(2014) 08 AP CK 0040

Andhra Pradesh High Court

Case No: Income Tax Tribunal Appeal No. 122 of 2002

L. Giridharlal and Co.	APPELLANT
Vs	
Income Tax Officer	RESPONDENT

Date of Decision: Aug. 26, 2014

Acts Referred:

- Income Tax Act, 1961 - Section 132, 132(4), 139, 139(1), 260A

Citation: (2014) 08 AP CK 0040

Hon'ble Judges: L.N. Reddy, J; Challa Kodanda Ram, J

Bench: Division Bench

Advocate: A.V. Krishna Koundinya, Sr. Counsel, Advocate for the Appellant; J.V. Prasad, Sr. SC, Advocate for the Respondent

Judgement

L. Narasimha Reddy, J.
The appellant is a Partnership Firm, undertaking business in bullion and jewellery, and it has been submitting returns under the Income Tax Act, 1961 (for short "the Act"), from time to time. On 26.06.1985, initially a survey was conducted in the business premises of the appellant. That, in turn, was converted into a search under Section 132 of the Act. It was found that 36 Kgs. of silver and about 8 Kgs. of gold was not accounted for, in the books. In the course of proceedings thereunder, explanation offered by the appellant in respect of 36 Kgs of silver, was accepted. However, the explanation offered in respect of gold, as to failure to enter in the stock books, was not accepted. Substantial quantity thereof was seized. In the subsequent proceedings initiated under Section 132 of the Act, the value of the seized gold was treated as income. It is stated that on payment of the tax thereon, the gold was released.

2. The appellant filed regular returns for the assessment year 1986-87, on 30.09.1986. An order of assessment was passed by treating the value of the gold as "Undisclosed Income" under Section 69A of the Act and the corresponding tax was levied. Though in the appeal preferred by the appellant herein before the Commissioner (Appeals) some

relief was granted, the same was nullified in the further appeal preferred by the Department. The Assessing Officer initiated proceedings under Section 271(1)(c) of the Act, proposing to levy penalty. Explanation submitted by the appellant was found not satisfactory. An order was passed, on 30.11.2000, levying penalty to the extent of 200% of the value of seized gold. Aggrieved by that, the appellant approached the Commissioner of Income Tax (Appeals), Hyderabad. Through order, dated 27.12.2001, the Commissioner reduced the penalty to 100%. Further appeal by the appellant to the Income Tax Appellate Tribunal, Hyderabad Bench, was rejected through order, dated 22.05.2002. Hence, this appeal under Section 260A of the Act.

3. Sri A.V. Krishna Koundinya, learned counsel for the appellant, I submits that the search was made at a time when the appellant had still opportunity to file return and there was no finding at any stage to the effect that the gold in question was acquired in the earlier assessment year. He contends that in the facts and circumstances of the case, the appellant was entitled to the benefit of clause (2) of Explanation 5 to Section 271 of the Act. He submits that all the three conditions stipulated by the Hon''ble Supreme Court in its decision in Assistant Commissioner of Income Tax Vs. Gebilal Kanhaialal (Huf), , are fulfilled in the instant case. Learned counsel further submits that a clear distinction needs to be maintained between the cases covered by sub-clause (a) of Explanation 5 to Section 271 of the Act, on the one hand, and sub-clause (b) thereof, on the other, in the context of levying penalty under that Section. He has also placed reliance upon the judgment of the Delhi High Court in Commissioner of Income Tax Vs. SAS Pharmaceuticals, and this Court in Commissioner of Income Tax v. M/s. Nasa Continental Exports Limited (I.T.T.A. No. 96 of 2001).

4. Sri J.V. Prasad, learned counsel for the respondent, on the other hand, submits that the search was conducted in the business premises of the appellant and that led to the discovery of a substantial quantity of gold, that was unaccounted for in the books. He submits that the very fact that the value of the seized gold was treated as "undisclosed income" and the same stood affirmed by the Tribunal in a different set of proceedings, reveals that there was a clear concealment on the part of the appellant. He further submits that the case of the appellant does not fit into any of the exceptions to Explanation 5 of Section 271 of the Act, and that the Tribunal has taken correct view of the matter.

5. The noticing of gold in the possession of the appellant, that was entered into books of account, has resulted in two sets of proceedings. The first is that in the returns submitted for the assessment year 1986-87, the value of the seized gold was treated as ''undisclosed income'' and the tax was levied accordingly. That aspect assumed finality.

6. The second set of proceedings are initiated under Section 271(1)(c) of the Act, proposing to levy penalty. On more occasions than one, the Supreme Court and High Courts held that every disclosure of an item of income over and above what is mentioned in the return of an assessee, cannot, by itself, be treated as an act of concealment,

attracting action under Section 271 of the Act. It is only when an element, similar to mens rea exists, that the occasion to levy penalty would arise. The reason is that the proceedings under Section 271(d) of the Act are treated as quasi criminal in nature. In this context, reference may be made to the judgment of the Supreme Court in Hindustan Steel Ltd. Vs. State of Orissa, .

7. The Assessing Officer invoked Section 271(1)(c) of the Act, alleging that the appellant has concealed details of income and furnished inaccurate particulars. Obviously because the consequences that flow from the proceedings initiated under Section 271(1)(c) of the Act are drastic, the Parliament made an effort to balance the interest of the State, on the one hand, and the interest of the assessee, on the other by incorporating certain safeguards. In this context, Explanation 5 of Section 271 of the Act, becomes relevant and significant. It reads:

"Explanation 5: Where in the course of a search under Section 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 sub-section (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 of 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."

8. The provision is in two parts. The first is about the circumstances under which the penalty becomes leviable, covering sub-clauses (a) and (b). The second is the exceptions carved out to it in the form of clauses (1) and (2). Sub-clauses (a) and (b) cover two substantially different situations. The first one is where the assessee failed to furnish the details of the income that was found during search, in the returns filed for the assessment year. It means that there was a clear failure or suppression on the part of the assessee, to mention in the returns filed by him. Sub-clause (b) covers a situation where the assessee had still time to file the returns, wherein he could have disclosed the income or other particulars that came to be noticed in the search. The fact that the Parliament maintained such a dichotomy, needs to be noticed. The case on hand falls into sub-clause (b). The reason is that by the time the search was undertaken, the appellant had time to file returns, and as a matter of fact, the returns were filed on 30.09.1986, wherein the income through which the seized gold was acquired, was also disclosed. It is a different matter that the plea was not accepted by the Assessing Officer.

9. Coming to the exceptions, the second one becomes relevant, in the facts of the present case. In Gebilal Kanhaialal''s case (supra), the Supreme Court held that three conditions must be fulfilled by an assessee, before claiming the immunity under clause (2) of Explanation 5 to Section 271 of the Act. They are,

(1) the assessee must make a statement under Section 132(4) of the Act, in the course of search to the effect that the unaccounted assets and incriminating documents found in his possession during search have been acquired out of his income that has not been disclosed in the return of income to be furnished before the expiry of time specified in Section 139(1) of the Act;

(2) the assessee has specified in a statement under Section 132(4) of the Act, the manner in which the income stood derived; and

(3) the assessee had paid tax together with interest, if any, in respect of such undisclosed income.

10. When these requirements are fitted into the case on hand, the first condition needs slight adjustment, since the appellant had time to file the return for the particular assessment year. To be precise, the search was made on 26.06.1985, and the returns were filed within time, on 30.09.1986. There was no finding at any stage of the proceedings that the acquisition of the seized gold was during any earlier assessment year. Therefore, the first condition can be deemed to have been complied with by the appellant.

11. So far as the second condition is concerned, a statement was recorded from the appellant under Section 132(4) of the Act. As a matter of fact, the Assessing Officer made a specific reference to that statement. However, he took the view that the explanation

offered by the appellant, is not satisfactory. What is required in the context of clause (2) of Explanation 5 to Section 271 of the Act is making of a statement by the assessee and not the acceptability or otherwise of it. Since the appellant made the statement, condition No. 2 is complied with.

12. Coming to condition No. 3, the record clearly discloses that the value of the seized gold was treated as income of the appellant and he paid thereon. With this, the case fits into clause (2) of Explanation 5, which in turn, would bring about immunity to the appellant vis-a-vis Section 271 of the Act.

13. Though the Commissioner was convinced to certain extent about the cause pleaded by the appellant, has limited the relief to the one of restricting the penalty to 100%. The Tribunal proceeded on hyper-technicalities and acted as though every seizure must entail initiation of proceedings under Section 271 of the Act. Such an approach cannot be countenanced. We hold that the case of the appellant is covered by clause (2) of Explanation 5 of Section 271 of the Act.

14. We, therefore, allow the appeal and set aside the order passed by the Tribunal as well as the Commissioner. The appeal preferred by the appellant before the Commissioner alone shall stand in its entirety and the penalty imposed by the Assessing Officer is set aside. There shall be no order as to costs.

15. The miscellaneous petition filed in this appeal shall also stand disposed of.