

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
R/TAX APPEAL NO. 806 of 2019**

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PRINCIPAL COMMISSIONER INCOME TAX SURAT
Versus
NAGESHWAR ENTERPRISES

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Appearance:
MRS KALPANAK RAVAL(1046) for the Appellant(s) No. 1
for the Opponent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE J.B.PARDIWALA**
and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

Date : 03/02/2020

ORAL ORDER

(PER : HONOURABLE MR.JUSTICE J.B.PARDIWALA)

1. This Tax Appeal under Section 260A of the Income Tax Act, 1961 (for short, 'the Act, 1961') is at the instance of the Revenue and is directed against the order passed by the Income Tax Appellate Tribunal, Surat, dated 03.05.2019, in the ITA No. 147/AHD/2011/SRT for the A.Y. 2007-2008.

2. The Revenue has proposed the following three questions of law for the consideration of this Court :

(a) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT was justified in deleting the addition made by the A.O. on account of undisclosed profit and unaccounted investment in undervalued goods despite the

assessee himself having admitted before DRI in his statement about his under invoicing of imports, though later retracted, when Hon'ble Supreme Court in Surjeet Singh Chhabra Vs Union of India [1997 (89) ELT 646(SC)] held that the confession, though retracted, is an admission and binding ?

(b) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT was justified in not considering that the statement of admission by the assessee was given by the assessee before the DRI based on the specific documentary evidences found during the search on M/s Nageshwar Enterprises on 22.09.2007 and therefore the primary onus was on the assessee to establish its case?

(c) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT was correct in stating that no addition can be made on the action of the third party when AO has already stated the details etc of investigation by the DDIT(Inv.), Unit-II among other details?"

3. It appears from the materials on record that on the basis of the information received from the Deputy Director of Income Tax (Investigation) Unit (II) Surat, a search of the residential premises of the assessee was undertaken by the Directorate of Revenue Intelligence (DRI), Surat. In the course of the search, one of the partners of the firm, namely Shri Rajesh Gandhi, in his statement recorded on oath, admitted before the DRI as regards the undervaluation

of the metallic yarn and jari/kasab to the extent of 60279.75 kgs., out of which 30405.00 kgs. pertains to the year under consideration. He admitted that the difference of the undervalued amount was paid in cash to the seller firm at China and Japan. In such circumstances, the case was selected for scrutiny.

4. It appears that the A.O. rejected all the submissions canvassed on behalf of the assessee and ultimately made addition of Rs.32,57,962/- on account of the peak unaccounted investment and addition of RS.35,13,067/- on the account of GP on unaccounted purchases and finalized the assessment under Section 143(3) of the Act.

5. The assessee, being dissatisfied with the assessment order, preferred an appeal before the CIT(A). The CIT(A) allowed the appeal of the assessee vide order dated 28th October 2010. The CIT(A), while allowing the appeal of the assessee, observed as under:

“7.1 I have carefully gone through the reasons mentioned by the A.O. in the assessment order as well as the lengthy submissions and arguments submitted on behalf of the appellant. I have

also considered various judicial pronouncements cited on behalf of the appellant. I find that in the assessment order the A.O. has not mentioned about any independent finding for making this addition. He has simply relied upon the information and evidences received from the customs department regarding the raid conducted by the officers of DRI. In my view after receiving information from the customs department the A.O. must have further carried out the inquiries to find out the truth. But it appears that no such exercise was done by the A.O. and there are no independent findings of the A.O. for reaching to the conclusion that the appellant firm in fact made any such unaccounted payments for goods imported from JAPAN and CHINA. So far as the findings of DRI are concerned, which are mentioned by the A.O. in the assessment order, I find that DRI has made up the case mainly on the basis of admission statement of a partner of the appellant firm. This is the main evidence relied upon by the Customs Authorities as well as by the A.O. Except for this admission statement, there is no finding either of DRI or of the A.O. to suggest that the so called differential amount was paid by the appellant firm. There is no mention of any other evidence or finding in this respect either by the DRI or by the A.O. The learned A.R. Of the appellant also pointed out various unique circumstances of this case as under:

The Japanese/Chinese sellers were professionally managed companies and there is no possibility of their agreeing for any under invoicing and taking the differential value in cash.

In his statement the partner of the appellant firm stated that they used to make payment to these Japanese and Chinese sellers after lifting of goods from the port. This is completely unbelievable. No exporter will agree for such a risky proposition. No exporter will take such a risk of delivering goods in advance without taking full payment.

Not even a single person or representative of the Japanese/Chinese Sellers has been identified either by the partner or by the DRI or by the A.O.

It is unbelievable that the seller who is sitting in JAPAN/CHINA will deliver the goods to a purchaser of Surat without receiving full payment and will depute a person who has never been identified by anybody to collect the differential cash from the buyer at Surat and to remit the same to the seller.

I have carefully considered these arguments and I am Inclined to agree with the

*learned A.R. of the appellant that had there been any such unaccounted payments to the Japanese/Chinese Sellers then some evidences must have been found out by the DRI or the A0. They could not Identify even one representative who used to collect the cash for Japanese/Chinese Suppliers. Had there been any such payment then at least some evidence must have been found out. Even no comparable cases or instances are mentioned to show that the prices declared by the appellant were less than fair market prices. The only evidence with the DRI as well as A0 is the admission by the partner of the appellant firm in his Statement recorded on oath u/s 108 of the Customs Act. It is argued on behalf of the appellant that **it is now almost settled law that no addition can be made merely on the basis of the admission statement until and unless there are corroborative evidences or findings.** In support of this argument the appellant has placed reliance on a number of case laws as mentioned hereinabove”*

6. Thus, the CIT(A) took the view that the only evidence with the DRI as well as the A.0. was in the form of a confessional statement made by Shri Gandhi on oath recorded under Section 108 of the Customs Act.

7. The Revenue, being dissatisfied with the order passed by the CIT(A), preferred an appeal before the Appellate Tribunal. The Appellate Tribunal, while dismissing the appeal preferred by the assessee and affirming the order passed by the CIT(A), observed as under :

"7. We have heard the rival submissions and perused the relevant material on record. We find that the addition made on the show-cause notice issued by the DRI. However, said statement was retracted by the partner of the assessee-firm. That the AO has based his findings influenced solely on DRI. There is no evidence whatsoever brought on record which could suggests that the assessee has actually done under invoicing by making import in purchases. Therefore, in our considered opinion, in the absence of any documentary evidence, no addition can be made on the action of third party i.e. the DRI. Further, the CESTAT, West Zone Bench Mumbai, vide its final order NO. A/85365-85368/2019 dated 25.02.2019 has also dropped the proceeding initiated against the assessee-firm. Therefore, we do not find any merits in the revenue appeal. Accordingly, same is dismissed."

8. Being dissatisfied with the order passed by the Tribunal, the Revenue is here before this Court with the present appeal.

9. A Co-ordinate Bench of this Court, in the case of **Kailashben Manharlal Chokshi vs. Commissioner of Income-tax, 328 ITR 411**, took the view that merely on the basis of admission, the assessee cannot be subjected to additions. The Co-ordinate Bench proceeded to observe that unless and until some corroborative evidence is found in support of such admission, the department would be justified in making additions. In other words the proposition of law as laid down is that the department cannot start with the confessional statement. The confessional statement has to be brought in aid of other materials on record. In the case on hand two authorities have concurrently recorded a finding of fact that, except the statement recorded under Section 108 of the Customs Act there is no other evidence.

10. Mrs.Raval, the learned standing counsel appearing for the Revenue seeks to rely upon the decision of the Rajasthan High Court in the case of

Bannalal Jat Constructions (P.) Ltd. vs. Assistant Commissioner of Income Tax reported in [2019] 106 taxmann.com 128 (SC).

11. The ratio of this decision is that there is a statement recorded in the course of the search proceedings and such statement is retracted and the burden is on the maker of the statement to establish that the admission in his statement was wrong and that such statement was recorded under duress and coercion. It is further brought to our notice that the decision of the Rajasthan High Court was carried in appeal by the assessee before the Supreme Court and the Supreme Court has dismissed the SLP. There need not be any debate with the proposition of law as laid down in the decision of the Rajasthan High Court, but a close look at the decision of the Rajasthan High Court would indicate that the confessional statement was not the only piece of evidence. There was no material to corroborate the statement made by the assessee in the form of confession. In the case on hand, as noted above, there is no material except the confessional statement of the assessee recorded under Section 108 of the Customs Act.

12. In view of the concurrent findings recorded by both, the CIT(A) as well as the Appellate Tribunal, we are of the view that we should not disturb the finding of facts. None of the questions as proposed by the Revenue could be termed as substantial question of law.

13. In the result, this Tax Appeal fails and is hereby dismissed.

(J. B. PARDIWALA, J)

(BHARGAV D. KARIA, J)

KUMAR ALOK

