

**MISC. APPEAL No. 58 OF 2002**

(Against the order dated 11.09.2001 passed by Income Tax Appellate Tribunal, Patna Bench, Patna, is presided over by Sri Balram Sharma and Dr. R.K. Yadav, in ITA No. 292 (Pat) 2000)

M/s Vimla Store, a partnership firm through partner Jagdish Narain S/O Late Dr. Awadhesh Kumar Rastogi, G.T. Road, Kudra, Distt.- Kaimur-821108

------(Assessee/Appellant)

Versus

1. The Commissioner of Income Tax, Patna.
2. The Income Tax Officer, Sasaram.

------(Assessing Officer/Respondents)

For the Appellant : 1. Mr. A.K. Rastogi, Adv.  
2. Mr. Shailendra Kr. Adv.  
3. Mr. Ashish Agrawal, Adv.

For the Revenue : Mr. Rishi Raj Sinha, Adv.

**P R E S E N T**

**THE HON'BLE MR. JUSTICE CHANDRAMAULI KUMAR PRASAD**

**THE HON'BLE MR. JUSTICE SUBASH CHANDRA JHA**

**Prasad &  
Jha, J.J.**

M/s. Vimla Store a firm deals in agricultural implements, diesel engine, G.I. Pipe, paints, spare parts and hardware, etc. It has three partners namely, Sri Jagdish Narain and his two brothers. The firm Vimla Stores, hereinafter referred to as assessee filed return for the assessment year 1996-97 on 31<sup>st</sup> of August, 1996, declaring an income of Rs. 11,193/-, and seeking refund of Rs. 37054/-.

On 13<sup>th</sup> of December, 1995 the Assessing Officer, Sasaram along with six Income-tax

Officers conducted a survey at the business premises of the assessee under the provisions of Section 133A of the Income Tax Act (hereinafter referred to as the Act).

The stock found in the survey was as follows:

Stock in shop premises :- Rs. 1,28,114/-

Stock in godown :- Rs. 11,14,687/-

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Total - Rs. 12,42,801/-

On the basis of Sales-tax return and cash memos it was found that for the period 1.4.1995 to 13.12.1995 sale of the value of 6,60,437/- was effected. On the basis of purchase invoices it transpired that the assessee during the said period purchased goods of the value of Rs. 8,88,437.70. Thus, in the survey unaccounted stock of Rs. 3,16,537/- was found with the assessee. Statement of one of the partners of the firm namely Jagdish Narain was recorded and in his statement he declared the value of all the unaccounted stock to be Rs. 5 lacs. He also volunteered to pay a sum of Rs. 2 lacs as advance tax. In the statement he had further disclosed that the assessee firm belongs to three persons including him and

three of his brothers and have equal share in the firm.

It is relevant here to state that although said Jagdish Narain, a partner of the assessee had made that statement during the survey operation but had filed application before the Chief Commissioner of Income-tax on 15.12.1995 in which he has inter alia stated that one of the partners of the assessee who was present at the business premises was asked to own unaccounted stock of Rs. 5 lacs on the threat of being arrested by the police personnel and sealing of business premises.

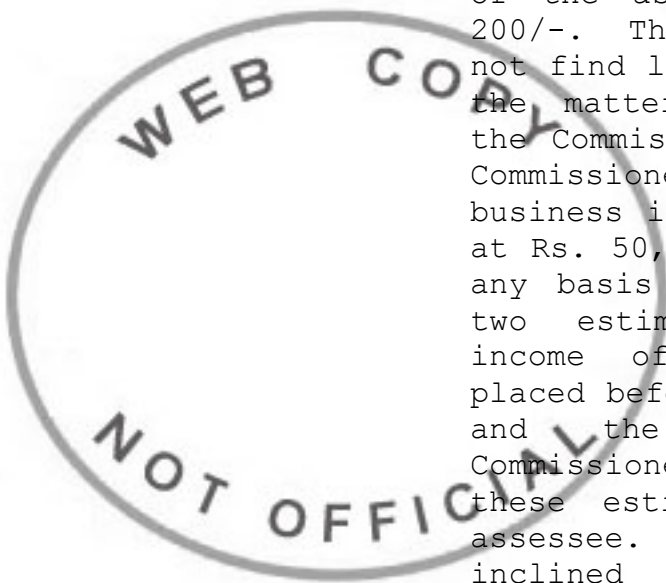
The Assessing Officer computed the assessment on a total income of Rs. 8,74,200/- consisting of business income of Rs. 3,74,200/- and income of Rs. 5 lacs from other sources under the provisions of Section 69 of the Act.

Aggrieved by the order of assessment, the assessee preferred appeal before the Commissioner of Income-tax (Appeals) who reduced the income from business from 3,74,200/- to 50,000/- and affirmed the addition of Rs. 5,00,000/- (Five lacs) as income from other sources under the provisions

of Section 69 of the Act.

Aggrieved by the same assessee preferred appeal before the Patna Bench of the Income tax Tribunal (hereinafter referred to as the Tribunal). The Tribunal accepted the estimate of business income of Rs. 50,000/- (Fifty thousand) and concurred with the finding of the Commissioner of Income tax in this regard. While doing so the Tribunal observed as follows:

"After allowing the expenses to the tune of Rs. 2,60,000/-, the AO assessed the business income of the assessee at Rs. 3,74,200/-. This estimation could not find legs and gave way when the matter was considered by the Commissioner (Appeals). The Commissioner also estimated the business income of the assessee at Rs. 50,000/-, without giving any basis for the same. Thus, two estimations of business income of the assessee are placed before us, one by the AO and the other by the Commissioner (Appeals). One of these estimations favours the assessee. Consequently, we are inclined to accept the estimation of the business income of the assessee made by the Commissioner (Appeals). Therefore, we affirm the addition in the business income of the assessee at Rs. 50,000/- as done by Commissioner (Appeals)."



As regards the unexplained investment Tribunal reduced it from Rs. 5,00,000 to 3,00,000/-, while coming to the aforesaid conclusion the Tribunal observed as follows:

"These facts and events lead us to conclude that the complaint to the Chief Commissioner was nothing but a step to create a defence against future additions in the returned income. As referred above, there was a margin of error in making inventory of the goods. Granting the benefits of margin of error, we are of the view that unexplained stock to the tune of Rs. 3,00,000/- was there at the business premises of the assessee. Taking into consideration that unexplained stock and the statement made by Jagdish Narain and the fact that a sum of Rs. 40,000/- was paid as an advance tax on 18.12.1995, we are of the view that a sum of Rs. 3,00,000/- only should be added to the income of the assessee as unexplained investment under the provisions of Section 69 of the Act. We, therefore, order that a sum of Rs. 3,00,000/ be substituted to the amount of Rs. 5,00,000/ to the income of the assessee under the provisions of Section 69 of the Act."

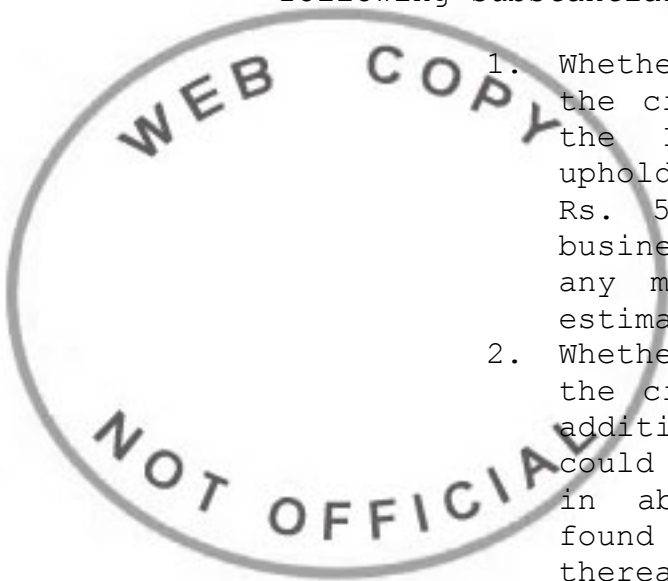
As regards the interest, the Tribunal has observed as follows:

"The assessee claims that interest under section 243B of the Act is against the provision of law. Contention of the assessee is uncalled for. The provisions of section 243B of

the Act are unambiguous and make it clear that the advance tax is to be paid on the assessed income and not on the returned income and when advance tax paid by the assessee is less than as required under the aforesaid section, he is liable to pay interest on the rate and for the period as prescribed therein. Consequently, it does not lie in the mouth of the assessee that it is not liable to pay interest on the less advance tax paid under the provisions of section 243B of the Act."

Assessee has preferred this appeal under section 260 A of the Act. By order dated 12.9.2006 appeal has been admitted on the following substantial questions of law:

1. Whether on the facts and in the circumstances of the case the ITAT was justified in upholding the estimation of Rs. 50,000/- under the head business income in absence of any material supporting such estimation?
2. Whether on the facts and in the circumstances of the case addition under section 69 could at all be made/sustained in absence of any material found in course of survey or thereafter and on mere suspicion, surmises and conjecture?
3. Whether on the facts and in the circumstances of the case the ITAT is justified in upholding interest under section 234B in absence of any order by the Assessing Officer in the order of assessment?



Mr. Ajay Kumar Rastogi appears on behalf of the assessee whereas the revenue is represented by Mr. Rishi Raj Sinha.

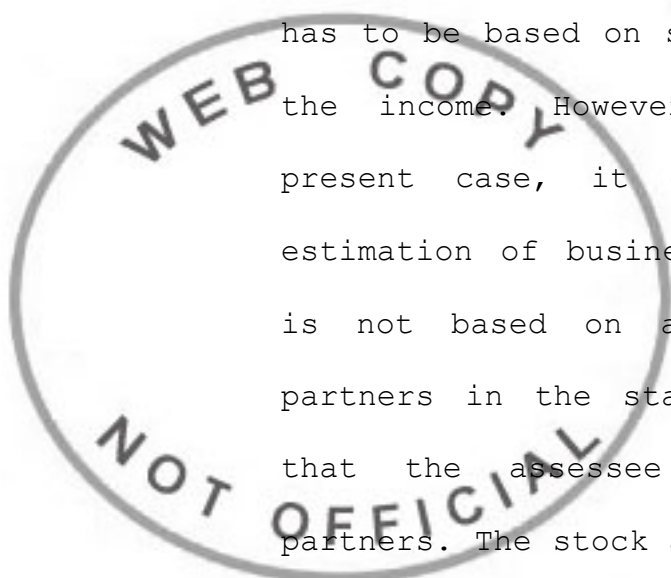
Mr. Rastogi submits that estimation of business income has to be based on some material. According to him, a sum of Rs. 50,000/- as business income assessed by the Commissioner of the Income tax (Appeals) as affirmed by the Tribunal is without any material. According to him, it is nothing but a guess work. In support of his submission, he has placed reliance on a judgment of the Privy Council in the case of **Commissioner of Income Tax, Central and United Provinces vs. Laxminarain Badridas**, reported in **5 I.T.R. 170** and our attention has been drawn to the following passage from the said judgment it reads as follows:

"He must not act dishonestly, or vindictively or capriciously because he must exercise judgment in the matter. He must make what he honestly believes to be a fair estimate of the proper figure of assessment, and for this purpose he must be able to take into consideration local knowledge and repute in regard to the assessee's circumstances; and his own knowledge of previous returns by, and assessments of, the

assessee, and all other matters which he thinks will assist him in arriving at a fair and proper estimate; and though there must necessarily be guess-work in the matter, it must be honest guess-work."

Mr. Sinha, however, submits that the assessment of business income at Rs. 50,000/- is on consideration of the material on record and cannot be said to be in any way arbitrary.

Having appreciated the rival submission, we do not have the slightest hesitation in accepting the broad submission of Mr. Rastogi that estimation of business income has to be based on some material touching upon the income. However, in the facts of the present case, it cannot be said that the estimation of business income of Rs. 50,000/- is not based on any material. One of the partners in the statement has clearly stated that the assessee firm consist of three partners. The stock and the quantum of sale are materials which are relevant to estimate the business income. If we take into account these facts, we are of the opinion that the business income of Rs. 50,000/- estimated by the Commissioner of Income tax and affirmed in





appeal by the Tribunal is based on available materials.

Accordingly our answer to the first question is in the affirmative, in favour of the revenue and against the assessee and it is held that in the facts and circumstances of the case, the Tribunal was justified in upholding the estimation of Rs. 50,000/- under the head business income.

Mr. Rastogi, then submits that unexplained investment on the basis of inventory lacking credibility is not permissible. He submits that the Tribunal itself having found error in making the inventory of the goods, the finding rendered by it of investment of Rs. 3,00,000/- from other sources in the stock under section 69 of the Act is not sustainable.

Reliance has been placed on a decision of the Delhi High Court in the case of **Commissioner of Income-tax, Delhi I, New Delhi vs. Bansal High Carbons (P) Ltd.** reported in (2007) 165 I.T.R. 243 (Delhi) and we have been invited to the following passage from the said judgment it reads as follows:

"It appeared that during the

search, the number of bundles and weight estimate in respect of half a dozen business concerns were made within a few hours. The search party either did not have the necessary time or did not have the necessary expertise to correctly assess the stock position. A short-cut appeared to have been taken by the search party which came to a certain conclusion on an estimate basis. In law, as in life, a short-cut is often a wrong-cut."

It has also been urged that one of the partners of the firm Jagdish Narain was coerced to admit a sum of Rs. 5,00,000/- as unexplained investment and that statement of Jagdish Narain is fit to be ignored.

We do not find any substance in the submission of Mr. Rastogi and the decision relied on in no way supports his contention.

The Tribunal has not found that the inventory of the goods was made illegally or not correctly made. In fact, the Tribunal has found marginal error in making inventory of the goods. In such circumstance, it cannot be said that the inventory prepared during the course of survey is fit to be rejected outright. During the course of survey an excess stock to the tune of Rs. 3,16,537/ was found and on

account of the marginal error in making the inventory, the Tribunal has reduced it to Rs. 3,00,000/- under the head unexplained investment.

We are of the opinion that the marginal error in making the inventory will not make it incredible deserving its total rejection.

Now referring to the decision of the Delhi High Court in the case of **Bansal High Carbons (P) Ltd. (supra)**, the court on fact found that the search party either did not had the necessary time or the expertise to correctly assess the stock position. On fact it was found that the search was made and inventory prepared in sleep-shod manner. That is not the position in the present case and as such the judgment relied on is of no assistance to the assessee.

Accordingly, our answer to the second question is in the affirmative against the assessee and in favour of the Revenue and it is held that addition under Section 69 of the Income tax Act was made on the basis of the material found in course of survey and it

cannot be said to be on mere suspicion, surmises and conjecture.

Mr. Rastogi draws our attention to the order of the Assessing Officer and submits that no specific order has been passed by the Tribunal charging interest. This is not disputed by Mr. Sinha. Although, such a contention was not raised before the Tribunal but in view of the fact such a question of law was formulated while admitting the appeal and in the face of the judgment of the Full Bench of this Court in the case of **Smt. Tej Kumari and ors. vs. Commissioner of Income-Tax and ors. (247) I.T.R. 210**, we have no option than to accept Mr. Rastogi's contention. In the said case the Full Bench of this Court has held as follows:

"In the absence of any specific order of the assessing authority interest could not be charged and recovered from the assessee."

In view of the aforesaid, answer to the third question is in the negative against the revenue and in favour of the assessee and it is held that the Tribunal was not justified in upholding the interest in the absence of any order of the Assessing Officer.

In the result, the appeal is partly allowed to the extent indicated above, but without any order as to cost.

(Chandramauli Kr. Prasad, J.)

Patna High  
Court, the  
24<sup>th</sup> of Oct.,  
2008 AFR  
Sanjeet

(Subash Chandra Jha, J.)

