THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 22.01.2013

+ ITA 28/2012

BHAGIRATH AGGARWAL ..... Appellant

versus

CIT ..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr O.S. Bajpai, Sr.Adv. with Mr Piyush Kaushik, Mr Shashwat Bajpai and Ms Manasvini Bajpai, Advs.

For the Respondent : Ms Suruchi Aggarwal and Mr Sanjeev Rajpal, sr. standing counsels

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE R.V.EASWAR

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

1. This is an appeal filed by the assessee being aggrieved by the order dated 6.5.2011 passed by the Income Tax Appellate Tribunal in ITA No.2118/Del/2008 pertaining to the assessment year 2006-2007. The Tribunal had reversed the decision of the Commissioner, Income Tax (Appeals) and sustained the decision of the Assessing Officer in making an addition of ₹1.75 crores on the basis of statements made by the

assessee under Section 132 (4) during the course of search conducted on 10-11.11.2005 and on 21.11.2005.

2. The learned counsel for the appellant/assessee proposed the following question as a substantial question of law: -

> "Whether the ITAT was justified in law in reversing the decision of CIT(A) and sustaining the addition of ₹1,75,00,000 made solely on the basis of statements recorded at the time of search and as modified vide subsequent letter dated 09.01.2006 in the absence of any evidence including corroborative evidence discovered during the course of search?"

However, in our view, the above question which has been proposed by the learned counsel for the appellant is not a substantial question of law. The reasons for arriving at this conclusion are mentioned hereinbelow: -

3. The Tribunal while considering the issue had noted the fact that on 10.11.2005/11.11.2005 a statement of the appellant/assessee was recorded u/s 132 (4) of the said Act. That was in answer to a question. The question and the answer given are as under:-

> "10-10/11/2005
> Q.13 Do you want to say anything else.

Ans. I, Bhagirath Aggarwal s/o Shri Shiv Narayan declare additional income of Rs.1 crore for current financial year 2005-06 on account of documents, jewellery, cash, property found during action u/s 132 for buying peace of mind and to avoid litigation. I request the Income-tax department that no penalty proceedings be initiated against me."

4. Subsequently, during search operations which continued, the appellant/assessee made a further statement u/s 132 (4) of the said Act on 21.11.2005. The question and the answer given were as under: -

"21.11.2005
Q.4 Do you want to say anything else.
Ans. Yes, My statement was recorded under sec. 132(4) of the Income-tax Act, 1961 on 11.11.2005 wherein I had voluntarily declared a sum of ₹1 crore as my additional income. This voluntarily disclosure was given for peace of mind and to avoid litigation and on account of all seized documents, jewellery, cash and property **which all family members, family firms and companies have acquired** at different times. I voluntarily, keeping in consideration of issues, increase the total amount of disclosure of additional income to ₹1.75 crores **on behalf of all family members, family firms and company**. I request you that no penal measures like penalty and prosecution be initiated against myself and my family members, family concerns, company in lieu of this voluntary disclosure of additional income. I promise that **after receiving all the seized documents from Income-tax Department** I will provide break up of this voluntary disclosure of ₹1.75 crore in various hands. I also promise to pay the due tax as soon as possible."

5. From the aforesaid two statements it is apparent that on 10-11.11.2005, the appellant/assessee had clearly surrendered a sum of ₹1 crore in respect of financial year 2005-06 for buying peace of mind and to avoid litigation. It was also requested that the Income-tax Department should not initiate any penalty proceedings against him.

6. Subsequently, after ten days, during the further search conducted by the Income-tax Department, the assessee made another statement on 21.11.2005 wherein he surrendered an additional sum of ₹75 lakhs on behalf of himself and all family members, family firms and the companies. The request for no penal measures was reiterated. In the said statement, however, he indicated that after receiving all the seized documents from the Income-tax Department he would provide the break up of the voluntary disclosure of ₹1.75 crore in various hands. He also promised to pay the due tax as soon as possible.

7. After about a month-and-a-half, the assessee sent a letter dated 09.01.2006 to the Income-tax Department which reads as under:-

> "
>
> 09.01.2006
>
> DDIT
> Unit IV(2)
> New Delhi

Sub: Proceedings in the case of Kaleva Group Date of Search: 10/11/2005.

Hon'ble Sir,

In response of the above said proceedings, it is hereby stated that the surrender originally made of ₹1 crore was thereafter increased by a sum of ₹75 lacs aggregating to ₹1.75 crores. Out of the total surrender made, a sum of ₹25 lacs would be attributed on the basis of undisclosed income found after verification of seized material in hands of different family members or business concerns of the assessee group at the time of filing of return as per the provisions of Section 153A of the Act and the balance of ₹1.50 crores would be treated as undisclosed business income in the hands of Mr. Bhagirath Aggarwal pending verification of such seized material.

Thanking you

Yours faithfully,

Encl: As above

Sd/-

Bhagirath Aggarwal"

8. It has been emphasized by the learned counsel for the appellant that the sum of ₹1.75 crores which was surrendered by the appellant/assessee was bifurcated by the said assessee into sums of ₹1.5 crores and ₹25 lakhs. The former sum was, according to the assessee, to be treated as undisclosed business income in his hands whereas the latter sum of ₹25 lakhs was to be attributed in the hands of different family members or business concerns of the assessee's group. It was also emphasized by the learned counsel for the appellant that the surrender of the said sum of

money was qualified in the sense that the assessee used the words "pending verification of such seized material".

9. The Tribunal examined the two statements made by the respondent assessee u/s 132 (4) of the said Act as also the said letter dated 09.01.2006. The main question raised by the assessee before the Tribunal was whether the statements, whereby the surrender was made, were sufficient for making the addition or not. The Tribunal, in this regard, held that as a general rule of practice it was unsafe to rely on a retracted confession and judicial as well as quasi judicial authorities ought to look for corroborative evidence. But, the Tribunal held that this was not a case of a retracted confession. The Tribunal noted as a fact that the appellant/assessee had not retracted the assessment but that he had, in his letter dated 09.01.2006, confirmed the earlier statements but, this time, with a qualification that the same would be pending verification of the seized documents. The Tribunal also noted that there was no allegation of any threat or intimation having been meted out by the revenue authorities. The Tribunal further expressed its opinion that there could not have been coercion on the part of the revenue authorities in as much as the first declaration was made on 10-11.11.2005 and the next

declaration was made on 21.11.2005 and there was a gap of 10 days in between. This also makes it clear that the declarations made by the respondent assessee were only after the appellant/assessee had thought over the same over a span of ten days. Even in the declaration made on 21.11.2005 the appellant/assessee did not disclaim the earlier declaration/admission made on 10-11.11.2005. It is on the basis of these observations that the Tribunal concluded that the statements of the appellant/assessee cannot be regarded as a retracted statements.

10. The Tribunal also observed that because the assessee had made the aforesaid surrender, the revenue had refrained from making any further enquiries into the matter. It was, therefore, not open to the appellant/assessee to retract from the earlier statement at the time of adjudication. It is for these reasons that the Tribunal held that the Commissioner of Income Tax (Appeals) had committed an error in deleting the addition made on the basis of the statement given by the assessee and, consequently, the Tribunal set aside the order of the CIT (Appeals) and restored that of the Assessing Officer.

11. Before us the learned counsel for the appellant contended that the statement made by an assess could always be subsequently retracted. He further submitted that it was open to the person who made an admission to show that the admission was incorrect. For this proposition he placed reliance on a Division Bench decision of this Court titled ***Ester Industries Ltd. Vs. Commissioner of Income-tax*: (2009) 316 ITR 0260**. However, that case was not one of search and seizure u/s 132 of the said Act. Furthermore, in the present case no material has been produced by the appellant/assessee to show that the admission made by him was incorrect in any way. On the other hand, it is the assessee who is insisting that it is for the department to corroborate the statement of admission made by him and until and unless the department corroborates the same, the statement cannot be relied upon. We are afraid that is not the correct position of law. The admission once made can certainly be retracted, if the circumstances permit, and it can also be shown to have been made under some mistake or to be otherwise incorrect. But, the onus would be on the maker of that admission. In this case it is the appellant/assessee who has admitted and surrendered a sum of ₹1.75 crores as his undisclosed income. It was incumbent upon him to show that he had

made a mistake in making that admission and that the said admission was incorrect. He had access to all the documents which has been seized in as much as the copies had been supplied to him. However, he did not produce anything to establish that the admission was incorrect in any way. That being the position, the appellant/assessee cannot resile from his earlier statement made on 10-11.11.2005 and 21.11.2005.

12. The learned counsel for the appellant/assessee also referred to the Supreme Court decision in the case of ***Pullangode Rubber Products Co. Ltd. Vs. State of Kerala*****: (1973) 91 ITR 18 SC** for the proposition that an admission is an extremely important piece of evidence but it cannot be said that it is conclusive. It was contended that it was open to the person who made the statement to show that it was incorrect. There cannot be any doubt about this position in law, but, in the present case the appellant/assessee has not produced any material to show that the admissions made by him were incorrect. The statements recorded u/s 132 (4) of the said Act are clearly relevant and admissible and they can be used as evidence. In fact, once there is a clear admission, voluntarily made, on the part of the assessee, that would constitute a good piece of evidence at the hands of the Revenue.

13. The learned counsel for the appellant also referred to the circular dated 11.03.2003 issued by the Central Board of Direct Taxes on the subject of Additional Income during the course of Search and Seizure Operation. As per the circular, there is an observation of the Board that the focus of the search party should be on collection of evidence of income which leads to information on what has not been disclosed or is not likely to be disclosed before the Income-tax Department. There is a further observation that, while recording statements during the course of search, seizure and survey operations, no attempt should be made to obtain confessions as to undisclosed income and that any action to the contrary would be viewed adversely.

14. We do not see how this circular would, in any way, come to the aid and assistance of the appellant. All that it shows is that the Income-tax Officers should not try to force a confession from an assessee. However, if an assessee voluntarily makes a surrender, the officials of the income tax department are bound to record that statement u/s 132(4) and such a statement, voluntarily made, is relevant and admissible and is liable to be used as evidence.

14. The learned counsel for the appellant also submitted that the admission should be taken as it is and the Revenue should not be permitted to accept part of it and reject the other parts. This submission was made in the context of the letter dated 09.01.2006 which the assessee wrote to the Department wherein he stated that the sum of ₹1.75 crores which had been surrendered by him by virtue of his two earlier statements ought to be bifurcated into two sums, namely, ₹25 lakhs and 1.5 crores. It was further submitted that the sum of ₹25 lakhs was to be attributable to the family members and family concerns and it was only the sum of ₹1.5 crores which was to be treated as undisclosed income in his hands. However, the Revenue, according to the learned counsel for the appellant, has not gone by this and has treated the entire sum of ₹1.75 crores at the hands of the appellant/assessee.

15. This plea had not been taken by the appellant/assessee before the authorities below. In any event, the letter dated 9.1.2006 was written one-and-a-half-months after the recording of the statement on 21.11.2005 and was clearly an afterthought. The letter dated 09.01.2006 cannot be treated as a statement u/s 132 (4) of the said Act and only the statements

recorded on 10-11/11/2005 and 21.11.2005 which are statements u/s 132(4) which have evidentiary value.

16. Although, the learned counsel for the appellant submitted that the letter dated 09.01.2006 was not an afterthought in as much as the ground for the same had been made in the statement recorded on 21.11.2005. We do not agree with this submission of the learned counsel for the appellant. The reason being that there is no mention of any documents in the letter dated 09.01.2006.

17. In view of the foregoing reasons we find that there is no substantial question of law in this matter. The issues raised pertain merely to appreciation of evidence, which the Tribunal, in our view, has appreciated correctly. The appeal is dismissed. There is no order as to costs.

BADAR DURREZ AHMED, J

R.V.EASWAR, J

JANUARY 22, 2013
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