

Ramesh T. Salve Vs. Assistant Commissioner of

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Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Nov-29-1999

Reported in : (2000)75ITD75(Mum.)

Appellant : Ramesh T. Salve

Respondent : Assistant Commissioner of

Judgement :

1. This appeal has been filed by the assessee Shri Ramesh T. Salve against the order of the CIT(A) confirming the addition of a sum of Rs. 4,70,000 as the undisclosed income for the assessment year 1986-87.

2. There was a search conducted in the premises of the assessee under section 132(5) of the Income-tax Act, 1961, on 7-9-1990. In the course of the search, the assessee's statement was recorded in regard to the purchase of a flat in the name of his wife from M/s. Sattalite Builders. When the assessee was informed that M/s. Sattalite Builders had admitted that for all the flats sold by them, 40% of the consideration had been received as on money and only balance 60% had been shown as the agreed price, the assessee accepted that position and agreed to pay tax accordingly. There was also a declaration under section 132(4) filed by the assessee on the date of the search admitting a total sum of Rs. 24,69,816. In arriving at that amount, the assessee has included Rs. 4,70,000 as "Cash payment for purchase of 203, Sujal Apartment, which is not accounted". The purchase of the flat in the name of the assessee's wife had been affected in the previous year relevant to the Assessment year 1986-87. Later on 5th October,

1990, the assessee filed a letter before the Assessing Officer stating that "I wish to say that I have not paid any amount in cash to builders for the purchase of the flat in 1985". The Assessing Officer did not accept the subsequent statement of the assessee. Instead on the basis of the statements given by the assessee at the time of the search, the Assessing Officer concluded that there was on money payment of Rs. 4,70,000 which the assessee had not accounted. In the assessment for the Assessment year 1986-87, the sum of Rs. 4,70,000 was added as the undisclosed income under section 69B of the Income-tax Act. Though the assessee took up the matter in appeal the CIT(A) found that in view of the clear statement of the assessee in reply to question No. 10 at the time of search, there was actual payment of Rs. 4,70,000 as on money for the purchase of the flat. The CIT(A) did not accept the plea that the statements given at the time of the search were under threat and when the assessee was in a confused state and so the same should not have been acted upon. The appellate authority held that there was no infirmity in the conclusion arrived by the Assessing Officer in regard to the unaccounted amount invested in the purchase of the flat.

Aggrieved with the order of the CIT(A) confirming the addition, the assessee has filed this appeal before the Tribunal.

3. On behalf of the assessee Shri K. Shivram Advocate submitted before us that the CIT(A) was not correct in confirming the addition as the assessee's undisclosed income without considering the fact that there was no evidence brought on record by the Assessing Officer to show that there was any on money payment for the purchase of the flat. According to the learned counsel, the revenue authorities were not correct in making the addition solely on the basis of the statement given by the assessee when he was in a confused state on account of the search. Shri Shivram further stated that the statement said to have been given by the assessee were only in the form of answers to questions that the search party was actually leading the assessee to the answer on the question of on money payment. It was stated that there was the threat that the department would acquire the property if the assessee would not admit the on money payment. The learned counsel added that as soon as the assessee realised his mistake he corrected the same through the latter filed on 5-10-1990. It was his

contention that the correct facts were given in that letter and so the Assessing Officer ought to have accepted the same, without making the addition under section 69B. The learned counsel added that the assessee had obtained a No Objection Certificate from the competent authority in regard to the transaction.

In the Paper Book before us by the learned counsel, there is a copy of the No Objection Certificate issued by the competent authority on 22-9-1987 (Page 101). The learned counsel contended that there was no evidence gathered by the Assessing Officer to show that the assessee had paid any amount over and above the price admitted in the agreement.

In the absence of corroborative evidence to show payment of on money the CIT(A) ought to have deleted the addition, the learned counsel submitted. It was further stated there was no mention in the assessment order as to whether similar additions had been made in the case of other purchases and it was also not made clear as to whether additions had been made in the assessment of the builders on account of the excess amounts received by them. Relying on various decisions, Shri Shivram also contended that on the basis of the assessee's statement alone no addition should have been made towards the unexplained investment. Shri Shivram also contended that no addition could have been made under section 69B of the Income-tax Act, for the unexplained investment if any. According to him even if there was any unexplained investment addition should have been made under section 69 only and not under section 69A. He extended his argument with the submission that the section provided that the investment might be deemed to be the income of the assessee which would mean that there was the discretion with the Assessing Officer to deem it as undisclosed income or not. His contention was that the Assessing Officer ought to have exercised the discretion in favour of the assessee in the absence of any corroborative evidence to show any on money payment by the assessee.

4. The departmental representative Sri B. L. Meena on the other hand, supported the order of the CIT(A) and submitted that when there was the clear admission by the assessee that 40% of the price was paid as on money, there was no further evidence to be introduced by the Assessing Officer. The assessee himself made

the declaration under section 132(4) admitting the total unexplained income of Rs. 24,69,816 for various years which included Rs. 4,70,000 as excess payment for the flat, purchased in the name of his wife in 1985. According to Shri Meena an admitted fact need not be proved. He added that there was no merit in the plea that the assessee was under mental strain being under threat and that he was compelled to give the statement regarding the on money payment. He submitted that in all cases of search the tax payers would later come up with the complaint of threat, coercion etc. Shri Meena pointed out that it took nearly one month for the assessee to come up with such a plea. It was stated that if there was any coercion or threat, the assessee would not have taken such a long period for retracting the statement given by him earlier at the time of the search on 7-9-1990. As regards the section under which the addition had been made it was stated that there was the investment in the flat over and above the agreed price and so to the extent the entries not made in the account, there could be addition under section 69A. He added that in any case even if the addition could be made under section 69, reference to a wrong section would not make the addition invalid.

5. We have given due consideration to the submissions of both the sides and gone through the facts of the case. We have also perused the various documents contained in the paper book filed before us by the assessee's counsel. The search in the assessee's premises was conducted on 7-9-1990. In the course of the search the assessee was asked as under : "Q. No. 10 - In regard to this flat purchased in your wife's name firm M/s. Sattalite Builders I must inform you that in 1985 M/s.

Sattalite Builders (Sky Build (P.) Ltd.) have confessed before the Department that all flats sold by them 40% of the total consideration of the flat was taken as on money and only the balance of 60% was fixed as the agreement price. In this respect the same will apply to your agreement also. Please explain the source of investment and payment of cash of Rs. 4,70,000 approximately being the on money 40% of Rs. 11,75,000.

Ans. 10. - I accept the above contention and offer to pay taxes accordingly." 6. On the same day he made another statement before the authorised officer as "Final

statement under section 132(4) of the Income-tax Act of Shri Ramesh Savle son of Shri Tajshi Savle residing at 203 Sujal Apartments College Lanes, Santacruz (West), Bombay on 7-9-1990 at 2.30 PM". (vide page 56 of the Paper book). In that statement inter alia, he stated : "I would like to summarise my confession under section 132(4) of the Income-tax Act as follows : (1) Cash seized 1991-92 Rs. 1,20,000 (2) Jewellery seized 1991-92 Rs. 5,32,410 (3) Spent for interior Apartment.

1990-91 Rs. 1,30,000 (4) Drawing of Family member 1990-91 me and my wife.

1989-90 Rs. 1,00,000 (5) Cash payment for Apartment which is not year.

Rs. 4,70,000 accounted for.

for loose paper file relevant Rs. 11,17,406 seized by the deptt.

year.

7. It was on the basis of the these statements of the assessee that the Assessing Officer came to the finding that he has paid Rs. 4,70,000 for the purchase of the flat, over and above what had been accounted by him. The learned counsel for the assessee submits that the Assessing Officer was not correct in making the addition on the basis of the assessee's statement along without any corroborative evidence. He further contends that, once the assessee retracted from the earlier statments they ceased to have any evidentiary value. Shri Shivram has drawn our attention to the assessee's letter dated 5th October, 1990 explaining that it was under mental strain and confusion that had earlier admitted the payment of on money to the builders. It appears that there was any complaint from the assessee before the Commissioner of Income-tax or other authorities, regarding any threat or coercion by the search party to induce any answer from the assessee. In this sworn statement given on 7-9-1990, the assessee affirmed that : "Whatever stated above is true and correct to the best of my knowledge and belief. I have read the statement and understood and found it correctly recorded".

8. In the statement the assessee gives the details of various items making up the total sum of Rs. 24,69,816. Against the narration he has given the actual amount

of expenditure. We find nothing in support of the plea that the assessee had given the statement under coercion or threat. The statement giving details of various items of expenses does not give the impression of a statement given by a person in a confused state of mind. As submitted by the learned DR in search cases, the assessee may later come up with such pleas. The learned DR has brought to our notice the decision of the ITAT E Bench Mumbai in the case of Param Anand Builders (P.) Ltd., Mumbai in ITA No. 7726/7727/Bom/94, dated 29th March, 1996. In that case in para 23 of the order the Tribunal dealt with a similar contention of the assessee regarding the torture and the harassment by the revenue during the search which resulted in a damaging statement as under : "In so far as the arguments and allegations of the assessee to the effect that it was tortured and harassed by the revenue during the course of the search and thereafter are concerned, we are unable to agree with the learned counsel for the assessee. We find nothing on record to indicate that Income-tax authorities have employed third degree methods to force some persons to make confessions or admissions. This all the more unacceptable when independent witnesses were present at the time of search. Even if for the sake of argument it is accepted for a moment that the revenue authorities had given some threat to the assessee and its employees, there is nothing to stop the assessee and its employees to either meet personally or through their authorised representatives of bringing to the higher authorities through written communications that any statement or admission made by them before the search party was on account of that coercion or undue influence." 9. In the above decision, the Tribunal has also considered the affect of the statements of witnesses which had been subsequently retracted. It was the finding of the Tribunal that inspite of the subsequent retraction the revenue could rely on the original statements given by the witnesses. In the present case, it took nearly one month for the assessee to make the plea for the first time that the earlier statements given by him on 7-9-1990 at the time of the search were not correct statement. It is difficult to believe that only after the assessee received the legal advice that he came to realise his mistake and that as soon as he received the advice he gave the letter to withdraw the earlier statements. It may be noted that there were two statements given by him under oath on 7-9-1990. We do not think that his solemn affirmations had no evidentiary value. As observed by the Calcutta

High Court in the case of CIT v. Chrestian Mica Industries Ltd. [1977] 109 ITR 324 (page 332) it is well settled that a fact admitted by the counsel is a substantive evidence against the assessee.

If the admission by the counsel is substantive evidence, it goes without saying that the admission by the assessee is definitely a substantive evidence. In this context it is worthwhile to refer to the decision of the Calcutta High Court in the case of Amal Kumar Chakraborty v. CIT [1994] 207 ITR 376. On page 390, the court observed : "Here, we are to go by the dictum 'falsus in uno falsus in omnibus'.

Though applicable in criminal law, it is a sound principle to apply in taxation when the matter is one of finding of fact on the basis of statements of a witness and their judicial evaluation. It is seen that in 1975, the assessee gave a false statement by stating that he had no connection with the bank deposits. Later he makes a volte face and says that the deposits are from the money supposedly declared in 1971. Therefore, the later statements of the assessee cannot be credited as the source of the deposits." 10. Shri Shivram has relied on the decision of the Andhra Pradesh High Court in the case of CIT v. Shri Ramdas Motor Transport [1999] 238 ITR 177/102 Taxman 300 to contend that the statements of the assessee should not have been acted upon, without corroboratory evidence. In the case decided by the Andhra Pradesh High Court, addition was made in the assessment of a company on the basis of the statement of the Managing Director recorded at the time of the search. It was later found that the examination of the Managing Director was not valid. The High Court held that under the provisions of section 132(4) as it existed at the relevant time, the question of examining any person by the authorised officer would arise only when he found such person to be in possession of any undisclosed money or books of account. The Explanation to section 132(4) permitting such examination came into effect only from April 1, 1989. The Tribunal had recorded a finding of fact that the statement of the Managing Director had no evidentiary value as they were not supported by any other documentary proof. The facts in the present case are different. During the search in the assessee's premises, cash of Rs. 1,20,000 and jewellery valued at Rs. 5,32,400 were seized. The assessee could have definitely been examined under section 132(4) by the authorised officer. It is provided in the section that any

statement made by such person during the examination may thereafter be used in evidence in any proceeding under the Income-tax Act. In such a case there is no need for corroboratory evidence, in view of the evidentiary value the statement of that person is bestowed with under section 132(4). The facts being different, the decision of the A.P. High Court does not support the assessee's case. In this connection we may also refer to the fact that in the present case, it is not as if there was no corroboratory evidence gathered by the department. From question No. 10, put to the assessee by the authorised officer, it can be seen that the department was in possession of information that the sellers M/s. Satellite Builders were collecting 40% of the consideration as on money, for the sale of the flats. There was the confession made by M/s. Satellite Builders that only 60% of the consideration was shown as agreed price.

11. The learned counsel has also referred to the decision of the Supreme Court in the case of *Kishinchand Chellaram v. CIT* [1980] 125 ITR 713 wherein it was held that evidence collected at the back of the assessee, was not admissible if no opportunity was given to the assessee to controvert. In the present case, as already stated, it was on the basis of the assessee's own admission under oath that the addition had been made. Even in regard to the confession of the builders, it may be noted that their statement was put to the assessee.

As soon as the assessee came to know of their admission, the assessee agreed for the addition and the payment of tax on that amount. Later on the same day the assessee gave the details of the undisclosed income including that amount. There was no demand by the assessee for an opportunity to examine the builders. The decision of the Supreme Court is thus distinguishable on facts. In the paper book filed before us by the assessee's counsel there is of course a letter from M/s. A.R. Bodha & Co., requesting him to give a copy of the confession statement of the firm M/s. Satellite Builders. But then that letter is dated 4th June, 1999. It can thus be seen that before completion of the assessment by the Assessing Officer, or the appeal by the CIT(A) there was no request from the assessee for a copy of their confessional statements even, leave apart the opportunity for examination.

12. We may also mention here that in the case of Param Anand Builders (P.) Ltd. (supra), the 'E' Bench of the Tribunal had upheld the assessment made in the case of a Builder company with the addition on account of on money receipt on the sale of flats. In the present case, in view of the fact that the assessee himself had admitted in the declaration under section 132(4) the payment of Rs. 4,70,000 as on money on the purchase of the flat, we find that revenue authorities were justified in making the addition as the unexplained income in the absence of any explanation regarding the source thereof.

13. The learned counsel has referred to the decision in the case of Pushpa Vihar v. Asstt. CIT [1994] 48 TTJ (Bom.) 389 to contend that the addition made on the basis of the assessee's earlier admission was not in order. In that case the Tribunal found that the original declarations at the time of the survey had been given by the junior most partner who was a non-matriculate and so the possibility of his committing a mistake in explaining the affairs of the business could not be ruled out. In the subsequent statement it was clarified that what the junior most partner had mentioned earlier, was about sale and not income, and in that sense there was some misunderstanding. It was in the above circumstances of the case that the Tribunal deleted the addition on the ground that the earlier declaration should not have been made the basis of the addition. The facts in the present case are entirely different. It is the assessee himself who made two statements including the declaration under section 132(4) at the time of the search. In the other case in Deepchand & Co. v. Asstt. CIT [1995] 51 TTJ (Bom.) 421 the Tribunal found that there was considerable force in the assessee's contention that the statements had been recorded under pressure and force, and further the retraction of the statement was supported by proper evidence. In the present case the later version of the assessee is not supported by any evidence. Further there is no evidence that the earlier statements had been given under pressure or force. The statement recorded under section 132(4) is a good evidence; but the assessee has a right to retract the same provided he can prove that the statement as given was not the correct statement or was not a voluntary statement. For that proposition, Shri Shivaram has relied on the decision in the case of Sree Krishna v. Kurukshetra University AIR 1976 SC 376. As already stated, we do not find any material to prove that the earlier statements given by the assessee were not

correct or that those statements were not given voluntarily. We have to bear in mind the fact that when a search is conducted by the department, and the statements are recorded, independent witnesses are present. It is difficult to believe that any force or pressure has been used by the authorised officer to induce the assessee in making that statement.

14. Shri Shivaram has also raised another plea that the statements of the assessee recorded in question - answer form lacked any evidentiary value, regarding the assessee's income. True some of the statements of the assessee were recorded as the answers given by him to the questions put to him by the Authorised Officer. But does it mean that the answers given by the assessee lack evidentiary value, merely because, the question first came from the authorized officer. Further a perusal of the "Final statement under section 132(4) of the Income-tax Act, of Shri Ramesh Savle son of Tejahie Savle residing at 203 Sujal Apartments, Cottage Lane, Santacruz, Bombay on 7-9-1990 at 2.30 PM" would show that the assessee give the complete details of the amounts making up the total sum of Rs. 24,69,816. The question put by the Assessing Officer (Q. No. 13) was - "Please give the final qualification of the confession made by you under section 132(4) of the Income-tax Act." 15. As a matter of fact, it was not a question of the Assessing Officer to the assessee, but a request from him to give the details as to how he had quantified the sum in his declaration under section 132(4). We do not find any question by the Assessing Officer, as to whether there was the sum of Rs. 4,70,000. We do not accept the plea that the above statement of the assessee was given as an answer to any question asked by the Assessing Officer, to deprive it of its evidentiary value.

16. Regarding the contention that the addition has been made under a wrong section, it may be noted that the assessee had no explanation for the source for the sum of Rs. 4,70,000 given as on money for the flat.

In his sworn statement this was shown as cash payment for purchase of flat not accounted. In the assessment the amount was added as undisclosed income under section 69B. Section 69B provides that wherein any financial year the assessee has made investment and the Assessing Officer finds that the amount

expended on making such investment exceeds the amount recorded in this behalf in the books of account maintained by the assessee for any source of income, and the assessee offers no explanation about such excess amount or the explanation offered by him is not in the opinion of the Assessing officer, satisfactory, the excess amount may be deemed to be the income by the assessee for such financial year. The assessee's claim is that the investment was made in the flat in the name of his wife and that the same was not recorded in his books of account. The learned counsel for the assessee submits that in such a case the excess investment, if any, could be deemed as income under section 69 only and not under section 69B. As held by the M.P. High Court in *mandlal Jaiswal & Co. v. CIT* [1998] 232 ITR 540 reference to a wrong section will not make the addition invalid. The fact is that the assessee admitted that there was excess payment of Rs. 4,70,000 as his investment in the purchase of the property in the name of his wife. The excess consideration paid by him has not been recorded in his books of account. If the investment is not recorded in the assessee's books of account, under section 69 it can be deemed as his income of the financial year. If the excess investment alone is not recorded in the books of account, such excess investment can be deemed as income under section 69B. In the circumstances of this case, we do not think, the Assessing Officer is in error in mentioning section 69B as the relevant section for making the addition. Further even if the correct section to be applied for, the deeming of the income is section 69 only, we do not think, the addition requires to be deleted, merely because the Assessing Officer has referred to section 69B, and not to section 69. Reference may also be made to the decision of the Gauwahati High Court in the case of *CIT v. Smt. Amiya Bala Paul* [1999] 240 ITR 378. *CIT v. Smt. P. K. Noorjahan* [1999] 237 ITR 570/103 Taxman 382 the Supreme Court has held that the word may in section 69 cannot be interpreted to mean 'shall' and that the Assessing Officer is not obliged to treat the source of investment as income whenever the explanation regarding it is not satisfactory. But that does not mean that the discretion has to be exercised always in favour of the assessee in all cases falling under section 69. As observed by the Supreme Court in the same case, the discretion has to be exercised keeping in view the facts and the circumstances of the particular case. In the present case, the facts and the circumstances do not point towards the discretion to be

exercised in the assessee's favour in the sense that the amount admitted by him as his unaccounted income and on which he also agreed to pay the taxes, should not be deemed as his income.

18. In the circumstances discussed above, it is our considered view that the CIT(A) was justified in confirming the sum of Rs. 4,70,000 added by the Assessing Officer as the assessee's undisclosed income for the assessment year 1986-87. We accordingly confirm the order of the First Appellate Authority.

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