

Pushpa Vihar Vs. Assistant Commissioner of Income Tax.

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Court : Mumbai

Decided On : Jul-12-1993

Reported in : (1994)48TTJ(Mumbai)389

Appeal No. : ITA No. 1822/Bom/1990; Asst. yr. 1988-89

Appellant : Pushpa Vihar

Respondent : Assistant Commissioner of Income Tax.

Judgement :

ORDER

M. K. CHATURVEDI, J.M. :

This appeal by the assessee is directed against the order of the CIT(A)-X, Bombay and pertains to the asst. yr. 1988-89.

2. The solitary ground take in this appeal relates to the sustenance of addition amounting to Rs. 6,25,000 added to the income pursuant to the original declaration made by the assessee at the time of survey.

3. Briefly the facts : The assessee is a registered firm comprising of three partners viz., Shri N. B. Shetty 55%, Shri B. N. Shetty 20% and Shri G. N. Shetty 25%. The assessee is running a hotel in the name and style of Pushpa Vihar. The hotel was stated to be Udippi style which provides tea, coffee, cold drinks, light refreshment, lunch and dinner. On 11th November 1987 survey action was conducted at the

hotel premises of the assessee firm. In the course of survey, Shri B. N. Shetty, one of the partners of the firm stated on a stamp paper and made affirmation on the oath that during the last three years, the assessee-firm underestimated the sales figures in their IT returns. In order to cover up the errors and omissions in disclosing the true figures of sales he, on behalf of the assessee-firm, declared and amount of Rs. 9,25,000 as additional income and offered the same for taxation for the asst. yr. 1988-89. He also agreed to pay additional tax on Rs. 9,25,000 and undertook to file the revised estimate of advance tax on or before 15th December, 1987. The declaration was stated to have been made voluntarily without any coercion. The assessee also made a request for the immunities as available in terms of letters of the law.

4. A summon under S. 131 was issued on the assessee. On 11th November, 1987 and he was called by the IT authorities on 13th November, 1987 at 3 P.M. Copy of the said summon was appended at page 11 of the paper book.

5. On 18th dNovember, 1987, the assessee filed a letter before the IAC, C-III Range, Bombay. Xerox copy of the said letter was produced before us which is included at pages 12 and 13 of the paper book. The letter is reproduced here asunder :

'Respected Sir,

Re : M/s. Pushpa Vihar Hotel, Kalbadevi Road, Bombay-400002.

Sub : Proceedings under S. 133A of IT Act.

With reference to survey action under S. 133A of the IT Act, 1961 on 11th November, 1987 at our hotel, known as Pushpa Vihar Hotel, and with reference to our discussions with your goodself on the said matter, we respectfully submit the following, for your kind and sympathetic consideration.

ITO and three others, have visited our hotel, Pushpa Vihar Hotel, at 520/522, Kalbadevi Road, Bombay-2 on 11th November, 1987 at 5.00 P.M. At the time of their visit, our father Shri Harayana B. Shetty was present, our father is a heart patient, who had by-pass surgery. He was interrogated by your officers.

Meanwhile, we came to the hotel. We told the officers that our father is a heart patient and he is very weak and nervous. Whatever information they require, they may ask us. The officers started interrogating us. We were very much worried about our father's health. We could not produce our books of account as the same are written by part time accountant. The books of account were also incomplete. Officers present, asked us to make voluntary disclosure to cover up understatement of sales and errors of commissions and omissions. After some discussions and negotiations, we agreed that the sales understated be estimated at Rs. 9,25,000 and income in respect of these sales will be declared as additional income for the asst. yr. 1988-89 to cover up all the errors of commissions and omissions.

We were asked to write on the stamp paper provided by the officer and I (Balakrishna Shetty) wrote on this stamp paper as dictated by the officer. We are both non-matriculate.

It is now pointed out by the officer, that we have agreed and voluntarily declared additional income of Rs. 9,25,000 for asst. yr. 1988-89 in our letter to ITO, dt. 11th November, 1987. We are really surprised to know this. We never intended so. There is clearly some misunderstanding on our part. Our returned income from this hotel for the last 4 years is as follows :

Asst. yr. 1984-85

Rs. 66,058

Asst. yr. 1985-86

Rs. 58,500

Asst. yr. 1986-87

Rs. 81,799

Asst. yr. 1987-88

Rs. 94,400

Sir, we in order to be free from botheration and anxiety and in order to buy peace, we voluntarily and in good faith with all sincerity offer additional income of Rs. 3,00,000 (Rupees three lakhs) for asst. yr. 1988-89 to cover up all the omissions and commissions. We shall revise the advance tax statement for the asst. yr. 1988-89 in respect of the firm as well as of partners on or before 15th December, 1987 and pay the tax accordingly.

We request your honour, to kindly accept this voluntary offer, made on good faith and grant us all the immunities as per law.

We are making this offer on behalf of all the partners.

Thanking you and assuring you, our co-operation at all times,

We remain,

Yours faithfully,

(1) Gangadhar N. Shetty

(2) Balakrishna N. Shetty

(Partners)

C : 9th Income-tax Officer,

C-III Ward,

Bombay.'

Thereafter another survey operation was conducted at the assessee's premises 2nd December, 1987. As per Inspectors report, some discrepancies in regard to the cash were found. During the survey, the management had stopped the A.C. room and also stopped making special preparations despite customers requests. Therefore, the correct sales figure could not be obtained. On this factual background, Revenue authorities concluded that there was concealment in the form of underestimation of sales and on the basis of declaration made by the assessee the amount was added to the income. The total income was computed

as under :

Rs.

Rs.

Net profit as per P&L; A/c

13,544

Add : Disallowances :

1/3rd car expenses as per assessee's statement

6,710

Income as already declared

3,00,000

1/3rd car depreciation

1,330

Income as declaration made during the course of survey but on retracted.

6,25,000

9,33,040

Taxable Income

Rs. 9,46,584

6. The CIT(A) did not accept the statement of the assessee. It was stated in the order that the assessee did not give any support declared income of Rs. 3 lakhs as done in the second statement. Both the declarations are ad hoc declarations. The books of the assessee were not in order. There is no material to accept that the assessee's first statement was not correct in the sense that the amount of Rs.

9,25,000 represented sales figure and not concealed income and that the assessee's second statement is the correct one. Since neither of the two statements supported by any evidence, there is no apparent choice between the two. However, since the first statement was made during the survey operation and since the figure of Rs. 9,25,000 as concealed income was given by the assessee spontaneously in a statement under oath, there is a preponderance of probability that this statement was the correct one rather than the second statement given later when the assessee had obviously time and scope to manipulate the book figures. In the light of all these, the addition was confirmed.

7. Shri D. M. Harish, learned counsel for the assessee, appeared before us. Relevant documents and papers were filed in the form of a paper book. At the outset, Shri Harish tried to demonstrate with reference to the records that the books as maintained by the assessee are correct and complete. The G.P. 36.11 per cent is more than adequate. There is no error in the account. The amount of Rs. 3 lakhs was offered with an intention to buy peace. Further reliance was placed on the following :

(i) Kishore A. Meswani (ITA No. 7161/B/87, dt. 7th August, 1990)

(ii) Raghuvanshi Builders (ITA No. 1057/B/88, dt. 21st July, 1992)

(iii) Sri Krishna vs . Kurukshetra University : AIR 1976 SC376 .

8. Shri M. N. Bajpai, learned Departmental Representative, appeared before us. It was contended that the additions made by the Revenue authorities are correct and in consonance with the declaration made by the assessee. There is no material to support that the declaration made by the assessee originally was incorrect. Nothing was filed to support that the assessee earned Rs. 3 lakhs only. Both the declarations were made on ad hoc basis. Relying on the reasoning given by the Revenue authorities, it was submitted that original declaration ought to be accepted in preference to the latter declaration.

9. We have heard the rival submissions in the light of material placed before us and precedents relied upon. We have noted that in the case of Kishore A.

Meswani (supra), the Tribunal held that merely on the basis of the assessee's offer for being taxed, the assessment cannot be sustained. The apex Court in the case *Shri Krishan vs. Kurukshetra University* (supra) has held that any admission made in is an accepted position that what is admitted by the party to be true, must be presumed to be true, unless the contrary is demonstrated. However, mere admission cannot be bed rock or foundation of an assessment. It is always open to the assessee who made the admission to show that what he admitted was not correct. Thus, it can be said that the admission made by a person is relevant in deciding the matter. But it is not always conclusive. The person who admitted the fact is at liberty to explain or clarify the circumstances and the nature of statement and also the correct facts. It is well settled that the effect of an alleged admission depends upon the circumstances in which it was made. Therefore, it can be said that an admission is the best evidence that Revenue can rely upon and though not conclusive, is decisive of the matter unless successfully withdrawn and proved erroneous.

10. We now ponder over the possibility of existence of 'misunderstanding' in stating the truth while narrating the facts before the Revenue authorities. *Shri B. N. Shetty* who is a partner of the firm (having 20% shares) admitted in original statement the amount of concealed income. Later on, there was retraction and it was stated that what he stated originally was in relation to the sale and not in relation to the income. We have also noted that he is a non-matriculate and the juniormost partner in the firm. The possibility of committing a mistake by him in explaining the affairs of the firm cannot be ruled out altogether. We find that the Revenue authorities adumbrated mainly on the statement recorded on 11th November, 1987. We do not find any cogent material in record to support or to justify the veracity or falsehood of the statement. The Revenue agreed to accept what *Mr. B. N. Shetty* stated at that time. No incriminating document was seized. Even on 2nd December, 1987, when another survey operation was conducted at the assessee's premises, nothing significant was found. The argument of Revenue that there was possibility of getting higher figures of sales but same could not be obtained as during the survey, the management stopped the A.C. room and also stopped making special preparations despite customers' requests, appears to be jejune. This allegation is not based on any material which could be relied or

accepted as evidence. If you are bidden to treat an imaginary state of affairs as real, you must surely unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. The principle upon which the case falls to be decided (is) simply this : 'whether the system of law permits the assessee to alter the admission made before the tax officials in the course of survey proceedings ?'

It is incumbent on the Revenue to follow the fine norms of jurisprudence. Else the whole process of law will be set at naught. The CIT(A) observed in his order that the assessee did not give any figures to support the declared income of Rs. 3 lacs as done in the second statement. Both the declarations are ad hoc declaration. There is no material to accept that the assessee's first statement was not correct the sense that the amount of Rs. 9,25,000 represented sales figure and not concealed income that the assessee's second statement is the correct one. Since neither of the two statements is supported by any evidence, there is no apparent choice between the two. However, since the first statement was made during the survey operation and since the figure of Rs. 9,25,000 as concealed income was given by the assessee spontaneously in a statement under oath, there is preponderance of probability that this statement was the correct one rather than the second statement given later when the assessee had obviously time and scope to manipulate the book figures. We are not inclined to accept this reasoning. As a matter of fact, no defect of any reckoning was pointed out in the books. The addition was wholly on the basis of assessee's admission. There is absolutely nothing on record to justify that the book results were manipulated. It is quite possible, that the partner who at the time of survey gave this statement might have misunderstood the contents comprised in the statement concerning his disclosure. In the surrounding circumstances, and having regard to the given facts, it cannot be concluded that what the assessee said originally was sacrosanct and the assessee is not at liberty or it does not lie in his mouth to correct the error, originally committed by giving a different version of truth. As said by the apex Court in the case of Shri Krishan (supra) that any admission made in ignorance of legal rights cannot bind the maker of the admission. It is always open to the assessee to demonstrate the correct facts. In the absence of any other material

apart from the original admission, there is nothing to support the addition. We are, therefore, not inclined to agree with the CIT(A). Accordingly, we direct the Assessing Officer to delete the addition made on this count.

In the result, appeal of the assessee stands allowed.

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