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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ITA 963/2011

CIT

..... Appellant

Through: Mr. Rohit Madan, Senior Standing
counsel with Mr. Akash Vajpai, Mr. Zoheb
Hussain, Advocates.

versus

MAHASHIAN DI HATTI LTD

..... Respondent

Through: Dr. Rakesh Gupta, Advocate with
Ms.Poonam Ahuja, Mr. Somil Agarwal and
Mr.Rohit Kumar Gupta, Advocates.

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CIT

ITA 965/2011

..... Appellant

Through: Mr. Rohit Madan, Senior Standing
counsel with Mr. Akash Vajpai, Mr. Zoheb
Hussain, Advocates.

versus

MAHASHIAN DI HATTI LTD

..... Respondent

Through: Dr. Rakesh Gupta, Advocate with
Ms.Poonam Ahuja, Mr. Somil Agarwal and
Mr.Rohit Kumar Gupta, Advocates.

With

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CIT

ITA 964/2011

..... Appellant

Through: Mr. Rohit Madan, Senior Standing
counsel with Mr. Akash Vajpai, Mr. Zoheb
Hussain, Advocates.

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By:AMULYA ITA Nos. 963,965,964,981/2011 & 83,91 & 211/2013

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versus

MAHASHIAN DI HATTI LTD

..... Respondent

Through: Dr. Rakesh Gupta, Advocate with
Ms.Poonam Ahuja, Mr. Somil Agarwal and
Mr.Rohit Kumar Gupta, Advocates.

With

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ITA 981/2011

CIT

..... Appellant.

Through: Mr. Rohit Madan, Senior Standing
counsel with Mr. Akash Vajpai, Mr. Zoheb
Hussain, Advocates.

versus

MAHASHIAN DI HATTI LTD

..... Respondent

Through: Dr. Rakesh Gupta, Advocate with
Ms.Poonam Ahuja, Mr. Somil Agarwal and
Mr.Rohit Kumar Gupta, Advocates.

With

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ITA 83/2013

COMMISSIONER OF INCOME TAX-(CENTRAL)-I..... Appellant

Through: Mr. Rohit Madan, Senior Standing
counsel with Mr. Akash Vajpai, Mr. Zoheb
Hussain, Advocates.

versus

MAHASHIAN DI HATTI LTD.

..... Respondent

Through: Dr. Rakesh Gupta, Advocate with
Ms.Poonam Ahuja, Mr. Somil Agarwal and
Mr.Rohit Kumar Gupta, Advocates.

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With

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ITA 91/2013

COMMISSIONER OF INCOME TAX-(CENTRAL)-I..... Appellant

Through: Mr. Rohit Madan, Senior Standing
counsel with Mr. Akash Vajpai, Mr. Zoheb
Hussain, Advocates.

versus

MAHASHIAN DI HATTI LTD.

..... Respondent

Through: Dr. Rakesh Gupta, Advocate with
Ms.Poonam Ahuja, Mr. Somil Agarwal and
Mr.Rohit Kumar Gupta, Advocates.

And

24.

ITA 211/2013

COMMISSIONER OF INCOME TAX-(CENTRAL)-I..... Appellant

Through: Mr. Rohit Madan, Senior Standing
counsel with Mr. Akash Vajpai, Mr. Zoheb
Hussain, Advocates.

versus

MAHASHIAN DI HATTI LTD.

..... Respondent

Through: Dr. Rakesh Gupta, Advocate with
Ms.Poonam Ahuja, Mr. Somil Agarwal and
Mr.Rohit Kumar Gupta, Advocates.

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE VIBHU BAKHURU

ORDER

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23.11.2015

1. All these appeals under Section 260A of the Income Tax Act, 1961 ('Act)

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are by the Revenue and pertain to the Assessment Years ('AYs') 2001-02 to 2007-08. The Assessee is Mahashian Di Hatti Ltd. ('MDH') The impugned orders of the Income Tax Appellate Tribunal ('ITAT') challenged in the these appeals are (i) the Order dated 29th October 2010 for AYs 2001-02 to 2004-05 and (ii) the Order dated 17th August 2012 for AYs 2005-06 to 2007-08.

2. At the time of admission of these appeals on 27th January 2015, the following questions were framed by the Court for consideration:

"1. Whether the ITAT was correct in its finding in setting aside the addition of 25% undisclosed sales in the circumstances of the case?

2. Whether the ITAT acted in error on the question of commodity speculation alleged by the Revenue in the circumstances of the case?

3. If the ITAT fell into error in directing the deletion of amounts added by the AO on account of the inflated purchase by the assessee?

4. Whether the ITAT was correct in its conclusion with respect to disallowance of advertisement expenditure?"

3. Additionally in ITA Nos. 83 of 2013, 91 of 2013 and 211 of 2013, the following three further questions were framed:

"5. Did the ITAT err in directing deletion of amounts added on account of unproved transactions, made by the AO, on the basis of seized material?

6. Did the ITAT fall into error in directing the deletion of amounts added as income by the AO under the head of 'Income Expenditure Investments' and the amounts relating to MDH account?

7. Is the Revenue correct in stating that the amounts have to be added towards the Assessee's investment in construction of school building at Byadagi, Karnataka."

4. For ITA No. 211 of 2013, following additional question was framed:

"(8) Was the amount of Rs.11 crores added by the AO on account of the discrepancies in closing stock and business transaction, correctly dealt with by the ITAT?"

5. The background to the filing of these appeals by the Revenue is that a search and seizure operation was undertaken of the MDH group on 22nd November 2006 under Section 132 of the Act. The search took place in the business premises of the MDH at Kirti Nagar in Delhi as well as its factory in Gurgaon. The search also simultaneously took place in the premises of Mr. Rajiv Gulati, Director of MDH at Vasant Vihar, New Delhi, the premises of Mr. Prem Arora, who was the main broker of MDH and Mata Chanan Devi Hospital which was being looked after by Mr. Sushil Kumar Trehan, son-in-law of Mr. Dharam Pal Gulati, Chairman-cum-Managing Director (CMD), MDH. According to the Revenue, cash of Rs. 48,00,000 was found in the premises of Mr. Rajiv Gulati and Rs. 24,86,00,000 at the premises of Mr. Dharam Pal Gulati. A sum of Rs.1 crore was found in the premises of Mr. Prem Arora. The statements of all the above four persons i.e. Mr. Rajiv Gulati, Mr. Prem Arora, Mr. Sushil Kumar Trehan and Mr. Dharam Pal Gulati were recorded. A diary was seized from the premises of

Mr. Prem Arora. Some papers from the premises of Super Delicacy containing hand-written entries, a bunch of loose papers serially numbered regarding sales of Financial Year 2000-01 to 2004-05 titled as All India Sales Report of MDH ('AISR'), and certain papers pertaining to 'Gold Ornaments A/c of MDH' were also seized. The statements made during the search were subsequently retracted.

6. The Assessing Officer ('AO') in the assessment order dated on 31st December 2008 for AY 2001-02 to 2004-05 made additions under certain heads. In the first place, he found that there was a difference between the figures of sales as per the AISR and the sales as per the return of income for the AYs 2001-02 to 2007-08. Therefore additions were made to the income of each of the above AYs on account of unaccounted sales/purchases, income from speculative trading, inflated purchases and advertisement expenditure. The penalty proceedings were also instituted. Separate assessment orders were passed on 27th September 2010 by the AO in respect of the AYs 2005-06, 2006-07 and 2007-08. Apart from the above additions, certain other additions were made on account of unproved transactions of MDH viz., unexplained entries, unexplained payments/balance, investment in the construction of a school building at Vyadgi in Karnataka, speculation in gold and the additions on account of the arms length price.

7. Against the aforementioned assessment order dated 31st December 2008, the Assessee appealed before the Commissioner of Income Tax (Appeals) [CIT (A)]. By the order dated 11th March 2010, the CIT (A) partly allowed the appeals of the Assessee for the AYs 2001-02 to 2004-05 by deleting the

additions on account of unaccounted purchases, advertisement expenses and speculative income. However, the other additions were sustained. Against the finding of the CIT (A), deleting the additions made on account of advertisement expenses and speculative income, appeals were filed by the Revenue before the ITAT. However, as regards the deletion of the addition on account the unaccounted purchases, no appeal was filed.

8. By a common order dated 29th October 2010 both the Assessee's and the Revenue's appeals for AYs 2001-02 to 2004-05 were disposed of by the ITAT.

9. As regards the order of the AO for AYs 2005-06, 2006-07 and 2007-08, the matter was carried by the Assessee before the Dispute Resolution Panel ('DRP'). Thereafter, the appeals were filed by the Assessee before the ITAT which were disposed of by the order dated 17th August 2012.

10. Now taking up the question framed by the Court in the issue concerning the additions on account of unaccounted sales, which were made by the AO relying on the ASIR and the note books seized from the premises of Prem Arora, it is seen that the ITAT deleted the additions by accepting the explanation of the Assessee regarding reconciliation of the sales figures, as per invoices which also showed trade discounts. It was noted that for each of the AYs 2001-02 to 2004-05, there was no difference between the figures reported in the monthly income sales ('MIS') report and the sales as per the books of accounts. Further it was noticed that the Assessee has been following this accounting policy consistently. It was noticed that trade

discounts were being allowed at a regional level all over the country and only the net amount of sales was taken to the Assessee's books of accounts. The Assessee was also allowing 2% discount on cash payments. These facts have been discussed by the ITAT in the impugned order extensively. On that basis, it was concluded "there is no difference between the figures reported in AISR and sales recorded in the books of accounts". Importantly, the ITAT also noted that the details under reconciliation were submitted by the Assessee both before the AO as well as CIT(A).

11. Mr. Rohit Madan, Senior Standing counsel for the Revenue, has produced a chart to show the difference between the figures of sales as per the AISR and the figures of sales given in the return of income. The difference is 15 to 20%. The Court is unable to accept the rough and ready method of determination of the percentage of the difference in the two sales figures. The exercise must be done at the micro level. Individual invoices have to be examined to see what the actual discounts allowed for the transactions were. This appears to be the exercise undertaken by the ITAT before it came to the conclusion that there was no difference between the figures reported in the AISR and the sales as per the return of income. It was based on the thorough examination of the books of accounts and is purely factual. Consequently, the Court finds no reason to differ with the conclusion of the ITAT on this aspect. The addition made by the AO of 25% of the sales was rightly deleted. Question No.1 is accordingly answered in the affirmative, i.e., in favour of the Assessee and against the Revenue.

12. Turning to Question No.2, regarding 'commodities speculation' Mr. Madan referred to the order of the AO which has extensively set out the statements made by Mr. Rajiv Gulati, Mr. Dharam Pal Gulati, Mr. Sushil Kumar Trehan and Mr. Prem Arora. In particular, reference is made to the statement of Mr. Rajiv Gulati, where he is supposed to have admitted to the Assessee having engaged in speculative trading. There is also a reference to the speculative trading in gold. Mr. Madan further relied on the decision of the Allahabad High Court in *Dr. S.C. Gupta v. Commissioner of Income Tax 248 ITR 782 (All)* to urge that even retracted statements could be relied upon. On the contrary, Dr. Rakesh Gupta, learned counsel for the Assessee, drew the attention of the Court to the decision of the Gujarat High Court in *Kailash Ben Manhar Lal Chokshi v. CIT 328 ITR 411 (Guj)* which supported the case of the Assessee.

13. At the outset, the Court would like to observe that the decision of the Allahabad High Court in *Dr. S.C. Gupta v. Commissioner of Income Tax (supra)* dealt with a situation where statements were made during the course of a survey under Section 133A of the Act. The probative value of the statement made before the Court under Section 132 (4) and the effect of its retraction stands on a different footing. As noted by the Gujarat High Court in *Kailash Ben Manhar Lal Chokshi v. CIT (supra)* what requires to be looked into is the explanation offered by the Assessee after retracting his statement. If credible evidence is produced which contradicts the purported admissions made in the statements given at the time of search, then the additions cannot be sustained only on the basis of the retracted statements. There has to be some corroborative evidence *de hors* the retracted

statements. The Court is inclined to follow the approach of the Gujarat High Court as far as the present case is concerned.

14. A perusal of the order of the AO reveals that there is no basis to come to the conclusion that the speculative purchases were made or that the Assessee was engaged in 'speculative trading'. In fact for arriving at a figure of so called 'speculative purchase', the AO took the alleged amount surrendered by the Assessee by multiplied it by the ratio of the sales turnover during the AY in question and the sales turnover for the year of search. It is not understood why the AO undertook this exercise to arrive at a notional figure. On the other hand, in the impugned order of the ITAT, it has been noted that the Assessee announced several schemes, one of which was distribution of gold chains on the birthday of Mr. Dharam Pal Gulati, to the dealers who achieved certain targets. The Assessee purchased the gold and alloy and got them converted into chains from M/s Vijay Kumar Jewellers with whom the Assessee had a regular account. The ITAT found that "the assessee is not engaged in purchase and sale of gold on the basis of which it could be presumed that the assessee was engaged in speculative business." It was further pointed out that if the Revenue wanted to rely on the surrender of certain amount made by the Directors after the search, the necessary evidence should have been brought on record since the statements made had been retracted. As rightly pointed out by the ITAT, the conclusion of the AO that the Assessee was engaged in the speculative business in agricultural commodities and gold was based on surmises and not on the basis of any credible evidence. The Court therefore holds that the deletion by the ITAT of the addition on the ground of speculative trading was for cogent and valid

reasons. Consequently, Question No.2 is also answered in favour of the Assessee and against the Revenue.

15. Turning to Question No. 3 concerning inflated purchases, it is seen that the AO on an analysis of the books of accounts of the Assessee concluded that purchase invoices for chillies and haldi were over-invoiced by Rs. 3 per kg in case of haldi and Rs. 5 per kg in case of chillies. Reference was also made to the statement recorded of Mr. Sushil Kumar Trehan who is supposed to have effected sales and purchases without delivery. The AO held that the income so generated through "speculative activity in commodities is not reflected in the books of accounts of MDH Ltd." The CIT (A) concurred with the AO and affirmed the addition.

16. However, the ITAT has reversed the finding and deleted the addition after noticing that the additions had been made in this regard in the hands of Mr. Sushil Kumar Trehan. Further the transactions involving over invoicing was found in the AY 2004-05 but the AO made additions of equal amounts in AY 2001-02, 2002-03, 2003-04 without any material found during the course of search. Consequently, it was concluded that the additions made in AY 2001-02, 2002-03 and 2003-04 were based on mere 'suspicion and presumption' and not on the basis of any evidence found during the course of the search. Since the said amounts were brought to tax in the hands of Mr. Sushil Kumar Trehan, they could not be again taxed in the hands of Assessee by way of disallowance of the expenditure.

17. The Court is unable to find any error in the approach of the ITAT in the

matter. Indeed if the amount has already been taxed at the hands of Mr. Sushil Kumar Trehan it is not understood how it could be brought to tax again in the hands of the Assessee by disallowance of the expenditure. Moreover the papers on the basis of which addition was made were found in the office of Mr. Sushil Kumar Trehan, who himself was engaged in the procurement of haldi and chillies. Further Mr. Rakesh Gupta, learned counsel for the Assessee informs that Mr. Trehan has paid the tax along with the interest in terms of the order of assessment of his return which has attained finality. Accordingly, this Court answers Question No. 3 in the negative, i.e., in favour of the Assessee and against the Revenue.

18. Question No. 4 concerns advertisement expenditure. The AO disallowed the said expenses on the ground that the Assessee had been unable to prove that it was towards the promotion of the products in the market place and that it was allowable as a legitimate business deduction. The AO disallowed 20% of the total expenditure in each year since according to the AO, expenditure was incurred to promote Mahashaya Dharam Pal Gulati, the CMD of MDH.

19. MDH deals primarily in household products. The contention of MDH that Mr. Dharam Pal Gulati is a pioneer of packaged spices in India and has built the business by his vision and hard work for over six decades has been unable to be contradicted by the Revenue. It is entirely up to the Assessee as to how it promotes its products. The Court finds no basis for the AO to have concluded that the expenses on advertisement was not for business purposes and for disallowing 20% of it. The ITAT rightly upheld the order of the CIT

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(A) deleting the said disallowance. Question (4) is answered in favour of the Assessee and against the Revenue.

20. Turning to the additional three questions framed in ITA Nos. 93 of 2013, 91 of 2013 and 211 of 2013, Question No. 5 is of a general nature. Question No. 6 concerns an amount added under the head "Income Expenditure Investments" but counsel for the revenue frankly states that he has been unable to ascertain how the said question arises in the concerned AYs. It may also be noticed that certain amounts attributed to the Assessee have in fact been brought to tax in the hands of Mr. Trehan and therefore, their addition in the hands of the Assessee was not justified.

21. Question No. 7 is whether the expenses incurred by the Assessee in construction of school building at Byadagi, Karnataka require to be added as income. As has rightly been held by the ITAT, the Revenue has not been able to show that the amount incurred on the construction of the school building came from the Assessee. The said addition appears to be on the basis of surmises and conjectures and has been rightly deleted by the ITAT. Question No. 7 is accordingly answered in the negative, i.e., in favour of the Assessee and against the Revenue.

22. The further question framed in ITA No. 211 of 2013 is whether the ITAT had rightly deleted the addition of Rs. 11 crores on account of discrepancies in stock. A perusal of the order passed by the ITAT for AYs 2005-06, 2006-07 and 2007-08 reveals that this addition was on the basis of the statement made during the course of search which was subsequently

retracted. No physical inventory of stock was prepared during the course of search. The ITAT noted that during the course of search Mr. Rajiv Gujati had surrendered a sum of Rs. 10 crores towards difference in stock and Rs. 1 crore on account of discrepancy in stock. The contention was that he was misled on account of pressure during the search operation into surrendering the said sum. This explained his retraction of the said surrender on 28th November 2006 itself. The ITAT also referred to the CBDT Instruction dated 10th March 2003 in this regarding making it mandatory that in the absence of discrepancy in the search inventory of the stock, no addition can be made. In the circumstances, the Court holds that the ITAT was justified in holding that the AO should have brought material in the form of inventory on record, if he wanted to make an addition of Rs. 11 crores. The ITAT, therefore, rightly deleted the said addition. Question No. 8 is accordingly answered in favour of the Assessee and against the Revenue.

23. For all the aforesaid reasons, these appeals are dismissed, but in the facts and circumstances of the cases, with no orders as to cost.



S.MURALIDHAR, J



VIBHU BAKHRU, J

NOVEMBER 23, 2015

mg/rkr