

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL NO. 1437 of 2007

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE KS JHAVERI Sd/-

and

HONOURABLE MR.JUSTICE G.R.UDHWANI Sd/-

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	Yes
2	To be referred to the Reporter or not ?	No
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

CHETNABEN J SHAH LEGAL HEIR OF JAGDISHCHANDRA K.
SHAH....Appellant(s)

Versus

THE INCOME TAX OFFICER, WARD 10(3) OR HIS SUCCESSOR
TO....Opponent(s)

Appearance:

MR RK PATEL, ADVOCATE for the Appellant(s) No. 1

MRS MAUNA M BHATT, ADVOCATE for the Opponent(s) No. 1

CORAM: HONOURABLE MR.JUSTICE KS JHAVERI
and
HONOURABLE MR.JUSTICE G.R.UDHWANI

Date : 14/07/2016

ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE KS JHAVERI)

1. By way of this Appeal, the Appellant - assessee has challenged the judgment and order dated 09.03.2007 of the Income Tax Appellate Tribunal, Ahmedabad Bench 'D', Ahmedabad in ITA No.352/Ahd/1999 for the Assessment Year : 1994-95 whereby the Tribunal has reversed the findings of CIT (Appeals) and confirmed the order of the Assessing Officer.

2. While admitting the matter on 27.03.2008, the following substantial question of law was framed by the Court for consideration :-

“(A) Whether the Appellate Tribunal is justified on facts and in law in restoring partial addition at Rs.10 lacs towards probable speculation income?”

3. The facts of the case are as under :-

The appellant - assessee is the legal heir of the deceased - Jagdishchandra K. Shah (original assessee) who was regularly assessed by the Income Tax Department at Ahmedabad Office. For the assessment year 1993-94, returns of income was filed which was processed by the Income-tax department where opportunity was granted to the assessee and ultimately order u/s. 143(4) of the Income tax was framed wherein several additions and/or disallowances were made. One of the major additions made by the Assessing Officer was in respect of alleged unexplained income from speculation business in shares at a figure of Rs.10,50,000/- earned over a period of several years based on tentative and qualified disclosure.

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Being aggrieved by such an addition, the assessee preferred an appeal before the CIT (Appeals) who deleted the entire addition as there was no material evidence to support the above speculation. Being dissatisfied with

the order of the CIT (Appeals), the Revenue preferred a second appeal before the ITAT whereby the Tribunal confirmed the addition at a round figure of Rs.10,00,000/=.

4. Learned Counsel for the appellant Mr. R.K. Patel has relied on various Circulars issued by the Department from time to time as also various decisions of this Court which are detailed hereunder :-

Circular No. F.No.286/2/2003-IT (In)
dated 10.03.2003. Relevant part reads as under :- सत्यमेव जयते

"It is, therefore, advised that there should be focus and concentration on collection of evidence of income which leads to information on what has not been disclosed or is not likely to be disclosed before the Income Tax Departments. Similarly, while recording statement during the course of search it seizures and survey operations no attempt should be made to obtain confession as to the undisclosed income. Any action on the contrary shall be viewed

adversely."

Circular vide letter (F.No.286/98/2013-IT (INV.II)], dated 18-12-2014. Relevant part reads as under :-

"2. I am further directed to invite your attention to the Instructions / Guidelines issued by CBDT from time to time, as referred above, through which the Board has emphasized upon the need to focus on gathering evidences during Search/Survey and to strictly avoid obtaining admission of undisclosed income under coercion/undue influence.

3. In view of the above, while reiterating the aforesaid guidelines of the Board, I am directed to convey that any instance of undue influence/coercion in the recording of the statement during Search/Survey/Other proceeding under the I.T. Act, 1961 and/or recording a disclosure of undisclosed income under undue pressure/coercion shall be viewed by the Board adversely."

The decision of this Court in the case of **Kailashben Manharlal Chokshi v. Commissioner of Income-tax** reported in [2008] 174 Taxman 466 (Guj.). Relevant

paragraphs read as under :-

"13. He has further relied on the instructions dated 10-3-2003 issued by the Central Board of Direct Taxes, which states that instances have come to the notice of the Board where assessee's have claimed that they have forced to confess the undisclosed income during the course of the search and seizure and survey operations. Such confessions, if not based on credible evidence, are later retracted by the concerned assessee while filing returns of income. In these circumstances, confessions during the course of search and seizure and survey operations do not serve any useful purpose. This instruction further states that it is, therefore, advised that there should be focus and concentration on collection of evidence of income which leads to information on what has not been disclosed or is not likely to be disclosed before the Income-tax Department. Similarly, while recording statement during the course of search and seizures and survey operations no attempt should be made to obtain confession as to the undisclosed income. Any action on the contrary shall be viewed adversely.

26. In view of what has been stated hereinabove, we are of the view that

this explanation seems to be more convincing, has not been considered by the authorities below and additions were made and/or confirmed merely on the basis of statement recorded under section 132(4) of the Act. Despite the fact that the said statement was later on retracted no evidence has been led by the Revenue authority. We are, therefore, of the view that merely on the basis of admission the assessee could not have been subjected to such additions unless and until, some corroborative evidence is found in support of such admission. We are also of the view that from the statement recorded at such odd hours cannot be considered to be a voluntary statement, if it is subsequently retracted and necessary evidence is led contrary to such admission. Hence there is no reason not to disbelieve the retraction made by the Assessing Officer and explanation duly supported by the evidence. We are, therefore, of the view that the Tribunal was not justified in making addition of Rs.6 lakhs on the basis of statement recorded by the Assessing Officer under section 132(4) of the Act. The Tribunal has committed an error in ignoring the retraction made by the assessee."

Learned Counsel for the appellant has taken us to the relevant findings of the

Assessing Officer which are reproduced herein below :-

"In this connection the assessee was requested to explain as to under what circumstances he has not made included the above concealed income in his return of income filed for the A.Y. 1994-95. To this, it is explained by the assessee that his statement u/s. 132(4) was recorded under pressure and he was forced to make disclosure on account of concealed income as well as the unaccounted investment made out of the said concealed income. The assessee also stated that during the course of search books of account and loose papers were found and seized but not evidences regarding the unaccounted concealed income of Rs.10,50,000/- in the purchase and sales of shares of the speculative nature have been found and seized by the Department. According to assessee he had not earned any such speculative income from the purchase and sales of shares but only Badla income was earned in earlier A.Y.'s which has been taxed while passing the order for Assessment in earlier years.

The arguments and explanations of the assessee are not accepted because his statement u/s 132(4) of the Act was recorded voluntarily without replying any coercive

measures by the search authorities and therefore now he cannot say that statement was recorded under pressure. The statement recorded u/s. 132(4) of the Act during the course of search as evidential value and the admission made by the assessee in his voluntary statement is an evidence itself to prove that the assessee had earned speculative income from the purchase and sale of shares which was not recorded in the books of accounts. The statement recorded u/s. 132(4) are very crucial and statement recorded under this sub-section are first in point of time, spontaneity in a statement suggests absence of deliberation on the part of the truthfulness in the version given. The first statement, therefore, carries more weight. Facts stated in the first statement are normally treated as acceptably.

Apparently, there is no reason for any authorized person to pressurise the assessee for disclosure and it is a settled position as per evidence acts done by the public officer in discharge of his duties are bonafide and if anybody alleges otherwise, heavy bonus lies on him to establish the same. Apart from making self serving statement, the assessee has brought no facts, evidence, or details on records to establish the correctness of the contentions now taken.

The assessee has admitted in initial statement that the income was earned from speculative activities in shares to some extent. This is provide from records as substantial shares were found and seized from the premises of the assessee has discussed elsewhere. It is a non fact that when assessee wants to keep his income concealed no record of the same be maintained and it has been held by Hon'ble Supreme Court in the case of Sumati Dayal vs. CIT (214 ITR 801) that where no direct evidence is available matters are to be decided on the basis of preponderance of probabilities. The Hon'ble Supreme Court in the case of Sumati Dayal has largely relied on test of human probabilities in testing that case. In two other decisions the Hon'ble ITAT, Bombay Bench third member has reported at 205 ITR 52 and 209 IT at page no.1 has also relied on the time tested test of human probabilities in concluding those cases. In the present case, any person or ordinary prudence would find the contentions of the assessee to be merely and after through. This is because of surrounding circumstances as described above make it highly likely that the assessee actually had earned speculation income of Rs.10,50,000/- from share transactions.

Learned Advocate for the appellant has

also taken us to the declaration which was made by the assessee at the time of filing of the assessment as also the statement u/s. 132(4) of the Act which was recorded on 24.08.1993 at 11.45 pm during the course of search proceedings and specifically to the statement No.(9) which reads as under :-

"(9) Over and above this, approximately Rs.10,50,000/- is earned from the trading of shares in different shares which are not recorded in the books of accounts."

It is submitted that the CIT (Appeals) while considering the appeal has taken into account all the relevant details and held at Paragraph 24 as under :-

"24. It is a normal presumption that statement under section 132(4) is given voluntarily unless it is proved otherwise. There is no evidence on record to show that this statement was given in any coercion. Therefore, I am unable to agree with the assessee that it was a forced statement. But I am reasonably impressed by the contention that this statement was subject to variation on either side after

verification i.e. assessee could reduce the disclosure made or the Assessing Officer could enhance the same if the facts and evidence so warranted. May be, even if this fact is not mentioned in the statement itself, the point will still remain since it is no body's case to get say any extra tax then is due. The reality remains that there is no evidence what-so-ever with the department even in consequence of a serious action like search and seizure followed by detailed security which could support the earning of speculation income of Rs.10,50,000/- in this year. In other words, there is no evidence to support the very existence of this income except the so called statement u/s 132(4) of the Act. It defies logic that an assessee will or should admit any income which he had not earned and which the department had not found out. I do not find any thing against the arguments that disclosure u/s. 132(4) was subject to variation and once the assessee had access to seized documents and he realised subsequently that there was no occasion to make this disclosure, he was having an inherent right to clarify the situation so that he could be taxed only on real income and not on an income which was not there at all, since there was no evidence to prove otherwise too. In addition, the very important fact

that remains that inspite of the search, no material/evidence was found to show that the assessee was having any other undisclosed assets which could be linked with this disclosure. In view of the totality of the circumstances, arguments given by the assessee and reasoning as above, the addition made is deleted."

5. Learned Counsel for the respondent has taken this Court to Section 132(4) of the Act and contended that the statement made during the search is required to be accepted and the retraction was made after a very long time. The reasoning of the Assessing Officer was confirmed by the Tribunal and therefore, no interference is called for by this Court in the facts and circumstances of the case.

6. We have heard learned Counsel for the respective parties and perused the records of the case. We are of the view that the CIT (Appeals) has rightly appreciated the case based on the sound principles of law and has also considered the statement made by the

assessee at the relevant point of time. We are of the view that in light of the observations made by this Court in the case of **Kailashben Manharlal Chokshi v. Commissioner of Income-tax (supra)**, mere speculation cannot be a ground for addition of income. There must be a some material substance either in the form of documents or the like to arrive at a ground for addition of income. Considering the ratio laid down in the above decision and in the facts of the present case, we are of the view that the issue raised in this Appeal is required to be answered in favour of the assessee and against the Department.

THE HIGH COURT
OF GUJARAT

Sd/-
(K.S. JHAVERI, J.)

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Sd/-
(G.R.UDHWANI, J.)

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