

IN THE INCOME TAX APPELLATE TRIBUNAL

"F" BENCH, MUMBAI

BEFORE SHRI OM PRAKASH KANT, ACCOUNTANT MEMBER AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no. 4688/Mum./2023

(Assessment Year : 2019-20)

Fun N Food Restaurant

National Highway No.8,
Near Laxmi Baug, P. O
Mira Road, Kashimira,
Thane-401107
PAN -AAAFF6807G

..... Appellant

v/s

ACIT, Central Circle-3

Asher IT Park, 6th Floor,
Road No.16Z, Wagle
Industrial Estate, Thane-400604

..... Respondent

Assessee by : Shri Hitesh Shah

Revenue by : Ms Usha Gaikwad, Sr. AR

Date of Hearing – 19/06/2024

Date of Order – 13/09/2024

ORDER

PER SANDEEP SINGH KARHAIL, J.M.

The present appeal has been filed by the assessee challenging the impugned order dated 07/11/2023, passed under section 250 of the Income Tax Act, 1961 ("*the Act*") by the learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi, [*learned CIT(A)*], for the assessment year 2019-20.

2. In its appeal, the assessee has raised the following grounds: –

"On the facts and in the circumstances of the case, the Commissioner of Income Tax (Appeals) – 11 Pune (hereinafter referred to as "CIT(A)") has erred in confirming the addition of Rs. 64,52,870/- being the alleged suppressed sales declared as an additional income in the statement recorded u/s. 133A in spite of the fact that the appellant had retracted the said declaration made under pressure, duress and force.

While doing so:

The CIT(A) failed to appreciate an additional income offered based on a statement recorded u/s 133A retracted immediately thereafter for the alleged come detected and admitted during the survey as suppressed sale.

The CIT(A) failed to appreciate the fact that, M/s Hotel Galaxy has hled-retraction letter along with an affidavit of Mr. Talha Mukhi, Partrer of NZS Hotel Galaxy and the then AO has not replied to this letter and the same is also not mentioned m the Assessment order.

The Appellant therefore prays that the addition of Rs. 64,52,870/- on account of suppressed sales being baseless, unwanted and illega an no corroborative of any incriminating materials be deleted in toto."

3. In the present appeal, the assessee's sole grievance is against the addition of INR 64,52,870 on account of alleged suppressed sales.
4. The brief facts of the case pertaining to this issue, as emanating from the record, are: On 05/02/2019, a survey action under section 133A of the Act was conducted at the business premises of the assessee. On 24/09/2019 the assessee filed its return of income declaring a total income of INR 41,02,100. The return filed by the assessee was selected for scrutiny through compulsory selection, and statutory notices under section 143(2) as well as section 142(1) of the Act along with a questionnaire were issued and served on the assessee. However, the assessee failed to respond to the statutory notices. Thereafter, multiple opportunities were granted to the assessee and also keeping the principle of natural justice in view, a final opportunity vide final show cause notice dated 26/07/2021 was given to the assessee. However, again the assessee failed to comply. Therefore, the

Assessing Officer ("AO") proceeded to complete the assessment on a best judgment basis based on material information available on record under section 144 of the Act. Vide order dated 19/08/2021 passed under section 144 of the Act, the AO held that during the survey, the assessee declared income of INR 64,52,870 over and above the regular income, however in the income tax return, it has not offered the additional income declared during the survey. Accordingly, in the absence of any response from the assessee, the AO proceeded to make an addition of the suppressed sales amounting to INR 64,52,870 to the total income of the assessee.

5. During the appellate proceedings, the assessee submitted that the entire addition was based on the statement recorded during the survey, which was subsequently retracted by the partner of the firm. The assessee further submitted that the statement was recorded under section 133A under duress, pressure and force and the partner was compelled to declare the additional income amounting to INR 64,52,870 over and above the regular income. The assessee submitted that the statement recorded during the survey operation does not have any evidentiary value. During the appellate proceedings, the learned CIT(A) sought comments from the AO. After confronting the remand report received from the AO to the assessee, the learned CIT(A), vide impugned order, held that the statement recorded during the survey can be retracted but such a retraction can be valid only when the statement was recorded under threat, coercion or there is a mistake in the recording of facts and should be supported by the documentary evidence. The learned CIT(A) held that however, in the

present case, the impounded documents in the form of monthly sales summary for each month of the financial year 2018-19 were found on the computer of the assessee firm. The learned CIT(A) held that as per the aforementioned sales summary sheets, the total sales come to INR 7,34,57,588 as against a total sales turnover shown in the profit and loss account of INR 6,70,04,718. The learned CIT(A) further noted that the partner of the firm accepted that the sales to the extent of INR 64,52,870 have been suppressed and submitted that no additional expenses for this undisclosed sale were incurred. Further, it was admitted that all the expenses incurred by the firm have already been booked in the regular books of account. The learned CIT(A) also noted the fact that the partner admitted that he is the only working partner having a 51% share in the partnership firm and also looks after the day-to-day working of the assessee firm. Further, it was held that the statement was recorded in the presence of two witnesses and therefore there was no coercion or duress. Accordingly, the learned CIT(A) rejected the submission of the assessee and held that retraction by the assessee's partner cannot be considered a valid retraction as it was neither recorded under coercion nor has any factual mistake. Accordingly, the learned CIT(A) held that the impugned addition has been made not only based on confession but the same was also made on the basis of incriminating documents found during the survey. As a result, the learned CIT(A) upheld the addition of additional income of INR 64,52,870 made by the AO. Being aggrieved, the assessee is in appeal before us.

6. We have considered the submissions of both sides and perused the material available on record. The assessee has a restaurant in Thane and is in the business of providing food and snacks to its customers. On 05/02/2020, a survey action under section 133A of the Act was conducted at the assessee's premises. During the survey operation, documents containing month-wise actual sales were found and it was noticed that the actual sales made by the assessee during the relevant financial year were higher than the sales recorded in the books of account. Accordingly, the said documents were confronted with the partner of the firm who admitted the suppression of sales and declared additional income of INR 64,52,870 on account of such suppression of sales during the relevant assessment year.

7. In the absence of any response from the assessee in reply to various notices issued during the assessment proceedings, the AO passed the order under section 144 of the Act making, inter-alia, an addition of INR 64,52,870 to the total income of the assessee, which were admitted as suppressed sales by the assessee's partner. As per the Revenue, these documents containing details of unaccounted sales of the assessee were found from the computer of the assessee and print of the same was taken and the same was impounded during the survey proceedings. In this regard, the learned CIT(A) has also referred to the format of summary sheets suggesting actual sales of the assessee month-wise on page 12 of the impugned order.

8. During the hearing, the learned Authorised Representative ("*learned AR*") submitted that the statement recorded during the survey on

05/02/2019 was retracted by the assessee's partner on 09/03/2020 and in this regard, an affidavit was also filed before the AO. From the perusal of the affidavit, forming part of the paper book from pages 23-24, we find that the assessee's partner submitted that no incriminating document was found during the survey action which continued for three days. In the affidavit, it is also submitted that he was tired and under stress on the date of recording of the statement and the disclosure was made under compulsion and pressure. The learned AR further submitted that the details as provided in the paper book from pages 40-51 were not found but the assessee was asked to prepare the summary based on audited accounts. The learned AR on without prejudice basis submitted that even if the amount of INR 64,52,870 is considered as suppressed sales, then benefit should also be given for the corresponding expenditure.

9. In the present case, it is an undisputed fact that the assessee has already filed its return of income for the assessment year 2019-20 having an annual turnover of INR 6,70,04,718 along with the tax audit report and it was an audited annual account under section 44AB of the Act. It also cannot be disputed that no amount of sale can be achieved, whether disclosed or undisclosed, without incurring expenditure on the preparation of the food and purchase of raw materials like vegetables, spices, oil, etc., as the assessee is in the business of food and dining. It is pertinent to note that apart from the statement of the partner which was subsequently retracted there is no other material available on the record to show that no additional expenses were incurred for the undisclosed sales, even though for the

undisclosed sales at least certain documents were allegedly found from the computer at the assessee's premises. Such being the facts even if we find no merits in the retracted statement, however at the same time accepting that no additional expenses were incurred for the undisclosed sales is contrary to general commercial principles. More so as in the present case, the accounts of the assessee have not been rejected and no material has been brought on record by the Revenue to show that the expenses shown to have been incurred were for earning income more than disclosed income. Therefore, we are of the view that a reasonable percentage of the net profit of suppressed sales should be considered for taxation. Since the assessee has declared a net profit of 6.12% on the sales declared in its annual accounts, we are of the considered view that a similar percentage of net profit, i.e. 6.12%, on the suppressed sales be considered as an additional profit. Therefore, we order the AO that the tax be computed accordingly and the addition be restricted to that extent. As a result, the grounds raised by the assessee are partly allowed.

10. In the result, the appeal by the assessee is partly allowed.

Order pronounced in the open Court on 13/09/2024

Sd/-
OM PRAKASH KANT
ACCOUNTANT MEMBER

Sd/-
SANDEEP SINGH KARHAIL
JUDICIAL MEMBER

MUMBAI, DATED: 13/09/2024

Copy of the order forwarded to:

- (1) The Assessee;*
- (2) The Revenue;*
- (3) The PCIT / CIT (Judicial);*
- (4) The DR, ITAT, Mumbai; and*
- (5) Guard file.*

By Order

Assistant Registrar
ITAT, Mumbai