

Assistant Commissioner of Vs. Jagat Explosives

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Court : Income Tax Appellate Tribunal ITAT Jodhpur

Decided On : Jun-29-2005

Reported in : (2006)98ITD50(Jodh.)

Judge : M Bakshi, Vice-, R Syal, H O Maratha

Appellant : Assistant Commissioner of

Respondent : Jagat Explosives

Advocate for Def. : Mr. Nandy

Judgement :

1. This appeal by the revenue is directed against the order passed by the CIT(A) on 24-7-2000 in relation to the assessment year 1996-97.
2. The only ground raised by the revenue is against the deletion of addition of Rs. 5,98,440 made by the Assessing Officer on account of unrecorded transportation charges.
3. Briefly stated facts of the case are that the assessee was a consignment agent for supply of explosive goods to I.C.I. India Ltd. in Rajasthan. As per information available on the records, a survey under Section 133A was carried out in the case of Pooja Roadlines, Udaipur and some bill books were impounded under Section 131 of the Act. On scrutiny of the bill books of M/s. Pooja Roadlines, it was noticed that the vans owned by the assessee had been used for transportation of goods to various places. On examination of the details, it was revealed that the assessee

had entered into an agreement with M/s. India Explosives Ltd. that the trading items of the principal company be supplied at Udaipur. The vans owned by the assessee were used for getting goods from Udaipur to Gomia in Bihar. The vans so used for delivering goods should be unloaded at Udaipur and empty vans should be sent to Bihar for obtaining the consignment. In short, the vans should not be used for getting other goods while sending and bringing the goods from Gomia to Udaipur. The principal company bore the cost of the whole transportation expenses to and fro.

4. Summons were issued under Section 131 to the partners of the assessee-firm, namely Shri Pradeep J. Mashru and Shri Harilal T. Mashru. During the course of statement under Section 131, Shri Harilal T. Mashru, being the Managing partner, admitted on 18-12-1998 that the assessee's vans were used for carrying goods to various places while sending it for bringing consignment goods. A chart as per Annexure A to the assessment order was prepared and brought to the notice of the assessee regarding the use of assessee's vans and amounts charged for such transportation. As per this chart, the assessee had charged a total sum of Rs. 5,98,440 during assessment year 1996-97. In the statements of Shri Harilal T. Mashru and Shri Pradeep J. Mashru, they both admitted of having no objection if the aforesaid sum of Rs. 5,98,440 was added in the total income declared for assessment year 1996-97 under consideration. They also admitted that this amount has not been declared in the I.T. return filed for this assessment year. In view of their admission and offering for taxation, the said sum of Rs. 5,98,440 was added to the total income of the assessee. In the first appeal, the Id. CIT(A) came to the conclusion that the Assessing Officer had drawn wrong inference of the assessee having earned any income as per Annexure A to this assessment order. It was further held that none of the partners had admitted that they had charged any amount for transportation of goods. It was observed that undue pressure was exercised on them as a result of which they made surrender. Accordingly the addition was deleted.

5. Before us, the Id. D.R. vehemently contested the action of the Id. CIT(A) in deleting the addition. He referred to the various pages of the statement record of both the partners in which they had categorically admitted the fact of having

earned income not disclosed in the books of account and they also agreed to surrender the amount subject to no penalty and no prosecution. It was stated that the Id.CIT(A) was wholly unjustified in deleting the addition which was made on the strength of the surrender made by the partners of the assessee-firm. In opposition, the Id. counsel for the assessee heavily relied upon the impugned order to contend that there was no material to indicate that the assessee had, in fact, earned any income of this magnitude, which was liable to be taxed. He also referred to certain portions of the statements of the partners to plead that the surrender was not validly made.

6. We have heard the rival submissions and perused the relevant material on record. It is obvious that the said income of Rs. 5,98,440 was included in the total income of the assessee for the year under consideration on the foundation of the statements made by two partners agreeing for surrender subject to no penalty for the year under consideration. In order to appreciate the rival contentions, it would be appropriate to go through the relevant extracts of the statements of the two partners, copies of which have been placed in the PB. Statement of Shri Pradeep J. Mashru was recorded on 21-12-1998. In the exhaustive statement, it was agreed vide answer to Question No. 33 at PB page 86 that the perusal of the four books revealed that the vehicles belonged to the assessee. He expressed ignorance about details. In response to Question No. 46 at PB page 89, when the Assessing Officer invited the attention of the partner to the fact that the books indicted the assessee had received transportation charges at Rs. 5,98,440 in the assessment year 1996-97, Rs. 3,58,785 in the assessment year 1997-98, Rs. 4,06,513 in the assessment year 1998-99 and Rs. 28,715 for assessment year 1999-2000, it was conceded by the partner that he was ready to offer the amount of Rs. 5,98,440 in the assessment year 1996-97 as income, subject to no penalty under Section 271(1)(c) of the Act and no prosecution. The statement of the other partner, namely, Shri Harilal T. Mashru was recorded on 17/18-12-1998. Vide Question No.2 at PB page 105, he agreed to surrender the abovesaid sum for assessment year under consideration subject to no penalty and no prosecution. In response to Question No. 3, at page 106 of the PB, he conceded that he was making surrender after making consultation with all the partners of the firm and they do not have any objection to it.

These two statements, of two different partners, recorded on two different dates, namely 18-12-1998 and 22-12-1998 bring out one conclusive fact that both of them agreed to offer the amount of unrecorded transportation receipts in question for taxation subject to no penalty and no prosecution. The stand of the assessee taken before the appellate authority and contended before us, with great vehemence, that the surrender was extracted by coercion, cannot be accepted because both the partners gave statements on different dates agreeing to the same conclusion of the offer of surrendering the said sum, which was acted upon and added to assessee's income. The timing of the statements of the two partners of the firm cannot be lost sight of. It is further important to note that if the statements were extracted forcefully, they could have immediately retracted from their stands by approaching the higher authorities in this regard. Nothing of this sort was done. We are reminded of the decision in the case of *Greenview Restaurant v. Asstt. CIT* in which case the Assessing Officer recorded the statements on 23-9-1993 and retraction of the statement coming on 24-12-1993 was not accepted on account of delay on the part of the assessee in retracting the statement recorded. It was further observed that there was no material on record to establish that any attempt was made on behalf of the assessee to prove the allegation of threat, inducement or coercion. It is further observed that more than two decades back, similar situation came up before the Punjab and Haryana High Court in the case of *Bantu Singh Kartar Singh v. CIT*. In this case, it was held that an order passed on an agreement cannot give rise to grievance and the same cannot be agitated in appeal.

7. We are conscious of the fact that it is not in each and every case that the statement made by the assessee cannot be retracted. Every case is required to be judged on its own facts by keeping into consideration various factors, such as, the timing of retraction, admission made in contravention of the provisions of the Statute and the material justifying the retraction from the earlier statement. If the assessee leads material to conclusively prove that the statement was obtained by the authorities under coercion, it can justify retraction. But where the assessee agrees to an addition on factual aspects of the matter, the denial coming long thereafter cannot be accepted on mere assertion of the assessee. Reverting back to the facts of the present case, it is found that as an admitted position that the two

partners of the assessee-firm agreed for surrender of the above referred sum on two different dates with the condition of non-imposition of penalty under Section 271(1)(c) and non-initiation of any penalty proceedings. The assessment was completed accordingly. No objection was raised at any time either before the Assessing Officer or his superiors, namely Commissioner of Income-tax with regard to the extracted surrender, as alleged. It was only during the appellate proceedings before the first appellate authority that the assessee came out with a version of its non-liability to be taxed on the said sum. The Id. CIT(A) promptly acted to accept the assessee's stand and deleted the addition without considering that the retraction made in the appeal proceedings was not based on sound footing. At this juncture, it would be appropriate to note the order passed by the Chandigarh Bench of the Tribunal in the case of ITO v. Sadu Ram Gupta [1998] 66 ITD 441 (SMC) in which it was held that the initial statement made by a person about a particular state of affairs carries more weight and a subsequent statement made retracting from the earlier position should be on good ground supported by cogent and relevant evidence. In this case also the addition made on the 1. 133 Taxman 432. strength of the surrender made by the assessee was deleted in the first appeal and the Tribunal vide its order restored the order of the Assessing Officer by holding that the retraction was not valid. Similar position was considered by the Delhi Bench of the Tribunal in the case of Smt. Vasanthi Sethi v. Asstt.

CIT[1992] 43 ITD 447 in which case also the initial admission made by the assessee was held to be valid and the subsequent retraction was disregarded. In view of the legal and factual position discussed above, we are of the considered opinion the Id. CIT(A) was not justified in deleting the addition of Rs. 5,98,440. By reversing the impugned order, we restore the assessment order on this score.

1. I have gone through the proposed order of my Id. Brother [A.M.] and I have not been able to persuade myself to agree with the view taken by my Id. Brother. Therefore, I am writing my own order.

2. The facts of the case have been discussed by my Id. Brother but to further elaborate, I would like to mention certain facts. The clear cut facts which could be culled out of the assessment order and the Id.CIT(A)'s order and also from other

available material are that the assessee-firm is a consignment agent for supply of explosive goods to I.C.I. India Ltd., in Rajasthan. It filed its return of income on 28-10-1996 declaring an income of Rs. 2,63,373, therein. A survey under Section 133A of the Income-tax Act, 1961 [hereinafter referred to as 'the Act'] was carried out in the case of one another firm, namely, M/s. Pooja Roadlines, Udaipur and, thereafter', its bill books were impounded under Section 131 of the Act. On scrutiny of these books, it was noticed that the vans owned by the assessee M/s. Jagat Explosives had been used for transportation of goods to various other places. The perusal of the whole record reveals that the date of survey had not been mentioned anywhere, either in the assessment order or in the appellate order.

3. The undisputed facts of the case are that no statement as could have been recorded or would have been recorded by the department, of the partners of M/s. Pooja Roadlines, was ever brought on record. It is also an undisputed fact that the assessment records or assessment orders in the case of M/s. Pooja Roadlines for the year under consideration were the best available evidence on record, which could prove the allegations in question against the assessee have not been brought on record. The vans owned by the assessee were used for bringing the goods from Gomia in Bihar to Udaipur in Rajasthan. These vans were required to be unloaded at Udaipur and empty vans were to be sent to Bihar for obtaining the consignment. So, as per the assessee, these vans were not used for carrying other goods while sending or bringing the goods from Gomia to Udaipur. The statements of the two partners, namely, Shri Pradeep J. Mashru and Shri Harilal T. Mashru of the assessee-firm were recorded under Section 131 of the Act on different dates. These partners surrendered a sum of Rs. 5,98,440 on the basis of these allegations. But the statements of these two partners, when read in entirety and in toto, nowhere give a suggestion that these partners of the assessee-firm did ever admit the factum of transportation of goods of M/s. Pooja Roadlines or having received payment for that transportation. It is only at the far end of their statements, only, that too with a condition, the surrender was made to avoid litigation and to co-operate with the department. I may mention that the name of the place as Golia has been said in the assessment order and Golia in the Id. CIT(A)'s order.

4. A careful consideration of these statements, particularly relevant questions, i.e. Question No. 32 at page 88 and Question No. 46 at page 89 and Question No. 2 at page 105 of the PB and the entire statements, when considered in the light of these questions fortifies the claim of the assessee that in these statements, the partners of the firm have nowhere admitted that they ever transported the alleged goods and received payments for that work. They simply made surrender and, later on, may be after a considerable period, retracted from earlier statement. So, the statement made during the survey, that too, in the case of a third party, cannot be taken to be a conclusive one and, moreover, no such statement can be recorded legally under Section 131 of the Act from the partners of this assessee. Reliance can be placed on the decision of the Calcutta Bench of the Tribunal, which is reported in (sic) 255 ITR 269 because for recording statement under Section 131, a condition precedent is existence of a pending procedure.

Again, reliance can be placed on the decision of the Hon'ble Patna High Court in Smt. Rina Sen v. CIT and ITO v. James Joseph O'Gorman . The specified authorities are empowered to record statement under Section 131 of the Act only to make enquiry or investigation in respect of suspected concealment and not otherwise.

The partner Shri Harilal T. Mashru had denied any knowledge of Jagat Explosives in the challan books of M/s. Pooja Roadlines. In reply to Question No. 32, this partner had categorically denied having transported any goods through M/s. Pooja Roadlines and having charged any freight, for that matter. It was only to avoid dispute of any sort and in order to cooperate with the department, on the condition of non-levy of penalty under Section 271(1)(c) of the Act or of launching of any prosecution, this partner stated that the transportation charges of Rs. 5,98,440. Similarly, the other partner Shri Pradeep J. Mashru, in his statement dated 21-12-1998 never admitted any receipt from plying of vans through M/s. Pooja Roadlines and such an admission for offering of receipts for taxation was made almost under similar circumstances on the next day. It is evidently clear from the above that nowhere these partners have admitted about the receipts from transportation charges having been received by plying their vehicles through M/s. Pooja Roadlines. The conditional offer for taxation of income as above, cannot be stated

to be with reference to specific material /evidence about transportation charges worked out by the Assessing Officer as per Annexure A to the assessment order. The statements of Shri Kataria of M/s. Pooja Roadlines and the details of vans allegedly used by the assessee were not placed or confronted to the partners while recording their statements. So, the submission of Id. A.R. that this surrender was obtained under pressure assumes colossal importance in the light of the above facts because the statement of Shri Kataria of M/s. Pooja Roadlines and details regarding the running of vans and loading of goods books by M/s. Pooja Roadlines and the assessment record of M/s. Pooja Roadlines with regard to these receipts is the best evidence which is missing from the records of this case. But the Assessing Officer has mentioned in the order that due to these revelations only, these partners were compelled to make such a surrender. This fact is not corroborated or supported by available evidence on record.

5. The statement recorded under Section 131 in such circumstances are not in parity with the statements recorded while carrying out search proceedings under Section 132 of the Act. The search procedures are special procedures wherein retraction of the statement is permitted by legal provisions itself in a certain fashion. So, the factum of retraction being after a long time, does not have specific significance with a view to give force to the conclusion that delayed retraction goes against the makers of the statement. There is no other material evidence on record except the conditional surrender, that too, retracted which could corroborate the observation of the Assessing Officer made in the assessment order that the assessee had charged a total sum of Rs. 5,98,440 during the financial year 1995-96. This finding of the Assessing Officer seems to be without proper basis. As I have stated above, the partners have not admitted the factum of either earning such income or use of the vans through M/s. Pooja Roadlines.

So, I am inclined to accept the statement of the Id. A.R. that the surrender was made by these partners on account of pressure and in order to avoid further dispute including levy of penalty and prosecution. These partners retracted by filing sworn affidavits wherein they had stated that their statements were recorded and the surrender was made due to conditional pressure to surrender the transportation charges found in the alleged challan books of M/s. Pooja Roadlines,

Udaipur and they also alleged that they were threatened to conduct I.T. raids if they did not surrender. In their affidavits, it is also mentioned that the department threatened to seize bank accounts in case they did not deposit the amount of tax and interest thereon.

6. I have already taken view in many cases that in such circumstances, addition cannot be made and sustained merely on the basis of offer of such income for taxation wherein conditional statement was recorded under Section 131 of the Act without making any reference to any specific source of income and their transactions as these statements cannot be equated with the statements recorded under Section 132(4) of the Act. Moreover, any material gathered at the back of the assessee cannot be utilized against it without providing proper opportunity and without providing copies thereof. Reliance can be placed on the decision of the Hon'ble Rajasthan High Court in 134 ITR 19 (sic) wherein it has been held that any statement taken on the basis of papers which were not shown or copies which were not given could not be legal. In this case, the particulars of GR [Goods Received], etc. were not provided to the partners/assessee.

7. One more important factor in this case is that vans used by the assessee are specifically manufactured which can transport explosives which are permitted to be used for such transportation only and not for any other goods. It would have been better if the department could have proved that M/s. Pooja Roadlines had transported such explosives and it had licence to do so. The age and health conditions of the partners, who are stated to be 70-75 years of age and suffering from ailments and who had suffered continuously for two days for making statements is also a factor which can give some impetus to the above conclusion. In my considered view, no addition can be sustained when the partners in question have not at all accepted the allegations of the department but had simply made a surrender, that too conditional, at the fag end of the statement. There is no exact relationship between the surrendered amount and receipts in question, which ostensibly give a suggestion that the surrender was made to buy peace and to avoid further litigation as has been claimed.

8. I may also add that no documents can be impounded under Section 133A/133, in the circumstances as has been alleged.

9. Mere mention of the name of this assessee on the challan books of M/s. Pooja Roadlines, a third party, cannot be sufficient enough for making the impugned addition. There is no direct or actual business links, which could be established between the assessee and M/s. Pooja Roadlines. The calculations made in Annexure-A to the assessment order are not proved on record. The nature of the business whereby explosives are transported is also an important factor, to be considered. The department has not bothered to take any pains in this regard. The Id. Assessing Officer has made the impugned addition or wrong assumption of facts that the partners have accepted the alleged business and have thus surrendered the receipts as per Annexure-A. The surrender was made under the above mentioned circumstances. The partners never accepted the plying of their vans for M/s. Pooja Roadlines of having received any payments as has been alleged. The comments of the Assessing Officer are general in nature. Rather, the partners categorically denied that their vehicles were never plied for freight and these were never sent for carrying the goods of M/s. Pooja Roadlines.

10. For above reasons I have to confirm the findings of the Id. CIT(A) in this regard. I dismiss this ground of appeal and in the result, the appeal is dismissed.

Since we have differed in our views, we request the Hon'ble President, ITAT for appointing Third Member to resolve the difference of opinion under Section 255(4) of the Income-tax Act, 1961 on the below given question : Whether on the facts and in the circumstances of the case, the Id. CIT(A) was justified in deleting the agreed addition of Rs. 5,98,440 on the basis of subsequent retraction 1. This appeal by the revenue for assessment year 1996-97 was heard by the Division Bench of the Tribunal. As a result of difference of opinion amongst the Members of the Bench, the Hon'ble President has nominated me for a decision on the point of difference, which was identified by the Bench as under: Whether on the facts and circumstances of the case, the Commissioner of Income-tax (Appeals) was justified in deleting the agreed addition of Rs. 5,98,440 on the basis of subsequent retraction.

2. I have heard the parties and perused the records. The assessee has filed an application for refraining the point of difference arising out of the respective orders of the Hon'ble Members of the Bench. According to the learned Counsel for the assessee, the point of difference identified by the Hon'ble Members may not bring out the actual point of difference between the Hon'ble Members. It has been suggested that on the basis of respective orders of the Members of the Division Bench, the following issue requires to be resolved : Whether on the facts and in the circumstances of the case, the Commissioner of Income-tax (Appeals) was justified in deleting the agreed addition of Rs. 5,98,440 The learned Counsel relied upon the decision of the Pune Bench of the Tribunal (Third Member) in the case of Khopade Kisanrao Manikrao v.Asstt. CIT[2000] 74 ITD 25 and the decision of the Jodhpur Bench of the Tribunal (Third Member) in the case of Rameshwar Lal Soni v. Asstt. CIT [2004] 91 ITD 301 in support of the contention that the Third Member should not be guided by the language of the point of difference and that he is required to decide the actual point of difference arising out of the respective orders of the Members of the Bench.

3. On merits, the learned Counsel for the assessee contended that there was a survey at the premises of M/s. Pooja Roadlines, Udaipur, a third party, unconnected with the assessee. According to the learned Counsel for the assessee, the assessee-firm constituted of five partners, namely, Shri Hari Lal 20 per cent, Shri Pradeep (son of Shri Hari Lal) 30 per cent, Shri Jagat Kumar S/o Shri Hari Lal 20 per cent, Smt.

Shiela Rajan, daughter-in-law of Shri Hari Lal 20 per cent, Smt.

Gitanjali, w/o Shri Pradeep and daughter-in-law of Shri Hari Lal 10 per cent. The sister concern of the assessee, by the name of Jagat Transporters constituted of four partners, namely, Shri Pradeep S/o Shri Hari Lal 30 per cent, Smt. Rukmani w/o Shri Hari Lal 30 per cent, Shri Jagat Kumar S/o Hari Lal 10 percent, Smt. Gitanjali, w/o Shri Pradeep 10 per cent. The learned Counsel contended that the partners of the firm, namely, Shri Hari Lal and Shri Pradeep were summoned by the Assessing Officer and their statements were recorded on 17/18-12-1998 in the case of Shri Hari Lal and on 21/22-12-1998 in the case of Shri Pradeep. The

assessment was completed on 24-12-1998. Inviting my attention to the statements recorded by the Assessing Officer, the learned Counsel contended that when the statements are read as a whole, it becomes abundantly clear that the partners of the firm had totally denied having earned any income from M/s. Pooja Roadlines, Udaipur.

However, when the partners of the firm were pressurized by the Assessing Officer, they had agreed to the addition on the basis of challans, notwithstanding the fact that they had specifically stated that no income was earned from M/s. Pooja Roadlines, Udaipur. It was pointed out that M/s. Pooja Roadlines, Udaipur is not authorized to deal with explosives. On the other hand, the assessee-firm is authorized to deal with explosives and the vehicles owned by them are specifically designed to transport the explosives, exclusively and that the said vehicles are not used for any other purpose. Since M/s. Pooja Roadlines, Udaipur was not authorized to deal in explosives, the assessee was not having any chance of having transported the explosives for M/s. Pooja Roadlines, Udaipur. Inviting my attention to the statement of the partners of the assessee-firm as well as the statement of one of the partners of M/s. Pooja Roadlines it was pointed out that they have denied any knowledge of transportation of goods by the vehicles owned by the assessee or the sister concern. The partner of M/s. Pooja Roadlines, Udaipur had also stated that they are not known to the partners of the assessee-firm and whatever goods had been transported were on account of contact with the drivers who used to come to M/s. Pooja Roadlines, Udaipur. According to the learned Counsel, since the vehicles owned by the assessee were carrying explosives, and were returning without any load, it was quite possible that the drivers of the assessee had transported goods belonging to M/s. Pooja Roadlines, Udaipur and since the assessee had not earned any income as such, the amount surrendered at the time of recording of the assessment by the partners was not binding on the assessee. It was contended that the other partners of the firm were not allowed to be consulted by the Assessing Officer. Referring to the finding of the learned Accountant Member that the assessee could have approached the higher authorities in case of any compulsion or duress, it was pointed out that the Assessing Officer had recorded statements between 17th and 22nd December, 1998 and the assessment order was completed on 24-12-1998. Immediately on

receipt of the assessment order, the assessee appealed to the Commissioner of Income-tax (Appeals), specifically challenging the addition made by the Assessing Officer. It was further contended that the partners of the firm had filed affidavits before the learned Commissioner of Income-tax (Appeals) stating the circumstances under which the statements had been recorded by the Assessing Officer. It was further contended that the learned Commissioner of Income-tax (Appeals) had given due opportunity to the Assessing Officer to give his comments in respect of contentions raised on behalf of the assessee and the learned Commissioner of Income-tax (Appeals), on consideration of various factors, came to the conclusion that the addition of Rs. 5,98,440 was not justified in this case. It was further contended that the statements recorded by the Assessing Officer are invalid insofar as both the partners, whose statements were recorded, are from Gujarat and are not well educated. One partner of the firm, namely, Shri Hari Lal is under Matriculate and another partner Shri Pradeep is a Matriculate. Both the partners do not know Hindi. The Assessing Officer has not specifically recorded in the statement which is in Hindi that the same was read and the contents admitted by the deponents. In the absence of such a recording, the statements are invalid and cannot be relied upon for basing the addition. In support of the contention, the learned Counsel relied upon the decision of the Jurisdictional High Court in the case of CTO v.Kewalram Sumnomal Cavanduspur [1994] 92 STC 629 (Raj.).

4. It was further contended that the basis for deleting the addition made by the learned Commissioner of Income-tax (Appeals) is that out of the five vehicles, three are not owned by the assessee. This has been verified from the records and the revenue has neither claimed nor furnished evidence to dispute the finding recorded by the Commissioner of Income-tax (Appeals). The two vehicles are owned by the assessee but as per the finding of the Commissioner of Income-tax (Appeals), such vehicles were leased out to sister concern, namely, M/s. Jagat Transport and they have reflected the income derived from the said vehicles in their books of account. The assessee has reflected the lease rent of Rs. 1,26,000 received from the sister concern in respect of two vehicles owned by the assessee. The income from lease rent has been assessed separately by the Assessing Officer in the hands of the assessee. It was further contended that the Assessing Officer has not found any entries in the books of account of M/s. Pooja

Road Lines, Udaipur for having made any payment to the assessee. As per the statement of the partner of M/s. Pooja Road Lines, Udaipur, the payments were made to the drivers of the vehicles. It was found that the partner of M/s. Pooja Road Lines, Udaipur had deposed that the drivers of vehicles would come to M/s. Pooja Road Lines, Udaipur and request "Rasta Karche Ke liye koi Bhada Hai? Agar hota to load dar lete aur agar nahin hota to mana kar lete". The partner had further categorically stated that the transactions were carried through drivers only. It was further contended that Shri Hari Lal is 73 years old and, therefore, he succumbed to the pressure of the Assessing Officer in agreeing to the assessment of income. My attention was also invited to the CBDT Circular No. 280 as is referred to in 264 ITR 49 (Land Mark Cases) to the effect that the officers had been directed not to record confessional statement as large scale complaints had been received that such statements are being recorded under duress. The learned Counsel further contended that the dates on which the material claimed to have been transported have not been given. The assessee would have otherwise established that the vehicles in question were not in Udaipur on the respective dates. Referring to the decisions relied upon by the learned Accountant Member, it was contended that the decision in *Greenview Restaurant v. Asstt. CIT* supports the case of the assessee than that of the Revenue. The decision of the Punjab & Haryana High Court in the case of *Banta Singh Kartar Singh v. CIT* was stated to be not applicable to the facts of this case. "Similarly, the decision of the Chandigarh Bench of the Tribunal in *ITO v. Sadu Ram Gupta*[1998] 66 ITD 441 (SMC) and *Smt. Vasanthi Sethi v. Asstt. CIT* [1992] 43 LTD 447 (Delhi) are claimed to be not applicable to the facts of this case. The learned Counsel for the assessee contended that on the contrary, the following decisions support the case of the assessee: *Pullangode Rubber Produce Co. Ltd. v. State of Kerala* [1973] 91 1TR 18(SC); *CIT v. M.R.P. Firm 5*. Reliance was also placed on the decision of the Jaipur Bench of the Tribunal in the case of *CTO v. Kewalram Sumnomal Cavanduspur*[1994] 92 STC 629 (Raj.) and that of the Jodhpur Bench of the Tribunal in the case of *Maheshwari Industries v. Asstt. CIT*[2003] 81 TTJ (Jodh.) 914 to support the contention.

6. It was further contended that the addition based purely on the statement of the assessee is not binding insofar as the assessee has been able to establish that no

such income was earned and the statement was retracted at the earliest opportunity, by way of appeal to the Commissioner of Income-tax (Appeals). It was further contended that the assessee had discharged the burden cast upon it and the finding of fact recorded by the Commissioner of Income-tax (Appeals) had not been rebutted by the revenue. On the other hand, the assessee had discharged the burden of establishing the fact that out of five vehicles, three are not owned by the assessee and the other two vehicles had been leased out and as such, there was no question of assessee having earned any income by way of transportation of material from M/s. Pooja Road Lines, Udaipur in the year under appeal. It was accordingly pleaded that the view expressed by the learned Judicial Member may be followed in preference to the view expressed by the learned Accountant Member.

7. The learned Departmental Representative, on the other hand, contended that the affidavits filed by the partners before the learned Commissioner of Income-tax (Appeals) are forged insofar as the signatures do not tally with the signatures of the partners in the statement recorded by the Assessing Officer. It was further contended that there were no reasons for M/s. Pooja Road Lines, Udaipur to write the name of the assessee in the challans if goods were not transported through the vehicles. M/s. Pooja Road Lines, Udaipur did not write the name of the departmental representative or any other person since the evidence was confronted to the assessee and had agreed for addition, no further enquiry was conducted and, therefore, the view proposed by the learned Accountant Member may be preferred to the view expressed by the learned Judicial Member.

8. I have given our careful consideration to the rival contentions. In my considered view, the point of difference identified by the learned Members of the Bench does not need any modification. I, therefore, proceed to decide the dispute involved in this appeal. The facts relating to the issue involved in this case have been elaborately discussed by the learned Members of this Bench. However, in order to maintain coherence, the relevant facts may be stated even at the cost of repetition so as to arrive at a reasonable conclusion. The assessee is a firm and a consignment agent of explosive goods to I.C.I. India Ltd., in Rajasthan. A survey was conducted at the premises of M/s.

Pooja Road Lines, Udaipur and its challan books were impounded under Section 131 of the Act. (M/s. Pooja Road Lines, Udaipur is neither sister concern of the assessee nor in any way connected with the assessee). On scrutiny of the challan books impounded from M/s. Pooja Road Lines, Udaipur, it was noticed that several vehicles had been used by the said concern for transportation of goods to various places. The name of the transporter reflected in the impounded challans was M/s.

Jagat Explosives, i.e., the assessee. On the basis of the information gathered from M/s. Pooja Road Lines, Udaipur, notices under Section 131 had been issued to the partners of the firm and statements of two of them, namely, Shri Pradeep J. Mashru and Shri Harilal T. Mashru recorded.

9. The partners of the firm, namely, Shri Harilal T. Masru and his grandson, another partner of the firm, namely Shri Pradeep J. Masru had been called by the Assessing Officer together on 17-12-1998 for recording the statement. On 17-12-1998, the statement of Shri Harilal T. Masru was recorded but could not be completed. The recording of his statement was completed on 18-12-1998. 19th & 20th December, 1998 being Saturday and Sunday, on 21-12-1998, Shri Pradeep J. Masru had again been called and his statement was recorded but not completed. Recording of his statement was concluded on 22-12-1998. The Assessing Officer completed the assessment on 24-12-1998 i.e., just two days after the completion of the recording of the statements. The Assessing Officer had made an addition of Rs. 5,98,440 on the basis of evidence found in the course of survey in the case of M/s. Pooja Road Lines and on the basis of surrender made by two partners of the assessee-firm. On receipt of the assessment order after a gap of about 3 months, the assessee filed appeal to the Commissioner of Income-tax (Appeals) challenging the addition made by the Assessing Officer of Rs. 5,98,440.

The Commissioner of Income-tax (Appeals) has deleted the addition by the impugned order which has been challenged by the revenue.

10. In order to appreciate as to whether the Commissioner of Income-tax (Appeals) was justified in deleting the addition notwithstanding the fact that two

partners of the firm had agreed to surrender the amount of Rs. 5,98,440 for assessment subject to no penalty under Section 271(1)(c), it would be necessary to refer to relevant decisions on the issue.

11. In the case of *Greenview Restaurant v. Asstt. CIT*, the partners of the firm made a disclosure of income in the statement recorded under Section 132(4) on 22-9-1993 in the presence of two independent witnesses. The said surrender was retracted by the partners by letter dated 24-12-1993 and 20-2-1995. The Assessing Officer made addition on the basis of the amount surrendered in the statement under Section 132(4). The addition was disputed by the assessee and ultimately following question was referred to the Hon'ble High Court for its esteemed opinion:-- Whether on the facts and circumstances of the case, addition of an amount of Rs. 4,00,000 only on the basis of statement made by the assessee under Section 132(4) without taking into consideration the retraction of confession made by the letters dated 24-12-1992 and 20-2-1995 is in accordance with law.

On an overall consideration of the case and circumstances of the case discussed above, we are of the considered view that the mandatory requirement of affording opportunity to the appellant firm to adduce evidence in support of the return and explained the disclosure made in the statement of the partner recorded on 23-9-1993 has not been complied with the learned Tribunal in passing the impugned order also did not address itself to this vital aspect of the matter. We are, therefore, unable to sustain the impugned orders of the learned Tribunal restoring the amount of Rs. 4,00,000 as undisclosed income of the appellant firm for the assessment year in question. We, therefore, set aside the same. The assessment order also set aside. The matter is remitted to the Assessing Officer for fresh assessment of the taxable income and the tax liability of the appellant-firm for the assessment years 1992-93 and 1993-94 by strictly following the procedure prescribed for assessment under Section 143(3) of Income-tax Act. The finding of the learned Tribunal that the statement of the appellant partner were made suo moto and there had been no inducement, threat or coercion at the time of making the disclosure under Section 132(4) of the Income-tax Act is, however, affirmed.

12. In the case of Pullangode Rubber Produce Co. Ltd. (supra), Their Lordships of Supreme Court held that an admission is an extremely important piece of evidence but it cannot be said that it is conclusive and that it is open to the person who made the admission to show that it is incorrect. CIT v. M.R.P. Firm The doctrine of 'approbate and reprobate' is only a species of estoppels; it applies only to the conduct of parties. As in the case of estoppels, it cannot operate against the provisions of a statute.

If a particular income is not taxable under the Income-tax Act, it cannot be taxed on the basis of estoppels or any other equitable doctrine. Equity is out of place in tax law; a particular income is either exigible to tax under the taxing statute or it is not. If it is not, the Income-tax Officer has no power to impose that on the said income. Shri Krishan v. Kurukshetra University , Their Lordships of Supreme Court held as under : Mr. Nandy, counsel for the respondent placed great reliance on the letter written by the appellant to the respondent wherein he undertook to file the requisite permission or to abide by any other order that may be passed by the University authorities. This letter was obviously written because the appellant was very anxious to appear in Part II Examination and the letter was written in terrarem and in complete ignorance of his legal rights. The appellant did not know that there was any provision in the University Statute which required that he should obtain the permission of his superior officers. But as the respondent was bent on prohibiting him from taking the examination he had no alternative but to write a letter per force. It is well settled that any admission made in ignorance of legal rights or under duress cannot bind the maker of the admission. In these circumstances, we are clearly of the opinion that the letter written by the appellant does not put him out of court.

15. In the case of CIT v. Bharat General Reinsurance Co. Ltd. , Their Lordships of Delhi High Court held as under:-- It is true that the assessee itself had included that dividend income in its return for the year in question but there is no estoppels in the Income-tax Act and the assessee having itself challenged the validity of taxing the dividend during the year assessment in question, it must be taken that it had resiled from the position which it had wrongly taken while filing the return.

Quite apart from it, it is incumbent on the Income-tax Department to find out whether a particular income was assessable in the particular year or not. Merely because the assessee wrongly included the income in its return for a particular year, it cannot confer jurisdiction on the Department to tax that income...

The assessee cannot be tied down to an inadvisably made wrong statement.

17. The sum and substance of the above principles laid down by the Hon'ble Supreme Court and other High Courts is that the admission made by the assessee is an important piece of evidence, so however, it is not conclusive. It will be open to the assessee to show that the admission made was on wrong premises or mistaken notion of law or facts.

18. Now, let me apply the above principle of law to the facts of this case. The basis for the addition of Rs. 5,98,440 made by the Assessing Officer is (a) Challan Books found from the premises of M/s. Pooja Road Lines which indicated that the goods belonging to M/s. Pooja Road Lines had been transported by five vehicles for which an aggregate amount of Rs. 5,98,440 was paid. Vehicle Numbers as per the challans are as under:-- The name of owner of vehicles is indicated as 'Jagat Explosive' i.e., the assessee.

19. Two of the partners of the firm in the course of recording of their statements were confronted with the information gathered from M/s.

Pooja Road Lines in the course of survey at the latter's premises. The partners are stated to be Gujaratis and this claim has not been disputed by the Revenue Authorities. The statement of the partners had been recorded in Hindi. The questions put to the partners are about 50 in number. A perusal of the statement recorded by the Assessing Officer indicates that the partners had expressed their ignorance about the receipt of the amounts indicated in the challans by M/s. Jagat Explosive i.e., the assessee. Both the partners stated that drivers might have done the job and received the payments. The partners agreed to be assessed in respect of a sum of Rs. 5,98,440 being the transportation charges shown by M/s. Pooja Road Lines to have been paid to the assessee in respect of five vehicles as per copy of the statement available on record. It is also observed from the statements

that the partners had stated that the amount was surrendered after discussion with other partners who had no objection in this regard.

20. Subsequently, the assessee contested the addition in appeal before the Commissioner of Income-tax (Appeals). The Commissioner of Income-tax (Appeals) has deleted the addition. In order to determine the issue involved in this appeal, it has first to be decided as to whether the Assessing Officer had recorded the statement of the partners under duress. If the statement of the partners had been recorded under duress, then the said statement has got to be ignored and the validity of the addition has to be judged on the basis of other material, if any. On the other hand, if it is found that the statement recorded by the Assessing Officer was not under duress, then, the said statement has got great evidentiary value. Whether the statement recorded by the Assessing Officer was under duress or not has necessarily to be decided on the basis of preponderance of probability and surrounding circumstances as there is no direct evidence one way or the other either to support the assessee's case or against it. The decision of the Hon'ble Supreme Court in the case of CIT v. Durga Prasad More would be relevant for determination of the issue involved in this case. Their Lordships held as under:-- It is true that an apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real. In a case of the present kind a party who relies on a recital in a deed has to establish the truth of those recitals, otherwise it will be very easy to make self-serving statements in documents either executed or taken by a party and rely on those recitals. If all that an assessee who wants to evade tax is to have some recitals made in a document either executed by him or executed in his favour then the door will be left wide open to evade tax. A little probing was sufficient in the present case to show that the apparent was not the real. The taxing authorities were not required to put on blinkers while looking at the documents produced before them. They were entitled to look into the surrounding circumstances to find out the reality of the recitals made in those documents.

Now, coming to the question of onus, the law does not prescribe any quantitative test to find out whether the onus in a particular case has been discharged or not. It all depends on the facts and circumstances of each case. In some cases, the onus

may be heavy whereas, in others, it may be nominal. There is nothing rigid about it. Herein the assessee was receiving some income. He says that it is not his income but his wife's income. His wife is supposed to have had two lakhs of rupees neither deposited in banks nor advanced to others but safely kept in her father's sale. Assessee is unable to say from what source she built up that amount. Two lakhs before the year 1940 was undoubtedly a big sum. It was said that the said amount was just left in the hands of the father-in-law of the assessee. The Tribunal disbelieved the story, which is, *prima facie*, a fantastic story. It is a story that does not accord with human probabilities. It is strange that the High Court found fault with the Tribunal for not swallowing that story. If that story is found to be unbelievable as the Tribunal has found, and in our opinion lightly, then the position remains that the consideration for the sale proceeded from the assessee and, therefore, it must be assumed to be his money.

It is surprising that the High Court has found fault with the Income-tax Officer for not examining the wife and the father-in-law of the assessee for proving the department's case. All that we can say is that the High Court has ignored the facts of life. It is unfortunate that the High Court has taken a superficial view of the onus that lay on the department.

It is true that neither the principle of *res judicata* nor the rule of estoppel is applicable to assessment proceedings. But the fact that the assessee included the income of the premises in his returns for several years, and that after objecting to the inclusion of that income in his total income in the assessment year 1942-43, in the absence of any satisfactory explanation, is undoubtedly a circumstance which the taxing authorities were entitled to take into consideration.

Now coming to the grounds that commended themselves to Mukharji, J. (the present Chief Justice of the High Court of Calcutta), we are unable to find out how the learned Judge was able to come to the conclusion that there was not proof or charge that the assessee had concealed any income of his. The orders of the Income-tax Officer, Appellate Assistant Commissioner and the Tribunal proceeded on the basis that the assessee was attempting to conceal a portion of his income by putting forward the story that the income from the premises is the income of the

trust created by his wife. The proof of that charge depends on the correctness of the findings of those authorities.

In stating that there is no proof that the consideration for the conveyance passed from the assessee the learned Judge, in our opinion, looked at the case from a wrong angle. There is no dispute that the consideration for the sale was in fact paid by the assessee. He says that he paid it on behalf of the trust orally created by his wife. Therefore, the question is whether he has satisfactorily proved that case. If he has failed to prove that case, as we think it to be so, and in the absence of any other alternative case pleaded by him, it follows as a matter of course that the consideration for the sale passed from him. Science has not yet invented any instrument to test the reliability of the evidence placed before a court or Tribunal. Therefore, the courts and Tribunals have to judge the evidence before them by applying the test of human probabilities. Human minds may differ as to the reliability of a piece of evidence. But in that sphere the decision of the final fact finding authority is made conclusive by law.

21. The said view has again been reiterated by the Hon'ble Supreme Court in the case of Sumati Dayal v. CIT . We now proceed to consider the issue in the light of aforementioned principle of law laid down by the Hon'ble Supreme Court. It has already been pointed out that the statements of the partners were recorded between 17-12-1998 to 22-12-1998 and the assessment was completed on 24-12-1998. The assessee did not make any complaint to any Income-tax Authority against the surrender having been extracted by coercion or under duress. This is a strong factor which negates the claim of the assessee that the statements of the partners were recorded by the Assessing Officer under duress or any sort of compulsion. The language of the statement also indicates that whatever was stated by the partners appears to have been faithfully recorded by the Assessing Officer as if it were not so, the Assessing Officer would not record that the partners are not aware of any receipt from M/s. Pooja Road Lines and that the drivers of the vehicles might have received the amount from the said concern on their return trip when the vehicles were not carrying any explosives. The Assessing Officer has also recorded in the statements that surrender was made subject to no penalty. The assessment order was not received by the assessee immediately.

The assessee has received the assessment order on 23-3-1999. Thus, there was a gap of about three months between the date of recording of the statements and receipt of the assessment order. In fact, the assessee had also deposited the tax due after the date of recording of the statement. The assessee did not consider it appropriate to inform the Income-tax Authorities superior to the Assessing Officer about any duress or compulsion for making the surrender before the Assessing Officer. The claim of the assessee is also negated by the fact that the statement of the partners was not recorded on a single day. The statement of Shri Harilal T. Masru was recorded on 17/18-12-1998 and he got full opportunity to consult other partners. Another partners of the firm got two days to consult the other partner of the firm. The statement of Shri Pradeep J. Masru was recorded on 21/22-12-1998 and the surrender was made by him on 22-12-1998. Thus the surrender made by the senior partner on 18-12-1998 was confirmed by the junior partner, namely, Shri Pradeep J. Masru after getting sufficient time to give a thought to the surrender made by the senior partner on 18-12-1998. Some of the questions and replies are reproduced hereunder for the sake of reference:-- Q.9. When did you become partner in J.E. Enterprises after became partner in Jagat Explosive Ans. I became partner in J.E. Enterprises in the year 1994. In this firm, how much capital of mine have been invested, I do not know. I know only this that I get interest and do not get any salary from there. Only my grand-father Shri H.T. Mashru knows this.

Q.12. What kind of work is being done by the partners and what salary is being received by the partners Ans. My grand-father Shri Harilal T. Mashru is doing finance work and also doing policy determination matters. Myself is doing daily general work of office and also doing sales & marketing work. My wife Smt. Gitanjali is a sleeping partner. My father Shri Jagat Mashru and my aunty Smt. Sheela R. Mashru both are non-working partners. What salary is being received by the partners, that was shown in the Balance Sheet by us.

Q.14. What kind of business is doing by Jagat Explosive and from when Ans. Right from the beginning, M/s. Jagat Explosive is doing trading work in Explosive and this is doing trading work from ICI (India) Ltd., Gomia (Bihar) right from the beginning. Goods is being order by M/s. Jagat Explosive from ICI (India) Ltd. and

2.5 per cent basis commission and additional commission is received by us and on being target completed, 5 per cent additional commission is also received by us on above amounts.

Q.18. What kind of agreement is between you and company for supply of goods of ICI (India) Ltd. (licence holder) in market Ans. Copy of this agreement has been delivered by us at the time of hearing.

Ans. Our explosive have two vehicles, the numbers of which are RJ-27-G-1890 and RJ-27-G-1871, and we bring our goods in Titradi Magazine.

Q.21. Who is incurred expenditure for bringing the goods and sending the vehicle Ans. ICI (India) Ltd. is incurred expenditure for food & drink of driver and helper on the way and also to and fro fare of vehicle for bringing the goods. For this, we prepared a bill and give that bill and our payment is made through credit note.

Q.27. Now this time, who is your driver and before this, who was your driver Ans. At this time Erkha and Babu are driver's, both are here about 2-3 years. I have not remembered the right date. Helper is taken as per the wish of driver. They are doing this. Before this, Pyara Singh and Nenu Singh were two another driver's. Their VAN are as follows : RJ-27-G-0871, RJ-27-G-0781. This was the old VAN, which was sold by us. These both vehicles were sold after April 1988 and both drivers after leaving the job, are doing another job. Where these both drivers have gone, I do not know.

Q.33. After verifying the challan Nos. 801 to 1200, please tell us that in these challans, the number of vehicle was written, to whom the vehicle belonged and where the vehicle was taken with the goods Ans. After seeing all the four books, it is known that the vehicle belongs to us on which vehicle number' and name is of Jagat Explosive. Our vehicle number is written, I do not know anything in this regard.

Q.38. The vehicle number is of your vehicles in challans shown to you (in challans of M/s. Pooja Road Lines) and also the name of your firm is shown and the vehicles are taken the goods, this is not known to you, then who knows this Ans. I

do not know anything in this regard. I will tell you after being confirmed.

Q.46. After seeing the challan book of M/s. Pooja Road Lines, Udaipur, it came to know that in assessment year 1996-97 financial year (1995-96). M/s. Jagat Explosive had been received Rs. 5,98,440 as transportation charges and in the same way, in assessment year 1998-99, Rs. 4,06,513 and in assessment year 1999-2000, Rs. 28,715 had been received, what did you say in this regard Ans. In this regard, I want to say that in assessment year 1996-97, the amount which was shown received in the name of M/s. Jagat Explosive (M/s Pooja Road Lines), this amount is being offered by me for tax as income. This statement is being given by me on the condition of not being conducted any type of proceedings and to help of Income-tax Department and not being imposition of penalty under Section 271(1)(c) and not being conducted the prosecution.

Q.47. In which house you are residing, that house of M/s. Jagat Explosive and which expenditure incurred on account of electricity, water, telephone, etc. on the partners, in this amount, some amount has been incurred by M/s. Jagat Explosive and except this, you have got depreciation by total rate on building, do you want to say something in this regard Ans. In this regard, I want to say that in the above question No. 46, what answer has been given, on those conditions, in assessment year 1996-97, Rs. 5,00,000 on account of household expenses is being offered for tax and for this, half of the depreciation may kindly be disallowed.

Except this, I want to say that for assessment years 1997-98, 1998-99 and 1999-2000, I do not want to say anything at this time.

After some time I tell you after seeing. The decision which will be taken after discussion with my tax consultant, will be conveyed to you.

Q.48. In question 46, except assessment year 1996-97, whichever was asked to you in respect of assessment years 1997-98, 1998-99 and 1999-2000, in this regard, you have not answered anything clearly.

Please clear this position Ans. In this regard, I want to say that in assessment year 1997-98, in the name of M/s. Pooja Road Lines, M/s. Jagat Explosive, whichever

the transportation charges have been shown, for that I will file revised return in Jan. 99 after depositing the tax and for other years, I will do the necessary proceedings after discussion with my tax consultant.

Ans. Except above statements, I want to explain this that in the challan book of M/s. Pooja Road Lines, Udaipur, the transportation charges charged on account of vehicle he was not charged on saying of our any partner, but without our knowledge, our drivers had been loaded the goods and only on our vehicle numbers having been shown and for doing help/co-operate of Income-tax Department, I/partner of M/s. Jagat Explosive, Udaipur, will be deposited the amount of tax immediately, which amount will be due as tax in assessment years 1996-97 and 1997-98. No other partner has any objection on my above statement. I am giving these statements on discussion with other partners. Except this, I want to explain this that in assessment year 1996-97, I will not file any appeal and for remaining years, I will file the revised return.

22. In both the statements of the partners recorded by the Assessing Officer, it is categorically stated that the other partners had been consulted and the surrender was made with the consent of the other partners. The deponents had enough time to discuss with other partners who happen to be family members. Therefore, the claim made on behalf of the assessee that the partners did not get sufficient time to consult the other partners is bereft of substance. The assessee had also consulted his Chartered Accountant (see replies to Qs. 48 and 49).

There is thus no merit in the contention advanced on behalf of the assessee that the surrender was extracted by the Assessing Officer under duress and without giving reasonable opportunity to the partners of the firm to consult other partners. I am, therefore, in agreement with the finding of the learned Accountant Member that the conduct of the assessee does not demonstrate that the Assessing Officer was guilty of recording the statement of the partners of the firm under duress or under any sort of pressure.

23. In the light of above finding that the statement was not recorded under duress, the question that requires to be considered is as to whether the addition made by the Assessing Officer was valid in the eye of law. As pointed earlier, the Assessing

Officer had collected the evidence from M/s, Pooja Road Lines in the form challan books in which the name of the assessee, particulars of vehicles and the names of the drivers were indicated alongwith payments made. After collection of the said evidence, the Assessing Officer had two options, one is to confront the assessee and find out the correctness of the evidence collected by the Assessing Officer. If the assessee admitted the correctness of the evidence or agreed to be assessed in respect of the income shown to have been paid, then no further enquiry would be required to be made by the Assessing Officer. On the other hand, if the assessee had denied the receipt from M/s. Pooja Road Lines or had not agreed to pay income-tax in respect of the receipt, the Assessing Officer would be required to make further enquiries and decide the issue on the basis of evidence on record. In this case, the evidence collected by the Assessing Officer was confronted to the partners of the firm. They initially expressed their ignorance about the payments from M/s. Pooja Road Lines. However, in reply to question No. 38 when the partners were asked about the information available in challan books of M/s. Pooja Road Lines, it was stated 'I will tell you after being confirmed'. Subsequently, the partners had agreed to be assessed in respect of the receipts. In fact, the tax in respect of the addition was also paid by the partners. In the light of the said facts, the Assessing Officer had not committed any mistake in making the addition in respect of the payments having been shown to have been paid to the assessee. In the statements, the partners had admitted that the vehicles shown in the challan books of M/s. Pooja Road Lines belong to the assessee. I am, therefore, of the considered view that the Assessing Officer was justified to make the addition of Rs. 5,98,440.

24. The next question that remains to be considered is as to whether it was open to the assessee to challenge the addition before the Commissioner of Income-tax (Appeals) notwithstanding the fact that the income, the assessability of which is in dispute was surrendered for assessment. I have referred to various decisions relating to this issue elsewhere in this order. The law is well settled. The assessee will be entitled to resile from his statement only if it is established that the surrender was made under duress or under mistaken notion of law. I have already held that the statements of the partners of the firm had not been recorded under duress. Thus, the only question that requires consideration is as to whether the

assessee has discharged the strong burden to establish that the income offered for taxation was not liable to be taxed in the hands of the assessee.

25. A perusal of the order of the Commissioner of Income-tax (Appeals) reveals that the assessee had taken totally a different stand before the Commissioner of Income-tax (Appeals), than taken before the Assessing Officer. The assessee had pleaded that out of the five vehicles three vehicles were owned by the sister concern and, therefore, the income relating to such vehicles could not in law be assessed in the hands of the assessee. The revenue has not disputed the ownership of the vehicles by the sister concern of the assessee. The sister concern is owned by the family members. The constitution of the assessee firm and that of the sister concern has been indicated in para 3 of this order from which it is evident that there are no outsiders in the sister concern of the firm. So however, the sister concern being separately assessed to tax and the vehicles in respect of which the income is stated to have been derived could in law be assessed in the hands of the sister concern and not in the case of the assessee.

Therefore, on that ground, the income referable to the vehicles owned by the sister concern and not by the assessee has got to be excluded from the assessment in the case of the assessee. To that extent I agree with the conclusion of the learned Judicial Member though on a different ground.

26. In regard to the income relating to two vehicles which are owned by the assessee, the claim was made for the first time before the Commissioner of Income-tax (Appeals) that these vehicles have been leased to the sister concern and, therefore, the assessee had no control over the said vehicles so as to earn income therefrom. The Commissioner of Income-tax (Appeals) has accepted the claim of the assessee. In my considered view, the relevant facts of this case have got to be taken into consideration for considering the claim of the assessee in the light of the relevant facts. It is to be considered as to whether the income relating to the vehicles owned the sister concern could be assessed in the hands of the assessee on the basis of the evidence followed by the surrender made by the partners of the firm. It is noteworthy that the assessee is a consignment agent of explosive goods of ICI (India) Ltd. in Rajasthan. It is also noteworthy that the

assessee receives transportation charges from ICI (India) Ltd. for which bills are raised by the assessee. As per the statements of the partners in reply to question No. 19 and question No. 21, it has specifically been stated as under :-- Ans. Our explosive have two vehicles, the numbers of which are RJ-27-G-1890 and RJ-27-G-1871, and we bring our goods in Titradi Magazine.

Q.21. Who is incurred expenditure for bringing the goods and sending the vehicle
Ans. ICI (India) Ltd. is incurred expenditure for food & drink of driver and helper on the way and also to and fro fare of vehicle for bringing the goods. For this, we prepared a bill and give that bill and our payment is made through credit note.

27. The vehicles had not been leased to the sister concern in the past.

There is no written agreement between the parties for leasing the vehicles. In the light of these facts and preponderance of probability coupled with surrounding circumstances, the leasing of vehicles to the sister concern is nothing but an arrangement between the family members for reflecting the income. The genuineness of leasing of vehicles was not questioned by the Assessing Officer as no such claim was made before the Assessing Officer. In any case as is evident from the statements of the partners of the firm, the relevant portion of which has been quoted above, the two vehicles are owned by the assessee and had been under its control. Therefore, the surrender of income pertaining to the two vehicles owned by the assessee is legally assessable in the hands of the assessee on the basis of challan books seized from M/s. Pooja Road Lines coupled with the surrender made by the partners of the firm. It may be pertinent to mention that the claim made by the assessee that the partners might have transported the goods without the knowledge of the assessee and appropriated the income has not been established by the assessee. The claim made by the assessee was required to be established as the drivers were under the control of the assessee and they could have been produced before the Assessing Officer to establish the claim. In the case of CIT v. Smt. Krishnaveni Ammal , it was held "The law of evidence mandates that if the best evidence is not placed before the court, an adverse inference can be drawn as against the person who ought to have produced it." Therefore, in the light of the evidence collected by the Assessing Officer and

surrender made by the partners of the firm, the income relating to the two vehicles owned by the assessee is assessable in the hands of the assessee. Though one of the partners, namely, Shri Pardeep is common in both firms and he had agreed to be assessed in respect of the three vehicles also, yet the income relating to the three vehicles not owned by the assessee could not be assessed in the hands of the assessee. The Assessing Officer could have taken necessary steps for assessment of such income in the hands of the sister concern. In the statement recorded by the Assessing Officer, it has been specifically stated by the partners that the firm owns only two vehicles. The Assessing Officer, therefore, committed a mistake in assessing the income relating to the three vehicles not owned by the assessee when the ownership of the vehicles is not in dispute.

28. Taking the totality of the facts and circumstances of this case into consideration, I am of the view that the income relating to the vehicles owned by the assessee received from M/s. Pooja Road Lines is assessable in the hands of the assessee on the basis of the evidence collected from M/s. Pooja Road Lines coupled with surrender made by the partners of the firm before the Assessing Officer. The income relating to the three vehicles not owned by the assessee is not assessable in the hands of the assessee notwithstanding the fact that the partners of the firm had agreed to pay the tax in respect of such income. It may be clarified that in respect of the income pertaining to the three vehicles not owned by the assessee, the burden has been discharged to establish that the income relating to such vehicles was not legally assessable in the hands of the assessee.

29. In the final analysis, I partly agree with the Judicial Member to the extent of income attributable to the three vehicles not owned by the assessee and partly agree with the view of the Accountant Member relating to assessment of income for the two vehicles owned by the assessee. This decision is peculiar insofar as I am unable to agree in full with the decision of either of the Members. On the basis of majority view, the income relating to two vehicles is assessable in the hands of the assessee and the income relating to three vehicles not owned by the assessee to be deleted.

30. The matter now be placed before the Division Bench for announcing of the majority view.

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