

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 1380 OF 2000

M/s. T. Lakhamshi Ladha & Co.,	]	
298, Narshi Natha Street,	]	
Mumbai 400 009.	]	.. Appellant.
v/s.		
The Commissioner of Income Tax	]	
Mumbai City-II, Mumbai.	]	.. Respondent.

Mr. Nitesh Joshi i/b. S. R. Rawell & Co., for the Appellant.
Mr. Suresh Kumar with Ms. Samiksha Kanani, for the Respondent.

**CORAM: M.S.SANKLECHA, &
A.K.MENON, JJ.**

RESERVED ON: 28th JUNE, 2016.

PRONOUNCED ON: 07th JULY, 2016.

JUDGMENT (Per M. S. Sanklecha, J.):-

This appeal under Section 260-A of the Income Tax Act, 1961 (the Act), challenges the order dated 31st January, 2000 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order dated 31st January, 2000 is a common order disposing of appeals relating to the appellant for the Assessment Years 1989-90, 1990-91, 1991-92, 1992-93 and 1993-94. The present appeal relates to Assessment Year 1990-91.

2 On 26th February, 2002, this appeal was admitted on the following substantial questions of law:-

“(a) Whether on the facts and in the circumstance of the case and in law, the Tribunal was right in sustaining the addition of Rs.1,37,375/- being payment made on account of 'Mehta Sukhadi'?”

(b) *Whether on the facts and in the circumstance of the case in spite of the fact that the A. O. has admitted that appellant has maintained proper books of accounts, Tribunal was right in holding that addition of Rs.4 lacs on account of inflation of labour charges?*

(c) *Whether on the facts and in the circumstance of the case, the Tribunal was justified in holding that the addition of Rs.6 lacs on account of wrong billing was proper?"*

Re Question (a):-

3 The appeals relating to Assessment Years 1991-92, 1992-93 and 1993-94 being Income Tax appeal Nos. 1376, 1378 and 1379 of 2000 were also admitted by this Court. However, in the above appeals, only one substantial question of law reproduced herein above as Question No.(a) was urged and admitted. This Court by an order dated 4th May, 2016 has dismissed the appellant's appeal for the Assessment Years 1991-92, 1992-93 and 1993-94 on 4th May, 2016.

4 In the above view, it is an agreed position between the parties that Question No.(a) as framed herein above, stands concluded against appellant and in favour of the revenue.

5 In view of the above, Question No.(a) as framed for our consideration is answered in affirmative i.e. against the appellant-assessee and in favour of the respondent-revenue.

Re: Questions (b) & (c):-

6 The relevant facts giving rise to the substantial questions of law listed at Serial Nos.(b) and (c) above, are as under:-

- (a) The appellant is a partnership firm, engaged in the business of trading in tarpaulins, including renting the tarpaulins for hire and erection of Monsoon Sheds as required by its Customers.
- (b) On 15th September, 1989, there was a search action carried out on the appellant-firm. At that time, a statement of its senior partner – Mr. T. V. Goshar was recorded on oath by the Officers of the revenue under Section 132(4) of the Act.
- (c) The relevant extract of the statement made on 15th September, 1989 by Mr. T. V. Goshar and endorsed by one of his partners and son- Mr. C.T. Goshar, reads as under:-

“Q. Do you want to say anything of your own before your statement is concluded for the day?”

Ans. In order to co-operate with the dependent and to disclose my real income to this department. I offer following amounts as additional income of the firm M/s. T. Lakshamshi Ladha & Co., for the current year that is Asst.Year 1990-91.

- | | | | |
|-----|-----------------|---|---|
| (1) | Rs. 63,000.00 | - | An unaccounted rent received for letting out the godown in J. B. Shah Market. |
| (2) | Rs. 1,77,000.00 | - | Unaccounted Cash found during the search over an above the Cash of Rs. 63,000/- inferred above received on account from on account of inflated expenses |
| (3) | Rs. 10,00000.00 | | (To the extent of about Rs.4,00,000/-) and balance on account of discrepancies which might have occurred through oversight such as wrong billing etc. |

I clarify here that this amount of Rs.12,40,000/- is offered for taxation as income in addition to the Income which will be declared as per books of accounts.

Whatever stated above is true and correct to the best of my knowledge and belief. The statement has been made voluntarily without any coercions or pressure. The contents of the statement have read to me in Hindi by my partner and son Shri Champshi T. Goshar and I have understood the contents of the same.

(Deponent)

Shri T. V. Goshar

Before me,

Witness

(Sri Champshi T. Goshar)

I also endorse the above statement made by Sri T. V. Goshar

(Sri Champshi T. Goshar)”

(d) On 19th October, 1989, the appellant-firm addressed a communication to the Officer of revenue seeking to withdraw/ retract / modify the statement made on oath under Section 132 (4) of the Act by Shri T. V. Goshar on 15th September, 1989. The relevant extract of the communication dated 19th October, 1989 reads as under:-

“ Shri Talakshibhai Goshar offered income of Rs.4,00,000/- without any idea and knowledge of business. Even his son who was present did not have idea of monsoon shed business. In fact there is no inflation of expenses and the offer of income of Rs.4,00,000/- on account of inflation of expenses of monsoon shed business is hereby withdrawn.

Similarly, Talakshibhai Goshar has offered income of Rs.6,00,000/- on account of discrepancy which might have

accrued through oversight. The admission by itself is self explanation. Income cannot be offered on probabilities. This shows how statement has been recorded in hurried manner. This offer of income of Rs.6,00,000/- on account of probable discrepancy is also hereby withdrawn.

Shri Talakshibhai Goshar had offered income of Rs.12,40,000/- including seized cash of Rs.2,40,000/-.The seized cash of Rs.2,40,000/- includes rent of Rs.63,000/-. The concerned parties were called and they also confirm these facts.

In short, our offer of income of Rs.12,40,000/- is reduced to Rs.2,40,000/- u/s. 132(4) for A. Y. 1990-91.

This amount of Rs.2,40,000/- represent cash seized and out of Rs.2,40,000/-, Rs.63,000/- represents the receipt of rent not accounted and the balance amount of Rs.1,77,000/- is also unaccounted and is earned by speculation and other sources.

Our offer of income u/s. 132(4) is Rs.2,40,000/- for A. Y. 1990-91. Kindly treat this letter as amendment to the statement taken u/s.132(4) and as part and parcel of statement taken u/s. 132(4) Shri Talakshibhai Goshar on 15th September, 1989 at office.

I confirm.

For T. Lakshamshi Ladha & Co.,

sd/-

sd/-

Talakshi Vasanji Goshar

Partner.”

It would, therefore, be noticed that the above communication is not signed by T. V. Goshar but by another partner. Mr. T. V. Goshar merely confirms the view of the partner who authors the letter dated 19th October, 1989.

(e) Thereafter, on 30th November, 1990, the appellant-firm filed its return of income for the Assessment Year 1990-91, declaring loss of Rs.53,000/-. However, the Assessing Officer while passing an

Assessment Order under Section 143(3) of the Act did not accept the retraction dated 19th October, 1989 made by the appellant-firm of the statement made by the partner - Mr. T. V. Goshar on 15th September, 1988. As a consequence, the Assessing Officer, inter alia made following additions to income of the appellant-firm:-

- (i) The addition on account of inflated expenses
on labour charges on monsoon sheds – Rs. 4,00,000/-
- (ii) On account of wrong billing in respect of
monsoon sheds - Rs. 6,00,000/-

In the result, the Assessment Order dated 31st March, 1992, after enhancing certain other income determined the appellant's income at Rs.11.91 lakhs for Assessment Year 1990-91.

- (f) Being aggrieved by the Assessment order dated 31st March, 1992 under Section 143 (3) of the Act, the appellant filed an appeal before the Commissioner of Income Tax (appeals) [CIT(A)]. By an order dated 28th February, 1993, the CIT(A) held that the statement of Mr. T. V. Goshar made under Section 132(4) of the Act cannot be accepted in respect of labour charges as well as wrong billing as there was no other corroborative evidence to support the statement. However, the CIT(A) while completely deleting the addition of Rs.6,00,000/- on account of wrong billing, restricted the addition to 10% of the labour charges of Rs.10.97 lakhs i.e. Rs.1.09 lakhs and deleted the balance.
- (g) Being aggrieved, the revenue filed an appeal to the Tribunal. The Tribunal by the impugned order dated 31st January, 2000 allowed the revenue's appeal on two issues which arise for consideration

before us. It held that the statement dated 15th September, 1999 was correctly relied upon by Assessing Officer and that the subsequent retraction on 19th October, 1989 of the statement made by the senior partner was an after thought. Thus, the retraction dated 19th October, 1989 could not be accepted. In the result, the addition of Rs.10,00,000/- made on account of labour charges and wrong billing by the Assessing Officer, was restored.

7 Being aggrieved by the order of the Tribunal, the appellant is in appeal before us.

8 Mr. Nitesh Joshi, learned Counsel appearing for the appellant submits as under:-

- (a) The statement of Mr. T. V. Goshar dated 15th September, 1988 made under Section 132(4) of the Act cannot be relied upon to make any addition as the same stood retracted by communication dated 19th October, 1988;
- (b) The statement of Mr. T. V. Goshar made on 15th September, 1988 is not supported by any corroborative evidence. Thus, the addition made on account of labour charges and wrong billing is not sustainable;
- (c) The accounts were verified and no defect was found in respect thereof with regard to purchase, sales etc., Thus, no basis to make addition of income merely on the basis of the statement made by Mr. T. V. Goshar on 19th September, 1998; and
- (d) The statement of Mr. T. V. Goshar on 15th September, 1988 itself indicates that the labour charges are inflated to the extent of 5%

to 10% only. Therefore, only the amount of Rs.1.09 lakhs being 10% of Rs.10.97 lakhs could alone be sustained out of Rs.4 lakhs. So far as wrong billing is concerned, no evidence even partially supporting the case of the Revenue.

9 Mr. Suresh Kumar, learned Counsel appearing for the revenue places reliance upon the impugned order of the Tribunal. It is further submitted that both issues arise out of a factual determination. Therefore, no interference is called for, by this Court.

10 We have considered the rival submissions. We shall first deal with the common submissions in respect of both the questions – (b) and (c) above.

- (i) It was the contention of the appellant that the additions on account of labour charges and wrong billing, was on the statement dated 15th September, 1988 of Mr. T. V. Goshar. However, same stood retracted on 19th October, 1989. Thus, the statement dated 15th September, 1988 could not be relied upon to make the additions.
- (ii) We note that the retraction of the statement made on 15th September, 1989 by communication dated 19th October, 1989 has not been made by the original deponent i.e. Mr.T. V. Goshar but has been made by another partner of the firm and Mr. T. V. Goshar has merely confirmed it. The alleged retraction dated 19th October, 1988, in fact, does not allege any pressure and/or coercion by the revenue to make the statement dated 15th September, 1988 as made. It only seeks to amend the statement made on 15th September, 1988. We note that on the date of search, it is undisputed that Mr. T. V. Goshar was a partner of the firm and

voluntarily made statement in respect of the business of the firm Nothing prevented him from stating that he is not aware of the business of the firm rather than proceed and make statement which suggest that he is a person in the know of the business of the firm and the manner in which it is conducted. In fact, his statement was made in the context of signed blank vouchers and loose papers found during the search. These loose papers found during search, were explained as record of payments made out side the books of account and so far as blank signed vouchers are concerned, it was stated that the figures are filled in later so as to enable inflating the expenses actually incurred. The above details in the statement is indicative of a person in the knowledge of the manner in which the business activities of the firm is being conducted. Besides, when the statement was made, another partner of the firm – one Mr. C. T. Goshar endorsed the statement made by Shri T. V. Goshar. Thus, approving the same. In case the aforesaid statement was not correct, the other partner would have certainly protested and not endorsed the statement made by Shri T. V. Goshar. In the above view, the finding by the Tribunal that the statement recorded on 15th September, 1988 is not effectively retracted on 19th October, 1988, cannot be said to be perverse and/or arbitrary. It is a possible view on the facts.

- (iii) It was next submitted by the appellant that in the absence of any corroborative evidence found during the course of search or otherwise to support the statement made on 15th September, 1988, it cannot be relied upon. In support, reliance was placed upon the decision of various Courts and we deal with each of them as under:-

- (a) The decision of the Chhatisgarh High Court in ***ITO v/s. Vijay Kumar Kesar – 327 ITR 497-*** to submit that the confession made by the assessee during the survey proceedings is not conclusive. However, in the aforesaid case, the statement made during the survey proceedings were retracted by a subsequent communication along with documentary evidence i.e. entries in books of accounts, vouchers etc., to establish that the statement made earlier were not true and correct. In the present facts, no documentary evidence has been filed to establish that the statement made by Mr. T. V. Goshar on 15th September, 1988 was not correct. Moreover, the onus is on the deponent of the statement on oath who seeks to retract, to establish that the earlier statement was not correct.
- (b) The decision of the Gujarat High Court in ***Kailashben M. Chokshi v/s. CIT – 328 ITR 411*** – wherein the statement made under Section 132 (4) of the Act was subsequently retracted giving proper explanation with documents in support of the retraction. Further, the statement therein was recorded at midnight, which was considered to be involuntary in view of the subsequent retraction with documentary evidence. In the present facts, it is not the case of the appellant that the statement made under Section 132(4) of the Act was recorded in the midnight or that any pressure or coercion was put upon the appellant to make a statement contrary to the facts. In the present facts, the statement dated 15th September, 1988 was made at 9.30 p.m. This is not an odd hour. Moreover, the retraction was bereft of any supporting evidence to establish that the original statement made on oath is incorrect. Thus, the aforesaid decision does not assist the

appellant. Here again, the onus to establish by corroborative evidence is upon the assessee that the statement made on oath earlier is not correct while retracting it.

- (c) The decision of Telangana and Andhra Pradesh High Court in ***Gajjam Chinna Yellapa & Others v/s. ITO 370 ITR 671*** wherein it held that the retracted statement cannot be the sole basis to fasten the liability. This, however, was in context of the fact that the assessee's contention was that the statement was recorded by applying pressure till midnight. In the present case, it is not the appellant's case nor the case of Mr. T. V. Goshar that any pressure was put upon him to make statement which does not reflect the truth. Thus, the above decision also does not assist the appellant.
- (d) The decision of the Jharkhand High Court in ***Shree Ganesh Trading Co., v/s. CIT 214 Taxman- 262*** – wherein the Court held that reliance upon a statement made under Section 132(4) of the Act without any corroborative evidence is not acceptable particularly when the same had been retracted. In the aforesaid case, none of the authorities under the Act had considered and /or given reason for rejecting the retraction made by assessee of the statement made under Section 132(4) of the Act. In the present facts, we find that the authorities have examined the statement made under Section 132(4) of the Act as well as the retraction dated 19th October, 1989. It is after consideration of the retraction that the Tribunal concluded that the alleged retraction does not make the statement made on oath unbelievable. In this

view, the above decision will not apply as it itself observes that the acceptance/ withdrawal of the statement made under Section 132(4) of the Act depends upon the facts and circumstance of the each case. Thus, the decision rendered in that case would have no universal application. In the present facts, we are of the view that the above decision would have no application; and

- (e) The decision of the Delhi Court in *CIT v/s. Sunil Aggarwal – 379 ITR 367* wherein the assessee was assessed to tax on the basis of the statement made by him during the course of search under Section 132(4) of the Act. This without having considered the subsequent retraction with an explanation for retraction. This particularly when the explanation offered in the retraction was supported by evidence in the form of books of account maintained by the assessee. Further, reliance was placed upon the statement by a third party without having given an opportunity of cross examination to the assessee therein. It was in the aforesaid context that the Court held that the additions made in the hands of the assessee could not be justified. Facts in the present case are entirely different. The retraction is no retraction at all but merely a request to treat the retraction as amended to admit to a lower quantum of unstated income. Moreover, the contention that the subject letter amounted to a retraction is misconceived. It was in any event not supported by any evidence whatsoever and the same was subject matter of examination by the authorities and the retraction was not found to be acceptable. Thus, the aforesaid decision would also have no application in the present facts.

- (iv) It must be pointed out that in the present facts, though the CIT(A) had disregarded the statement made on oath under Section 132(4) of the Act, it was on the basis that the statement made by a partner of the firm cannot bind the firm in the absence of it being confronted to all the other partners. This goes against the basic principle of partnership law.

In the above view, reliance upon the statement dated 15th September, 1989 given by Mr. T. V. Goshar to the authorities under Section 132(4) of the Act cannot be found fault with.

11 So far as the additional submissions in respect of question (b) viz: labour charges is concerned, Mr. Joshi submitted to the effect that the accounts of the firm were examined by the Assessing Officer during the assessment proceedings, while passing the Assessment Order dated 31st March, 1992 and no discrepancies in the Accounts were found. Therefore, no basis to make any addition on account of labour charges. We notice that in the statement dated 15th September, 1988, Mr. T. V. Goshar has stated that labour expenses are inflated. It is pertinent to note that the order of the CIT(A) which partly deleted additions made on account of labour charges and restricted it up to 10% of Rs.10.97 lakh, had itself rendered a finding that there was a shortcoming in the accounts of the labour charges till the date of search. In the above context, reliance by the Tribunal upon the statement made under Section 132(4) of the Act after considering the retracted statement, could not be faulted with. The view taken by the impugned order of the Tribunal is a possible view in the facts and circumstance of the present case. Thus, substantial question (b) as framed is answered in the affirmative i.e. in favour of the revenue and

against the appellant-assessee.

12 So far as the additional submissions in respect of question (c) viz: wrong billing is concerned, Mr. Joshi submitted that in the absence of any error/ discrepancy being noted in the accounts, no amount could be added on account of non-billing. It is pertinent to note that the impugned order does record that the Assessing Officer had rendered a finding that the appellant has not entered bills for hiring charges in its books of account in day-to-day running of the business. Thus, the contention of the appellant is not sustainable. Further, our attention is drawn to para 20 of the impugned order where reliance is placed upon the decision of Gujarat High Court in *N. K. Paper Board v/s. DCIT 234 ITR 733* to hold against the appellant. We find that the citation is incorrect and does not assist the revenue. However, the impugned order of the Tribunal even in the absence of the above decision cannot be held to be bad in law. In the above circumstance, the view of the Tribunal in upholding the order of the Assessing Officer to add an amount of Rs.6 lakhs to the appellant's income cannot be faulted. This is a possible view on facts found. Thus, the substantial question (c) as framed is also answered in the affirmative i.e. against the appellant-assessee and in favour of the Respondent-revenue.

13 In view of the above, the questions (a), (b) and (c) are all answered in affirmative i.e. in favour of the respondent-revenue and against the appellant-assessee.

14 Accordingly, **appeal dismissed.** No order as to costs.

(A.K.MENON,J.)

(M.S.SANKLECHA,J.)