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Ashok Kumar Gupta Vs Commissioner of Income Tax

Income Tax Appeal No. 585 of 2005 (O and M) , 25 August 2006, A.Y. 1993-94

Court: High Court Of Punjab And Haryana At Chandigarh

Date of Decision: Aug. 25, 2006

Acts Referred:
Income Tax Act, 1961 â€" Section 10, 100, 101, 102, 103

Citation: (2006) 287 ITR 376 : (2006) 157 TAXMAN 339

Hon'ble Judges: Rajesh Bindal, J; Adarsh Kumar Goel, J

Bench: Full Bench

Advocate: P. C. Jain, Dr. N. L. Sharda, for the Appellant;

Judgement

Rajesh Bindal J.

The judgment of the court was delivered by

C. M. No. 23470-CII of 2005.

For the reasons stated in the application, the delay in filing the appeal is condoned.

The application stands disposed of.

I. T. A. No. 585 of 2005 :

The appellant (hereinafter described as the assessee""), has approached this court, by filing the present appeal, challenging order dated 12-4-2005,

passed by the Income Tax Appellate Tribunal, Amritsar Bench, Amritsar (hereinafter referred to as ""the Tribunal""), in I.T.A. No. 79/ASR/2004

for the assessment year 1993-94, raising the following substantial question of law : ""Whether under the facts and circumstances of the case, the

Tribunal was justified in upholding the levy of penalty u/s 271(1)(c) to the extent of Rs. 4,42,928 while interpreting Explanation Section 5 to

271(1)(c) for the assessment year 1993-94 ?

Briefly, the facts of the case are that search and seizure operation was carried out at the residential and business premises of the assessee, who

was in the business of property dealing on 26-3-1993. During the course of search, a large number of books of account and other incriminating

documents were found from the business as well as residential premise. Undisclosed cash and jewellery were also found and seized. The statement

of the assessee u/s 132(4) of the Income Tax Act, 1961 (hereinafter referred to as ""the Act""), was also recorded wherein the assessee offered, to

surrender undisclosed income of Rs. 10 lakhs for the purpose of taxation, which included the cash and jewellery found at the time of search,

deposits in the bank, investment in household articles and the income reflected from various transactions recorded in the seized papers. Thereafter,

on 19-1-1995, a return for the assessment year 1993-94 was filed declaring an income of Rs. 10,25,530 which included the surrendered income.

This return was filed in response to a notice u/s 142(1) of the Act. In the assessment, certain additions were made by disallowing certain expenses,

which were partly deleted, whereas some of the additions were upheld up to the Tribunal.

As the assessee had concealed particulars of his income and it was only as a result of the search and seizure operation carried out at his residential

and business premises, that the assessee came forward to disclose his concealed income to the tune of Rs. 10 lakhs which may not be even to the

extent of his concealed income, a notice u/s 271(1)(c) of the Act was issued for levy of penalty on account of concealment of income. After

considering the explanation furnished by the assessee and also his reliance upon Explanation 5 to section 271(1)(c) of the Act, the assessing officer

held that the assessee does not fulfil the mandatory conditions as laid down in Explanation 5 to section 271(1)(c) and penalty u/s 271(1)(c) was

clearly leviable. Accordingly, Rs. 4,42,928 was levied as penalty vide order dated 27-2-2003. An appeal against the order levying penalty was

dismissed by the Commissioner (Appeals) (hereinafter referred to as ""the Commissioner (Appeals)""), vide order dated 28-11-2003, by observing

as under :

I have considered the submissions of the appellant in the light of the details available on the record and relying upon my decision in the case of Sh.

Nand Kishore Mihindru decided vide order dated 30-9-2003 (supra). I find merits in the arguments of the appellant that the appellant has

specified the manner in which the income was earned but the immunity which is available is dependent on the other clause also, i.e., payment of the

taxes on the income disclosed together with the interest thereon. The appellant asked for adjustment of seized cash of Rs. 1,90,000 towards the

tax payable as advance tax based on the decisions of the honble jurisdictional Income Tax Appellate Tribunal but the, same being not before the

assessing officer the claim of the appellant is not adjudicated. In the written submissions, the appellant has mentioned that the total tax worked out

by the department was Rs. 4,21,498 but the said fact is factually incorrect because total tax along with the interest payable which was worked out

as a result of the section 143(1)(a) order stood at a sum of Rs. 6,94,558 and after considering the self-assessment tax of Rs. 2,70,000 and even

for the time being after treating the seized cash of Rs. 1,90,000 as advance tax the appellant defaulted in clearing the tax along with interest on the

amount so surrendered. One of the basic conditions of Explanation 5 having not been complied with, therefore, I find merit in the order of the

assessing officer and the penalty worked out at a sum of Rs. 4,42,928 is confirmed.

Before the Tribunal to explain the non-payment of tax and interest along with the return, the only plea raised by the assessee was that he did not

have sufficient funds to pay the tax. The Tribunal also dismissed the appeal of the assessee by recording the following observations :

We have considered the rival submissions and are of the view that the assessee has not complied with the conditions specified in Explanation 5 to

section 271(1)(c) of the Income Tax Act. The authorities below have referred to Explanation 5 to section 271(1)(c) of the Income Tax Act and

are of the specific view that the assessee has not paid the taxes together with interest in respect of the concealed income. It is essential conditions

before getting immunity from penalty. The assessee even if made a statement u/s 132(4) of the Income Tax Act in order to surrender Rs. 10 lakhs

as concealed income but he was aware in statement to pay taxes and interest as per Explanation 5 to section 271(1)(c) in order to get the immunity

from penalty. Learned counsel for the assessee fairly admitted even before us that the assessee made short payment of the taxes. He has submitted

that the assessee was not having sufficient funds, therefore, taxes could not be paid. However, there is no such explanation mentioned in

Explanation 5 to section 271(1)(c) of the Income Tax Act. Therefore, such plea cannot be entertained. We, therefore, reject his contention in this

regard.

The relevant provisions of section 271(1)(c) of the Act and Explanation 5 thereof are extracted below :

271.(1) If the assessing officer or the Commissioner (Appeals) or the Commissioner in the course of any proceedings under this Act, is satisfied

that any person-. . .

(c) has concealed the particulars of his income or furnished inaccurate particulars of such income,

he may direct that such person shall pay by way of penalty,-. . .

(iii) in the cases referred to in clause (c), in addition to tax, if any, payable by him, a sum which shall not be less than, but which shall not exceed

three times, the amount of tax sought to be evaded by reason of the concealment of particulars of his income or the furnishing of inaccurate

particulars of such income ...

Explanation 5.Where in the course of a search u/s 132, the assessee is found to be the owner of any money, bullion, jewellery or other valuable

article or thing (hereafter in this Explanation referred to as ""assets""), and the assessee claims that such assets have been acquired by him by utilising

(wholly or in part), his income,

(a) for any previous year which has ended before the date of the search, but the return of income for such year has not been furnished before the

said date or, where such return has been furnished before the said date, such income has not been declared therein; or

(b) for any previous year which is to end on or after the date of the search,

then, notwithstanding that such income is declared by him in any return of income furnished on or after the date of the search, he shall, for the

purposes of imposition of a penalty under clause (c) of sub-section (1) of this section, be deemed to have concealed the particulars of his income

or furnished inaccurate particulars of such income, unless,

(1) such income, is, or the transactions resulting in such income are recorded,

(i) in a case falling under clause (a), before the date of the search; and

(ii) in a case falling under clause (b), on or before such date,

in the books of account, if any, maintained by him for any source of income or such income is otherwise disclosed to the Chief Commissioner or

Commissioner before the said date; or

(2) he, in the course of the search, makes a statement under subsection (4) of section 132 that any money, bullion, jewellery or other valuable

article or thing found in his possession or under his control, has been acquired out of his income which has not been disclosed so far in his return of

income to be furnished before the expiry o time specified in sub-section (1) of section 139, and also specifies in the statement the manner in which

such income has been derived and pays the tax, together with interest, if any, in respect of such income.

We have heard learned counsel for the parties and perused the record.

The only contention raised by learned counsel for the assessee is that there is no requirement for payment of tax and interest thereon along with the

return. If the assessee has delayed the payment of tax, interest thereon has already been paid by the assessee and the entire amount was paid

before processing of the return u/s 143(1)(a) of the Act. Learned counsel relied upon Commissioner of Income Tax Vs. Chhabra Emporium, and

Gebilal Kanhaialal (HUF) Vs. Assistant Commissioner of Income Tax, to support his argument.

On the other hand, learned counsel for the revenue, while referring to the admission made by the assessee during the course of arguments before

the Tribunal that the assessee was in default for payment of tax and interest for a sum of Rs. 88,234 even after deemed adjustment of Rs. 1,90,000

contended that since the assessee had failed to comply with the terms and conditions envisaged under Explanation 5 to section 271(1)(c) of the

Act, penalty was rightly levied by the assessing officer, which was upheld up to the Tribunal.

The search in the present case was conducted on 26-3-1993. The assessment year involved is 1993-94 relating to the previous year 1992-93, for

which return of income was required to be filed by 31-7-1993. However, the assessee admittedly filed the return only on 19-1-1995, that too in

response to a notice u/s 142(1) of the Act issued on 15-9-1993, meaning thereby the return was not filed within time. In the assessment framed on

26-3-1996, tax of Rs. 4,93,293 was found to be payable by the assessee. In addition to this, interest of Rs. 3,48,793 was levied. After reducing

therefrom a sum of Rs. 6,94,558 already charged while processing the return u/s 143(1)(a) of the Act, the balance demand of Rs. 1,47,528 was

calculated. From the statement on record, as furnished by the assessee himself at annexure A-8, it is evident that the assessee had merely paid a

sum of Rs. 2,50,000 before the due date for filing of the return, in addition to Rs. 3,060 as tax deducted at source and requested for adjustment of

Rs. 1,90,000 in the seized amount against the advance tax, making a total of Rs. 4,43,060. The rest of the amount was paid by the assessee later

on, i.e., Rs. 1,20,000 on 17-11-1994, and Rs. 84,000 on 31-1-1996. Another sum of Rs. 50,000 was paid on 29-3-1996, after the assessment

having been framed on 26-3-1996. Further amount was paid thereafter in February, 2000 and January, 2003.

Section 271(1)(c) of the Act provides for levy of penalty, inter alia, for concealment of particulars of income, which could be up to three times the

amount of tax sought to be evaded. By adding Explanation 5 to section 271(1)(c) of the Act, a concession is sought to be given to an assessee,

who during the course of search and seizure operation, is found to have concealed particulars of his income, in case he surrenders such income by

making a statement during the course of search that such undisclosed money, bullion, jewellery or other valuable article or thing found at the time of

search has been acquired by him out of his undisclosed income and further specifies in the statement the manner in which the income has been

derived and pays the tax together with interest, if any, in respect of such income.

It is not in dispute that certain undisclosed assets were found from the premises of the assessee at the time of search and besides that certain books

of account and other documents were also found from which it was evident that the assessee had earned undisclosed income as well. In the

statement made u/s 132(4) of the Act on the date of search, the assessee surrendered a sum of Rs. 10 lakhs as concealed income for the year in

question. The date for filing of return for the assessment year in question had not yet expired. The assessee did not even file the return on or before

the due date. He filed the same on 19-1-1995. What to talk of payment of tax and interest, if any, due from the undisclosed income, so

surrendered by the assessee on the due date, the assessee did not even pay the amount along with the belated return filed on 19-1-1995. From a

reading of Explanation 5 to section 271(1)(c) of the Act, it is evident that this concession is meant for persons who after surrendering the

undisclosed income for the current year, pay the amount of tax along with interest, if any, on such income before the due date. This does not give

liberty to the assessee to plead that no penalty should belevied on him for concealment of income merely for the reason that having failed to pay the

due tax and the interest on the due date, the assessee paid the statutory interest thereon. In our view, the concession, as provided in Explanation 5,

referred to above, can be availed of only by an assessee who after surrendering the income, pays the tax immediately and not belatedly.

In Commissioner of Income Tax Vs. Chhabra Emporium, , relied upon by the assessee, the issue under consideration was whether Explanation 5

could be invoked by an assessee where the surrender has been made during the course of search. The issue there was not about the time and

payment of tax on the amount of surrender so made. Accordingly, that case is distinguishable on the facts.

In Gebilal Kanhaialal (HUF) Vs. Assistant Commissioner of Income Tax, the Tribunal had restored the penalty by rejecting the plea of concession

available under Explanation 5, referred to above. The contention of the assessee before the High Court was that the amount of tax was paid before

completion of assessment which should be held to be sufficient for invoking Explanation 5, supra. To support his argument, he relied upon a

judgment of the Delhi High Court in Commissioner of Income Tax Vs. Chhabra Emporium, which was different on the facts. The High Court

accepted the plea of the assessee by recording the following observations (page 525)

There is no dispute on the facts that search was continued till 1-8-1987, and on 1-8-1987, in the statement, the assessee has disclosed a

particular concealed income and surrendered it for the tax and tax has been paid along with interest. In these circumstances, the Tribunal has

committed error in restoring the penalty order of the assessing officer.

We respectfully do not subscribe to the view taken by the Rajasthan High Court for two reasons, namely, the facts in that case are distinguishable

and secondly, there is no discussion on the issue. In our view, if immunity from penalty is to be availed of by the assessee by invoking the

provisions of Explanationsection 5 to 271(1)(c) of the Act, tax on the surrendered income along with interest, if any, is required to be paid

immediately and in any case before the due date of return, in view of the scheme of law which is clear from the language of the statute itself. The

plea of non-availability of funds for payment of tax due on the surrendered income, payment of tax along with interest before the date of

assessment or payment of interest for delayed payment of tax cannot be circumstances which could be pleaded by the assessee to claim immunity

from levy of penalty in terms of Explanation 5 as referred to above. An assessee who, having surrendered his concealed income during the course

of search and seizure still neither files the return in time nor deposits the tax on surrendered income immediately after the surrender, cannot be given

the benefit of Explanation 5, as referred to above.

Accordingly, finding no merit in the appeal, we dismiss the same while upholding the order passed by the Tribunal.