
(2014) 11 AP CK 0108

In the Andhra Pradesh High Court

Case No : I.T.T.A. Nos. 268, 273 and 308 of 2003 and 287, 291 and 294 of 2006

G. China Yellappa

APPELLANT

Vs

Income Tax Officer

RESPONDENT

Date of Decision : 06-11-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164
Income Tax Act, 1961 — Section 132, 148, 260-A

Citation : (2014) 11 AP CK 0108

Hon'ble Judges : L.N. Reddy, J;Challa Kodanda Ram, J

Bench : Division Bench

Advocate : A.V. Shiva Karthikeya, Advocates for the Appellant; J.V. Prasad, Advocates for the Respondent

Judgement

L.N. Reddy, J.—These six appeals are interrelated and arise out of identical orders of assessment passed in respect of three partners of a firm.

2. The partnership firm, M/s. Gajjam Vithaleswar & Company, comprises of three partners by names, G. Ramulu, G. Chinna Yellappa and G. Anjaiah. The firm is an assessee of Income Tax, and it purchased a plot of land in Nizamabad, in December, 1991, for a consideration of Rs. 3,57,600/-. The Assessing Officer caused survey in the business premises of the firm, on 14.09.1995. He opined that the consideration for the plot of land purchased in December, 1991 is Rs. 6,00,000/- and there was an understatement of the consideration. Statements are said to have been recorded from all the three partners, in this behalf. The differential amount was treated as undisclosed income of the firm and 1/3rd each, of the same was added to the income of the partners. Accordingly, notices were issued under Section 148 of the Income Tax Act, 1961 (for short "the Act") and not satisfied with the reply submitted by the partners, the Assessing Officer passed identical orders of assessment dated 01.12.1998 against them. The tax was determined and interest was levied thereon.

3. The three partners filed appeals before the Commissioner of Appeals. The

appeals were partly allowed through a common order dated 09.06.1999. Thereupon, the appellants filed I.T.A. Nos. 597 to 599/Hyd./99 before the Hyderabad Bench "B" of the Income Tax Appellate Tribunal (for short, "the Tribunal"). The appeals were partly allowed by the Tribunal through order dated 09.04.2003. Not content with that relief, they filed I.T.T.A. Nos. 268, 273 and 308 of 2003 under Section 260-A of the Act.

4. The appellants have also filed Miscellaneous Petitions before the Tribunal for rectification of the order in the appeals. The Miscellaneous Petitions were rejected through order dated 14.11.2005. I.T.T.A. Nos. 287, 291 and 294 of 2006 are filed against the said order.

5. Sri A.V. Shiva Karthikeya, learned counsel for the appellants submits that the sole basis for the Assessing Officer to pass orders dated 01.12.1998 was the statements recorded from the respective appellants in the course of survey and the appellants have retracted from the same stating that they were put under pressure and duress, and have also filed affidavits presenting their version. He contends that the very fact that the cheques for the amount of the probable tax and interest were extracted on the day of inspection, would reveal the nature of coercion and pressure exerted upon the appellants. He submits that a statement recorded during the course of survey and search can constitute the sole basis for an Assessing Officer to pass orders, only when it is not retracted from, and once it is retracted, the order of assessment must be based upon some other material. He has placed reliance upon certain precedents.

6. Sri J.V. Prasad, learned counsel for the respondent, on the other hand, submits that the statements were made by the appellants on their own accord and obviously, for that reason, the Assessing Officer did not proceed further in the survey, and gather other material. He contends that in case the statements were recorded under threat, coercion or duress, the normal course of conduct would have been to retract from them at the earliest, and that in the instant case, the so called retraction is after more than one year from the date of recording of the statements. He submits that the Assessing Officer, the Commissioner and the Tribunal have decided the matter correctly and no interference is warranted.

7. The proceedings initiated against the appellants are the result of a survey. The only matter that was dealt with during the survey, was the transaction of purchase of an item of immovable property. The sale deed reflected the consideration of the property as Rs. 3,57,600/-. However, according to the Assessing Officer, the partners of the firm have voluntarily stated that the consideration was understated by Rs. 2,00,000/- and that the said amount is their undisclosed income. To that effect, not only statements were recorded from the partners but also the amount payable as tax on the respective shares of the alleged undisclosed income, was collected through cheques.

8. The Assessing Officer initiated proceedings under Section 148 of the Act by

issuing notice. At that stage, the appellants came forward with the plea that the statements were forcibly recorded, and even cheques were taken from them, under duress. That plea was not accepted and the Assessing Officer felt that there are no bona fides in the statement of retraction, and orders of assessment were passed. Those orders were upheld by the Commissioner as well as the Tribunal.

9. The Act empowers the Assessing Officers or other authorities to record the statements of the assessee, whenever a survey or search is conducted under the relevant provisions of law. The statements so recorded are referable to Section 132 of the Act. Sub-section 4 thereof enables the authorities not only to rely upon the statement in the concerned proceedings but also in other proceedings that are pending, by the time the statement was recorded.

10. If the statement is not retracted, the same can constitute the sole basis for the authorities to pass an order of assessment. However, if it is retracted by the person from whom it was recorded, totally different considerations altogether, ensue. The situation resembles the one, which arises on retraction from the statement recorded under Section 164 Cr.P.C. The evidentiary value of a retracted statement becomes diluted and it loses the strength, to stand on its own. Once the statement is retracted, the Assessing Authority has to garner some support, to the statement for passing an order of assessment.

11. In I.T.A. No. 112 of 2003, this Court dealt with the very aspect and held that a retracted statement cannot constitute the sole basis for fastening liability upon the assessee.

12. In the instant case, the appellants specifically pleaded that the statements were recorded from them by applying pressure, till midnight, and that they have been denied access outside the society. The Assessing Officer made an effort to depict that the withdrawal or retraction on the part of the appellants is not genuine. We do not hesitate to observe that an Assessing Officer does not have any power, right or jurisdiction to tell, much less to decide, upon the nature of withdrawal or retraction. His duty ends where the statement is recorded. If the statements are retracted, the fate thereof must be decided by law meaning thereby, a superior forum and not by the very authority, who is alleged to have exerted force.

13. It is not as if the retraction from a statement by an assessee would put an end to the procedure that ensued on account of survey or search. The Assessing Officer can very well support his findings on the basis of other material. If he did not have any other material, in a way, it reflects upon the very perfunctory nature of the survey. We find that the appellate authority and the Tribunal did not apply the correct parameters, while adjudicating the appeals filed before them. On the undisputed facts of the case, there was absolutely no basis for the Assessing Officer to fasten the liability upon the appellants. Our conclusion finds support from the Circular dated 10.03.2003 issued by the Central Board of Direct

Taxes, which took exception to the initiation of the proceedings on the basis of retracted statements.

14. Therefore, I.T.T.A. Nos. 268, 273 and 308 of 2003 are allowed and the orders of assessment dated 01.12.1998 are set aside. Since the orders of assessment are set aside, I.T.T.A. Nos. 287, 291 and 294 of 2006 have virtually become infructuous and they are accordingly closed. There shall be no order as to costs.

15. Miscellaneous Petitions, if any pending in these appeals shall also stand disposed of.