
(2007) 07 P&H CK 0077
In the Punjab And Haryana At Chandigarh

Commissioner of Income Tax

APPELLANT

Vs

K.C. Malhotra

RESPONDENT

Date of Decision : 02-07-2007

Acts Referred:

Income Tax Act, 1961 — Section 133A, 260A, 68

Citation : (2007) 211 CTR 559 : (2008) 304 ITR 149

Hon'ble Judges : S.D. Anand, J;M.M. Kumar, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

M.M. Kumar, J.—The Revenue has approached this Court by filing the instant appeal u/s 260A of the IT Act, 1961 (for brevity, "the Act"), challenging the order dt. 31st Oct., 2006 (A-3) passed by the Tribunal, Chandigarh Bench-A (for brevity, "the Tribunal"), in ITA No. 27/Chd/2006. The Revenue has claimed that the Mowing substantial questions of law would arise for determination of this Court:

(i) Whether on facts and in the circumstances of the case, the Tribunal is right in law in ignoring the admitted facts that sale proceeds of the sold stocks were not available with the employee sons for introduction in the books ?

(ii) Whether on facts and in the circumstances of the case, the statement given by two employee sons of the assessee on cross-examination on 28th March, 2005 was not retraction of the admission made during their examination on 10th March, 2005 ?

2. The Tribunal has allowed the appeal of the assessee by deleting an amount of Rs. 13,56,000, which was added by the AO by invoking the provisions of Section 68 of the Act. However, the Tribunal has upheld the other additions of Rs. 2,61,532 calculated on the basis of GP declared by the assessee in his books of account and also the addition of Rs. 60,000 which was claimed to be income earned from the agricultural operation.

3. Few skeleton facts may first be noticed. The assessee has two sons, namely, Sarvshri Vinay Malhotra and Ashok Malhotra, who were his employees and were also managing the affairs of the business. A survey was conducted at his business premises u/s 133A of the Act on 21st Feb., 2002. The assessee himself was not present during the course of survey proceedings but his son Shri Vinay Malhotra was present. During the course of survey it was found that the stock available physically at the shop did not tally with the closing stock calculated as per the books of account. The value of the stock was found short by Rs. 41,34,153. The stock actually found and valued was worth Rs. 18,25,118 and as per account prepared, it was worth Rs. 59,59,271. The glaring discrepancy was confronted to the employee-son of the assessee--Shri Vinay Malhotra, who also admittedly looked after the affairs of the business along with his other brother. His statement was recorded on which reliance has been placed by the AO. During the course of survey proceedings on 21st Feb., 2002, no books of account were produced, which were later produced by the assessee on 26th Feb., 2002 in the office of the ITO, Ward 4(2), Chandigarh. Again the books of account were presented by Shri Vinay Malhotra on 26th Feb., 2002, and he was asked to explain the glaring difference in stock which was calculated at Rs. 41,34,153 as was found at the time of survey. The son employee of the assessee has stated that there appears to be pilferage of the stock. After going into details, the AO recorded the following findings in para 2.8, which read as under:

2.8 Apparently, the following facts emerge from the above:

- (i) The assessee had been making sales outside the books of account.
- (ii) All purchases were recorded in the books of account.
- (iii) This resulted in shortage of stock found physically at the shop.
- (iv) The stock register is not maintained.
- (v) Recovery shown to be made in cash amounting to Rs. 7,43,500 from Sh. Vinay Malhotra and Rs. 6,12,500 from Sh. Ashok Malhotra on 27th Feb., 2002 and 26th Feb., 2002, respectively.
- (vi) By declaring the sum of Rs. 41 lakhs representing shortage in stock in the credit side of the trading account along with the normal sale declared, the assessee has admitted that sales were actually made outside the books of account.
- (vii) The amount shown to have recovered is by way of cash deposits.
- (viii) The said cash deposits are stated to have been made by the sons of the assessee.
- (ix) Sum of Rs. 10 lakhs deposited in cash in bank on 27th March, 2002 i.e., after almost one month after from the date when recovery is stated to have been made.

On the basis of the aforementioned findings, the AO hurriedly concluded that the money deposited by the sons of the assessee, as recorded at Sl. No. (v) of para 2.8 above, appears to belong to the assessee himself being his undisclosed income. In that regard, the AO has discussed various statements of both the sons of the assessee as well as the assessee himself. In that regard, the findings have been recorded in paras 3.7 and 3.8, which read as under:

3.7. On a careful reading of the statements given by Sh. K.C. Malhotra and his sons-Sh. Vinay Malhotra and Sh. Ashok Malhotra (all enclosed as annexures to this assessment order and forming part of the assessment order), the following facts emerge:

Both the sons of the assessee are well versed with the business affairs of the assessee as they are the only ones who are looking after the same;

Facts told at the time of recording the statements on 10th March, 2005, are in complete contradiction with the replies given at the time of cross-examination;

Similar questions asked by the assessee and similar replies to these at the time of cross-examination indicate that it was well planned and the answers given by the same were properly rehearsed prior to the recording of the statement whereas the original statement was the true representation of facts. In fact, the whole process of cross-examination was intentionally/specifically designed for the purpose;

Both Sh. Vinay Malhotra and Sh. Ashok Malhotra can handle all the business affairs involving purchase, sales and marketing on their own but allege that they did not understand what was recorded by the Department on 10th March, 2005. It may be noted that this explanation has been given only with regard to one particular statement where they had confessed the true facts and all other documents, statements are acceptable to them even recorded in the same language. It is clear that this is an afterthought and only an excuse.

3.8 The money shown to have been recovered by the assessee from his sons is only an entry made in the books of account without actual money having exchanged hands as the sons had actually no money with them....

As a consequence, the AO made an addition of Rs. 13,56,000 besides the other two additions of Rs. 2,61,532 and Rs. 60,000.

4. On appeal filed by the assessee, the CIT(A), Chandigarh, upheld the order passed by the AO and the appeal was dismissed vide order dt. 13th Dec, 2005. On further appeal before the Tribunal to delete the addition of Rs. 13,56,000 made by the AO by invoking the provisions of Section 68 of the Act, the Tribunal has adopted the following reasoning:

...Firstly, there is no dispute that the stock found short have been sold outside the books of account. This explanation of the assessee has been accepted even by the AO for the reason that the sales credited in the trading account amounting

to Rs. 41 lakhs have not been doubted by the AO. In fact it is only the sum of Rs. 13,56,000, the amount purported to have been recovered in cash out of such sale proceeds which has been doubted by the AO. In our view, once the sale of goods is accepted, there is no justification to reject the corresponding sales realization. Secondly, it is noteworthy that the stand of the assessee has been consistent on this aspect. At the time of survey, when the statement of Sh. Vinay Malhotra, son of the assessee, was recorded the fact of shortage of stock was confronted to him.... In the return of income filed and during the assessment proceedings, the assessee explained that the sale of the pilfered stock was carried out by his two sons out of which he had recovered a sum of Rs. 13,56,000 during the year and balance was outstanding. We find that the said explanation of the assessee stands corroborated by the statement of his two sons also....

5. After quoting the statements of Ashok Malhotra, employee-son of the assessee, made during cross-examination on 28th March, 2005, before the AO, the Tribunal has concluded that the identity of the creditors, nature and source of the credit stood explained. The Tribunal also discussed the reasoning weighing with the AO for invoking Section 68 of the Act. The Tribunal after perusing the statements of the sons of the assessee refused to endorse the view of the AO who has drawn an inference from those statements that two sons of the assessee did not pay the impugned amount to him. The Tribunal has held that the inference drawn by the AO is totally misdirected and was, in fact, contrary to what emerges from the reading of the statements. The Tribunal recorded the finding that the AO did not in terms put any question to either of the sons of the assessee as to whether or not they have paid over to their father any amount out of the sale of pilfered goods. The Tribunal also noticed that the entire case of the AO was in the realm of conjectures and was based on doubts without there being any evidence that the huge amount of Rs. 13,56,000 was the undisclosed income of the assessee. The Tribunal after copiously referring to the statements of the sons of the assessee proceeded to record the finding towards the end of para 8, which reads as under:

...The assessee, in our view, has been successful in proving that the credits in question represent amount received by him from his two employee sons out of the proceeds of the goods pilfered and sold outside the books of account by them. Further, the bona fides of the claim of the assessee are supported by the stock found short at the time of survey and the admission at the time of survey itself that goods have been sold outside the books of account. Therefore, on this account we set aside the order of the CIT(A) and direct the AO to delete the addition of Rs. 13,56,000.

6. Mr. S.K. Garg, learned Counsel for the Revenue, has argued that on 10th March, 2005, Sarvshri Vinay Malhotra and Ashok Malhotra have made statements before the AO clearly spelling out that they did not hand over any money to their father i.e., the assessee. He has further submitted that when the aforementioned

statements were confronted to the assessee, he had stated that he did not know the details as the main affairs of the business were being managed by his sons. On the basis of the aforementioned statements and some other statements made before the AO, learned Counsel has tried to persuade us to reverse the findings recorded by the Tribunal.

7. After hearing learned Counsel at some length, we are of the considered view that the statements dt. 10th March, 2005, on which reliance has been placed by the learned Counsel for the Revenue, has been noticed, discussed and explained by the Tribunal in its order as is evident from the perusal of para 7 thereof and the same reads as under:

7. Similarly, the AO also noticed that in the course of the statement recorded on 10th March, 2005, the sons of the assessee denied having given any money to the assessee. In order to appreciate this stand of the AO we have perused the statements of the sons recorded on 10th March, 2005, which are placed in the paper book filed before us. The two statements are on similar lines. We may refer to the statement of Sh. Ashok Malhotra in this regard placed at p. 16 of the paper book. We find that the AO has drawn inference from some of the answers to deduce that the two sons would not have paid the impugned amount to the assessee. In our view the inference of the AO is misdirected and is, in fact, contrary to what emerges from the reading of the statement. Quite surprisingly, from a reading of the statement it emerges that the AO did not categorically query the sons as to whether or not he has given any amount over to his father, the assessee, out of the sale of pilfered goods, although the entire case of the AO was in the realm of doubt whether the impugned credits represented moneys given by the sons to the assessee out of sale of pilfered goods. Moreover, the factum of pilferage of goods and its sale outside the books of account have been specifically admitted by the son as would be evident from the perusal of the following portion of the statement.

Q. Have you been pilfering stock of your father, Prop. Malhotra Motors.

Ans. We generally (show) less sales to our father and keep some sale consideration made at shop with us. In this way we generally keep Rs. 500, Rs. 1,000 per day. As already stated we were not doing pilferage with the stock for sale of different parties but in fact we used to keep a part of sale consideration of goods with us i.e. cash was kept. We have spent the money in our day-today needs and saved nothing.

Q. In the statement of your father recorded by ITO, Ward 4(2) he has stated that you were stealing the goods such as tyres, etc. and selling them to different parties by taking the goods out of shop.

Ans. We have not disclosed the fact of pilferage made by us, the two brothers. I again state that the goods were not taken away from the shop but a part of sales made was pocketed by us and that amount has been spent and no saving has been made. I have no immovable property, no FDR, no advance has been given

to anyone. I have only one scooter.

Therefore, we fail to appreciate why did the AO not direct a question to the son about the impugned credit. On the contrary, a vague question was asked, as reproduced below, and the answer to which has been wrongly interpreted by the AO to justify his misplaced premise.

Q. Have you given any cash to your father as a gift, loan or help during last five years or received any amount from him for personal use or otherwise.

Ans. No. I have neither given or taken any money.

8. It is, thus, evident that the Tribunal has gone into all possible details and, thereafter, recorded the findings in favour of the assessee. It is well settled that this Court, while exercising appellate jurisdiction u/s 260A of the Act, cannot arrogate to itself the function of recording a finding by reappreciating evidence taking a view different than the one recorded by the Tribunal. It is well settled that merely because another view is possible, would not constitute a basis for us to reverse the findings after reappreciating evidence. In that regard, we place reliance on a judgment of Hon"ble the Supreme Court in the case of Santosh Hazari Vs. Purushottam Tiwai (Dead) by Lrs., . Therefore, we are of the view that no opportunity is provided to set aside the findings recorded by the Tribunal that the amount of Rs. 13,56,000 has been deposited by the sons of the assessee, which was realized after selling the pilferaged stocks outside the books of account. There is no merit in the appeal as no substantive question of law for its admission would arise. Dismissed.