

Pranav Construction Co. Vs. Assistant Commissioner of Income

Pranav Construction Co. Vs. Assistant Commissioner of Income

SooperKanoon Citation : sooperkanoon.com/69253

Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Nov-12-1997

Appellant : Pranav Construction Co.

Respondent : Assistant Commissioner of Income

Judgement :

1. The assessee is a partnership firm engaged in the business of construction and sale of flats. On 9th March, 1992, there was a search of the assessee's registered office and premises of some of the partners. Certain materials were seized during the search. One of them was a diary No. 9. At p. 12 of the diary certain notings were found.

These notings are as under :05 80,000 12-2-1992 86,250 Recd.06 80,500 5-2-1992 86,250 Recd.07 80,500 12-2-1992 86,250 Recd.18/018 1,31,600)19/019 80,500) 3,95,850 Recd. 8/1220 1,26,700 1,35,750 Recd. 9/209/009 1,66,000 Recd.

+ 20,000 Bal.

----- 5,80,300 11,56,350 The partner of the assessee-firm by name Jagdish N. Lodaria, was asked to explain the notings in the course of the statement recorded from him under s. 132(4) of the Act. The relevant questions and the answers are as below : "Q. No. 5 - I now show you p. 12 of serial No. 9, a rough paid seized from your office. Please explain the cash receipts received in the month of February, 1992 and where they are accounted.

Ans :- This shows that I have received some money in cash for sale of our flats, shops, etc. (received in the current financial year which is not accounted in the books of a/c). I have been charging on an average Rs. 100 per sq. ft. in cash over and above the agreed price at Kasturi Plaza, Dombivli. The area is approx. 10,000 sq. ft.

sold so far. Rs. 100 on this area comes to Rs. 70,00,000. This entire amount has been received by me in this year only. In addition to these, I have received about Rs. 10,00,000 in respect of my other projects also thus I wish to offer Rs. 80 lakhs as my current year's income under s. 132(4). Immunity allowable under s. 132(4) may please be given to me. I shall pay the tax on this declared income.

This is in addition to normal income earned by us. I am making this disclosure on behalf of my family and also on behalf of families of my partners, Shri Rajendra Mehta, Shri Deepak H. Poonatar and Shri Suresh Shah. The bifurcation in respect of each family shall be given later.

In reply to Question No. 6, Shri Jagdish N. Lodaria, has stated as under : Q. No. 6 - As regards the above disclosure I have to observe that certain papers have been found at your Dombivli Office in respect of your unaccounted transactions. Kindly state whether the same are covered in the aforesaid statement.

Ans - The aforesaid disclosure naturally covers all the discrepancies in respect of unaccounted transactions. Shri Jagdish Lodaria declared the Addl. income in view of transaction found at p.-12 which pertained to M/s Viral Enterprise".

The AO observed that the notings at p. 12 of diary No. 9 had been made by one Suresh R. Shah, one of the partners of Viral Enterprises.

2. While filing the return of income, the assessee declared a taxable income of Rs. 11,55,880 as under : "Profit as per P&L a/c 51,908.01 Add : Declaration under s. 132(4) 52,68,400 Less : Expenses incurred for purpose earning the above income 42,14,720 10,53,680.00 Total Taxable Income 11,55,880.01" The AO was of the view that whereas in the statement recorded under s.

132(4) the partner of the assessee-firm had disclosed an income of Rs. 70 lakhs, in the return there has been retraction of the said statement inasmuch as the assessee had declared only Rs. 10,53,680 on account of undisclosed income. He noticed that the assessee had retracted from the statement in respect of two issues, the first being the undisclosed receipts, which were reduced from Rs. 70 lakhs to Rs. 52,68,400 and the second being the claim of expenses amounting to Rs. 42,14,720. The assessee was asked to explain the return and in response thereto the assessee vide letter dt. 30th June, 1992 stated, as under (relevant portion only) : "The aforesaid statement was recorded by the Asstt. Director of Inspection at 2.30 A.M. in the early morning, though it was mentioned at 11.45 P.M. Pre-recording of the statement was started at 11.45 P.M. on the previous day and it ended at 2.30 A.M. in the early morning on the next day. I was totally tired. I was under tremendous pressure and not in a proper state of mind to understand the implications as to what is stated in the said statement. I did make a mention of the fact before the ADI during the course of discussion that the aforesaid amount of Rs. 80 lakhs is the gross receipts, but as a builder, we are required to incur lot of expenditure, which is unaccounted for. It is difficult to produce the evidence, regarding the expenditure incurred, though it is for the purpose of the business in the course of business and such expenditure is in the vicinity of almost 80 per cent. of the amount that is received. The statement made by me, therefore, needs some modifications to the extent that the amount received by way of income being the 'on-money' for the sale of the flats is not the net income, but the net income may be at the most 20 per cent. of the entire gross receipts".

The letter also contained an explanation regarding the expenses claimed. The assessee was asked by the AO to produce evidence in respect of the expenses and vide letter dt. 5th February, 1993, the assessee furnished a detailed explanation. The relevant portion of the letter, wherein the break-up for the expenses claimed was given is as below : (b) Shri Padmakar Choudhary 12.5 20.00 (2) Security charges paid in order Dilip Mahtra 0.75 5.00 (3) For removing the Hawkers & Taporis from front portion of plot.

13.00 (4) Commission paid to Shri Suresh Patil eviction.

4.00(5) Expenses incurred for Satyanarayan the construction 0.14,720 Total : 42,14,720" 3. By letter dt. 8th February, 1993, the assessee was asked to produce the parties named above for verification and also to produce the bills and vouchers along with the books of account as proof of the expenditure. The assessee produced the following parties before the AO on 17th February, 1993 :Name of person Amount paid Purpose Rs.Salim Khan 1,50,000 securityRam Prasad Dubey 1,25,000 securityDilip Mahatre 75,000 securityShamsher Khan 1,50,000 securityGopal Reddy 75,000 vacating tapriJanardhan Choudhary 1,00,000 vacating tapriEknath Sudham Patil 1,25,000 vacating tapriBalu T. Madhavi 1,00,000 vacating tapir These parties were also examined by the AO under s. 131 of the Act. All of them admitted that they had received the amount from the assessee in cash. They were not maintaining books of account, bank accounts nor were they assessed to income-tax. The AO also deputed his Inspector to verify the claim and as per the report of the Inspector dt. 4th March, 1993, he had verified the assessee's claim from Gopal Reddy, Ram Prasad Dubey and Salim Khan at the addresses given by them and they had also admitted to have received the money from the assessee in cash either for providing security to the partners or for vacating tapories, as claimed by the assessee. The Inspector could not contact Shri Eknath Sudham Patil at the given address since he has gone to his native place. So far as the amounts paid to S. B. Shellar of Dombivli and Padmakar Choudhary are concerned, the assessee wrote to the AO on 22nd February, 1993, that these persons could not be produced for enquiry since both of them had been killed in a gang war. The assessee also produced certain paper cuttings before the AO in support of the claim that these persons were killed in gang wars.

"(1) No such expenses have been recorded in the regular books of a/c nor assessee has claimed before the search party while declaring the additional income for taxation.

(2) During the proceedings under s. 132(5) of IT Act, Shri Jagdish N. Lodaria has clearly mentioned that the expenses claimed for which no evidence can be produced. However, they produced necessary evidences during the assessment proceedings, which cannot be accepted as prima facie proof for claiming such expenses, as it is only an afterthought.

(3) The additional income declared under s. 132(4) is only a net income for taxation after considering all possible expenses.

Therefore, the expenses claimed by the assessee is a double one.

(4) No evidences of transactions have been found or seized by the search party. Therefore, the unaccounted and unrecorded expenses claimed by the assessee is not an allowable deduction.

(5) Lastly, there is no provision under the Act, to allow such type of deduction from the additional income under s. 132(4) of IT Act.

(6) The submission of the assessee regarding the protection money paid to (a) Shri S. B. Shellar, Dombivli and (b) Shri Padmakar Choudhary that both these person have expired is also not substantiated by proper documentary proof." He therefore brought to assessment a sum of Rs. 73,37,100 calculated @ Rs. 100 per sq. ft. in respect of 73,371 sq. ft. consisting of residential flats, shops and offices as addition on account of undisclosed income.

5. On appeal, the CIT(A) observed that in the statement given under s.

132(4) the partner of the assessee-firm had clearly admitted additional income of Rs. 70 lakhs on the ground that the firm had received Rs. 100 per sq. ft. in cash in respect of the flats, shops, etc. and therefore the revised claim that the cash was received only in respect of flats sold amounting to 52,684 sq. ft. was an afterthought and cannot be accepted. He therefore upheld the conclusion of the AO that the assessee had received on money of Rs. 100 per sq. ft. in respect of the residential flats, shops and offices aggregating to 73,371 sq. ft. As regards the claim for expenses, the CIT(A) held that they had not been recorded in the regular books of account nor were they claimed in the course of the search proceedings. He referred in this connection to the statement made by Jagdish Lodaria in the course of the proceedings under s. 132(5) to the effect that no evidence can be produced in support of the expenses. He therefore concluded that the claim for expenses and the evidence produced in support thereof was only an afterthought. He was of the view that the assessee cannot be allowed to retract from the

statement made under s. 132(4). In this view of the matter, the inclusion of Rs. 73,37,100 in the assessment was upheld.⁶ Before us, the learned counsel for the assessee submitted that it is not proper to characterise the modification of the statement made under s. 132(4) as a retraction. He pointed out that the partner of the assessee-firm was not in complete control of his mental faculties when the statement was recorded. In this connection he pointed out that the statement was recorded at a time when the partner was totally exhausted and tired and was not in a fit state of mind to realise or analyse the implications of the statement. As regards the claim that the assessee-firm did not receive on money in respect of the shops and offices, the learned counsel pointed out that there was no demand for them and, therefore, the assessee could not realise any extra money which is possible only if there is huge demand. As regards the expenses, he pointed out, on the basis of the evidence compiled in the paper-book, that they were all fully supported by the statements, independent verification by the Inspector, newspaper cuttings, etc. and therefore the Departmental authorities were not justified in rejecting the claim. He also drew our attention to the unreasonably high rate of gross profit which would arise if the expenses are not allowed and this he pointed out to demonstrate the inherent fallacy in the rejection of the claim for expenses. He also pointed out that the amount of concealed income as reflected by the seizure was not commensurate with what has now been allowed by the Departmental authorities and this was one pointer to the unreasonableness of their stand. Wherever it was necessary, our attention was drawn to the evidence compiled in the paper-book. According to the learned counsel, the real income of the assessee has to be estimated as it was common knowledge that the extra money received in cash was used for disbursements in the form of protection money, haftas, for acquiring tapories, etc. and after all such expenses have been incurred, the assessee-firm would hardly be left with about 15 per cent. of such on moneys, which alone can be brought to tax.

7. The learned Departmental Representative submitted that the land had been purchased by the assessee in 1985 and construction had commenced immediately thereafter and in the year 1992, when the search took place, 90 per cent. of the project, namely Kasturi Plaza, had been completed and considering the time-lag between the commencement of the construction and the near

completion of the project. It is not at all acceptable that expenses to the tune of Rs. 42 lakhs had been spent in the accounting year relevant to the assessment year under consideration, even if it is assumed for the sake of argument that the expenses were allowable. He hastened to add that the expenditure was not allowable at all because it was clearly an afterthought and the claim did not find any mention in the statement made by the partner under s. 132(4). As regards the claim of the assessee that it did not receive any on money in respect of shops and flats, he pointed out that the commercial properties are generally in greater demand than residential properties even during periods of lull in the real estate market and in the assessee's case it was clear from the details filed at pp. 14 and 89 of the paper-book that the sale of shops was not slack. Therefore, he submitted that it is not possible to accept the claim that the assessee did not receive any on money in respect of the shops or offices. As regards the assessee's claim that there has to be an estimate of the net profit in such cases taking a practical view and considering the various types of disbursements required to be made by builders, the learned Departmental Representative submitted that 15 per cent. as claimed by the assessee was very low. In this connection he drew our attention to the trading account filed at p. 42 of the paper-book, wherein the net profit has been declared at Rs. 51,908 which reflected only 0.77 per cent. of the turnover, which is ridiculously low. On the basis of these statements and facts, the learned Departmental Representative contended that the addition has been rightly made and sustained by the Departmental authorities.

8. We have carefully considered the rival contentions. We have also gone through the orders of the Departmental authorities and the evidence compiled in the paper-books filed by the assessee. Two questions arise for our consideration. The first question is how far the statement made by the assessee's partner under s. 132(4) can be relied on for the purpose of making the addition. According to the section, the authorised officer may examine any person in the course of search or seizure who is found to be in possession or control of any books, documents, money, etc. and any statement made by such person may "thereafter be used in evidence in any proceeding" under the IT Act.

The statement made by the partner of the assessee-firm can therefore be used as evidence for the purpose of making an assessment under s.

143(3) of the Act. As per this section, the AO is required to take into account all relevant material which he has gathered while making the assessment. Such material by virtue of s. 132(4), also includes the statement made by the partner of the assessee. An admission is normally the best evidence against the person making it but it is evidence only so far as what has been clearly and specifically admitted. A perusal of question No. 5 and the answer thereto shows that there was an admission that cash was received for the sale of flats, shops, etc. and therefore it is not possible to accept the assessee's contention that in respect of shops and offices no on money was received. There is also an admission that the entire amount of Rs. 70 lakhs, @ Rs. 100 per sq. ft.

for 70,000 sq. ft. at Kasturi Plaza has been received by the assessee in the relevant year. An additional amount of Rs. 10 lakhs in respect of other projects and the assessee has stated that the sum of Rs. 80 lakhs would be offered as the current year's income and that the tax will also be paid on the declared income. Therefore so far as the receipts of on money @ Rs. 100 per sq. ft. is concerned, the assessee must be taken to have admitted that the total receipts are Rs. 73,37,100, which covers the sale of flats, shops and offices to the extent of 73,371 sq. ft. It is not possible to accept the assessee's claim that the on money was received only in respect of 52,684 sq. ft., which is the total area comprised of flats.

9. The second question is as to whether the assessee's claim for expenses can be accepted. We are of the opinion that too much cannot be read in the admission, so as to preclude the assessee from claiming such expenses. Considering the fact that the statement was recorded after a tiresome search proceedings and considering the state of mind of the partner, it would be too much to expect him to be alert enough to claim the expenses while the statement is being recorded or to make any mention regarding the expenses. After all we have also to take the human probabilities into account. It must be remembered that the partner was shown at p. No. 12 of diary No. 9, which was seized. That p. did not relate to the assessee-firm at all. It related to the sale of shops, etc. made by Viral Enterprises.

The diary was written by Suresh Shah, who was a partner in Viral Enterprises. These are admitted facts. This p., admittedly, did not contain any claim regarding the expenses. What it showed was only the on money receipts on sale of shops. It is therefore quite natural that when this p. was shown to the assessee-firm's partner, Jagdish Lodaria, his mind was fixed to the amount of on money received by the assessee-firm and the amounts disbursed by way of expenses could not have been present in his mind.

If a question had been asked as to whether any expenses were incurred by the firm out of the on money receipts, perhaps the partner would have come out with the details thereof. We have to take a practical view of such matter and it is common knowledge that extra moneys are received in cash by builders in order to incur certain expenses which could not be recorded. Whatever remains can only be taxed as income.

Therefore, in our opinion, the admission can be made use of only for the purpose of holding that the assessee received on moneys @ Rs. 100 sq. ft. in respect of 73,371 sq. ft. on flats, shops and offices. The statement cannot be made use of for the purpose of precluding the assessee-firm from claiming the disbursements made out of the on money receipts as expenditure, if they are backed by satisfactory proof.

10. Coming to the various expenses claimed, we have already referred to the fact that eight persons appeared before the AO on 8th February, 1993, and had confirmed the fact that they had received various amounts from the assessee-firm in cash for the purpose of providing security to the partners or for getting the tapories vacated earlier. Their statements are placed in the paper-book. We have gone through them and we find that there is categorical admission of having received the amounts from the assessee. A few of them have been independently verified by the Inspector and this also we have already referred to. It is therefore not possible to reject the claim for deduction of Rs. 9 lakhs.

11. As regards the claim of Rs. 20 lakhs paid as protection money to Padmakar Choudhary and S. B. Shellar, they could not be produced before the AO because they were killed in a gang war on 10th February, 1993, as per paper reports and

cuttings filed in the paper-book. A perusal of these reports and cuttings indicate that these persons were reportedly engaged in collecting haftas or extortion moneys from builders in Thane and Dombivli areas. The paper reports also support the assessee's claim that builders engaged in construction activities in Dombivli. Thane and Kalyan are vulnerable to such dangers as extortion, haftas, etc. and unless they oblige it would be impossible to conduct the business. It is, therefore, quite probable that the assessee was under such danger and had to pay Padmakar Choudhary and S. B. Shellar. There is strong circumstantial evidence supporting such payments. It must be remembered that the assessee made the claim for the first time in its letter dt.

5th February, 1993. The names were mentioned in its letter at p. 2. The AO had required the assessee to produce these persons before him by letter dt. 8th February, 1993. But these two persons were reportedly killed in gang wars on 10th February, 1993, and, therefore, could not produced before the assessing officer. The assessee could not have anticipated this. Therefore when it claimed that it had paid Rs. 20 lakhs to these two persons, the claim may be taken as genuine. It would be a fair inference that had these persons not died, the assessee would have been able to produce them before the AO. The fact that the assessee came out with the names of these two persons in its letter dt.

5th February, 1993 is a strong circumstantial piece of evidence in its favour. We therefore consider that the claim of Rs. 20 lakhs has to be allowed.

12. So far as the pooja expenses are concerned, the expenditure of Rs. 14,720 which is stated to have been incurred for Satyanarayana Pooja conducted after completion of the construction can be allowed as deduction.

13. There is no direct proof in respect of the other payments claimed by the assessee. Such payments claimed by the assessee are in respect of hawkers, tapories, protection money, etc. However, considering the newspaper reports and also the fact that the assessee had been forced to incur similar payments, and taking an overall view of the situation in which the builders are placed, an additional estimated expenditure of Rs. 1,00,000 is allowed as deduction.

14. The addition to be sustained as per our direction will be as below :100 per sq. ft. for 73,371 sq. ft.

73,37,100Less : Payments as protectionetc.

30,00,000Pooja expenses 14,720 30,14,720 -----Balance taxable as income
43,22,380 ----- The addition is therefore reduced to Rs. 43,22,380. The learned Departmental Representative had submitted that there is no proof to show that the payments have been made during the relevant year, even assuming for the sake of argument that such payments have been made. It must be remembered that the assessment has proceeded on the basis that the entire moneys have been received by the assessee only during the relevant accounting year. It cannot be postulated that the assessee had effected the payments out of the moneys received by it earlier in respect of the flats, offices and shops and recorded in the books. It would therefore be a fair inference that the expenses claimed have been incurred only out of the on moneys received during the year. With regard to the admission, the learned Departmental Representative had argued that there is no scope for allowing any expenditure because the statement of the assessee's partner under s. 132(4) relates to disclosure of income, which means net income. We are of the view that the admission cannot be read as an Act of Parliament and that it has to be read in the context fairly and reasonably. We have already adverted to this aspect. The learned Departmental Representative next contended that the assessee has not discharged the burden of proving the expenditure. The burden can be discharged either by direct evidence or if such evidence is not available the assessee can always point out to circumstantial evidence supporting the claim. In the present case in respect of the payment of Rs. 9 lakhs there is direct evidence and in respect of the payment of protection money to the extent of Rs. 20 lakhs to Shellar and Padmakar Choudhary, there is circumstantial evidence, to which we have already referred. The further deduction of Rs. 1 lakh which we have allowed is also based only on the circumstantial evidence such as newspaper cuttings, reports, etc.

15. The other ground is directed against certain disallowances out of telephone expenses, motor car expenses, depreciation on motor car and office expenses.

This is covered by ground No. 12. After going through the orders of the IT authorities, we see no reason to interfere and dismiss the ground.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com