

**IN THE INCOME TAX APPELLATE TRIBUNAL
DIVISION BENCH, CHANDIGARH**

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND MS. ANNAPURNA GUPTA, ACCOUNTANT MEMBER

ITA No.591/Chd/2013
(Assessment Year : 2008-09)

M/s Jain Sons,
SCO 24, Sector 17-E,
Chandigarh.

Vs.

The A.C.I.T.,
Central Circle-1,
Chandigarh.

PAN: AACFJ3533D

(Appellant)

(Respondent)

Appellant by : Shri Vineet Krishan

Respondent by : Shri Sushil Kumar, CIT DR

Date of hearing : 26.09.2016

Date of Pronouncement : 16.12.2016

ORDER

PER ANNAPURNA GUPTA, A.M. :

This appeal filed by the assessee is directed against the order of learned Commissioner of Income Tax (Appeals)(Central), Gurgaon dated 12.03.2013, relating to assessment year 2008-09.

2. The assessee has raised the following effective Grounds of appeal:

“2. *That the Id. Commissioner of Income Tax (Appeals) gravely erred in rejecting the retraction of surrender made by the assessee. The surrender was under coercion and misunderstanding of facts and law.*

3. *a) That in the facts and circumstances of the case, the Id. Commissioner of Income Tax (Appeals) gravely erred in upholding the addition of Rs.23,92,000/- made by the Id. Assessing Officer on account of alleged difference in stocks.*
b) Without prejudice to ground No. 3 (a) the addition sustained is highly excessive.
4. *That in the facts and circumstances of the case, the Id. Commissioner of Income Tax (Appeals) gravely erred in sustaining the addition of Rs.25000/- out of total addition of Rs.50,000/- made by the Id. Assessing Officer on account of personal use of vehicle and telephone.”*

3. At the outset it may be stated that Ground No.4 raised by the assessee was not pressed before us and the same is therefore treated as dismissed.

4. Ground Nos.2 &3 raised by the assessee relate to the addition on account of difference in stock, upheld by the CIT(A).

5. Brief Facts relating to the issue are that the assessee is engaged in the trading of readymade garments. Search was conducted on the assessee on 28.11.2007. During the course of search operation, inventory of stock was prepared and total value of stock found was Rs.1,88,09,898/-, whereas as per books of account the stock on the date of search was Rs.2,79,75,096/-. Thus, the actual stock found was less by Rs.91,65,198/-. In the statement recorded during the course of search, the assessee expressed his inability to explain the difference but on 30.11.2007 i.e. two days after the search, the

assessee surrendered the difference in stock found, as being on account of sales outside the books and assuming the Gross Profit @ 26%, surrendered the gross profit on the same amounting to Rs.23.92 lacs. Thereafter in the return of income filed, the assessee did not disclose the impugned surrender and in the letter filed during the assessment proceedings, dated 16.12.2009, retracted from the same. The reason for the retraction were that :

- a) The surrender was obtained by coercion.
- b) The family of the assessee was under the process of partition and to balance the stock vis-à-vis family members, the stock was sent to the premises of Jain Brothers and in the mean time search was conducted and excess stock found at Jain Brothers, while short stock was found with the assessee.
- c) While valuing the stock found, cost of certain items was taken less and there was certain calculation mistake also totaling to Rs.3,43,931/-.
- d) GP rate of 26% applied for calculating stock as per books was unreasonable and if GP rate of 22% was applied the difference in stock would be reduced by Rs.10 lacs.

6. The Assessing Officer rejected the retraction made on all accounts by stating as under :

- 1) The statement was given voluntarily without any force and nothing was produced by the assessee to evidence coercion, threat or pressure at the time of surrender.
- 2) No material was there to suggest any mistaken belief of law or fact to hold the retraction as valid.
- 3) The family settlement took place more than 7½ months before search i.e. in April, 2007. No other family member has made such claim, no documents produced to show that the stock was transferred to Jain Brothers, no entry in the books of Jain Brothers to evidence the transfer and even Jain Brothers did not show the stock in its closing stock. Thus the stock of the assessee could not be attributed to stock found at Jain Brothers on account of family settlement.
- 4) GP fall of 22% from 26% in preceding year was not explained by the assessee and, therefore, 26% rate of GP was correctly applied for working out the value of stock.
- 5) Reliance placed on GP of one M/s S.S. Nath & Co. of 7% could not be relied upon since no detail filed.
- 6) The argument of the assessee that the GP of assessment year 2007-08 @ 26% was shown on the instance of the authorities had not been duly evidenced.

7. Thus, the contentions raised for retraction from the disclosure were rejected and addition of GP @ 26% on unaccounted stock of Rs.91,65,198/- amounting to Rs.23.92 lacs was made to the income of the assessee.

8. The matter was carried in appeal before the Ld. CIT (Appeals), who vide his order dated 12.03.2013 upheld the order of the Assessing Officer.

9. Before us, the learned counsel for the assessee reiterated the submissions made before the Ld. CIT (Appeals).

10. The Ld. DR, on the other hand, stated that since no evidence of exercise of coercion or undue pressure has been brought on record the arguments of the assessee cannot be accepted. The Ld. DR stated that the fact that retraction took place 11 months after the surrender itself, makes the retraction invalid. The Ld. DR relied upon the following case laws in support of its above contentions :

- a) Navdeep Dhingra Vs. CIT,
56 Taxmann.com 75 (P&H)
- b) B.Kishore Kumar Vs. DCIT
52 Taxmann.com 449 (Mad)
- c) B.Kishore Kumar Vs. DCIT
62 Taxmann.com 215 (SC)

11. We have heard the learned representatives of both the parties, perused the findings of the authorities below and considered the material available on record.

12. The first issue before us is whether the statement made on oath can be retracted. While the learned counsel for the assessee has stated that since the statement was extracted under pressure and there was no incriminating material relating to the surrender made, the same could be retracted. The Ld. DR, on the other hand, has stated that the retraction of surrender after long time gap cannot be made. The Ld. DR relied upon judicial decisions in this regard.

13. On this issue, we find that the Hon'ble Supreme Court in the case of Pullangode Rubber Produce Co. Vs. State Of Kerala And Anr. (1973) 91 ITR 18 (SC) has stated that the retraction from surrender of income made under section 132(4) of the Act may be accepted on the facts of the case. The Hon'ble Apex Court held as under :

“An admission is an extremely important piece of evidence but it cannot be said that it is conclusive. It is open to the person who made the admission to show that it is incorrect”.

14. This proposition was reiterated by the Hon'ble Jurisdictional High Court in the case of Krishan Lal Shiv Chand Vs. CIT (1973) 88 ITR 293 wherein the Hon'ble High Court held as under :

“It is an established principle of law that a party is entitled to show and prove that the admission made by him previously is in fact not correct and true”.

15. Therefore, it is settled law that if the facts so warrant even a surrender made on oath under section 132(4) of the Act may be retracted. The reliance placed by the Ld.DR on the decision in the case of B.Kishore Kumar (supra), with reference to retraction from statement after a long time gap ,we find is misplaced since in that case the Hon’ble court had found that there was a clear and categorical admission of undisclosed income which was not demonstrated as incorrect or mistake of fact and therefore was held to constitute a good piece of evidence.

16. Having said so, this ratio has to be applied to the facts of the present case.

17. It is not denied that the actual stock found was short of the stock as per the books by an amount of Rs.91,65,198/-, which was surrendered by the assessee as unaccounted sales and applying GP of 26% on the same, surrender of Rs.23.92 lacs was made by the assessee. The assessee thereafter retracted the surrender for the reasons stated above, which was not accepted by the Assessing Officer and also by the Ld. CIT (Appeals). The Ld. CIT (Appeals), we find gave detailed findings for rejecting the surrender as follows :

“4.2 I have considered the submissions of the assessee and the impugned order. During the search operation the physical stock found was Rs. 1,88,09,898/- as against Rs. 2,79,75,096/- as per books. The stock found short to the extent of Rs.91,65,198/-could not be explained by the assessee. Consequently vide letter dated 30-11-2007 the assessee inter-alia surrendered the difference in stock as arising out of sales outside the books of account and on applying GP rate of 26%, the Gross profit was worked out at Rs.23,921acs.

However the AO noticed that the additional income surrendered was not included in the return of income filed. During the course of assessment proceedings a letter dated 16-12-2009 was filed explaining the retraction as obtained under pressure besides contending that there were discrepancies in stock inventoried during the search proceedings viz. calculation error of Rs. 4,34,931/- and wrong application of the price-rates. It was further contended that the assessee was mentally preoccupied with a family dispute. These contentions were rejected.

It is the case of the assessee that no discrepancies were found in the books as no unvouched purchase and sale vouchers were found and neither any material to suggest any transactions outside the books. That the trading account worked out by applying the G.P, rate of 26.56% was not correct as the value of the stock was required to have been considered at average rate in earlier years. It was explained that the margin of the appellant-firm has been shown 17.42%, 17.23%, 19.35%, 21.86%, 26.56% and 22% of the Assessment Year 2002-03, 2003-04, 2004-05, 2005-06, 2006-07 and 2007-08 respectively. The average rate comes to 20.73%. That the rates shown in earlier years cannot be ignored and if the rate as shown in the A.Y. 2002-03 and 2003-04 is applied, there would be hardly any difference.

The fact that there was a family dispute which was settled seven month earlier to the search operation is not in debate. The stock in the assessee case was found short while excess stock was found in the other concern M/s Jain Bros. Both the concerns are

engaged in the same business of trading in readymade garments. Be that as it may, the stock of goods stated to be part of the family settlement or that part of the stock was lying with Jain Bros, have not been evidenced documentarily. Five bills have been listed at page 10 which have not been accounted for, three of which are dated August 2007. So the contention that barring two-three days' vouchers prior to date of search, all have been entered in the books is incorrect. Similarly the sixth bill of repairs/maintenance of vehicles which has been discredited as dumb document/ assessee-firm not owning any vehicle is also not tenable as the audited accounts for FY 2007-08 [filed with submission dated 14.4.2011] reflect expenses debited under head running and maintenance of vehicle. As regards the assessee retracting the surrender made in u/s 132(4), no evidence has been put forth of any threat or coercion. The letter of surrender dated 30.11.2007 was made two days after the search before the DDIT (Inv). In other words it was voluntary. The withdrawing of surrender on stock was made while filing its return of income on 3.10.2008 i.e after 11 months, which was followed by letter dated 16.12.2009. It has been held in Manoharlal Kasturichand (v) ACIT (1997) 57 TTJ (Ahd) 639 and Param Anand Builders (P) Ltd (1996) 56 TTJ (Mumbai) 21, that for retractment of statement, assessee should prove threat or coercion. Neither any such proof has been given nor can there be a threat or coercion when the surrender was made two days after the search by way of a letter. The arguments for retractment stands disproved as discussed above. Furthermore the delay by eleven months further weakens the case of the assessee in view of the decision of Guwahati High Court in the case of M/s Greenview Restaurant (v) ACIT, 263 ITR 169.

On the issue of the G.P. rate applied of 26%, the assessee had submitted that the ratio fluctuates depending upon market trend etc and that the rate was too excessive. No further substantiation has been made to contest with proof the application of the GP rate of 26%. Needless to say the assessee has also been unsuccessful in disproving the position of six of the bills discussed above. Thus, considering the facts and circumstances of the case, I am inclined to uphold the addition made by the AO. The assessee fails on this ground.”

18. We are in agreement with the Ld. CIT (Appeals) that the reason given by the assessee for retracting the surrender, that it was forced and made under coercion, was baseless. No evidence of any threat or coercion has been produced either before the lower authorities or even before us. Further, no facts or circumstances under which the surrender was made, to prove undue pressure or coercion, has been stated by the assessee. No statement or affidavit of panch (witness) have been filed in support of pressure having been brought upon the assessee. In short, no evidence of existence of any pressure or coercion at the time of making surrender has been brought on record. The contention of the assessee that the surrender was made under pressure appears to be a mere statement with no basis at all. Once the statement has been given making a surrender, the presumption is that it has been given voluntarily without any pressure or coercion and while stating otherwise for retracting the same, the onus is on the assessee to prove so, as held by various Courts as follows :

- i) Manoharlal Kasturichand Vs. ACIT
(1997) 57 TTJ (Ahd)639
- ii) Param Anand Builders (P Ltd. Vs. ITO
(1996) 56 TTJ (Ahd) 21

19. Therefore, we hold that, the admission made by the assessee, surrendering the excess stock, cannot be rejected as admissible evidence on this ground.

20. The next contention of the assessee for retracting the surrender, that there was actually no shortage of stock since certain stock belonging to the assessee was at the premises of Jain Brothers on account of family settlement, has also been rightly rejected by the Ld. CIT (Appeals). As pointed out by the Ld. CIT (Appeals), the dispute was settled 7½ months back, which fact has not been controverted by the assessee. Further no documentary evidence has been produced to prove the stock at the premises of Jain Brothers belonging to the assessee, in the form of disclosure in the sales tax return, disclosure of movement of stock in the books of the assessee or even in the books of Jain Brothers. Further, as pointed out by the Ld. DR that even the statement of Shri Raj Jain, proprietor of Jain Brothers makes it very clear that there was no stock of the assessee at the premises of Jain Brothers at the time of search. Therefore, this contention of the assessee also does not justify retraction of the surrender made.

21. On the issue of application of GP rate of 26% for the purpose of calculating the difference in stock as also the Gross Profit on the stock found short, the contention of the assessee that it is excessive considering the past history of the assessee, we find merit. The GP rate shown by the assessee in different years tabulated at page 5 of the Ld. CIT (Appeals) is as follows :

<i>A.Y.</i>	<i>Sales</i>	<i>G.P.</i>	<i>G.P. Rate</i>
2002-03	28,975,231 /-	Rs. 50,47,095/-	17.42%
2003-04	3,51,74,768/-	Rs. 60,61,737 /-	17.23%
2004-05	3,53,82,810 /-	Rs. 68,45,093 /-	19.35%
2005-06	3,63,63,847 /-	Rs. 79,48,231/-	21.86%
2006-07	3,59,09,981/-	Rs. 96,38,919 /-	26.56%
2007-08	4,17,44,280 /-	Rs. 92,16,392 /-	22%

22. Further GP rate of the current year is 22%. All these facts have not been controverted by the Revenue. What emerges from the above is that the average GP rate of the assessee is 20.48%. The Revenue has given no reason for adopting the GP rate of the immediately preceding year only i.e. 26% and we find no reason to adopt the same particularly considering the fact that the average GP rate of the preceding years comes to 20.48% and further GP rate accepted in this year is undeniably 22%. In such circumstances, we hold, it would be fair and reasonable to adopt the GP rate of the current year i.e. 22% for the purpose of calculating stock as per Books on the date of search. The retraction of the assessee is to this extent, therefore, accepted.

23. The Assessing Officer is therefore directed to compute the difference in stock found on the date of search by calculating the stock as per Books by applying GP rate of 22% to the trading results of the assessee as on the date of search. The Gross Profit on the stock found short if any is also directed to be calculated after applying GP rate of 22% and addition is directed to be upheld of the same.

24. Ground Nos.2 & 3 raised by the assessee are therefore allowed accordingly.

25. In effect the appeal of the assessee is partly allowed.

Order pronounced in the open court.

Sd/-

(BHAVNESH SAINI)
JUDICIAL MEMBER

Sd/-

(ANNAPURNA GUPTA)
ACCOUNTANT MEMBER

Dated : 16th December, 2016

Rati

Copy to:

1. The Appellant
2. The Respondent
3. The CIT(A)
4. The CIT
5. The DR

Assistant Registrar,
ITAT, Chandigarh