

**Rishab Kumar Jain Vs. Assistant Commissioner of Income**

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**Court :** Income Tax Appellate Tribunal ITAT Delhi

**Decided On :** Sep-28-1998

**Appellant :** Rishab Kumar Jain

**Respondent :** Assistant Commissioner of Income

**Judgement :**

1. This is an appeal by the assessee against the order of the CIT (A) dt. 25th Oct., 1989, wherein the assessee has disputed the confirmation of addition of Rs. 45,000 on account of undisclosed cash found during search by way of the following ground : "In the facts and circumstances of the case the CIT has erred in sustaining addition of Rs. 45,000 on account of cash belonging to Sudhir Jain and Smt. Karuna Jain found at the time of search as the income of the appellant. That the assessee had discharged his onus by proving that the amount was received from Sudhir Jain and Smt.

Karuna Jain by filing their confirmations, proving their capacity to place the amount at the disposal of the assessee which was further verifiable from the income-tax and wealth-tax records of the above two family members of the appellant." 2. We have heard the assessee's counsel as well as the learned Departmental Representative, but before coming to rival submissions, we consider it necessary to extract brief facts necessary for adjudication of the issue involved in this appeal which, as borne out from records before us are as under : "Action under s. 132 was taken at assessee's residence on 4th Feb., 1986, when the assessee, in his so-called preliminary statement, in answer to question as to how much cash would

be available in his house had replied as under : "Sudhir Kumar Jain PNB, Model Town.

Kamal Kumar Jain (Sons) -do- Account Nos. : I do not remember. I do not have any FDRs nor does any of my dependents have such FDRs. A. : In my bedroom at ground floor and the setting room adjoining and also one bedroom near to my bed room (where my mother stays whenever she is here), total cash of Rs. 25,000 approximately is lying. The break up of this is as follows : Q. : Do you have any cash kept in your house belonging to anyone else apart from what you have stated above or is some cash belonging to you lying with anybody else A. : Apart from above, I have an amount of Rs. 10,000 given by either my son Sudhir or his wife Mrs. Madhu.

Please try to remember and tell exactly who gave the money to you and for what purpose I do not remember who gave it to me. These were given for keeping with me.

Q. : How much jewellery do you and your wife have, where it is kept I do not have any details regarding jewellery of my wife. The same are detected by her returns. She is assessed with ITO, Rohtak.

Q. : What investments do you hold in the term of un-movable and movable properties A. : Regarding bldg. which is owned by my wife and dependent F-12/2, Model Town, Delhi.

I do not have any immovable properties, in my name like a plot of land.

Q. : Do you have any documents/book of account reflecting investment Income which have not been disclosed in your IT return at your residence.

3. According to the observation of the CIT (A) in para 2.5 of his order this statement was recorded before the actual rummaging of the search was started. The assessee's another statement was recorded during the course of search on 4th Feb., 1986, itself in which the assessee explained the sources of cash of Rs. 94,530 found during the search, in the following manner : "Statement of Rishab Kumar Jain, s/o (Late) J. D. Jain, R/o. F. 12/2, Model Town, Delhi, aged about 56

years on S. A. recorded under s. 131/132 of the IT Act, 1961 during search effected on 4th Feb., 1986.

Q. No. 1. : In the morning in your preliminary statement at p. 4 you had stated that cash available from your two bedrooms would be about 25,000 to 29,000. Another sum of Rs. 10,000 was kept with you by your son or daughter-in-law, son Sudhir Jain or Mrs. Madhu Jain.

After the search, cash of Rs. 94,530 has been found from your main bed room at ground floor of building No. F. 12/2, Model Town, Delhi.

You had categorically stated that there was no other cash apart from that available with you in your room. Please explain the discrepancy.

Ans. No. 1. : I was mentally disturbed on the unexpected arrival of the big team of the officers and I could not recollect the exact position nor I keep my cash counted. The estimate given was approximate and I got headache by the action of the raiding party which they had made by circling the premises and the persons. This was my first experience of the kind.

Q. No. 2. : May I remind you that in the morning at the time of recording of the statement you did not complain of any headache or any other problem with you. Would you please now explain the source of acquisition of the amount of Rs. 94,530 found from your bedroom  
Ans. No. 2. : Rs. 30,000 were handed over by my sons Karuna and Kamal Rs. 25,000 by Sudhir and Madhu, Rs. 7,000 by my mother Shrimati Hira Devi and the balance belong to my wife and myself.

Which is Rs. 32,530.

Q. No. 3. : In the morning you stated that you received Rs. 10,000 only from your son Sudhir or his wife Madhu whereas now you say that you received Rs. 25,000. Please explain the difference in the two statements and also state as to when did they give you the money and who exactly gave this money to you-Sudhir or his wife and where and for what purpose  
Ans. No. 3. : The difference in the two statements is explained in my early reply that I was disturbed and was in an improper state of mind. I do not remember who gave the amount to me, and I do

not remember when and on what day they gave me the amount.

They often handed over the cash to me for safety purpose as they live on the front side of the house and they are having two ailing babies who remained very bed-ridden.

Q. No. 4. : I am repeating the question requesting you to tell who gave you the money-Sudhir or Madhu and was it given in one go or in different instalments Ans. No. 4. : They are my real son and daughter-in-law. There is no account with me to tell date and the bifurcation. They sometime keep the money in our almirah by themselves also.

Q. No. 5. : You have just now stated that at times Sudhir & Madhu keep the money in my almirah themselves and at times they gave it to me for keeping. Please state did they keep this amount themselves or they gave it to you for keeping Ans. No. 5. : This is routine. They are my son and daughter-in-law and I am (sic-not) very particular to know it. I cannot recollect whether they gave it to me or they kept it themselves.

Q. No. 6. : You have just now said that your son Kamal and his wife Karuna have kept Rs. 30,000 with you. Please state who of the two gave you the money, when, in what currency and for what purpose Ans. No. 6. : Kamal has a fractured leg and was under plaster for one (sic) as stated in the case of Madhu and Sudhir, position is the same. I am an old man about (sic-almost) retired and not keeping good health." 4. Two statements of assessee's son, Sudhir Jain were recorded at 1.35 p.m. and 9.00 p.m. on 4th Feb., 1986, itself in which he explained the source of cash claimed by his father belonging to him amounting to Rs. 25,000. Another statement of Sudhir Jain was recorded during the course of proceedings under s. 132(5) on 20th May, 1986, in which Sudhir Jain again confirmed the source of availability of cash of Rs. 25,000 found during search on 4th Feb., 1986. Statements of assessee's other son, Kamal Kant Jain and of Mrs. Karuna Jain, wife of Kamal Kant Jain were also recorded during search operation on 4th Feb., 1986. During the course of assessment proceedings the assessee was called upon to explain the source of cash of Rs. 94,530 out of which cash of Rs. 90,000 was seized, I found during the search and the assessee as per para 12 of his

written reply dt. 5th Feb., 1988, explained the ownership of cash person-wise which was as stated in his second statement recorded during the search itself and also explained the sources of such availability with relevant persons, in the following terms : "With regard to the cash seized and retained under s. 132(5), it is submitted that during the course of search the authorised officer found Rs. 94,530 in my house at F. 12/2, Model Town, Delhi, out of which Rs. 90,000 was seized. Break-up of the amount and its ownership is as under :Smt. Kanti Devi (wife) 23,250Smt. Karuna Jain (wife of my son Kamal Kant Jain) 30,000Smt. Hira Devi Jain (mother) 7,000Sudhir Jain (son) 25,000Cash belonging to self 9,280 With regard to the nature and source of the cash of my wife, it was explained that this amount belonged to her and is out of the amount disclosed by her by filing an estimate of higher income on 22nd Jan., 1986, with the ITO, B-Ward, Rohtak. She also paid tax on the amount disclosed by her as per her estimate. The above matter came up for consideration before the ITO, B-Ward, Rohtak, in her regular case for asst. yr. 1986-87 and the matter was thoroughly looked into by him and after going through the facts and circumstances of the case the cash held by her at Rs. 23,250 as on 4th Feb., 1986, seized by the Department was accepted. Copies of the income-tax assessment order for the asst. yr. 1986-87 passed by the ITO, B-Ward, Rohtak on 31st March, 1987, discussing all the pros and cons and the statement of wealth, etc. enclosed, the assessment of my wife for wealth-tax has also been completed and the jewellery restrained was also released by the ADI (I) as per copy of the vacation order enclosed for your kind perusal. It conclusively proves that the amount of Rs. 23,250 found during the course of search belongs to my wife and has been accepted by the ITO holding jurisdiction over her. Statement of my wife was also recorded by your predecessor ITO during 132(5) proceedings where she confirmed that the amount of Rs. 23,250 belonged to her. In view of the above, it is submitted that there is absolutely no doubt about the possession of Rs. 23,250 in the hands of my wife and therefore there will be no justification for again holding the same amount as again income in the year under consideration.

A sum of Rs. 30,000 was explained out of the seized amount as belonging to Smt. Karuna Jain. She is wife of my son Kamal Kant Jain and was married to him on 28th Nov., 1983. She is assessed to income- tax and wealth-tax with the ITO, A-

Ward, Ghaziabad, vide GIR No. K-28. She had filed her return of wealth for the asst. yr.

1985-86 wherein she had disclosed cash of Rs. 53,500. Assessment for the asst. yr. 1985-86 was completed by the ITO referred to above on 12th March, 1986, on the declared wealth. Subsequent return for the asst. yr. 1986-87 showing the amount seized in the search was filed within the statutory period and the assessment was framed by the WTO referred to above on 28th Oct., 1986. Copies of the wealth-tax assessment orders for both the years are enclosed. Statement of Smt.

Karuna Jain was also recorded by your predecessor ITO during 132(5) proceedings and she had confirmed that the amount of Rs. 30,000 belonged to her. Even during the course of search, I had explained in my statement under s. 132(4) that the amount of Rs. 30,000 belonged to my daughter-in-law Smt. Karuna Jain. Thus it is submitted that there is absolutely no contradiction in the statements made under s. 132(4) and copy of statements recorded during 132(5) proceedings.

Regarding the amount of Rs. 7,000 belonging to my mother Smt. Hira Devi, this was explained during the course of my statement recorded under s. 132(4). It was explained that my father was a leading lawyer of Delhi who died in 1982 and his estate duty assessment was completed by the Asstt. Controller of Estate Duty, New Delhi. My mother had her deposits in Rishab Kumar Janender Kumar and she had been drawing Rs. 6,000 every year on account of interest. She was living partly with me and partly with my brother Jajender Kumar Jain and therefore she was not required to make any expenses. She is 76 years of age and she had kept the amount of Rs 7,000 with me. Her confirmation was also filed during 132(5) proceedings.

With regard to the amount of Rs. 25,000 belonging to my son Sudhir Jain, it is submitted that this was explained during the course of search in my statement recorded under s. 132(4). Statement of Sudhir Jain was also recorded during the course of search and he also confirmed it at that time. Therefore the statement recorded at the time of search tallies with the funds found during the course of

search. Sudhir Jain had also appeared before your predecessor ITO during 132(5) proceedings and he had again confirmed that the amount of Rs. 25,000 out of the total amount found during the course of search belonged to him. He is an existing income-tax assessee in Distt. IX (1), New Delhi. Regarding the available of funds with him, it is submitted that he had withdrawn Rs. 39,000 from Sudhir & Sanjay Metal Plast during 1st April, 1985 to 31st Dec., 1985. He is a partner in the above firm. Besides he also withdrew Rs. 25,600 from Sahil Services during the above period and copies of account of Sudhir Jain as appearing in the books of Sudhir & Sanjay Metal Plast and Sahil Services were also submitted during the course of 132(5) proceedings. Copies of the same are again enclosed. Out of the above Rs. 29,000 and Rs. 25,600, he only made investment of Rs. 5,500 in Sahil Services and Rs. 8,500 towards his house hold expenses. He also paid Rs. 4,800 by way of advance tax in three instalments of Rs. 1,600 each. Thus the balance amount so available with him, out of which he kept Rs. 25,000 with his father as there was only one steel almirah wherein all valuables belonging to the assessee and his sons were placed. It is in these circumstances that the above amount of Rs. 25,000 belonging to Sudhir Jain was found in the same almirah. Copy of the assessment order of Sudhir Jain for asst. yr.

1986-87 is also enclosed.

Regarding the availability of cash of Rs. 9,280 with the undersigned, I have already explained in earlier para about the availability of funds and household expenses incurred by me. The balance amount tallies with the amount found during the course of search. It is, therefore, requested that the amount found during the course of search stands fully explained and the same, therefore, may kindly be accepted." 5. The AO accepted the availability of cash of Rs. 7,000 claimed by the assessee as belonging to his mother, Smt. Hira Devi and also the cash of Rs. 32,530 claimed to be belonging to the assessee and his wife, Smt. Kanti Devi. Availability of cash of Rs. 30,000 which was claimed by the assessee as belonging to Mr. Kamal Kant Jain and Mrs. Karuna Jain and cash of Rs. 25,000 which was claimed as belonging to Sudhir Jain and Smt. Madhu was not accepted. Consequently, an addition of Rs. 55,000 was made while completing the assessment. The CIT (A), however, allowed the assessee a further relief of Rs.

10,000 against assessee's claim of availability of cash of Rs. 25,000 from Sudhir Jain and Mrs.

Madhu Jain, after holding that there being contradictions in the so-called preliminary statement and the statement recorded during the search, the former is to be preferred, because that gives the true state of affairs. According to him the assertions during the recording of second statement were afterthought. The assessee is in appeal against the aforesaid action of the Revenue authorities.

6. The assessee's counsel, in the light of the above facts and circumstances, submitted that the so-called preliminary statement, which admittedly was recorded before the start of the search action was given under the disturbed state of mind. According to him any ordinary person, who is visited by a contingent of IT authorities for the first time and that too for carrying on search operations will get mentally disturbed. According to him the assessee got mentally disturbed and this fact was stated by the assessee in his second statement recorded during the search itself when he was again called upon to explain the sources of cash of Rs. 94,530 which by that time had been found at his residence. In view of this fact the assessee's counsel submitted that the so-called preliminary statement has no evidentiary value. On the other hand, it is the second statement, which was recorded during the search itself, which has to be considered. Supporting this plea the assessee's counsel submitted that since the assessee was not allowed to go anywhere out of his premises during the search, the second statement cannot be termed as after thought. According to the assessee's counsel the second statement was not the retraction rather it was the only statement which can be considered as statement legally recorded during the course of search. The assessee's counsel further submitted that even if it is taken that the second statement was the retraction of the first statement, then also the second statement has to be considered, because the assessee is legally entitled to retract the statement given under duress or tension or disturbed state of mind provided he is able to substantiate the second statement and since the assessee's second statement was substantiated by the two statements of his son, Sudhir Jain, statement of Kamal Kant Jain and statement of Smt. Karuna Jain recorded during the search proceedings on 4th Feb., 1986 itself and also by other corroborating

evidence such as WT returns of Smt. Karuna Jain for asst. yrs. 1984-85, 1985-86 and 1986-87, certificate of Smt.

Karuna Jain's father confirming the giving of cash of Rs. 50,000 at the time of her marriage etc. so the retraction was legally justified. At this point, the learned assessee's counsel submitted that the fact that WT returns were furnished at a far away place i.e. at Ghaziabad on 4th Feb., 1986, i.e. the day of search itself supports the assessee's claim of availability of cash with Smt. Karuna Jain. According to him the return furnished on 4th Feb., 1986, must have been prepared and signed definitely before the commencement of the search, because after start of the search the lady remained at the searched place and did not go out of place till the close of the search. He, therefore, disputed the conclusion of the Revenue authorities in holding that the WT returns were filed was afterthought. Concluding his remarks the assessee's counsel heavily relied on various statements and the documentary evidence submitted before the lower authorities and placed in its compilation furnished before the Tribunal. He further submitted that the authorities have accepted a part of the statement when they accepted the availability of cash of Rs. 32,530 with the assessee and his wife, because in the preliminary statement the assessee had claimed only a cash of Rs. 22,000 on this account. According to him when the Revenue authorities were accepting a part of assessee's version why not the balance one especially when the same was supported by statements of concerned persons duly corroborated by documentary evidence. He, therefore, submitted that the addition of Rs. 45,000 confirmed by the CIT (A) out of addition of Rs. 55,000 is liable to be deleted in toto.

The assessee's counsel had made another submission that the onus which lay on the assessee for explaining the source of cash found during search was discharged and the Revenue cannot take the plea that statements given by other persons were afterthought or with an intention to save the assessee, because there is no presumption in law that the witness will come to help the assessee and for this proposition, relied on the decision of the Hon'ble Allahabad High Court in Sheo Narain Dulichand vs. CIT (1969) 72 ITR 766 (All). The learned Departmental Representative, on the other hand, in addition to strongly supporting the order of the Revenue authorities submitted that the second statement was afterthought and

it is the preliminary statement which has to be taken into account, because it is the initial statement which carries more weight and for this purpose relied on the Tribunal's decision in *Asstt. CIT vs. Dr. S. N. Gupta* (1997) 58 TTJ (Del) 12 : (1996) 56 ITD 440 (Del). He further submitted that there was no question of accepting the second statement in part. According to him the second statement was not accepted at all, but the claim for cash available with the assessee and his wife was allowed keeping in view the principles of natural justice. For this purpose the learned Departmental Representative relied on the decision in *CIT vs. Durga Prasad More* (1971) 82 ITR 540 (SC). As regards the statements of Sudhir Jain, the learned Departmental Representative submitted that there was contradiction in all the three statements of this person and, therefore, none of them was of any evidentiary value.

7. The assessee's counsel in rejoinder submitted that the addition has been sustained only on the basis of suspicion and since it is settled law that suspicion however strong it may be cannot be substituted in place of evidence so the addition is likely to be deleted.

8. After considering the rival submissions, facts and circumstances of the case, material placed before us, the case law and the provisions of s. 132(4), we are of the opinion that the issues for our decision in this appeal are : (I) status and binding nature of so-called preliminary statement recorded before the start of actual search action; and (II) (i) can the second statement recorded during the search action itself can be considered as a retraction of the preliminary statement and did the assessee has a right to retract. (ii) If so, then the status and binding of second statement.

9. For deciding the issue relating to the status and binding nature of so-called preliminary statement, which admittedly (as observations of CIT (A) in para No. 2.5 of his order) was recorded before the actual rummaging for the search was started, there is no dispute about the proposition canvassed by the learned Departmental Representative that the first statement carries more weight. However, the dispute arises only when such a statement, as has been recorded in the present case i.e., recorded before actual start of the search action and

consequently to resolve this controversy, it is necessary to consider the provisions of sub-s. (4) of s. 132 which at the relevant time were in the following terms : "(4) The authorised officer may, during the course of the search or seizure, examine on oath any person who is found to be in possession or control of any books of account, documents, money, bullion, jewellery or other valuable article or thing and any statement made by such person during such examination may thereafter be used in evidence in any proceeding under the Indian IT Act, 1922 (11 of 1922), or under this Act." 10. The language used in the aforesaid provisions speaks of "examination of oath during the search and seizure" which clearly means that the examination of a person under s. 132(4) can be carried on only "during the course of search and seizure" i.e. after the actual start of the search operation and before the close of the operation which otherwise means that prior to insertion of Explanation to s. 132(4) i.e. prior to 1st April, 1989 the power to interrogate on oath conferred with authorised officer by s. 132(4) was not for the purpose of general investigation of the assets, but was for limited purpose of seeking explanation or information in respect of the documents, articles or things found during the search. The authorised officer, therefore, had limited power to make enquiries on oath in respect of assets found during search and was not authorised to put questions in general. In view of this proposition of law, we are of the opinion that the authorised officer cannot have any power to record a so-called preliminary statement before the start of the search action, this proposition of ours finds support from the decision of the Hon'ble Bombay High Court in the case of R. R. Gavit vs. Smt. Sher Banu Hasan Daya & Anr. (1987) 161 ITR 793 (Bom) against which the SLP was also rejected by the Hon'ble Supreme Court as in 116 ITR (St.) 111.

11. As far as the present case is concerned, it is noticed from para 2.5 of the order of the CIT (A) (which has not been disputed by the Revenue before us) that the assessee's so-called preliminary statement was recorded before the actual rummaging of the search was started and if it is so then, in our opinion, the so-called preliminary statement in which the questions put to the assessee were of the general nature and not related to any specific asset or document, was not at all a statement under s. 132(4). Consequently the Revenue cannot legally rely on such an unauthorised statement. On the contrary, the assessee's second

statement which admittedly was recorded during the course of search operation and was corroborated by the statements of other members of the family as well as documentary evidence furnished during the course of assessment proceedings, was in fact the only legal statement under s. 132(4) and could not be ignored. In view of our discussion, we are of the opinion that the so-called preliminary statement was not a statement under s. 132(4). On the contrary, it was the second statement which could be said to be as valid statement under s. 132(4).

12. Coming to the second issue, we, in view of our findings against the status and binding nature of so-called preliminary statement in the foregoing para, hold that the second statement could not be said to be the retraction of the so-called preliminary statement.

13. Presuming that the second statement was the retraction of the so-called preliminary statement then we are of the opinion that since the assessee's assertion in the second statement giving reasons for assertions in the so-called preliminary statement have not been contradicted by the Revenue, it has to be held that the preliminary statement was given under a disturbed state of mind which could be retracted by the assessee-legally entitled to retract and to substantiate his second statement. Here we would respectfully refer to the decision of the Hon'ble Supreme Court at AIR 1976 SC 376 where the Hon'ble apex Court has held that any admission made in ignorance of legal rights or under duress cannot bind the maker of the admission.

Respectfully following the law laid down by the Hon'ble Supreme Court and in view of the circumstances explained by the assessee in his second statement, which have not been disputed by the Revenue, we are of the opinion that if at all the assessee's second statement is considered retraction of the preliminary statement then the assessee had a right to do so.

14. As far as the status and binding nature of the assessee's second statement is concerned since it is found from the material on record that the assessee's assertions made therein were corroborated by the statement of other family members which in turn were corroborated by documentary evidence, we are of the opinion that it was only the second statement which could be relied upon by the

Revenue and not the preliminary statement. If at all, the Revenue still wanted to rely on the preliminary statement then the onus lay on it to bring material/evidence on record for rejecting the assessee's assertions in assessee's second statement which, in our opinion, has not been discharged. Further, whatever reasons have been given by the Revenue for rejecting the assertions made in the second statement, we in the absence of any supporting evidence, have found the same as based either on human presumptions or on conjectures and surmises which cannot be sustained in income-tax matters.

15. In view of aforesaid discussion, we are of the opinion that the Revenue was not justified in rejecting the assessee's assertions with regard to the source of cash of Rs. 94,530 found during the search and consequently the addition of Rs. 45,000 sustained by the CIT (A) is deleted.

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