
(2009) 08 CHH CK 0022
In the Chhattisgarh High Court

Income Tax Officer

APPELLANT

Vs

Vijay Kumar Kesar

RESPONDENT

Date of Decision : 21-08-2009

Acts Referred:

Income Tax Act, 1961 — Section 143(1), 260A, 271A

Citation : (2010) 231 CTR 165 : (2010) 327 ITR 497

Hon'ble Judges : R.N. Chandrakar, J;Dhirendra Mishra, J

Bench : Full Bench

Final Decision : Dismissed

Judgement

Dhirendra Mishra, J.—The appellant-Revenue has preferred this appeal u/s 260A of the IT Act, 1961 (for short "Act") against the order dt. 16th Dec., 2005 passed by the Income Tax Appellate Tribunal, Nagpur (for short "the Tribunal") whereby the Tribunal has dismissed the appeal of the Revenue and upheld the order of the CIT(A).

2. This appeal has been admitted on the following substantial questions of law:

(a) Whether on the facts and in the circumstances of the case, the Hon'ble Tribunal was justified in endorsing order of the CIT(A) for deletion of Rs. 6,33,753, made on account of excess cash found at the time of survey, which was surrendered by the respondent on oath?

(b) Whether on facts and in the circumstances of the case, the Tribunal was justified in upholding the order of the CIT(A) deleting addition of Rs. 24,49,707 made by the AC) on account of excess stock found at the time of survey and surrendered by the respondent on oath?

(c) Whether on the facts and in the circumstances of the case, the conclusion reached by the Tribunal are vitiated by irrelevant considerations or made from prejudice?

3. Briefly stated, facts of the case are that the respondent-assessee filed return

for the asst. yr. 2000-01 declaring total income of Rs. 1,52,250. Return was processed u/s 143(1) of the Act. The assessee derives income from the wholesale business of manufacturing and sales of utensils in the name of "M/s Kaser Metals, Durg." The assessee had also shown income of Rs. 78,700 from agriculture. During the relevant accounting period, survey u/s 133A of the Act was conducted in the premises of the assessee as well as in the business premises of Kaser Bartanwala", a retail shop of utensils under the ownership of the assessee's mother Smt. Savitri Bai Kaser. During survey, books of account were found to be maintained only upto 31st March, 1997. Physical verification of the stock and cash was made and Inventories were prepared with the help and assistance of the assessee. On verification, cash amount of Rs. 4,18,028 was found in the assessee's business premises. An amount of Rs. 3,00,000 was also found in the business belonging to Smt. Savitri Devi Kaser. Thus, total cash of Rs. 7,18,028 was found during survey. In the statement the assessee admitted that he has not maintained account after 31st March, 1997 and he requested for treating cash amount of Rs. 7,18,028 as his undisclosed income for the relevant accounting year and he may be given an opportunity to pay Income Tax. Similarly, stock worth Rs. 37,06,697 was found in the premises during survey and the assessee offered the value of excess stock of Rs. 24,49,707 for taxation after subtracting the value of closing stock as on 31st March, 1997. However, the assessee did not offer any amount in the return either on account of excess cash or on account of value of excess stock found during survey.

4. During assessment proceedings, the assessee referred to his letter dt. 31st Jan., 2000 in which he has stated that he could not file return for the asst. yrs. 1998-99 and 1999-2000 before survey proceedings as he was disturbed on account of suicidal death of his daughter. Stock found during survey has been taken by reducing the stock on 31st March, 1997 without considering the purchases and sales made between 1st April, 1997 and 31st Oct., 1999. The correct position could only be found by taking into consideration the transactions in goods upto the survey date. Similarly, full amount of cash was taken as undisclosed income ignoring that the assessee was doing regular business and was also doing cash transactions and maintaining cash balance regularly. The assessee made statement during survey proceedings as he was mentally disturbed. The declarations made by the assessee during survey proceedings were not true and correct and the same may be treated as cancelled. Cash found in the coffer (Tijori) behind "Kaser Bartanwala" belongs to HUF namely, Vijay Kumar Kaser & Sons of which he is Karta. The HUF is an old assessee.

5. The AO did not accept the contention of the assessee and also did not take cognizance of the assessee's letter dt. 31st Jan., 2000 retracting his admissions on the ground that the same was an attempt to retract his admissions made before and during survey and the facts unearth during survey. Retraction was made after more than three months from the date of survey and the assessee created foundation for backing out his earlier admissions in this period. Figures of purchase and sales during 1st April, 1997 and 21st Oct., 1999 were not taken

by the survey team as the assessee himself voluntarily came forth and declared his undisclosed income and offered to permit him to pay tax thereon. He also paid an amount of Rs. 3,00,000 towards advance tax on 25th Oct., 1999 and 28th Oct., 1999. Voluntarily disclosure of undisclosed income and payment towards advance tax of Rs. 3,00,000 immediately thereafter establishes that earlier admissions were voluntarily and unintentional. Explanation regarding amount of Rs. 3,00,000 found in coffer (Tijori) was also disbelieved on the ground that the same was not disclosed in his initial statement or final statement of survey. Gifts of Rs. 9,75,000 received by the assessee for the accounting year 1998-99 was also disbelieved on the ground that the donors are close relatives of the assessee, the donors could not explain the sources and availability of above amount on the date of gift and the gift was given in cash though the donors were holding bank accounts and thus, it was held that the claim of gift is impertinent. With these observations it was held that entire exercise was an afterthought and it was aimed at mitigating the effect of surrender made during survey. Relying upon the judgment of the Hon'ble Supreme Court rendered in the Customs Act matter it was held that admissions made by the assessee before the 1TO would bind the assessee.

With the aforesaid discussions, addition of Rs. 6,33,753 towards cash found during survey; Rs. 24,49,707 towards value of excess stock; Rs. 38,390 towards taxable new goods account; and Rs. 45,510 towards tax paid new goods account were made and total income of the assessee was assessed at Rs. 33,19,910. Penalty proceeding u/s 271A of the Act was directed to be initiated separately. It was further directed that interest under Sections 234A, 234B and 234C of the Act was chargeable.

6. Appeal preferred by the assessee was allowed by the CIT(A) on the ground that statement of the assessee was not corroborated by the facts and circumstances and therefore, it has no evidentiary value and the assessee can very well retract it. Addition of Rs. 30,83,460 towards undisclosed income and stock made by the AO was deleted. Similarly, addition of Rs. 38,390 was also deleted. However, charging of interest under Sections 234A, 234B and 234C of the Act was upheld and appeal against initiation of penalty proceeding under Sections 271A and 271(l)(c) of the Act was rejected as not appellable.

7. The Tribunal dismissed the appeal of the Revenue and confirmed the order of the CIT(A) by the impugned order.

8. Mr. Rao, learned Counsel for the appellant-Revenue relying on the judgment in the matter of DR. S.C. GUPTA Vs. COMMISSIONER OF INCOME TAX, submitted that additions made on the basis of statement recorded u/s 133A(3)(iii) of the Act is sustainable. It was argued that the assessee did not maintain books of account. All the books of account and other material found during survey were inventorized at the time of survey and no vouchers/back-up material was found. The books of account were prepared during the course of regular business and even the alleged primary records were neither found available at the time of

extensive survey nor the same were produced during post-survey proceedings and the entire material was subsequently created. Vouchers produced by the assessee were for the alleged transactions made 2-3 days prior to survey and the same were not available at the premises during survey. The CIT(A) allowed the reliefs assuming that the assessee being in regular business must be having primary records, however, it was the responsibility of the assessee to prove that he had primary records. Out of total purchases of Rs. 27,29,655 for the accounting year, the purchases to the tune of Rs. 14,50,664 was made in the month of survey and preceding two months and all the purchases were made on credit which also creates suspicion about the genuineness of the primary records produced by the assessee. The stock covered under these purchases was not found on physical verification. The claim of stock transferred to Karigars is not supported by any documentary evidence, such as issue register, covering invoices, vouchers for forwarding expenses etc. In order to explain the sources of investment for the purchases, the assessee had claimed that he has received gifts from the family members, use of sale proceeds of assets declared under VDIS and sundry creditors. However, the donors were close relatives and the gifts were made in cash that too without any occasion and there is no independent evidence to support the self-serving statement of the family members. All of them admitted the assessee as the controlling person for financial affairs. In the statement recorded during survey, the assessee confirmed that VDIS, sale proceeds were used for construction of house property. Initially, the assessee confirmed the cash found at the premises of his mother as his personal cash, however, subsequently, he claimed that the same belongs to his HUF. Substantial sums aggregating to Rs. 11,77,766 was shown as sundry creditors for goods as on 21st Oct., 1999, whereas sundry creditors in the preceding two years was of Rs. 52,782 and Rs. 1,06,066. Sales of Rs. 7,15,718 were shown for a major period of seven months and balance sales of Rs. 18,63,832 for five months cut of total sales of Rs. 25,79,550, which was highly improbable. The above facts clearly establish that the assessee has retracted his admissions after 3 1/2 months after fabricating the alleged primary records. Since the assessee failed to satisfactorily explain the excess cash and stock found during survey, as required under Sections 69A and 69 of the Act, it has to be deemed as assessee's income applying the principles of law laid down in the matter of Commissioner of Income Tax, West Bengal Vs. Durga Prasad More, and Sumati Dayal Vs. Commissioner of Income Tax Bangalore, . The copies of the sales-tax returns/stock forms were not filed before the AO.

9. On the other hand, Mr. Moolchand Jain, learned Counsel for the respondent-assessee argued that entire cash amount of Rs. 7,18,028 was got surrendered as undisclosed income for the asst. yr. 2000-01, whereas out of total stock, stock of Rs. 24,49,707 was got surrendered as income of the asst. yr. 2000-01 from undisclosed sources. The assessee made reference of "Bahikhata" in his statement recorded during survey. Whatever was found during survey and entered in the account books was treated as income from undisclosed sources.

The assessee had submitted that he had no other source of income except the business income and in the survey proceeding also no evidence was found to show that the assessee had other sources of income. The stocks discovered during survey were also utensils, which is the business of the assessee. The above fact was explained by the assessee in writing vide his explanation dt. 20th Nov., 2002. The assessee had categorically stated that he would prepare the books of account. The fact that primary records like purchase bills, sales bills, electricity bills, bank pass book etc. were kept in almirah, was also disclosed by the assessee in his letter dt. 20th Nov., 2002. The assessee had already filed his letter of retraction on 31st Jan., 2000. Stocks found on 21st Oct., 1999 were held to be excess after deducting the balance stock as on 31st March, 1997 without considering the purchases and sales during the intervening period. Whole amount was taken as undisclosed income by taking cash balance as nil. All the primary records on the basis of which books of account were prepared were verified by the ITO from the selling parties and the same tallied with the accounts. Entries in the books of account prepared on the basis of vouchers and invoices were produced before the ITO, however, the same were rejected.

The CIT(A) and the Tribunal considering the primary records produced by the assessee have held that the assessee was having necessary material on the basis of which books of account for the period after 1st April, 1997 could be prepared. No serious defects were found in the books of account which entitles addition u/s 68 of the Act or for that matter u/s 69 or 69A of the Act. It was argued that the findings of fact recorded by the CIT(A), which has been subsequently confirmed by the Tribunal, is based on detailed verified primary records and no question of law arises for adjudication of this appeal. It was also argued that vide Instruction No. F. No. 286/2/2003-IT (Inv.) dt. 10th March, 2003 the Board has pointed the instances where the assessee has been forced to confess undisclosed income during the course of search, seizure and survey-operations. Such confessions, if not based upon credible evidence, are later retracted by the concerned assessee while filing returns of income, do not serve any useful purpose and therefore, there should be focus and concentration on collection of evidence of income which leads to information on what has not been disclosed or is not likely to be disclosed. No attempt should be made to obtain confession as to the undisclosed income. The officers have been seriously warned in this regard.

It was also argued that the statement recorded on oath during survey proceedings do not have any evidentiary value as Section 133A does not empower the ITO to record statement of the assessee on oath. Reliance is placed on *Paul Mathews and Sons Vs. Commissioner of Income Tax*, .

Further relying upon the order of the Cochin Bench in the matter of *Asstt. CIT v. Manorajyam* (1996) 54 TTJ 397, it was argued that report of survey party reads more like a pre-assessment order than a report on collection of data and information. The survey party is not entitled to do. If the survey party had merely collected the information and verified the things found in the course of

the survey and pass on the information to the AO, so as to draw such inferences as he may deem fit, in the course of assessment proceedings.

Relying upon the judgment in the matter of Pullangode Rubber Produce Co. Ltd. Vs. State of Kerala and Another, it was argued that admission is an important piece of evidence but it cannot be said that it is conclusive. It is open to the person who made the admission to show that it is incorrect. Further relying upon the judgment in the matter of Asstt. CIT v. Satyanarayan Agrarwal (2002) 205 ITR 69 : (2004) 91 TTJ 481 it was argued that addition cannot be made only on the basis of admissions recorded u/s 133A of the Act without any corroborative evidence. The only occasion when the assessee's own statement can be used as an evidence against himself is the statement recorded u/s 132(4) during the course of search and seizure operations, and by virtue of specific legal provision to this effect in Section 132(4) itself. The general rule of evidence is that no person can be forced to be a witness against himself.

Copies of trading account, P&L a/c and balance sheet and stock forms filed before the STA were not filed during the assessment proceeding as the same were never demanded by the AO and the assessee had no reason to apprehend that the books of account will be treated as cooked-up by the AO since the primary documents produced by the assessee were duly verified by the ITO from various parties regarding purchase transactions and since the AO also examined the donors to verify the fact of gifts, which was confirmed by all of them with documentary evidence. The assessee did not file various records, which he filed before the STO, which were subsequently filed at the appellate stage. Sections 68, 639 and 69A of the Act are not applicable in the facts of the present case and the same have been duly explained in the written submissions before the CIT(A).

10. We have heard learned Counsel for the parties.

11. We have already reproduced the findings recorded by the AO, in detail, as also the findings recorded by the CIT(A) whereby the order of assessment has been set aside and reliefs have been allowed to the respondent-assessee.

12. The Tribunal after considering the rival submissions of the parties and material available on record, recorded the finding in para 8 of the impugned order as under:

The retraction by the assessee appears to be bona fide insofar as in the state of mind when the survey had occurred the assessee may have overridden the fact of death of his daughter and the fact that the books of accounts were not maintained properly. The assessee in the proceedings u/s 143(3) produced the books of accounts which were on the basis of vouchers and invoices which indicated the entries in the books of accounts. It is these books of accounts which were to be verified under the proceedings u/s 143(3) which appears to have been considered defective from the very beginning by the AO. The evidentiary value, therefore, completely lost sight in the mind of the AO who wanted to justify the statement with a proposition that a continuing business

could not have increased his cash and stock holding unless income has been generated. We find force in the contention of the learned CIT(A) that the cash and stock having been found in excess could have been found in excess only on the basis of books of accounts if at all were available on the date of survey. The intervening 2-1/2 years could not be the source of making an addition which otherwise has been given credence by the AO by enhancing the GP rate by way of regular acceptance of the very books of accounts against which he refuses to adjust the excess stock and the cash. This clearly indicates the contradiction in the AO's mind and deserves no further deliberation. The assessee was having the necessary material on the basis of which books of accounts for the period after 1st April, 1997 could be prepared. The assessee filed the returns after preparing the books of accounts for the asst. yrs. 1998-99, 1999-2000 and 2000-01. The return for asst. yr. 1998-99 was filed on 26th Nov., 1999. The assessment was completed on 11th Feb., 2003. In the assessment order the AO had discussed the fact regarding survey u/s 133A on 21st Oct., 1999 and had verified the books produced which was in the computerized form. Merely negating that they were not the books of accounts prepared regularly in the course of business it could not be considered as an adverse finding against the assessee. No serious defects were found in the books of accounts by way of bogus entries which entitled the AO to frame addition u/s 68 or for that matter u/s 69 too. The assessee had submitted separate trading account for taxable goods and tax paid goods and had also given details of opening stock, closing stock, purchases, sales etc. The AO did not disturb the same thereby indirectly accepting the flow of stock from 31st March, 1997 to the date of survey. Similarly, with the cash balance the expenses and other claim on account of payments to creditors were not disturbed which were inscribed in the books of accounts on the basis of primary vouchers and, therefore, were accepted by the AO. It was simply rejection by the AO without any basis. On the issue of obtaining the gifts and other creditors it was explained in detail and were verified and, therefore, no addition was made on account of holding the donors as non-genuine. The AO had relied on the apex Court decision in the case of Surjeet Singh Chhabra Vs. Union of India and others, which was considered by the learned CIT(A) as not applicable to the facts of the case before him. There was no contravention by the assessee under the provisions of customs and FERA which was considered by the apex Court. On the decision relied upon by the AO of Kerala High Court in the case of V. Kunhambu and Sons Vs. Commissioner of Income Tax, which has also been relied upon by the learned Departmental Representative the learned CIT(A) clearly distinguished the same in pursuance to statements taken u/s 132(4) vis-a-vis u/s 133A for distinguishing and consideration of the assessee's case. The retraction and supporting arguments, therefore, could not be held as afterthought insofar as they very much had arisen from the facts not controverted by the AO. The learned CIT(A) clinched the issue before him by holding that the assessee was fortified with the sales-tax documents which directly supported the holding of stock by way of regular business transaction and not income having remained undisclosed in the

intervening period. The enclosures from the debtors and creditors also could not lead to any discrepancy which the learned Counsel before us has submitted by way of voluminous paper books as were before the CIT(A). Therefore, keeping in view all these considerations we are inclined to agree with the action of the learned CIT(A) in deleting the addition of Rs. 30,83,460 towards undeclared cash and stock made by the AO.

13. From perusal of the order of the AO it appears that the AO disregarded the books of accounts produced by the assessee during assessment proceedings u/s 143(3) of the Act for the period after 1st April, 1997 and other primary records solely on the ground that the assessee had made confessional statement during survey proceedings and voluntary payment of tax against the income from undisclosed sources surrendered during survey proceedings in the form of cash and surplus stock. The primary evidence in the form of purchase bills, vouchers, gifts etc. were rejected as the same were produced at the time of assessment after considerable period and retraction statement was made after more than 3-1/2 months and the same was an afterthought. From the record it also appears that the AO before rejecting the primary evidence had verified the vouchers, purchase bills, gifts etc. from the parties from whom it was shown to be purchased and the donors on whose names entries were made in the books of accounts were also interrogated. It also appears that all of them confirmed the entries and verified the transactions, however, the same was disbelieved by the AO on the ground that the donors were close relatives of the assessee, the donation was made in cash just to enable the assessee for the purpose of his accounting to show that he made purchases from the money received by him by way of donation.

14. The CIT(A) on appreciation of material available on record accepted the explanation offered by the assessee and also accepted the books of accounts filed along with the return by the assessee as the entries in the books of accounts were supported by the primary evidence. The CIT(A) also accepted the explanation that the statements were made by the assessee without understanding the import of the same as he was under stress due to suicidal death of his daughter. The CIT(A) also considered the other aspect that the primary evidence produced by the assessee also reflects in the sales-tax return filed by the assessee, which were produced before the appellate authority, and the same was subsequently confirmed by the Tribunal. From the Instructions No. 286/2/2003, dt. 10th March, 2003 it is evident that the Board had issued instructions to its officers not to extract confessional statement by way of admission from the assessee at the time of search, seizure or survey operations. It is also settled law that the admission of a person is an important piece of evidence, however, the same is not conclusive, as held in Pullangode Rubber Produce Co. Ltd. (supra).

15. Mr. Rao, learned Counsel for the appellant Revenue has pointed out various circumstances, which were noticed by the AO, to demonstrate that subsequent

retraction by the assessee of his earlier admissions was an afterthought. Books of accounts prepared on the basis of primary records were in fact cooked-up documents and the same were got prepared by the assessee just to escape from the effect of his confession. Relying upon the principles of law laid down in matter of Dr. S.C. Gupta (supra) it was argued that additions made on the basis of statement recorded as per provisions of Section 133A(3)(iii) of the Act is sustainable in law. Further relying upon the judgment in the matter of CIT v. Durga Prasad More (supra) it was argued that where the assessee fails to satisfactorily explain the excess cash and stock found during survey, as required under Sections 69 and 69A of the Act, it may be deemed as assessee's income.

16. On the other hand, Mr. Moolchand Jain, learned Counsel appearing for the respondent argued that findings of fact recorded by the AO has been reversed by the CIT(A) after considering the material produced by the assessee before the STO and also after considering the materials that were filed by the assessee along with his sales-tax return before the survey proceedings. The findings are based on the primary evidence produced by the assessee and duly verified by the AO during assessment proceedings u/s 143(3) and the same cannot be considered to be a perverse finding without any evidence contrary to record. Finding of the CIT(A) has been confirmed by the Tribunal and the Tribunal being the final forum of facts, the Revenue cannot be permitted to challenge the concurrent findings of fact recorded by two appellate forums below.

17. After close examination of the order passed by the CIT(A), which has been subsequently confirmed by the Tribunal, we are of the opinion that findings recorded by the both the forums below cannot be termed perverse and beyond record. The CIT(A) after considering the material produced by the assessee during the assessment proceedings and on due appreciation thereof, has accepted the explanation of the assessee for retracting his admission as bona fide and further accepted the books of accounts prepared by the assessee on the basis of duly verified primary evidence. The Tribunal has confirmed the order of the CIT(A) in para 8 of the order which we have already produced. The substantial questions of law on which the appeal has been admitted are basically the questions of fact. It is settled law that confession made by the assessee during survey proceedings is not conclusive and it is open to the assessee to establish by filing cogent evidence that the same was not true and correct.

18. On the basis of aforesaid discussions, we are of the opinion that findings of fact recorded by the CIT(A) and subsequently confirmed by the Tribunal in appeal are concurrent findings of fact and the same are not perverse. The substantial questions of law on which the appeal has been admitted are decided in favour of the assessee and against the Revenue.

19. Accordingly, the appeal is dismissed. No order as to costs.