A.F.R.

Court No. - 34

Case :- INCOME TAX APPEAL No. - 250 of 2000

Appellant :- M/S Vertex Chemical Industries
Respondent :- Income Tax Appellate Tribunal, Lko.
Counsel for Appellant :- Manu Ghildiyal,S P Gupta,S.D.Singh
Counsel for Respondent :- C.S.C.,A N Mahajan,B.J.Agrawal,Dhananjai Awasthi,R.K.Upadhyay

Hon'ble Sudhir Agarwal,J.
Hon'ble Dr. Kaushal Jayendra Thaker,J.

1. This is an appeal under Section 260-A of Income Tax Act, 1961 *(hereinafter to be referred as 'Act, 1961')* arising from the judgment and order dated 26.07.1999, passed in Income Tax Appeal No. 1885 (Alld) of 1992, by Income Tax Appellate Tribunal, Allahabad Bench, Allahabad *(hereinafter to be referred as 'Tribunal')* relating to Assessment Year 1990-91.

2. It was admitted on following two substantial questions of law:

"(a) Whether on the fact that cash book of appellant was found duly and completely posted, and no discrepancy was found in it, Tribunal was justified in holding that proviso to Section 145(1) of Income Tax Act is applicable and Assessing Authority was justified in estimating sales and taking out average gross profit of Assessee firm.

(d) Whether Tribunal was justified in holding that assessment should be made on the amount surrendered by Assessee on estimation basis at the time of search."

3. Appellant Assessee *(hereinafter to be referred as 'Assessee')* filed return for the Assessment Year *(hereinafter to be referred as 'A.Y.')* 1990-91, showing total income of Rs. 1,83,750/-.

4. Assessing Authority took into consideration the material

collected in search and seizure operation conducted at the residential and business premises of Assessee on 22.08.1989 and 23.08.1989 wherein cash, jewellery and some incriminating documents were seized. An order under Section132(5) of Act, 1961 was passed on 15.12.1989 creating a tax liability of Rs. 19,08,468/- including penalty under Section 271(1)(c) of Act, 1961. Assessing Officer examined seized books and loose papers in the light of explanation submitted by Assessee and thereafter, computed income vide order dated 07.03.1992 as under:

S.N.	Particulars	Amount in Rupees	
	Net profit as per P & L A/c.	Rs.	71,049/-
1	Depreciation for separate consideration	Rs.	63,725/-
2	Income Tax	Rs.	1,12,705/-
3	Out of car maintenance 1/4th disallowed	Rs.	3,409/-
4	Out of car repairs	Rs.	2,720/-
5	Out of telephone disallowed	Rs.	1,000/-
6	Out of travelling expenses	Rs.	1,000/-
7	Extra profit as discussed as above	Rs.	55,838/-
8	Addition as per Annnexure AK-5 as discussed above	Rs.	7,030/-
9	Addition as per Annnexure AK-4 as discussed above	Rs.	30,030/-
10	Amount surrendered as discussed above	Rs.	4,30,367/-
11	Stock surrendered as discussed above	Rs.	10,000/-
12	Profit surrendered U/s 132(4)	Rs.	50,000/-
		Rs.	**8,71,873/-**

Total Income b/f Rs. 8,71,873/-

Less: Admissible depreciation as under:

Depreciation as claimed Rs. 63,725/-

Less: 1/4th disallowed on

car UGW-7115 Rs. 4,210/-

Rs. 59,515/-
Rs. 8,12,358/-
or
Rs. 8,12,360/-

Thus the total income comes to Rs. 8,12,360/- on which assessment was completed. Tax effect was as under:

Total Income	Rs. 8,12,358/-
Less: Firm's tax	Rs. 1,95,414/-
	Rs. 6,16,916/-

5. Assessee preferred appeal before Commissioner of Income Tax (Appeals)-I, Kanpur *(hereinafter to be referred as 'CIT(A)')* which was partly allowed and CIT(A) deleted addition of Rs. 4,30,367/-, 10,000/- and 50,000/- respectively. Besides relief in addition of Rs. 63,030/- and 55,838/- was also granted. The appeal was allowed granting a total relief of Rs. 6,10,235/-.

6. Aggrieved by the aforesaid order of CIT(A), Revenue preferred appeal No. 2117 (Alld)/1992 before Tribunal which has been allowed vide impugned judgment dated 29.09.2000 and reversing order of CIT(A), Tribunal has maintained and restored assessment order passed by Assessing Officer.

7. Sri S.D. Singh, learned Senior Advocate contended that various additions have been made relying on the statement of one of the partner of Assessee firm during search and seizure operation, though, subsequently Assessee retracted and took the stand that such statement was incorrect. He argued that on mere statement of Assessee given during search and seizure operation, additions could not have been made unless corroborated, since such statement per-se is not admissible in evidence. Reliance is placed on judgments in **(2010) 328 ITR 411 (Guj) Kailashben Manharlal**

Chokshi Vs. Commissioner of Income Tax, (2013) 14 Taxman 262 (Jhar) Shree Ganesh Trading Co. Vs. Commissioner of Income Tax, Dhanbad, (1973) 91 ITR 18 (SC) Pullangode Rubber Produce Co. Ltd. Vs. State of Kerala and another and (2005) 278 ITR 454 (AII) Commissioner of Income Tax Vs. Radha Kishan Goel.

8. Learned Senior Counsel stressed upon the fact that no discrepancy in books of account of Assessee was found by Assessing Officer. With regard to Rs. 9 lacs, satisfactory explanation was furnished. No discriminating evidence regarding purchase or stocks was found, other than shown by Assessee in its return. He also pointed out that in similar circumstances in the case of M/s. Vertex Organics (a sister concern of Assessee firm) where also raid was conducted on same dates, Tribunal accepted contention of Assessee and confirmed order of CIT(A) and rejected Revenue's appeal for Assessment Year 1990-91. Copy of this order has been filed as Annexure No. 4 to the memo of appeal.

9. The counsel for Revenue on the contrary submitted that statement given during search operation is admissible in evidence and if there is nothing otherwise, such statement can be relied on for the purpose of making assessment against Assessee.

10. We have heard counsel for the parties at length and perused record.

11. It is not disputed before us that Assessee M/s. Vertex Chemical Industries is a partnership firm in which Sri Brij Lal Bhatia and his wife Smt. Usha Bhatia are partners. At the time of search and seizure, Sri Brij Lal Bhatia, one of

the partner, made a statement, recorded by Authorized Officer under Section 132(4) of Act, 1961, and relevant extract thereof reads as under:

> ''मैं दो फर्मों जिनमें एक फर्म में मैं भागीदार हूँ और एक में मेरी पत्नी भागीदार है – इस दोनों फर्मों में 9 (नौ) लाख रूपए अघोषित आय के रूप में Surrender करना चाहता हूँ। किस फर्म की कितनी अघोषित आय किस वर्ष में है यह मैं कागज देखने के बाद बताऊँगा। यह अघोषित आय Stock अचल सम्पत्ति और दूसरे Asset में Invested है। मैं इस नौ लााख की अघोषित आय पर आयकर अदा करूँगा। मैं यह स्वेच्छा से यह Surrender 132(4) के अधीन कर रहा हूँ।''

12. Various additions were made by Assessing Officer in the light of aforesaid statement wherein he ultimately found justification of addition of Rs. 8,12,360/- for Assessment Year in question. Contention of learned counsel for appellant is that on such statement, addition is not justified.

13. Section 132(4) of Act, 1961 reads as under:

> *"**Section 132(4) –** The authorised officer may, during the course of the search or seizure, examine on oath any person who is found to be in possession or control of any books of account, documents, money, bullion, jewellery or other valuable article or thing **and any statement made by such person during such examination may thereafter be used in evidence in any proceeding under the Indian Income-tax Act, 1922 (11 of 1922), or under this Act**.*
>
> *Explanation.—For the removal of doubts, it is hereby declared that the examination of any person under this sub-section may be not merely in respect of any books of account, other documents or assets found as a result of the search, but also in respect of all matters relevant*

for the purposes of any investigation connected with any proceeding under the Indian Income-tax Act, 1922 (11 of 1922), or under this Act.

(4A) Where any books of account, other documents, money, bullion, jewellery or other valuable article or thing are or is found in the ***possession or control of any person*** *in the course of a search,* ***it may be presumed****—*

(i) that such books of account, other documents, money, bullion, jewellery or other valuable article or thing belong or belongs to such person;

(ii) that the contents of such books of account and other documents are true ; and

(iii) that the signature and every other part of such books of account and other documents which purport to be in the handwriting of any particular person or which may reasonably be assumed to have been signed by, or to be in the handwriting of, any particular person, are in that person's handwriting, and in the case of a document stamped, executed or attested, that it was duly stamped and executed or attested by the person by whom it purports to have been so executed or attested."

14. Aforesaid provision makes it very clear that statement recorded on oath during the course of search and seizure by Authorized Officer may be used in evidence in any proceeding under Act, 1961. When something can be used as an evidence, meaning thereby, it is a relevant material to support a finding to be recorded in a particular manner. Such evidence, however, by itself, may not be a conclusive proof of everything, in every case. Whether such statement by itself is credit worthy to draw an inference or requires some further corroboration, depends on facts and circumstances of each case, the documentes and material collected etc. It is founded on the objective consideration by Assessing Authority and in every case neither it can be said that mere statement is sufficient to draw an inference nor it

can be said that corroboration is always required.

15. Tribunal has found substance in approving finding of Assessing Officer with regard to additions of different amount, and has held that there was a transaction of Rs. 63,030/- which sought to be explained by stating that it represented receipts of M/s. Vikram Chemical Industries from customers in the capacity of Karta but that explanation was not found correct in view of noting in papers (AK-5) showing that amount have been received in excess. Tribunal has also noted that Sri Brij Lal Bhatia surrendered a sum of Rs. 50,000/- being undisclosed profit from the Firm, M/s. Vertex Chemicals i.e. Assessee for five years from A.Y. 1985-86 to 1989-90 and also surrendered Rs. 10,000/- as unexplained stock found at the time of search. On the date of search, ledger was found written upto June 1989 and same was the position of sale register of firm. Cash book was written up to 21.08.1989. Assessee was not maintaining stock register and bills in respect of purchase and sales, hence the same were not verified.

16. It is in these circumstances, Assessing Officer estimated sales at Rs. 63 lacs against sales disclosed as Rs. 62,36,678/- and applied a gross profit rate ranging from 9.2% to 11.27% during A.Y. 1987-88 to 1990-91. That is how it made addition of Rs. 55,838/-. Tribunal therefore, upheld addition of Rs. 55,834/- and Rs. 63,030/- and held that CIT(A) wrongly deleted the same.

17. With regard to addition of Rs. 4,30,367/-, Rs. 10,000/- being difference on account of stock, out of surrender of Rs. 9 lacs, Tribunal has said in para 7 of judgment as under:

> *"Regarding the addition of Rs. 4,30,367/- and Rs. 10,000/- being the difference on account of stock out of surrender of Rs. 9 lacs, and Rs. 10,000/- being in respect of unexplained stock, we find that the surrender was made during the course of search in respect of two firms and the Assessee himself was required to state as to what amounts pertained the learned CIT(A) does not appear to be justified in deleting the balance amount merely because the A.O. could find unexplained stock to the extent of Rs. 4,69,633/- whereas the surrender was not only with reference to investment in stock but also with reference to immovable property and other assets and during the course of search, surrender was in view of cash, jewellery and incriminating documents seized. Therefore, without referring the same, the learned CIT(A) is not justified in deleting the balance amount of Rs. 4,30,367/- as to that extent, the A.O. not find unexplained investment in stock. Similarly, the CIT(A) failed to appreciate than the amount of Rs. 50,000/- was surrendered by the Assessee being the profit of the firm M/s. Vertex Chemicals for five years from the Assessment Year 1985-86 to 1989-90 and the same could not be proved by the documentary evidence, therefore, the surrender was rightly considered as pertaining to the year of search and the same holds true in respect of Rs. 10,000/- being unexplained stock surrendered at the time of search. Under the facts and circumstances, the learned CIT (A) is not justified in deleting Rs. 4,30,363/- and Rs. 50,000/- and Rs. 10,000/-. Therefore, his order cannot be sustained with regard to the same."*

18. These findings are not shown incorrect. The contention of learned Senior Counsel that accounts were found duly maintained and in order, is not correct. It is coupled with fact that there was voluntary disclosure by one partner of Assessee Firm. Hence, there was no reason, not to act upon evidence collected under Section 132(4) of Act, 1961.

19. There is no material on record to show that statement was obtained by Authorized Officer under any duress or

during odd hours or there was any other justification in infer that statement recorded was not voluntary.

20. Various authorities cited on behalf of Assessee, we find, have considered the matter in the light of particular facts involved in those cases, hence do not help appellant in any manner.

21. In **Pullangode Rubber Produce Co. Ltd. (supra)** there was no issue with regard to a voluntary statement recorded by Authorized Officer during search and seizure operation. The question was, whether entries contained in the account books on the face of it could have been accepted. Therein entries contained in the accounts maintained by Assessee sought to be explained by Assessee differently, so as to reduce his liability. Court held that entries in the account books of Assessee amounts to an admission that amount in question has been laid out or expended for particular purpose though it may not be said to be excess. It is open to the person who made admission to show that it is incorrect. Relevant observations made by Court read as under:

> *"it is no doubt true that entries in the account books of the Assessee amount to an admission that the amount in question was laid out or expended for the cultivation, upkeep or maintenance of immature plants from which no agricultural income was derived during the previous year. ……………… It is open to the person who made the admission to show that it is incorrect."*

22. The exposition of law is well established that an admission is the best evidence. It is however, always open to the person making admission to explain the same but whether explanation is credible or not would depend upon the material placed by such person who

endeavour to explain his admission. Mere fact that an admission was explained, does not mean that admission will loose its nature of important piece of evidence. Competent authority who has to assess evidence, for valid reasons, can prefer to rely on admission and reject explanation.

23. In the present case, account books having not being found maintained in ordinary course of business and supporting material was also not maintained by Assessee, the alleged explanation of Assessee has rightly been rejected by Assessing Officer and Tribunal has also rightly affirmed the same. The judgment in **Pullangode Rubber Produce Co. Ltd. (supra)** therefore of no help to Assessee.

24. Then comes Division Bench judgment of this Court in **CIT Vs. Radha Kishan Goel (supra).** Therein question up for consideration was whether Tribunal was justified in holding that conditions laid down in explanation 5(2) of Section 271(1)(c) were fulfilled and no penalty was leviable therein. It was not a case where any statement was recorded by Authorized Officer during search and seizure operation under Section 132(4) of Act, 1961. In fact, after search and seizure conducted at the premises of Assessee on 30.08.1988, when cash, jewellery and other articles and things were found and seized, Assessee during the course of assessment proceedings, moved an application before Commissioner of Income Tax *(hereinafter to be referred as 'CIT')* agreeing to settle dispute. Thereupon, CIT made an endorsement that penalty proceedings under Section 271(1)(c) may not be applicable where additional income is discovered as the said income stood surrendered in the statement

under Section 132(4) of Act, 1961 for which returns were due to be filed within statutory period. Since penalty still was levied hence dispute was with regard to justification of imposition of penalty. Court considered applicability of explanation 5 of Section 271(c) viz-a-viz the statement made under Section 132(4) of Act, 1961 and thereafter held as under:

> *"From a perusal of Explanation 5, it is evident that in circumstances, which otherwise did not attract the penalty provisions of section 271 (1)(c) of the Act, now a deeming provision was introduced as to attract the penalty provisions to those cases as well. But an exception is provided in clause (2) of Explanation 5 where the deeming provision will not apply if during the course of search the Assessee makes the statement under sub-section (4) of section 132 of the Act that the money, bullion, jewellery etc. found in his possession has been acquired out of his income which has not been disclosed so far in his return of income to be furnished before the expiry of time specified in section 139 of the Act and also specifies in the statement the manner in which such income has been derived and pays the tax together with interest, if any in respect of such income. The exception appears to be to provide an opportunity to the Assessee to make a clean and fair confession and to surrender his income and also to deposit the tax and interest thereon which may result in an agreed assessment. The paramount intention appears to be that in case of fair and clean confession and surrender of his income during the course of search further litigation may be avoided and the Revenue may get the tax and interest etc. at an earliest and the Assessee may be saved from further litigation.*
>
> *Under section 132 (4) of the Act, it is the authorised officer, who examine on oath any person, who is found to be in possession or control of any books of account, documents, money, bullion, jewellery or other valuable article or thing, therefore, it is for the authorised officer to record the statement in his own way. Therefore, it is not expected from the person to state those things, which are not asked by the authorised officer.*

It is a matter of common knowledge, which can not be ignored that the search is being conducted with the complete team of the officers consisting of several officers with the police force. Usually telephone and all other connections are disconnected and all ingress and egress are blocked. During the course of search person is so tortured, harassed and put to a mental agony that he loses his normal mental state of mind and at that stage it can not be expected from a person to pre-empt the statement required to be given in law as a part of his defence.

In these circumstances, we are of the view that under section 132 (4) of the Act unless authorised officer puts a specific question with regard to the manner in which income has been derived, it is not expected from the person to make a statement in this regard and in case in the statement the manner in which income has been derived has not been stated but has been stated subsequently, that amounts to the compliance of Explanation 5(2) of the Act. We are also of the opinion that in case there is nothing to the contrary in the statement recorded under section 132 (4) of the Act, in the absence of any specific statement about the manner in which such income has been derived, it can be inferred that such undisclosed income was derived from the business, which he was carrying on or from other sources. The object of the provision is achieved by making the statement admitting the non-disclosure of money bullion, jewellery etc. Thus, we are of the opinion that much importance should not be attached to the statement about the manner in which such income has been derived. It can be inferred on the facts and circumstances of the case, in the absence of anything to the contrary. Therefore, mere non-statement of the manner in which such income was derived would not make Explanation 5 (2) inapplicable.

25. Real dispute was, when explanation 5(2) would be attracted. Court said, when a statement was recorded under Section 132(4) of Act, 1961, the person making statement is not expected to disclose on his own one or more facts but basically such a person replies to the questions asked by Authorized Officer since he examines

such person on oath. It cannot be said that such person would state those things which are not asked by Authorized Officer. In absence of any question specifically raised by Authorized Officer with regard to the manner in which disclosed income was derived, it was not expected from person concerned who made statement to give facts in this regard. If such facts are disclosed subsequently, it cannot be said that explanation 5(2) of Section 271(c) is not complied with. Thus, aforesaid judgment does not help appellant in answer questions which we are required to adjudicate.

26. In the judgment of Gujarat High Court in **Kailashben Manharlal Chokshi (supra),** therein search and seizure operation was conducted at the premises of Assessee on 04.11.1988. Statement under Section 132(4) of Act, 1961 was recorded in late night. Assessee made a disclosure of Rs. 7 lacs which included Rs. 4 lacs towards unaccounted investment of house property, Rs. 1 lac towards unaccounted cash and Rs. 1 lac towards unaccounted investment in Gold ornaments. In January 1989, Assessee retracted to the said disclosure and claimed that disclosure was of only Rs. 50,000/-, Assessee submitted before Assessing Officer that disclosure of Rs. 7 Lacs was made under pressure and coercion, hence no cognizance of it should be taken while making assessment. Assessing Officer held that Assessee cannot retract from its disclosure, and made addition. In appeal, CIT(A) confirmed such addition and Tribunal also concurred. It is in these circumstances substantial question of law, came up for consideration before Gujrat High Court in **Kailashben Manharlal Chokshi (supra),** was:

> *"Whether on the facts and circumstances of the case, the Tribunal was right in law in confirming the addition of Rs. 7 lakhs as disclosed in the statement under section 132(4) of the Act but retracted thereafter?"*

27. Gujarat High Court held that in normal circumstances, it would not interfere in the findings of fact recorded by Revenue Authorities and Tribunal, but it can always look into the facts whether explanation tendered by Assessee at the time of assessment has been considered by authorities below or not. An addition, if made merely on the basis of statement recorded under Section 132(4) of Act, 1961 and no cognizance taken of subsequent explanation or retracted statement, such approach on the part of Revenue Authorities is not legal. Court found as a matter of fact, therein, that statement of Assessee was recorded under Section 132(4) of Act, 1961 at mid night. In such circumstances, it was too much, to give any credit to statement recorded at odd hours. The person may not be in a position to make any correct or conscious disclosure in a statement if such statement is recorded in such odd hours, particularly when such statement is retracted. Observations to this effect in the judgment are reproduced as under:

> *"So far as the case on hand is concerned, the glaring fact required to be noted is that the statement of the Assessee was recorded under section 132(4) of the Act at midnight. In normal circumstances,* ***it is too much to give any credit to the statement recorded at such odd hours****. The person may not be in a position to make any correct or conscious disclosure in a statement if such statement is recorded at such odd hours. Moreover,* ***this statement was retracted*** *after two months."*

(Emphasis added)

28. Court held that mere fact that statement was not

retracted immediately but later on, may be an afterthought and might have come after legal advice but still retraction has to be viewed, may be in the light of statement furnished by Assessee along with affidavit and if a proper explanation comes in respect of all the items under which disclosure was made, the same has to be considered and if no discrepancy is found therein, should have to be accepted.

29. In our case, the aforesaid judgment has no application. The reason is that here is not a case of retraction by Assessee but during the course of assessment, documents produced by him have been examined threadbare and thereafter, reasons for addition have been given. This approach is evident from the fact that Assessing Officer has not mechanically made addition of Rs. 9 lacs which was disclosed in the statement under Section 132(4) of Act, 1961 but actual addition is only Rs. 8,12,360/- which shows due application of mind on the part of Assessing Officer, which has been affirmed by Tribunal.

30. The last decision cited is a Division Bench judgment of Jharkhand High Court in **Shree Ganesh Trading Co. (supra)** where also a statement under Section 132(4) of Act, 1961 was recorded which was subsequently retracted. Judgment clearly shows that retraction of Assessee virtually remain unconsidered, inasmuch as, it was rejected without giving any reason whatsoever. With regard to the evidenciary value of statement recorded under Section 132(4) of Act, 1961 and manner in which it has to be considered, Court has said as under:

> *"We are of the considered opinion that* ***statement recorded under section 132(4) of the Income***

> ***Tax Act, 1961 is evidence but its reliability depends upon the facts of the case and particularly surrounding circumstances.*** *Drawing inference from the facts is a question of law. Here in this case, all the authorities below have merely reached to the conclusion of one conclusion merely on the basis of assumption resulting into fastening of the liability upon the Assessee. The statement on oath of the Assessee is a piece of evidence as per section 132(4) of the Income Tax Act and when there is incriminating admission against himself, then it is required to be examined with due care and caution."*

(Emphasis added)

31. The aforesaid judgments therefore, unequivocally lay down an exposition of law consistently that a statement recorded under Section 132(4) of Act, 1961 is an admission of Assessee and an important piece of evidence, but if subsequently Assessee provides an explanation or retracts from his earlier statement by supporting material to show that disclosure made in statement under Section 132(4) of Act, 1961 should not be accepted, Revenue Authorities are bound to consider such explanation or retraction or material brought on record by Assessee and thereafter, decide whether any addition is to be made in the light of statement under Section 132(4) of Act, 1961 or it require some dilution or a total rejection by accepting explanation or retraction of Assessee. The subsequent explanation or retraction or material placed by Assessee can neither be brushed aside nor ignored nor can prevail per-se on the statement under Section 132(4) of Act, 1961, so as to render it worthless.

32. In the present case, Assessing Officer has not made additions merely on such statement. It was looked into the explanation, account books and other material

placed before it and then made addition of certain amount which is admittedly less than the amount of disclosure under Section 132(4) of Act, 1961. Tribunal has rightly affirmed the same.

33. We, therefore, answer both the questions against Assessee and in favour of Revenue and confirm the order passed by Tribunal.

34. The appeal accordingly lacks merit and hence is **dismissed** with cost.

Order Date :- 26.9.2016

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