

(2016) 10 RAJ CK 0093

In the Rajasthan High Court

Case No : . Sales Tax Revision Petition No. 99 of 2009

ACTO

APPELLANT

Vs

Khandelwal Foods Products

RESPONDENT

Date of Decision : 03-10-2016

Acts Referred:

Rajasthan Sales Tax Act, 1994 — Section 77(8)
Rajasthan Sales Tax Rules, 1995 — Rule 50

Citation : (2017) 1 RLW 612

Hon'ble Judges : Mr. Jainendra Kumar Ranka, J.

Bench : Single Bench

Advocate : Ms. Tanvi Sahai and Ms. Meenal Ghiya, Counsel, for the Petitioner;
Mr. Surendra Singh, Counsel, for the Respondent

Final Decision : Allowed

Judgement

Mr. Jainendra Kumar Ranka, J.—The instant petition is directed against order dated 29.6.2007 passed by the Rajasthan Tax Board, Ajmer, in Appeal No.752/2008/Alwar, by which appeal of the petitioner has been dismissed.

2. The brief facts noticed are that a survey came to be conducted by the officers of the Anti Evasion Wing at the business premises of the respondent assessee on 28.10.2002, wherein some excess stock was found by the officers concerned and physical stock was also taken. It was noticed by the officers that the stock of Namkeen on spot verification was 6422 kg whereas in the books it was weighted at 3892 kg only and, therefore, there was excess stock of 2530 kg. A show cause notice was given, however, the respondent assessee filed a reply on the spot stating therein that he accepts the excess stock and he has no explanation to offer and that appropriate order be passed. Taking into consideration the aforesaid explanation the officers concerned imposed penalty u/s 77(8) of the Rajasthan Sales Tax Act, 1994.

3. The matter was assailed before the Dy. Commissioner (Appeals), who however taking into consideration that there was violation of R.50 of the Rajasthan Sales

Tax Rules, 1995, the witnesses if any were employees of the assessee and they ought to have been independent witnesses, and that an affidavit was also filed before the Appellate Authority, that statements were recorded under coercion and pressure. The Dy. Com. (Appeals), taking into consideration these facts, deleted the penalty and further appeal filed by the Revenue before Tax Board also resulted in dismissal of the appeal upholding the order of Dy. Com. (Appeals).

4. Learned counsel for the petitioner vehemently contended that on the day of survey, excess stock was found and there was no explanation offered and there is no allegation about coercion or pressure on the assessee, which has not been proved at all, and it is a mere allegation not supported by any material or evidence. Learned counsel contended that though show cause notice was given for a later date to the assessee to offer a reasonable explanation supporting with bills and books but when the assessee himself requested to pass order on the spot accepting the excess stock, the observation of the both the Appellate Authorities is perverse and contrary to the material on record. Nothing was required to be done by the AO when the assessee himself agreed to the excess stock having been found and accepted. Learned counsel also contended that how this explanation was offered before the Dy. Com. (Appeals) that the so-called two witnesses are the employees/workers of the assessee and had it been so, such an additional affidavit placed before the Dy. Com. (Appeals) ought not to have been accepted without seeking explanation from the AO. She also contended that the officers of the Anti Evasion Wing have taken due precautions of R.50 of the Rules, and the finding of the Tax Board so also of the Dy. Com. (Appeals) is perverse and require to be interfered with. Learned counsel also relied upon judgment passed in ACTO, Ward- II v. B.C. & Company & Another (2013) 66 VST 3 (Raj), where on identical facts this court had upheld the claim of Revenue.

5. Per contra, learned counsel for the assessee contended that both the Appellate Authorities have come to a categorical finding that the survey was not conducted in a proper and just manner, coercion and pressure was built on the assessee and the finding recorded that both the witnesses, were employees/workers of the respondent assessee and they could not be said to be independent witnesses, and thus supported the order of both the Appellate Authorities and also contended that it is a finding of fact.

6. I have considered the arguments advanced by the learned counsel for the parties and perused the impugned order so also the other orders on record and the record of Assessing Officer in particular, and in my view the orders of Tax Board and Dy. Com. (Appeals) are required to be interfered with for the following reasons.

7. Having perused the record of the assessee it transpires that on the day of survey the statements were recorded of the respondent assessee who agreed that there was excess stock to the extent of 2530 kg on physical verification vis-a-vis the books/stock register found on the spot. On the stock statement taken

on spot two witnesses have signed, namely Shri Sushil Kankariya s/o Shri P.M. Kankariya and Shri Rajeev s/o Shri H.M. Ghatak. However, the learned counsel for the respondent was unable to provide copy of the so-called affidavit, which appeared to have been placed before the Dy. Com. (Appeals) and the Tax Board, though the matter was adjourned for quite number of times and today also when the matter was heard after the record was summoned, the learned counsel for assessee was unable to place on record the so-called affidavit.

8. Be that as it may, in my view the Dy. Com. (Appeals) ought not to have accepted such an affidavit without providing a chance to the AO to comment upon such an affidavit. Any additional evidence placed at the appellate stage is required to be sent for comments of the AO and in my view the Tax Board also ought not to have considered the additional affidavit/evidence.

9. On perusal of the facts, it transpire that a show cause notice was given to the assessee respondent on 28.10.2002 for hearing on 7.11.2002, however, as pointed out earlier the assessee himself requested that he is not able to explain the difference of stock to the extent of 2530 kg and the order may be passed on the spot. It is only then that the AO passed an order on 28.10.2002.

10. Nothing has been placed on record by the learned counsel for the assessee as to whether there was pressure or coercion inflicted on the assessee and now it was for the assessee to prove by evidence that coercion or pressure was built upon the assessee by the survey team.

11. The principles about the statements having been recorded at the time of survey/search being *pari materia* insofar as the Income Tax proceedings or the Central Excise proceedings or/and the Sales Tax proceedings, in my opinion, is identical and in the instant case the respondent assessee claims that by a subsequent act before the Dy. Com. (Appeals), an affidavit appears to have been filed claiming that on account of threat/pressurising tactics and coercion the statements were recorded at the time of survey & search and statements being on account of threat or otherwise cannot be said to be proper. It has already been expressed earlier that despite chance having been provided to the counsel for respondent he is unable to produce the copy of the said affidavit for perusal of the court and the records which have been produced of the AO which was produced by the counsel for Revenue and which is also seen by the counsel for the respondent, at-least no affidavit or any material is apparent.

12. Division Bench of this Court in the case of CIT, Bikaner v. Ravi Mathur and other connected matters [D.B. Income Tax Appeal No.67/2002, decided on 13.5.2016] had considered the issue of retraction/resiling of the statements though in the context of provision of section 132(4) of the IT Act. As expressed earlier, in my view the same principle would apply. It would be appropriate to quote few relevant paras of the said judgment *supra* which reads *ad infra* :-

"15. In our view, the statements recorded under Section 132(4) have great evidentiary value and it cannot be discarded as in the instant case by the

Tribunal in a summary or in a cryptic manner. Statements recorded under Section 132(4) cannot be discarded by simply observing that the assessee retracted the statements. One has to come to a definite finding as to the manner in which retraction takes place. On perusal of the facts noticed hereinbefore, we have noticed that while the statements were recorded at the time of search on 9.11.1995 and onwards but retraction, is almost after an year and that too when the assessment proceedings were being taken up in November 1996. We may observe that retraction should be made as soon as possible and immediately after such a statement has been recorded, either by filing a complaint to the higher officials or otherwise brought to the notice of the higher officials, either by way of a duly sworn affidavit or statements supported by convincing evidence through which an assessee could demonstrate that the statements initially recorded were under pressure/coercion and factually incorrect. In our view, retraction after a sufficient long gap or point of time, as in the instant case, loses its significance and is an afterthought. Once statements have been recorded on oath, duly signed, it has a great evidentiary value and it is normally presumed that whatever stated at the time of recording of statements under Section 132(4), are true and correct and brings out the correct picture, as by that time the assessee is uninfluenced by external agencies. Thus, whenever an assessee pleads that the statements have been obtained forcefully/by coercion/undue influence without material/contrary to the material, then it should be supported by strong evidence which we have observed hereinbefore. Once a statement is recorded under Section 132(4), such a statement can be used as a strong evidence against the assessee in assessing the income, the burden lies on the assessee to establish that the admission made in the statements are incorrect/wrong and that burden has to be discharged by an assessee at the earliest point of time and in the instant case we notice that the AO in the Assessment Order observes :-

"Regarding the amount of Rs.44.285 lakhs, it is now contended that the statement u/s 132(4) was not correct and these amounts are in thousands, not lakhs i.e. it is now attempted to retract from the statements made at the time of S & S operations".

Therefore, what we gather from the Assessment Order and on perusal of the above finding that the retraction was at the stage when the assessment proceedings were being finalised i.e. almost after a gap of more than an year. Such a so-called retraction in our view is no retraction in law and is simply a self-serving statement without any material.

15.1 xxx xxx xxx xxx

15.2 This Court in *Raj Kumar Sodhani v. The CIT* [DB ITA No.15/2015, decided on 28.4.2016] has taken this very view that retraction after a sufficient long gap loses its sanctity.

15.3 xxx xxx xxx xxx

15.4 The question in the case of *Bachittar Singh v. CIT & Anr.* (supra) of the Punjab & Haryana High Court, arose that a survey took place under Section 133A on 21.3.2003 and the assessee during the course of survey surrendered for taxation a sum of Rs.19 lakh stating therein that he had purchased shop no.5-A, New Cloth Market, Ambala City, for Rs.24 lakh jointly with his brother and source of investment was not reflected in the books of account. Later the assessee sought to resile from the said statement by taking stand that he had agricultural income to that effect, the investment was from that source, he had done potato business which was evidenced by entries in a diary found during the survey, he also produced other evidence in support of his claim. The AO rejected the stand holding that there was a long gap between the statement made originally on 21.3.2003 and retraction of the said statement on 28.5.2003 (less than three months), and the stand taken was afterthought. It was also claimed that the said statement was not at par with the statement made under Section 132(4) of the Act on oath. However, the Tribunal held that retraction from the statement had to be at the earliest opportunity in the absence of which voluntary statement recorded in the presence of family members was an important material, which could be acted upon. The Punjab & Haryana High Court upheld the finding of the Tribunal, even when there was just a gap of less than 3 months. It would also be appropriate to quote relevant paras :-

"6. It is not disputed that the statement was made by the assessee at the time of survey, which was retracted on May 28, 2003, and he did not take any further action for a period of more than two months. In such circumstances, the view taken by the Tribunal that retraction from the earlier statement was not permissible, is definitely a possible view. The mere fact that some entries were made in a diary could not be held to be sufficient and conclusive to hold that the statement earlier made was false. The assessee failed to produce books of account which may have been maintained during regular course of business or any other authentic contemporaneous evidence of agricultural income. In the circumstances, the statement of the assessee could certainly be acted upon."

15.5 In the case of *CIT v. Hotel Meriya* (supra), the facts before the Kerala High Court were that a search was conducted under Section 132(4) on 28.6.2001, which resulted that there was suppression of sale. Cash book was recorded upto 25.6.2001. Though cash book showed a cash balance of Rs.21,31,523/- but the physical balance found on spot was only Rs.34,552/-. On interrogation of Managing Partner and the employees revealed that only 80% of the actual sales turnover in respect of liquor was recorded in the cash book. The AO arrived at a conclusion that there was concealment of income. The Court, after analysing the findings and after quoting Section 132(4) of the Act in extenso so also explanation, observed ad infra :-

"..Going by the above provision along with its Explanation we find that the statement of the partner and employees recorded and documents collected are relevant and admissible in respect of all matters for the purpose of any

investigation connected with any proceedings under the Income-tax Act. Hence, we are of the opinion that the statements so recorded and documents collected by the Assessing Officer cannot be brushed aside as done by the Appellate Tribunal stating that it is having only very limited application. We answer the question in favour of the appellant.

.. None of the provisions under Chapter XIVB mandates that for making block assessment there shall be evidence regarding the concealment of income for every year in the block period. It cannot be expected that the assessee would retain documents regarding the concealment of income. If documents for every concealment are insisted to be searched, practically the provision for block assessment would be defeated. We cannot shut our eyes to the legislative intent. Here, what was disclosed that for sale, no bills are issued, but paper slips are issued with the price. Though carbon copy is retained it did not contain the sale price. Sale slips are destroyed then and there. Cash books are maintained by recording the 80 per cent of the price of liquor at a later date. When such practices are adopted, nobody can expect evidence for every year in a block period. What is possible is only to have a best judgment assessment on the basis of the evidence collected during search. The Assessing Officer is authorised and empowered to make block assessment in a judicious manner on the basis of the materials disclosed during the search under section 132 of the Incometax Act."

15.6 In the case of CIT v. O. Abdul Razak (supra), on the basis of seized documents recovered during search, addition was made with respect to purchase of lands on the strength of the admission made by the assessee regarding the actual amount paid as disclosed voluntarily in his sworn statement and the amounts disclosed in the cash flow statement corroborated by the recovery and seizure of title deeds. Personal expenses were estimated on the basis of the admission made again in the statement under Section 132(4) of the Act. Though the AO made addition, the Tribunal deleted the addition on the basis that apart from the statements, there was no other material and there was a retraction made by the assessee. However, the High Court taking into consideration that the statements recorded under Section 132(4) of the Act have a strong evidentiary value, observed *ad infra* :-

"12. The Tribunal's finding that the statement recorded under section 132(4) has no evidentiary value, hence cannot be sustained. The reliance placed by the Tribunal on the retraction statement is totally untenable in so far as any statement recorded under section 132(4), statutorily deemed to have evidentiary value; cannot be retracted at the mere will of the party. A statement made under oath deemed and permitted to be used in evidence, by express statutory provision, has to be taken as true unless there is contra evidence to dispel such assumption. A self-serving retraction, without anything more cannot dispel the statutory presumption. The admission made by the assessee before the Assessing Officer corroborated by the title deeds seized in search absolved the Department from discharging any burden regarding the additions made on the

strength of such admission. Admission as has been often held is the best evidence on a point in issue and though not conclusive is decisive of the matter unless successfully withdrawn or proved erroneous. Any retraction of a clear admission made has to be on the ground of it being either erroneous or factually incorrect or one made under threat or coercion. In the instant case, the first appellate authority has clearly found that the plea of the assessee that the admissions were made under threat and coercion is clearly unfounded. The Tribunal also has categorically refused to consider the issue of threat and coercion. In such circumstances, the Tribunal ought to have seen if the assessee has established that the admissions made were erroneous and factually incorrect. It was well within the capacity of the assessee to have shown before the fact finding authorities either at the original or at the appellate stage that the assessee had only paid amounts as disclosed in the documents for the various property transactions entered into by him. The assessee having not proved any threat or coercion and further having failed to prove that the amounts shown in the documents were the only payments made, the Tribunal was not right in casting a burden on the Department. The assessee, in the instant case, has failed to successfully disprove the admissions made by him and the admissions made in a statement under section 132(4), by the clear provisions in the statute has to be considered to have evidentiary value. In the circumstances, we proceed to answer the first question of law in favour of the Revenue and against the assessee.

13. The sustainability of the additions made by the Assessing Officer with respect to undisclosed income vis-à-vis the property transactions as also that made on account of personal expenditure has to be decided with reference to the answer in the first question, since both additions are on account of admissions made in section 132(4) statement corroborated by documents recovered in search and the attendant circumstances. The Tribunal placed much reliance on the retraction and even went to the extent of stating that it was the Department's burden to prove the retraction to be untrue by bringing in any corroborative evidence. The Hon'ble Supreme Court has considered the question of burden of proof in the decision reported in CIT v. Best and Co. P. Ltd. [1966] 60 ITR 11 (SC); AIR 1966 SC 1325.

14. In the instant case, on the clear admission of the assessee corroborated by the documents the burden on the Department ceases to exist. On the retraction being filed by the assessee, there is a burden cast on the assessee to prove the retraction or rather disprove the admissions made. It is not a shifting of the onus but a new burden cast on the assessee to disprove the earlier admissions having evidentiary value. As noticed earlier, retraction made by the assessee can only be considered as a self-serving after thought and no reliance can be placed on the same to disbelieve the clear admissions made in the statement recorded under section 132(4). Deletion of the additions vis-à-vis the property transactions on the reasoning that the Department cannot do so on the basis of the admission made under section 132(4) and on the premise that the Department ought to

have proved retraction to be untrue cannot be countenanced in view of the specific words employed in section 132(4)."

15.7 The High Court of Madras in the case of K. Sakthivel v. Assistant Commissioner of Income Tax (2012) 252 CTR (Mad) 531, had also an occasion to consider an identical situation of statements having been recorded under Section 132(4) of the Act, where retraction was made during the course of the assessment proceedings and much later than the statements had been recorded, the Court held thus :-

"18. As regards the contention of the assessee that the statement recorded was in violation of provisions of CPC and CrPC, we do not think that the said contention would be well received by this Court. The conduct of the assessee has to be seen herein. The assessee made a statement in the enquiry conducted by the department as regards the parting of a sum over and above what was recorded in the sale deed. A reading of the questions and answers which are extracted in the preceding para shows that the assessee was well aware of the contents of the statement made by him. The statement was recorded in the year 1999 and the assessee thereafter too participated in the enquiry until 2003 and he had no doubt about the truthfulness of the statement made. However, for some reason best known to him, the assessee in the letter on 26.6.2003, took a plea that the statement were not recorded in the presence of Dy. Director of IT (Inv.) and statements were not given voluntarily. It may be seen that the assessee is stated to have written letters on 12th June, 2003 and 26th June, 2003 and it is relevant to point out that the so-called retraction came to be made only in the letter dated 26th June, 2003, which clearly shows that it is merely an afterthought to say that he made the statement under threat or coercion. Consequently, this ground fails."

15.8 The Apex Court in the case of Surjeet Singh Chhabra v. Union of India & Others AIR 1977 SC 2560, which was a case of Customs Act, where even the retraction was made within six days from the confession, held as under :-

"3. It is true that the petitioner had confessed that he purchased the gold and had brought it. He admitted that he purchased the gold and converted it as a Kara. In this situation, bringing the gold without permission of the authority is in contravention of the Customs Duty Act and also FERA. When the petitioner seeks for cross-examination of the witnesses who have said that the recovery was made from the petitioner, necessarily an opportunity requires to be given for the cross-examination of the witnesses as regards the place at which recovery was made. Since the dispute concerns the confiscation of the jewellery, whether at conveyor belt or at the green channel, perhaps the witnesses were required to be called. But in view of confession made by him, it binds him and, therefore, in the facts and circumstances of this case the failure to give him the opportunity to cross-examine the witnesses is not violative of principle of natural justice. It is contended that the petitioner had retracted within six days from the confession. Therefore, he is entitled to cross-examine the panch witnesses before the

authority takes a decision on proof of the offence. We find no force in this contention. The Customs officials are not police officers. The confession, though retracted, is an admission and binds the petitioner. So there is no need to call panch witnesses for examination and cross-examination by the petitioner."

13. Therefore taking into consideration the above observation of this court, though in Income Tax proceedings, it was not at all justified on the part of the Dy. Com. (Appeals) so also the Tax Board to have accepted an affidavit after a sufficient long gap inasmuch as the survey was conducted on 28.10.2002 and the order of the Dy. Com. (Appeals) is dt 8.6.2005 which is almost about 2? years later. The so-called retraction/resiling of statements before Dy. Com. (Appeals) after a long gap loses significance and cannot be accepted.

14. On perusal of the facts noticed earlier, in my view the assessee failed to discharge the onus immediately as soon as the survey took place and the onus as noticed earlier was to bring to the notice of the higher officials of the Revenue, if something wrong happened in the survey proceedings and such having not been brought, the onus has not been discharged.

15. It is settled law that once the officer conducting survey on the basis of the very own statements of the respondent assessee having accepted the guilt/charge, having accepted about the excess stock and has no explanation to offer, it may not be proper for the court to enter upon merits of the controversy at all and unless it is demonstrated that the penalty proceedings initiated and imposed, is mala fide, perverse, based on no evidence, misreading of evidence or which a reasonable man could not form or that the person concerned was not given due opportunity, resulting in prejudice, said proceedings need no interference.

16. The Division Bench of this court in the case of M/s Grass Field Farms & Resorts Pvt Ltd v. Dy.CIT Circle-2, Jaipur [DB ITA 60/2016 decided on 1.6.2016], had an occasion to consider the penalty imposed on the assessee consequent to a survey u/s 133A of the IT Act where incriminating documents were found and statements of the Directors were recorded and so also of various employees or/and other connected persons, this court taking into consideration the voluntary statements recorded of the Directors as well as employees/associates held that even surrendering income "to buy peace" or "to avoid litigation" after detection by the Revenue, was not proper and it was held that the penalty imposed u/s 271(1)(c) was just and proper.

17. In view of the above facts and circumstances, and taking into consideration the judgments of this court, the finding by the Tax Board so also the Dy. Com. (A), is not proper and is contrary to the material on record and accordingly the orders are reversed and that of the AO is upheld imposing penalty of Rs.30,360/-. Petition succeeds.

18. Copy of this order be sent to Rajasthan Tax Board separately.