

Sterling Tools Ltd. Vs. Dy. Cit

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SooperKanoon Citation : sooperkanoon.com/707471

Court : Delhi

Decided On : May-23-2003

Reported in : (2004)91TTJ(Del)261

Appeal No. : IT(SS)A No. 5659/Del/1996 23 May 2003 Block period 1 April 1985 to 29 September 1995

Appellant : Sterling Tools Ltd.

Respondent : Dy. Cit

Advocate for Pet/Ap. : MS. Syali & V.S. Rastogi,;for the assessed; Jyoti Shankar,;for the Revenue

Judgement :

ORDER

R.M. Mehta, V.P.

This appeal is directed against the order passed by the assessing officer in block assessment raising as many as 13 effective grounds which run as under :

'1. The learned Dy. CIT has erred in law and on the facts and circumstances of the case in making an addition of Rs. 12,13,000 on account of the alleged unaccounted investment in purchase of property at No. 54-A, DLF Industrial Estate, Phase-I, Faridabad, on wholly illegal, erroneous and untenable ground.

2. The learned Dy. CIT has erred in law and on the facts and circumstances of the case in making an addition of Rs. 10,86,000 on account of alleged unaccounted investment in purchase of property at No. 4, DLF Industrial Estate, Phase-I, , Faridabad, on wholly illegal, erroneous and untenable grounds.

3(a) The learned Dy. CIT has erred in law and on the facts and circumstances of the case in making an addition of Rs, 10,71,000 as undisclosed income on account of the alleged under valuation of closing stock as on 31-3-1995, on wholly illegal, erroneous and untenable grounds,

(b) The learned Dy. CIT has erred in law and on the facts and circumstances of the case in observing that the appellant has not followed FIFO system or the average purchase price system for valuation of the closing stock, on wholly illegal, erroneous and untenable grounds,

(c) Without prejudice to ground Nos. 3(a) and (b), the learned Dy. CIT has erred in law and on the facts and circumstances of the case in rejecting the appellant's alternate plea that assuming the closing stock as on 31-3-1995, was to be increased by Rs. 10,71,000, the value of the opening stock as on 1-4-1995, should consequently be increased by the same amount which would have the effect of reducing the income for the period from 1-4-1995 to 29-9-1995 (falling within the block period), by the same amount.

4. The learned Dy. CIT has erred in law and on the facts and circumstances of the case in making an addition of Rs. 11,40,000 on account of the alleged unaccounted investment in the excess stock without appreciating the fact that the alleged excess stock, on wholly illegal, erroneous and untenable grounds.

5. The learned Dy. CIT has erred in law and on the facts and circumstances of the case in making addition of Rs. 3,000 and Rs. 35,000 on account of profits alleged to have been made by the appellant on the alleged sale of the finished goods/raw materials of the value of Rs. 14,756 and Rs. 1,80,440 respectively outside the books of account, on wholly illegal, erroneous and untenable grounds.

6. The learned Dy. CIT has erred in law and on the facts and circumstances of the case in making an addition of Rs. 14,785 on account of the alleged unexplained/unaccounted expenses under section 69C of the Income Tax Act, on wholly illegal, erroneous and untenable grounds.

7. The learned Dy. CIT has erred in law and on the facts and circumstances of the case in making an addition of Rs. 1,06,046 on account of the alleged unexplained advances under section 69 of the Income Tax Act, whereas the peak amount of such advances was at Rs. 16,215 only, on wholly illegal, erroneous and untenable grounds.

8. The learned Dy. CIT has erred in law and on the facts and circumstances of the case in making an addition of a sum of Rs. 31,000 on account of the alleged unaccounted/unexplained advance given to one 'Billu', on wholly illegal, erroneous and untenable grounds.

9. The learned Dy. CIT has erred in law and on the facts and circumstances of the case in making an addition of a sum of Rs. 10,000 on account of payment made on 16-2-1995 (wrongly mentioned as 16-10-1995, in the assessment order), under section 69 of the Income Tax Act, on wholly illegal, erroneous and untenable grounds.

10. The learned Dy. CIT has erred in law and on the facts and circumstances of the case in making an addition of a sum of Rs. 40,000 on account of the alleged payment under section 69 of the Income Tax Act, on wholly illegal erroneous and untenable grounds,

11. The learned Dy. CIT has erred in law and on the facts and circumstances of the case in making an addition of a sum of Rs. 10,000 on account of the alleged payment made on 22-6-1995, under section 69 of the Income Tax Act, on wholly illegal, erroneous and untenable grounds.

12. The learned Dy. CIT has erred in law and on the facts and circumstances of the case in making an addition of a sum of Rs. 15,000 on account of the alleged unaccounted/unexplained advance under section 69 of the Income Tax Act, on

wholly illegal, erroneous and untenable grounds.

13. The learned Dy. CIT has erred in law and on the facts and circumstances of the case in making an addition of a sum of Rs. 35,000 on account of the alleged payment made to Shri Surinder Gulati of M/s Architect Allied, Faridabad, in case under section 69/69C of the Income Tax Act, on wholly illegal, erroneous and untenable grounds.

2. Grounds Nos. 14 and 15 are general in nature and in any case the learned counsel for the appellant did not make any submissions on the said grounds and these would, therefore, stand rejected.

3. Ground Nos. 1 and 2 are inter-connected having the same set of facts and to summarize these, we go to the order of the assessing officer wherein the following facts are noted :

The assessed- company purchased two industrial plots at DLF Industrial Estate I, Faridabad, the first bearing No. 54-A and the other No. 4. The first was purchased for a consideration of Rs. 9.50 lakhs on 18-3-1995, but there was an agreement to purchase between the parties, which was struck on 14-10-1994. The total area in respect of this plot was 4,006 sq. yds. with a temporary hut for a chowkidar and with front compound wall and a small steel gate. According to the assessing officer the consideration shown by the assessed 'appeared to be very low' as compared to the fair market value and the matter was referred to the DVO. The DVO by means of a communication addressed to the assessing officer worked out the total value of the property in question at Rs. 21.63 lakhs.

4. Similarly, in respect of the other property the purchase had been effected on 25-8-1994, but there was an earlier agreement dated 6-8-1994, and vis-a-vis the sum which had passed between the parties i.e., Rs. 7.20 lakhs the assessing officer was of the view that it was considerably lower than the fair market value. As in the earlier property, the matter was referred to the DVO and who arrived at a fair market value of Rs. 18.06 lakhs.

5. On receiving the valuations from the DVO the assessing officer asked the assessed to show cause as to why the difference between the market value as arrived at by the DVO and the value declared by the assessed be not taxed as its additional income. The assessed on its request was supplied with the copies of the valuation reports of the two properties and the submissions, which were made were as under :

'Plot Mo. 54-A, DLF Industrial Estate, Phase-I, Faridabad :

This plot was purchased by still for a price of Rs. 9.5 lacs and the consideration has been correctly shown in the books of accounts. The consideration shown is duly supported by sale deed of the plot. As regards the valuation report of the DVO, it is submitted that the same is merely an estimate of the fair market value of the plot by the valuation officer in his opinion and it does not prove that the plot was actually purchased by still at a higher consideration than what has been stated in the sale deed. In this connection, your kind attention is invited to the decision of the Calcutta High Court in the case of Income Tax Officer & Ors. v. Santosh Kumar Dalmia : [1994]208ITR337(Cal) wherein the High Court has observed as under :

'..... The question of valuation is a matter of opinion and valuation differs from valuer to valuer, property to property, depending on the facts and circumstances of each case. The valuer's report is after all a statistical hypothesis that leaves wide room for error on either side. It is no useful material for rational belief as to suppression of real consideration that passed in a transaction. ' Further, as observed by the Supreme Court in the case of C.B. Gautam v. Union of India & Ors. : [1993]199ITR530(SC) , in a given transaction, there might be several bona fide considerations, which might induce a seller to sell his immovable property at less than what might be considered to be the fair market value. thereforee, the question is not what the market value is, the question is whether the assessed has paid a higher price than recorded in the sale deed. Unless that fact is established and there is material for a conclusion that the assessed did not disclose the full consideration, no addition can be made on the basis of a valuation report. It is further submitted that Hon'ble Supreme Court, in the case of K.P. Varghese v.

Income Tax Officer & Anr. : [1981]131ITR597(SC) has held that burden of proving understatement or concealment of consideration rests on the revenue. No document or paper has been found by the department at the time of search to prove that we have paid any consideration in addition to what is recorded in the sale deed and the books of accounts. It is, therefore, submitted that there are no basis/ground/evidence for the proposed addition of Rs. 12.13 lakhs as additional income of STL. The valuation report being only an opinion, cannot be a substitute for the documents/papers/evidence found, for the purpose of section 69B of the Income Tax Act, 1961. In any case, the valuation of the valuation officer is arbitrary and highly excessive. We are also getting the property valued by another valuation officer registered with the department'. 'Plot Mo. 4, DLF Industrial Area, Phase-1, Faridabad

Sterling Tools Ltd. had purchased Plot No. 4, DLF Industrial Area, Phase-I, Faridabad, on 25-8-1994, at the then prevailing market price and the transaction was genuine and at the consideration correctly stated in the sale deed. The valuation report of the valuation officer is only an opinion and does not prove or substantiate that any consideration, other than the amount recorded in the sale deed, was passed on between the parties. The Hon'ble Supreme Court, in the case of K.P. Varghese v. CIT (supra), has held that burden of proving understatement or concealment of consideration rests on the revenue. No document or paper has been found by the department to prove that we have paid any consideration in addition to what is recorded in the sale deed and the books of accounts. It is, therefore, submitted that there are no basis/grounds/evidence of Rs. 10.86 lakhs as additional income of STL. The valuation report being only an opinion, cannot be a substitute for the documents/papers/evidence found, for the purpose of section 69B of the Income Tax Act. In any case, the valuation of the valuation officer is arbitrary and highly excessive. We are also getting the property valued by another valuation officer registered with the department. Our submissions mentioned against point No. 2 above apply in this case as well.'

6. In order to support the aforesaid submissions the assessed also filed copies of valuation reports of the two plots carried out by M/s Architect Allied Approved Valuer. According to the said approved valuer the fair market value of plot No. 54-

A was Rs. 9,01,350 and in respect of plot No. 4 the fair market value arrived at Rs. 7.06 lakhs.

7. The assessing officer, at the outset, observed that the approved valuer had not given any details about any market survey having been carried out to support the valuations and in contradistinction thereto the DVO had given the instances as also the grounds on which the valuation had been arrived at. According to the assessing officer the report of the DVO was, therefore, to be relied upon and not the valuation report submitted by the assessed.

8. On the basis of the aforesaid facts the assessing officer concluded that the difference between the disclosed amount and the valuations accorded to the properties in the report of the DVO represented the 'on money' which had been passed on to the seller for the purchase of the properties in question. According to the assessing officer most of the properties were being sold 'with a considerable amount of 'on money' on them. This, according to him, was matter of common knowledge and market practice, which could not be denied. In concluding, the assessing officer made an addition of Rs. 212.99 lakhs, i.e., Rs. 12.13 lakhs + Rs. 10.86 lakhs as the undisclosed income of the assessed and the deeming provisions of section 69 were applied. This addition, as already stated, is the subject-matter of the first two grounds before the Tribunal.

9. The learned counsel for the appellant, at the outset, adverted to the definition of 'undisclosed income' as appearing in section 158B(b) of the Income Tax Act, 1961. According to him no material had been found during the course of the search and which would show that the figures reflected by the assessed vis-a-vis the purchase of the two plots were incorrect or false. It was emphasized by the learned counsel that agreements to sell in respect of both the properties had been found during the course of the search and nothing indicating a position to the contrary has emerged from the record. The further submission was to the effect that the sole basis for making the addition was the valuation reports of the DVO which at the best could be an estimate, but not adequate enough for making an addition during a block assessment when it was the accepted legal position that such an assessment had to be based on material found during the course of the

search. The further submission of the learned counsel was to the effect that the total amount expended in respect of the aforesaid two properties stood reflected in the assessed's books of accounts and for this he invited attention to pp. 104 and 173 of the paper book.

10. The only other submission was that both the plots had been purchased in the period relevant to assessment year 1995-96 and in respect of which the regular assessment had already been completed under section 143(3) on 31-1-1997 (copy of the assessment order at pp. 105 to 110 of the paper book).

11. Coming to the legal propositions emerging from various reported judgments, the learned counsel placed reliance on CIT v. Ravi Kant Jain (2001) 250 ITR 141 for the proposition that the scope and ambit under Chapter XIV-B was limited to material unearthed during the course of the search, on CIT v. Rajendra Prasad Gupta for the same proposition i.e., a block assessment having to be framed in the light of material which had come into the possession of the assessing officer during the course of the search and N.R. Papers & Boards Ltd. & Ors. v. Dy. CIT : [1998]234ITR733(Guj) for the same proposition.

12. The authorities which were cited for the proposition that post-search enquiry could not be made to gather evidence to be used for making a block assessment, the learned counsel placed reliance on P.K. Ganeshwar v. Dy. CIT (2002) 80 i TD 429 (Chen), but highlighting at the same time that it was only the amendment carried out in sub-section (1) of section 158BB by the Finance Act, 2002, with effect from 1-6-2002, that the evidence gathered in post-search enquiries could be made the basis for proceeding with a block assessment.

13. Reliance was also placed on C.M. Mehta v. Asstt. CIT , Digvijay Chemicals Ltd. v. Asstt CIT (2000) 68 TTJ (Delhi) 280; Samrat Beer Bar v. Asstt. CIT (2000) 251 iTR 1 (TMAT) and Patel Rajesh Kumar Kantilal & Co. v. Asstt. CIT for the proposition that undisclosed income in a block assessment had to be computed on the basis of the evidence found as a result of the search, additions based on suspicion and surmises are not covered in a block assessment and such assessment has to be based on concrete material, the assessing officer cannot proceed by presuming that there must be some other material or evidence, which

was not found during the course of the search.

14. For the proposition that details and income which are already recorded in the books of accounts cannot be re-examined to arrive at a fresh conclusion in a block assessment, reliance was placed on *Essem Intra-Port Services (P) Ltd. v. Asstt. CIT* and *Parakh Foods Ltd. v. Dy. CIT* .

15. In coming to the direct cases pertaining to the facts emerging in ground Nos. 1 and 2, the learned counsel placed reliance on *CIT v. Vinod Danchand Ghodawat* : [2001]247ITR448(Bom) ; *Reeta Jaiswal v. Asstt. CIT* (2001) 116 Taxman (Jab); *Kapoor Sons Steels (P) Ltd. v. Asstt. CIT* (2001) 119 Taxman 113 (Chd); *Essem Intra-Port Services (P) Ltd. v. Asstt. CIT* (supra) and *Aggarwal Motors v. Asstt. CIT* . The submissions were that subsequent reference to the DVO, who estimated a higher value and the difference being added as undisclosed income was not valid especially when the assessed had disclosed the investment/cost of construction in a regular assessment.

16. In view of the aforesaid detailed factual and legal submissions, the learned counsel concluded by urging that the addition of Rs. 22,99,000 be deleted.

17. The learned departmental Representative, on the other hand, supported the order passed by the assessing officer and subsequent arguments advanced by him were a reiteration of the reasons recorded by the said assessing officer in making the addition impugned. We may categorically observe at this stage that the learned departmental Representative did not cite any authority to counter the legal propositions propounded before us by the learned counsel for the appellant.

18. After considering the rival submissions, we are of the view that there is substantial merit in the arguments advanced by the learned counsel on behalf of the appellant. As rightly contended by him the only basis for making the addition was the reports of the DVO and admittedly no material was found during the course of the search and which could even give a hint or point out to any 'on money' payment in respect of the two plots. It is not rebutted by the learned departmental Representative that agreements to sell in respect of both the

properties were found during the course of the search and these did indicate the same figures at which the properties ultimately changed hands. The learned counsel has been able to show to us from his paper book that the investment in the two properties stands reflected in the books of accounts and we may refer to p. 104 which contains in details of the investment in the two plots which comprises of the cost, the stamp duty and the other miscellaneous charges' The total investment in two plots, i.e., Rs. 19,16,148 finds a place in the assessed's audited accounts and a reference may be made to p. 173 which is the schedule of fixed assets as also the capital work- in-progress for the previous year ending 31-3-1995, with corresponding figures for assessment year 1994-95 also reflected therein. As rightly contended by the learned counsel and once again not challenged on behalf of the revenue, the regular assessment under section 143(3) came to be made on 31-1-1997, and the search took place much earlier i.e., on 29-9-1995. In other words, the assessing officer in the regular assessment made under section 143(3) did not choose to make any addition on account of the investment in the two plots.

19. Coming to the legal position, the learned counsel cited before us apt and relevant case law, which we have already summarized in the earlier part of the present order. Not finding it necessary to say anything on the amendment carried out by the Finance Act, 2002, w.e.f 1-6-2002, the legal position vis-a-vis the period under consideration is more than clear since various Hon'ble High Courts as also different Benches of the Tribunal have taken the view that block assessment under Chapter XIV-B has to be made on the basis of material (found) during the course of the search, and post-search inquiries cannot be made the basis for a block assessment and vis-a-vis the two grounds before us, a valuation report obtained subsequently by the assessing officer cannot form the basis of an addition in a block assessment, moreso, when a regular assessment under section 143(3) has already been made. In our opinion, addition in a block assessment cannot be made on suspicion, surmises and conjectures and has to be related to cogent and positive. material found during the course of search and in case any item is disclosed in the books of accounts or at any other place in the financial statements or records prior to the date of search, then such items are clearly outside the ambit of a block assessment under Chapter XIV-B.

20. In the final analysis, we, on the facts of the case and relying on the numerous cases cited before us, proceed to delete the total addition of Rs. 22,99,000, which forms the subject-matter of ground Nos. 1 and 2 in the present appeal.

21. The facts pertaining to ground Nos. 3(a) to (c) are that during the course of the search a file on which 'stock valuation of STL, 31-3-1995' was written was seized from 5-A, DLF Industrial Area, Faridabad. The various pages of this file marked Annex. 17 gave the valuation of raw material, work-in progress and finished goods. Page 16 of the Annexure gave the valuation of raw material as on 31-3-1995, on the FIFO basis. The figure of valuation as worked out came to Rs. 1,20,22,000 and which was corroborated by the transactions written on p. 19 of the said Annexure and where the value of raw material had been written at Rs. 120.22 lakhs. On the same page, i.e., page No. 19 the value of the work-in-progress was written at Rs. 27.09 lakhs and the finished goods at Rs. 17.19 lakhs. The total value of raw material, work-in progress and the finished goods as on 31-3-1995, therefore, worked out at Rs. 164.50 lakhs. As compared in this figure the assessing officer noticed that in the audited accounts pertaining to the period 1994-95 the value of the stock as on 31-3-1995, worked out as follows :

(i) Raw material

1,09,77,000

(ii) Work-in-progress

26,95,000

(iii) Finished goods

17,07,000

1,53,79,000

22. According to the assessing officer the aforesaid figures reflected under valuation of stock to the tune of Rs. 10.71 lakhs as on 31-3-1995, and this according to the assessing officer meant suppression of profit by the same amount. On being asked as to why the sum in question be not treated as

unaccounted income for the block period the assessed by means of a written Explanationn submitted as under

'The rate applied for wire rods was wrongly taken at Rs. 24.37 per kg. And Rs. 24.24 per kg. as against 21.96 per kg. As the discrepancy was detected in checking at the time of audit of final accounts by the auditors' representatives, the same were corrected and incorporated in audited balance sheet. The corrected statement is also amongst the seized papers (see Annexure 17, pp. 16 and 19 working sheets of sterling tools). The management had only certified the corrected figures as finalized in the course of audit. The corrections were carried out by accounts department at the instance of the audit staff.

It may be submitted that the observation that the management has to intervene only to make adjustments is not at all factually correct. However, a mistake is detected by the accounts/audit person, the same is to be corrected in order to arrive at true profits.'

23. According to the assessing officer the basis on which the value of stock of raw material, work-in-progress and the finished goods had been taken as per page No. 19 of the Annexure could not be doubted, but on the other hand, the assessed had not furnished any basis for the so-called 'corrections' of the valuation made by it earlier. According to the assessing officer the downward valuation had been made without pointing out any specific mistakes in respect of each such item and he, therefore, proceeded to reject the Explanationn of the assessed.

24. Further, according to the assessing officer, Annex. 17 revealed that two sets of valuation of closing stock had been made as on 31-3-1995, and out of this the first valuation was based on pp. 16 to 19 of the seized annexure whereas the second set was made as per p. 15 of the said annexure. The Income Tax Officer appended all the aforesaid pages as annexures to the assessment order and the further observation was to the effect that this revealed that the assessed had initially followed the FIFO method because the valuation on the basis of this method was less than the average price, but subsequent with a view to reduce the value of closing stock arbitrary values had been adopted. This according to the assessing officer was apparent from pp. 15 and 16 of the seized material. It was

noted by the assessing officer that initially the value was taken at Rs. 24.48 per kg., which was evident from p. 16 and subsequently the value had been reduced to Rs. 22.03 per kg. as per p. 15 and this was thereafter crossed out and a third valuation was taken viz., Rs. 21.96 per kg. All the aforesaid facts, according to the assessing officer revealed how the assessed kept changing the values of the closing stock in order to reduce the closing stock valuation to suit its convenience and with a view to reduce the tax incidence in the financial year 1994-95. According to the assessing officer, the assessed had neither followed the FIFO system nor had he followed the average purchase price system and the arbitrary valuation method, which had been adopted was, therefore, liable to be rejected.

25. The assessing officer further observed that most of the raw material had already been converted into work-in-progress and while taking the valuation at the end of the accounting period the assessed had taken the value of work-in-progress at cost price instead of taking the proper valuation of the work-in-progress. Considering the assessed's Explanationn to be of a general nature, the assessing officer treated the same to be unsatisfactory and vis-a-vis the assessed's submission before the CIT during the course of hearing on 27-9-1996, that the assessed may be allowed the benefit of the revised opening stock as on 1-4-1995, the assessing officer observed that this issue could not be considered in the block assessment and that the assessed was free to file a revised return for assessment year 1996-97 if it so chose. In the final analysis, the assessing officer made the addition to the tune of Rs. 10.71 lakhs as undisclosed incomes.

26. In respect of the aforesaid grounds the initial submission of the learned counsel was that there was no 'difference' in the quantity found and the difference was only in respect of the value. The further submission was to the effect that the corrected papers were amongst the seized documents and the benefit of the addition had not been given in the opening stock by the assessing officer. The further submission of the learned counsel was to the effect that the onus was squarely on the revenue to establish that there had been undisclosed income and it was emphasized that no material had been found during the course of the search to establish any undisclosed income pertaining to the valuation of the stock.

27. The learned counsel thereafter referred to the paper book filed during the course of the hearing taking us straightaway to p. 111 and which according to him mentioned at the top 'provisional working' and thereafter he took us to p. 112 and which according to him also mentioned the term 'provisional'. Both the aforesaid workings, according to the learned counsel, pertained to the same date i.e., 15-4-1995, and p. 112 was the corrected version of p. 111. The corrections, according to the learned counsel, had been made by the auditors and he thereafter referred to pp. 119 to 122 and which was the extract from a letter dated 19-8-1996, filed before the CIT. A perusal thereof shows that this letter contains the Explanationns pertaining to the valuation of stock.

28. In concluding the submissions with reference to ground No. 3 along with its sub-grounds, the learned counsel contended that the matter was entirely factual and all that was required was a relook by the assessing officer vis-a-vis the two sets of calculations as also the submissions made before the CIT and for which purpose the issue could be restored back to the file of the assessing officer. On being asked, the learned departmental Representative did not raise any serious objection to the proposal made by the learned counsel.

29. After considering the rival submissions and seeing that the matter is entirely factual and the same can be sorted out between the parties by a proper re-examination by the assessing officer and relating thereto the submissions made by the assessed now before the Tribunal and at the earlier stages of the proceedings before the tax authorities, we consider it appropriate to set aside the order passed by the assessing officer with reference to the addition of Rs. 10.71 lakhs and restore the matter back to the file of the assessing officer for a decision de novo on merits after giving a reasonable opportunity to the assessed. In case what the assessed says turns out to be correct and it is in fact not a case of two separate valuations with a view to hoodwink the department but a legitimate and proper correction of one valuation by a second working, then apparently no addition would be required to be made. The learned counsel has categorically stated and which has not been countered by the learned departmental Representative that the 'difference' is only on account of the valuation and in so far as the items/quantity is concerned, there is no dispute between the parties. The

assessing officer is also required to reconsider the assessed's submission pertaining to the benefit of a revised opening stock as on 1-4-1995, being given inasmuch as we are of the view that in a block assessment where a number of years are involved, in case an addition is made by the assessing officer in respect of the valuation of the closing stock for any one year falling in the block period, then obviously a figure of revised opening stock has to be adopted for the subsequent assessment year. One cannot be telling the assessed as the assessing officer has done that in so far as the block assessment is concerned, the addition is made, but if you want any consequential relief, then you file a revised return and seek requisite relief in the regular assessment proceedings. These observations on our part would become relevant in case the assessing officer once again repeats the addition.

30. The facts pertaining to ground No. 4 in the appeal are that during the course of search the inventory of raw material, semi-finished goods, finished goods, sample stores, etc. was prepared by physical verification and a statement of one of the directors, i.e., Shri Atul Aggarwal, was recorded on 1-10-1995, pertaining to the stock position reflected in the books of accounts as on 29-9-1995. As per the statement recorded the position of stock was as under :

'Raw material

166.362 metric tonnes

Work- in-progress

231.815 metric tonnes

Finished goods

45.458 metric tonnes

Scrap

18.091 metric tonnes'

31. On the other hand, a physical verification gave the following position

'Raw material

301.329 metric tonnes

Work-in-progress

241.164 metric tonnes

Finished goods

44.931 metric tonnes

Scrap

32.125 metric tonnes'

32. The statement of Shri M.L. Aggarwal, the managing director of the company, was recorded under section 132(4) on 18-10-1995, i.e., the date of the final conclusion of the search and Shri Aggarwal stated that the position of stock given to the Asstt. Director of IT as on 1-10-1995, was based on a wrong briefing from the staff members and in a hurried manner. Shri Aggarwal had stated on oath that discrepancies had arisen because of not taking into account certain receipts of goods and details of which was filed by him before the Asstt. Director of IT vide letter dated 16-10-1995. On being asked to explain the discrepancies during the course of the assessment proceedings the assessed reiterated that reliance was being placed on letter dated 16-10-1995, filed before the Asstt. Director of IT and as per the aforesaid submissions, stock of 25.36 MT had been received back from M/s JCT Ltd., Hoshiarpur, on 28-9-1995, but entry in respect of the same was not made on the same day and the search took place on 29-9-1995. In support of the aforesaid submissions, the assessed filed copies of the lorry receipts pertaining to the dispatch of goods by M/s JCT Ltd., dharam kanta Slip etc. Further, according to the assessed material weighing 43.910 M.T. supplied by three other parties and received on 28-9-1995, was not entered in the register on the same day. A similar Explanationn was given in respect of goods weighing 28.825 M.T. received from

two parties on 28-9-1995, but no entered in the excise register on the same day.

33. As per the assessment order, the Asstt. Director of IT considered the aforesaid Explanationn furnished and made enquiries from some of the parties and who in turn confirmed the transactions as stated by Shri M.L. Aggarwal. In the light of the aforesaid credit was given to the tune of 98.095 M.T. and the value of the 'excess stock' was worked out at Rs. 11,99,220. This was proposed to be treated as unaccounted investment of the assessed, but the assessed in turn pleaded that the stock-taking was done on estimate basis and the visual estimate could not be considered as the actual weight of the stock. It was pointed out that there was duplication in taking the figure of stock and further even the inventory lists mentioned that the figures were on approximate basis.

34. Considering the aforesaid submissions, the assessing officer observed that approximations could be both positive as well as negative and they would neutralize each other to a large extent. To be fair to the assessed, however, he proceeded to allow deduction to the tune of 5 per cent of the total value of the stock and in this manner he made an addition of Rs. 11,40,000 as the further undisclosed income of the assessed pertaining to the investment in excess stock found during the course of the search.

35. The learned counsel, at the outset, contended that there was no basis for the addition and it was quite apparent from a perusal of pp. 128 to 133 of the paper book that the weight taken by the search party was 'approximate' as noted on the said inventories/calculations. It was further emphasized by the learned counsel that no material had been found during the course of the search, which warranted such an addition and further in the regular assessment made for assessment year 1996-97 no such addition had been made. He placed on record a copy of the assessment order for assessment year 1996-97 framed under section 143(3) on 6-10-1997, which is once again a date much later to the date of the search. The learned departmental Representative, on the other hand, strongly supported the order passed by the assessing officer and subsequent arguments advanced by him were a reiteration of the reasons recorded by the assessing officer in making the addition impugned.

36. We have examined the rival submissions and have also perused the material on record to which our attention was invited during the course of hearing. A reference to pp. 141 to 143 of the paper book shows that the assessed sought to reconcile the difference before the CIT and the first set of calculations at p. 141 worked out a difference of 134.967 M.T. and the assessed claimed a credit from the said figures of 98.095 M.T. pertaining to goods received from ' three parties and which had not been entered in the books of accounts. A perusal of the order of the assessing officer shows that credit for the said goods was given and the balance difference, which remained was 36.872 M.T. At p. 142 of the paper book the assessed has sought to explain the further difference by contending that there was no actual weighment of the stock and everything had been worked out by approximations. At p. 143 there is a reference to the generation of scrap and ultimately the difference, which remains is indicated at 14.034 M.T. and the stand of the assessed is that the physical inventory taken by the search party included dust, floor sweepings, packing material, scrap and other types of waste material and the value thereof would be quite negligible.

37. In our opinion, this issue as in the earlier ground would be required to be restored back to the file of the assessing officer for the limited purpose of examining the two main submissions of the assessed, the first pertaining to the calculation being carried out by the search party without actual weighment and on approximations and secondly, the question of scrap generated. We, however, note that even as per assessed's own calculation at p. 143 of the paper book there is still a difference of 14.034 M.T. In other words, the facts and circumstances of the case do warrant an addition, but the quantum thereof can be decided by the assessing officer to whose file we are restoring the matter back for readjudication.

38. It may, however, be not out of place to mention that in the regular assessment for assessment year. 1996-97 no such addition had been made and this is an assessment framed after the search. The Income Tax Officer in re-examining the issue may, therefore, examine the legal position vis-a-vis the scope of an assessment under Chapter XIV-B. The decision relied upon by the learned counsel in the first two grounds in the present appeal would, therefore, be quite relevant.

39. Coming to ground No. 5, the brief facts are that the assessing officer in the course of the assessment proceedings noticed that finished goods had shown a shortfall of 0.527 M.T. valued at Rs. 14,756 and being of the view that this quantity of stock had been sold outside the books of accounts, he worked out on an estimate basis a GP of Rs. 3,000 and added the same as undisclosed income. A further addition of Rs. 35,000 was made by the assessing officer who took note of the fact that the stock inventory taken at the premises of a sister concern of the assessed and which did job work on behalf of the assessed revealed a total shortfall of 9.412 M.T. of raw material/finished goods. This raw material was in the form of wire rod and the finished goods were in the form of wire. The assessed sought to explain the shortfall by contending that the stock had been taken on estimate basis and not on the basis of actual weighment and further the shortfall was due to generation of scrap. The shortfall in the finished goods was to the tune of 4.901 M.T.

40. The assessing officer accepted the assessed's contention with reference to the shortfall of 4.901 M.T. in respect of the finished goods, but declined to do so with regard to the shortfall of 4.511 M.T. in respect of the other item. According to the assessing officer the material to the aforesaid extent had been sold outside the books of accounts, but not accounted for. In adopting the value of the material sold at Rs. 1,80,440 the assessing officer worked out the G.P. addition at Rs. 35,000.

41. We have heard both the parties, the learned counsel for the appellant reiterating the arguments advanced in the preceding two grounds, but with reference to p. 133 of the paper book, his submission was that the difference was only 2.5 per cent whereas in considering the earlier grounds, the assessing officer had accepted the difference up to 5 per cent. The learned departmental Representative, on the other hand, supported the order passed by the assessing officer.

42. After examining the rival submissions, we are of the view that the facts and circumstances of the case do justify an addition, but considering the submissions made by the learned counsel about the percentage as also taking into account the fact that the difference is somewhat of a nominal nature taking into account the

magnitude of business carried on by the assessed as also the quantum of material involved, we feel that an addition of Rs. 25,000 would be fair and reasonable as against the two additions aggregating Rs. 38,000. We order accordingly.

43. As regards ground No. 6, the addition pertains to Annexure 2 of the loose paper bundle seized from the residence of Shri M.L. Aggarwal, M.D. of the assessed, at C-606, New Friends Colony, New Delhi. This revealed expenditure on different dates as also advances to certain parties. The assessed was to explain whether these outgoings were accounted for or not and in response thereto he filed reply dated 16-9-1996, wherein the following submissions were made .-

'Annexure 2 of the materials seized from C-606, New Friends Colony, New Delhi. Pages 1 to 108 : These are rough papers written by some of our employee(s) mentioning therein expenses incurred/utilization of cash. All these pages, -which relate to a period of one week just before the search date viz., 29-9-1995, were to be checked, but the same could not be done as the search took place on 29-9-1995. Some expenses were, yet to be reconciled, verified and then recorded in the cash book. The net effect of these items is Rs. 2,285, details thereof are placed at Annexure : IV. The relevant entries are verifiable from regular books of accounts, which will be produced at the time of hearing. It is thereforee, prayed that no adverse view may be taken for unreconciled not accounted for.'

44. The assessing officer was not satisfied with the assessed's Explanationn as according to him the assessed's own working indicated expenditure to the tune of Rs. 14,785 recorded in the seized material. According to the assessing officer the expenses pertaining to a sister concern were required to be considered in that case, but he ultimately proceeded to treat the sum of Rs. 14,785 as expenditure made out of unaccounted income of the assessed- company. This was added under section 69C of the Income Tax Act.

45. In respect of the aforesaid ground the learned counsel referred to pp. 145 and 146 of the paper book and which was a summary of the contents of the documents seized. It was his submission that benefit be allowed for a sum of Rs. 12,500 vide p. 146 and this plea being made on the ground that both sides of the seized

document were required to be considered. According to the assessed's counsel the difference between Rs. 14,785 and Rs. 12,500 could be added i.e., Rs. 2,285. The learned departmental Representative supported the order of the assessing officer and we may mention that the learned counsel placed reliance on *Chander Mohan Mehta v. Asstt. CIT (Inv.)* .

46. After considering the rival submissions, we are of the view that this issue can be restored back to the file of the assessing officer for verifying the contents of pp. 145 and 146 and in case the stand of the assessed about the credit of Rs. 12,500 is found to be valid on merits, then the assessing officer may allow the requisite relief. However, if the assessed is not able to substantiate its case about the credit for the said amount, then the addition of Rs. 14,785 would have to be sustained.

47. As regards ground No. 7, the only plea of the learned counsel with reference to P. 148 of the paper book was that the peak amount be added and which was Rs. 16,215. According to him this aspect of the matter was probably overlooked by the assessing officer while making the assessment. The learned departmental Representative supported the order of the assessing officer.

48. Considering the aforesaid submissions as also the quantum involved, we restore the matter back to the file of the assessing officer asking him to examine p. 148 as also take into account the assessed's submission pertaining to the taxability of the peak amount and not an addition to the tune of Rs. 1,06,046.

49. The facts pertaining to ground No. 8 are that one of the documents seized from 5-A, DLF Industrial Estate, Faridabad, reflected an amount of Rs. 31,000 given on 21-7-1994, to one 'Billu'. On being asked to explain, the assessed in a written reply stated that the amount in question was given to one Shri R.K. Aggarwal (family name 'Billu') on temporary basis by Shri M.L. Aggarwal, the managing director of the company out of the cash balance in the books of accounts. The further Explanationn was that subsequently the amount had been recovered. This Explanationn did not satisfy the assessing officer as according to him the amount had neither been reflected in the cash book of the company nor was there any evidence/proof to show the recovery of the amount from Shri R.K.

Aggarwal alias Billu on any subsequent date. He, therefore, proceeded to make the addition of Rs. 31,000 by invoking section 69B of the Income Tax Act.

50. The learned counsel reiterated the arguments advanced before the assessing officer vehemently contending that the amount in question did not represent the income of the assessed. A reference was made to pp. 149 and 150 of the paper book. The learned departmental Representative, on the other hand, supported the order passed by the assessing officer.

51. After considering the rival submissions, we are of the view that the submissions of the learned counsel are without merit and the Explanationn tendered before the assessing officer and now before us does not inspire any confidence. As rightly observed by the assessing officer, there was no entry in the books of accounts of the company pertaining to the withdrawal of the cash and neither was any other evidence placed on record which would show the subsequent recovery from Shri R.K. Aggarwal/Billu. We, therefore, have no option, but to uphold the addition of Rs. 31,000.

52. The facts pertaining to ground No. 9 once again refer to a document seized during the course of the search from the same premises viz., 5-A, DLF Industrial Estate, Faridabad, and this time the amount of payment was in a sum of Rs. 10,000 on 16-10-1995. The learned counsel has clarified before us that the correct date is 16-2-1995, and not 16-10-1995. On being asked to explain the assessed stated that the sum in question represented the imprest amount paid out of the cash balance of the company to its purchase officer for effecting daily purchases, Along with the Explanationn the copy of amount of the said purchase manager was also submitted. According to the assessing officer the account in question pertained to the imprest amount given in the month of Feb., 1995, and on the ground that the same could not be linked with the expenses made on 16-10-1995, the assessing officer proceeded to reject the Explanationn and make the addition impugned.

53. The solitary submission before us is that the correct date is 16-2-1995, when the amount was recorded in the books and not 16-10-1995. The learned departmental Representative supported the order of the assessing officer.

54. In our opinion, it would be fair and reasonable if this issue is restored back to the file of the assessing officer asking him to carry out the necessary verification about the correct date and thereafter deal with the matter on merits.

55. Coming to ground No. 10, the reference was once again to a document found during the course of search and which reflected a payment to the tune of Rs. 40,000. The assessed by means of a written communication explained that it purchased a machine from M/s K.B. Machine Industry, Amritsar, for a sum of Rs. 2,19,336 against which a payment of Rs. 1,79,336 was made and the debit balance in their account was 'adjusted' through said purchases. This Explanationn did not satisfy the assessing officer, who proceeded to treat the sum of Rs. 40,000 as the additional unaccounted income of the assessed.

56. During the course of the hearing the learned counsel for the appellant invited attention to pp. 152 and 156 of the paper book reiterating the submissions made before the assessing officer. According to him nothing had been paid outside the books of accounts. The learned departmental Representative supported the order of the assessing officer.

57. A perusal of p. 155 of the paper book shows that this is the submission made before the assessing officer and which we have already reproduced earlier and p. 156 is the copy of account of the party at Amritsar which shows cheque payment of Rs. 1,79,336 and thereafter credit of the bill amount to the tune of Rs. 2,19,336. As against this the case of the department is that the document seized mentioned a sum of Rs. 40,000 in the name of K.B. Machines. A copy of the seized document is available on p. 154 of the paper book.

58. The position before us remains the same as it was before the assessing officer and that would mean that there is no Explanationn for the entry in question and we, thereforee, have no option, but to assume that the balance payment of Rs. 40,000 to the party at Amritsar was made in cash outside the books of account, moreso, when the assessed has not even placed on record any subsequent copy of account with the said party which would show the further payment of Rs. 40,000 in the books of account. The addition is sustained and ground No. 10 is rejected.

59. Ground No. 11 pertains to an addition of Rs. 10,000 pertaining to a payment to have been made on 22-6-1995, and remaining unexplained at the assessment stage. It is noticed from p. 23 of the assessment order that the assessed could not offer any Explanation as to whether the same was accounted for in the books of accounts or not. The position regarding another payment of Rs. 15,000 which is the subject-matter of ground No. 12 is also identical. Before us the only submission made by the learned counsel was that these two payments had been made to employees of the company and there was sufficient cash balance in the books of accounts, but inadvertently the necessary entries had not been made. He prayed for the requisite relief whereas the learned departmental Representative vehemently urged that the two additions in question be sustained.

60. After examining the rival contentions, we are of the view that there is no merit whatsoever in the submissions made by the learned counsel on behalf of the appellant and inasmuch as no material on record has been adverted to which would show that these two payments are reflected in the books of account, we have no option, but to confirm both the additions rejecting ground Nos. 11 and 12.

61. The last effective ground in this appeal and which is No. 13 pertains to an addition on Rs. 35,000 once again made with reference to a document found during the course of the search. The relevant extract is reproduced at p. 24 of the assessment order at the top. The assessed was asked to explain the entries made in the said document and in response thereto it submitted that a payment of Rs. 15,000 had been made to one Shri Surinder Gulati of M/s Architect Allied, Faridabad, and in support thereof a copy of account of the said party was furnished. It was observed by the assessing officer that the copy of account did reveal that a sum of Rs. 10,000 had been paid to the said person by means of a cheque on 17-1-1995, but the cash amounts had not been reflected in the said copy of account. Further, according to the assessing officer, the sum of Rs. 10,000 on 17.1 mentioned CH which meant a cheque and on the same analogy the other amounts against which 'cash' was written reflected cash payments to Shri Surinder Gulati or M/s Architect Allied and these were in thousands. On the ground that the total of such cash entries viz., Rs. 35,000 had been given by the assessed-company to Shri Surinder Gulati of M/s Architect Allied out of unexplained sources,

the assessing officer proceeded to add the amount in question.

62. Before us the submissions of the learned counsel for the appellant were absolutely identical to those tendered before the assessing officer and a reference was made to pp. 162 to 165 of the paper book. The learned departmental Representative supported the order of the assessing officer and after considering the rival submissions, we are of the view that there is no merit whatsoever in the arguments advanced by the learned counsel on behalf of the appellant. There is no Explanationn about the entries in the seized material, which apparently indicate cash payments to the person in question and these remaining unexplained, we uphold the action of the assessing officer rejecting ground No. 13.

63. Before we part with this appeal, we would like to mention that during the course of the hearing, the following additional ground was referred :

'That on the facts and circumstances of the case and in law, the assessing officer erred in levying surcharge on the income-tax determined to be payable while completing the block assessment.'

64. We have heard both the parties in respect of the aforesaid additional ground, the learned counsel for the appellant placing reliance on a decision of the Delhi Bench of the Tribunal in the case of H.B. Stockholdings Ltd. v. A CIT in IT(SS)A No. 83/Del/2000 (order dated 8-5-2002). Reliance was also placed on the judgment of the Calcutta Bench of the Tribunal in the case of Principal Officer, Bulcon Towers (P) Ltd. v. Asstt. CIT in IT(SS)A No. 96/Cal/1997 (Order dated 17-5-1999). The learned counsel also referred to the amendment in the Act brought about with effect from the first day of June, 2002, and which provided for surcharge over and above the amount of tax chargeable. The plea, in other words, was that the additional ground being legal, be admitted and adjudicated upon. The learned departmental Representative did not oppose the admission of the additional ground and urged that the matter be restored to the file of the assessing officer for a decision on merits.

65. After hearing the parties, we admit the additional ground, but restore the same back to the file of the assessing officer asking him to decide the same on merits

and in accordance with law along with some of the other grounds, which have been sent back to him, after affording reasonable opportunity to the assessed.

66. In the result, the appeal of the assessed is partly allowed.

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