr Salil Aggarwal with Mr P. C. Yadav

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE V.K. JAIN

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

1. These two appeals preferred by the revenue are directed against the order dated 26.02.2010 passed by the Income Tax Appellate Tribunal in ITA 2877/Del/2009 and CO No. 240/Del/2009 in the said ITA in respect of the assessment year 2004-2005. The revenue was in appeal before the Tribunal by virtue of the said ITA 2877/Del/2009, whereas the assessee had filed the said Cross Objection (CO No. 240/Del/2009).

2. According to the appellant, the following questions are important and substantial questions of law and arise for determination by this Court:-

- (1) Whether learned ITAT erred in deleting the addition of ₹ 1,19,07,201/- made by the Assessing Officer on account of alleged understatement of sale of bullion by invoking the provisions of section 69A of the Income Tax Act, 1961?
- (2) Whether learned ITAT erred in deleting the addition of ₹ 1,66,571/- made by the Assessing Officer on account of stock written off?

3. The Assessing Officer, while making the assessment in respect of the assessment year 2004-2005, *inter alia*, made an addition of ₹ 1,19,07,201/- on account of the alleged understatement of sale of bullion (gold and silver) by invoking the provisions of Section 69A of the Income Tax Act, 1961. The Assessing Officer had also, *inter alia*, made an addition of ₹ 1,66,571/- on account of stock of silver bars written off. Insofar as the latter additional is concerned, the Assessing Officer found that there was a difference of 14.28 kilograms in the concerned year with regard to the stock of silver bars. Consequently, he added the value of 14.28 kilograms amounting to ₹ 1,66,571/-. According to the Assessing Officer, the

assessee was unable to give a proper explanation as to why there was a difference in the stock of silver bars to the extent of 14.28 kilograms. Even the Commissioner of Income Tax (Appeals) [hereinafter referred to as 'the CIT (A)'] agreed with the Assessing Officer and rejected the assessee's appeal on this aspect of the matter. The CIT (A) was of the view that silver was not a perishable commodity and, therefore, he did not accept the explanation of the assessee with regard to the loss of 14.28 kilograms during the year.

4. It is in this context that the assessee had filed the aforesaid Cross Objection before the Tribunal. The assessee contended that during weighing and re-weighing of the silver bars on a repeated basis, there is, sometimes, a weight loss due to breakage of corners of the silver bricks. Consequently, in the year in question, there was a loss of 14.28 kilograms of silver which was only 0.012% of total quantity of silver.

5. According to the Tribunal, the Assessing Officer, while rejecting the explanation given by the assessee, did not make any verification as to whether in the type of trade i.e., wholesale trade in silver, a negligible amount of breakage occurs or not. The Tribunal was of the view that the

Assessing Officer merely took the view that the loss in the silver to the extent of 14.28 kilograms represented sales made by the assessee outside the books of accounts. The Tribunal concluded that the Assessing Officer, without any evidence to this effect, could not have reached this conclusion that the sales had been made outside the books of accounts. It is on this basis that the Tribunal, on facts, reversed the finding of the CIT (A) as also the Assessing Officer on the ground of lack of evidence of any transaction having been made outside the books of accounts.

6. After hearing the counsel for the parties, we are of the view that the Tribunal has arrived at this conclusion and the same is a pure finding of fact. This is so because the Tribunal took the view that there was no evidence of any transaction outside the books of accounts. No perversity has been pointed out by the learned counsel for the appellant in this finding. Consequently, no substantial question of law, insofar as this aspect is concerned, arises for our consideration.

7. We now come to the first issue and that is with regard to the allegation of understatement of the sale of bullion (gold and silver) made by

the assessee. According to the learned counsel for the revenue, all these sales represented cash sales of gold and silver to unknown persons. When the Assessing Officer had required the assessee to disclose the names of those persons to whom the cash sales of gold and silver were made, the assessee was unable to do so and, therefore, the Assessing Officer came to the conclusion, on the basis of the average rates of the Delhi Bullion Association, that the sales were understated to the extent of ₹ 1,19,07,201/-. Accordingly, the Assessing Officer made an addition of ₹ 1,19,07,201/- on this account.

8. Being aggrieved, the assessee preferred an appeal, as aforesaid, before the CIT (A), who agreed with the submissions made by the assessee and deleted the said addition. The CIT (A) noted that it had been verified by the Assessing Officer that the said Delhi Bullion Association rates were in respect of retail transaction and not in respect of the wholesale trade. It may be pointed out that the assessee was admittedly involved in the wholesale trade and not in the retail trade. Consequently, the CIT (A) held that the Delhi Bullion Association rates were, therefore, not applicable to the transactions entered into by the assessee and, therefore, the same could

not have been used for arriving at the conclusion that there was an understatement of the sales. As a result, the CIT (A) deleted the addition of ₹ 1,19,07,201/-. As pointed out above, the revenue preferred the appeal being ITA 2877/Del/2009 before the Tribunal on, *inter alia*, this aspect of the matter.

9. The Tribunal, after hearing the counsel for the parties, came to the following conclusion in respect of the said deletion of ₹ 1,19,07,201/-:-

“20. We have heard both the counsels and perused the records. AO’s basic reason is that there are cash sales which are not verifiable and the rates whereof is below the average rate of Delhi Bullion Association. As pointed out by the Id. CIT(A),AO on remand has himself accepted that the Delhi Bullion Association rates are wholesale rates and are not applicable to the case of the assessee. In any case, it is not the case of the AO that he has come across any material showing that the assessee is receiving something over and above that entered into the books of accounts maintained. All the requisite books and records are maintained and the same are duly audited and no specific defect in the same has been pointed out. Moreover, Id. CIT(A) rightly observed that the lower rates of the Delhi Bullion Association are quite comparable with that shown by the assessee. In the case of CIT vs. Kolkata Discount Company Ltd. 91 ITR 8, the Hon’ble Apex Court has held that transactions between the assessee and its subsidiary company was bonafide transactions; that assessee had transferred its value shares at cost price to its subsidiary in order to so arranged its affairs as to reduce its tax burden and therefore, unless AO on the basis of the material before him was able to come to the conclusion that the assessee has really made profits

in the transactions. It was not permissible for him to add back the assessee's return and fictional income. In the background of the aforesaid discussion and precedent, we do not find any infirmity in the orders of the Id. CIT(A) in this regard and accordingly we uphold the same.”

10. It is apparent that the Tribunal concurred with the observations of the CIT (A). Another aspect, which has been noted by the Tribunal, was that the lower rates of the Delhi Bullion Association were also comparable with that shown by the assessee even though the rates of the Delhi Bullion Association were in respect of the retail trade and not in respect of the wholesale trade in which the assessee was involved. The Tribunal correctly noted that in the present case, the Assessing Officer had not come across any evidence or material to show that the assessee had received something over and above what was reflected in the books of accounts in respect of the sale of the said bullion. Consequently, we feel that the Tribunal, being the final fact finding authority, has come to the correct conclusion on facts and no perversity in the same has been pointed out by the learned counsel appearing on behalf of the appellant. As such, no substantial question of law arises for our consideration.

11. We may also point out that we had enquired from the learned counsel for the appellant as to whether there was any requirement in law of recording the names of the purchasers of the bullion to whom the cash sales of gold and silver were made. The learned counsel for the revenue stated that there was no such requirement in law at the relevant time. Consequently, no adverse inference could have been drawn by the Assessing Officer on account of the fact that the assessee was not in a position to furnish the names of the persons to whom the cash sales of the bullion were made.

Thus, there is no merit in these appeals. The same are dismissed.

BADAR DURREZ AHMED, J

V.K. JAIN, J

APRIL 18, 2012

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