

Court No. - 32

Case :- INCOME TAX APPEAL No. - 54 of 2003

Appellant :- The Commissioner, Of Income Tax, Ghaziabad

Respondent :- Mathura Commercial Co. Mathura

Counsel for Appellant :- A.N. Mahajan, Ashok Kumar, Bharatji Agarwal, D. Awasthi, G. Krishna, R.K. Upadhaya, S Chopra

Counsel for Respondent :- R.S. Agarwal, G.K. Garg

Hon'ble Ashok Bhushan, J.

Hon'ble Mahesh Chandra Tripathi, J.

We have heard Sri Dhananjay Awasthi, learned counsel appearing for the appellant and Sri Ashish Bansal, learned counsel appearing for the assessee.

This appeal under Section 260-A of the Income Tax Appeal, 1961 has been filed by the Department against the judgment and order dated 12.09.2002 of the Income Tax Appellate Tribunal.

In the appeal following two questions of law have been framed for consideration:-

"1. Whether on the facts and in the circumstances of the case, the Hon'ble Tribunal is legally justified in holding the A.O., should prove mensrea of the assessee that it concealed the income to evade tax.

2. Whether on the facts and in the circumstances of the case, the Hon'ble ITAT is legally correct to uphold the order of the CIT (A), Agra canceling the penalty under Section 271 (1)(c) imposed at Rs. 2,10,000/- without appreciating the fact that the revised return was filed only of the detection of bogus liabilities.

A return was filed by the assessee in the year 1991-92 on 31.10.1991. In the return, the assessee had shown various outstanding amount against different parties. The Assessing Officer issued notices to the assessee to explain and assessee was granted opportunity by the Assessing Officer with regard to different entries showing outstanding amount. The Assessing Officer doubted the genuineness of the liabilities. The assessee took time for bringing confirmation of the entries. There were 20 such entries showing outstanding amount. The assessee could produce confirmation with regard to only 15 such parties and with regard to 5 such entries, the assessee was given a notice as to why the said outstanding amount be not deleted or added in the income of the assessee. The assessee filed a revised return surrendering the aforesaid outstanding amount regarding 5 entries. Five persons, namely, Gulshan Bardana wala, Akil Ahmad Boriwala, Satish Chand Gupta & Co., Yakub Bardana wala and Mohd. Hussain Bardana wala. The assessment was made. Notice for imposing penalty under Section 271 (1)(c) was issued and the Assistant Commissioner, Income Tax vide his order dated 29.09.1993 imposed penalty of Rs. 2,10,000/-. The Assistant Commissioner, Income Tax held that the assessee deliberately concealed the income and furnished incorrect particulars. For imposing the penalty an appeal was filed by the assessee. The Commissioner, Income Tax vide his order dated 01.08.1994

allowed the appeal and cancelled the penalty. The Department went in appeal before the Income Tax Appellate Tribunal and the same has been dismissed on 12.09.2004.

Sri Dhananjay Awasthi, learned counsel for the appellant vehemently submitted that filing of the revised return under Section 139(5) of the Act was a kind of notice issued by the Assessing Officer to include the said outstanding amount as income, hence, the disclosure was not voluntary. He submitted that the Assessing Officer has rightly held that the present was a case of furnishing incorrect particulars in writing penalty under Section 271 (1)(c). He submits that any disclosure for the particulars of ending the litigation or paying piece cannot be said to be voluntary disclosure nor in such disclosure can absolve assessee from the penalty under Section 271 (1)(c). Sri Dhananjay Awasthi in support of his submission has relied on two judgments of this Court and one judgment of Delhi High Court, namely, ***Standard Hind Co. Vs. Commissioner of Income Tax, Bareilly (2012) 22 taxmann.com 62 (All.)***, ***Commissioner of Income Tax Vs. Mak Data Ltd., (2013) 31 taxmann.com 35 (Delhi)*** and ***Bajrang Glass Emporium Vs. Commissioner of Income Tax, Agra (2013) 30 taxmann.com 18 (All.)***.

Sri Ashish Bansal, learned counsel appearing for the assessee refuting the submission has contended that while submitting the return, the assessee himself has deleted the aforesaid outstanding entries and since on account of riots as noticed by the Commissioner of Income Tax (Appeals)-II, the assessee were not traceable. He submitted the fact that out of 20 entries shown by the assessee as the outstanding liabilities 15 confirmation could be obtained and it was only 5 traders out of which four belonging to one particular community of Muslim, the confirmation could not be obtained. The present was not a case of disclosure of any inaccurate particulars or making any false statement. He submitted that the explanation given by the assessee for deleting the said entries in revised return was based upon correct facts which has rightly been believed by the Commissioner of Income Tax (Appeals)-II as well as the Tribunal. He submitted that no question of law raised in the appeal and the appeal deserves to be dismissed.

The Tribunal by considering the submission has noticed the relevant Paragraph No. 2.5 which to the following effect:-

2.5- The CIT(A) cancelled the penalty levied u/s. 271(1)(c) for the reason that the AO failed to make proper enquiries into the genuineness of the appellant's claim with the persons in whose names the liabilities were shown to be outstanding. According to CIT(A), the AO has impounded the vouchers related to purchase of Bardana as far back as in Oct. 92 but no inquiry was made in regarding to cuttings, erasers etc. The AO found that most of suppliers of Bardana were genuine as no addition was made as he issued notice about 20 persons. While addition was made only in regard to 5 persons. According to CIT (A), the books of accounts for subsequent year, could be summoned to ascertain the correct position regarding payment made in subsequent year by the assessee. Further the AO could have also rejected the offer of assessee for surrendering. The assessment was not got barred by limitation as the same could be completed upto 31.03.1994. Further, the imposition of penalty by invoking the provisions of Sec. 271(1) (c) as it stood prior to 1.4.76, is also not justified. According to CIT(A), if it is

presumed that the AO intended to invoking the existing explanation, he should have expressed intention of doing so and should give opportunity to the assessee to offer his comments. Penalty proceedings being quasi-criminal in nature, the appellant must have been provided with opportunity to rebut the presumption raised against him. The AO levied penalty on the basis of assessment completed where also he has failed to give clear findings as to the nature of concealment. The CIT(A) also mentioned in her order that there is no mention in the order that the penalty on account of concealment of income or furnishing inaccurate particulars will be initiated against the assessee. It is only towards the close of the assessment order that he has simply mentioned in routine manner "penalty proceedings u/s. 140-A and 271(1) (c) have been initiated separately".

The findings recorded by the Tribunal as contained in Paragraph No. 3.2 are to the following effect:-

"3.2-.....But in the instant case, nothing was concealed. the revised return was filed only for the reasons that the dealers belong to a particular community who had left the Town during riots due to Ram Janma Bhumi and Babari Masjid dispute or otherwise refused to give confirmation letter. So, the assessee opted to surrender the amount to end the litigation. This could have been verified by the AO by making local enquires and on going through the books of account of subsequent assessment years in which the amount was paid to the dealers. Similarly, in the case of Mohd. Ibrahim Azimulla Vs. CIT, 131 ITR 680, the jurisdictional High Court has held that the acceptance of revised return of income u/s 139(5) depends on the fulfillment of certain essentials. It is only a disclosure in the revised return in the circumstances mentioned in the section which will ensure to the benefit of the assessee, as a disclosure may be voluntary yet dishonest. If the revised return showing correct higher income is to cover up what was in the knowledge of the assessee or made in bad faith then it will not come within the ambit of Sec. 139(5), nor can the assessee claim any benefit on it. But in the instant case, disclosure was voluntary as the ITO did not mention any reason to hold that the disclosure was not voluntary. We further noted that the AO has erred in invoking the provisions of Sec. 271(1) (c) by mentioning that since the difference in the return and assessed income is more than 20%, the onus lies upon the assessee to rebut the presumption raised by the said explanation. The AO's reliance placed upon the various case laws in this regard is also not called for. The case laws relied upon are required only when the explanation becomes applicable. The said explanation was deleted from the statute book w.e.f. 1.4.76 by Taxation Laws Amendment, 1975. The penalty proceedings being quasi-criminal in nature, the AO should prove the mensrea of the assessee that it concealed the income to evade tax. No such evidence was brought on record by the AO. Therefore, only for the reasons that the amount was surrendered by filing revised return of income, penalty u/s 271(1) (c) cannot be levied.

There cannot be any dispute to the proposition that the penalty is leviable under Section 271(1) (c) when any person has concealed the particulars of his income or furnished inaccurate particulars of such income. The present is not a case of concealment of particulars of any income of the assessee. At best, the case could have proceeded on the ground that assessee "furnished inaccurate particulars of such income".

From the order passed by the Commissioner of Income Tax (Appeals)-II as well as the Tribunal, it is clear that the assessee has shown in his initial return filed on 31.10.1991, twenty entries showing outstanding as on 31.03.1991 against the different parties. The assessee was asked to bring confirmation of the aforesaid outstanding amount. The Assessing Officer doubted the genuineness of the transaction. The Assessing Officer in fact issued notice to 20 such parties against whom outstanding were shown. The assessee could bring confirmation with regard to 15 transaction but with regard to 5 whose parties became untraceable, the revised return was filed deleting the said entries.

The findings recorded by the Tribunal as contained in Paragraph No. 3.1 are to the following effect:-

3.1-.....*The AO issued notices to about 20 parties out of that only five were picked up, where the assessee could not obtain confirmation letter for the reasons that those parties were not available at the time of requirement of the AO. Therefore, the assess surrendered the credits appearing in the name of those five persons to by peace and to cooperative with the department. In view of these submissions, it was pleaded that the CIT(A) has rightly cancelled the penalty.*

The assessee has come with the explanation for filing a revised return by deleting outstanding entries regarding aforesaid five traders. The reason was noticed by the Tribunal that the dealers being belonging to particular community had left the Town during riots due to Ram Janma Bhumi and Babari Masjid dispute or otherwise refused to give confirmation letter. The mere fact that the assessee could not obtain confirmation letter of the said outstanding entries from only five traders out of 15 in no manner can be said that in his return filed on 31.10.1991, he mentioned inaccurate particulars. In the revised return those entries were deleted by the assessee on account of he having not been able to file requisite confirmation letters or proof. In the said circumstances, it cannot be said that he filed any inaccurate particulars on which penalty could have been imposed under Section 271 (1) (c).

The judgment relied by learned counsel for the appellant in ***Bajrang Glass Emporium Vs. Commissioner of Income Tax, Agra (supra)*** where it was held that in case of surrender of income by assessee without offering plausible explanation whether he can be absolve from the charge of penalty for concealment of income. The Division Bench has held that such assessee cannot be absolve from the charge of penalty for concealment. The ratio is that the assessee cannot be absolved from charge of penalty. He does not offer any plausible explanation in the present, the explanation offered by the assessee was plausible and is rightly been accepted by the Commissioner of Income Tax (Appeals)-II as well as the Tribunal. Thus the judgment in ***Bajrang Glass Emporium Vs. Commissioner of Income Tax, Agra (supra)*** does not help the appellant in the present case. The other judgment of this Court relied by the appellant in the case of ***Standard Hind Co. Vs. Commissioner of Income Tax, Bareilly (supra)*** was case where the Court found that the revised return was a specific concealment for a particular month was detected by the Assessing Officer. The Court held that it was a clear case of concealment of income and furnishing of wrong particulars, hence penalty was rightly imposed. There cannot be dispute in the proposition

as laid down in the said judgment. The judgment of Delhi High Court in the case of ***Commissioner of Income Tax Vs. Mak Data Ltd., (supra)*** was a case where Assessing Officer required the assessee to produce evidence as to the nature and source of the amount received as share capital, the creditworthiness of the applicants and the genuineness of transactions, the assessee simply surrendered certain amount. The Assessing Officer made addition of said amount and also levied penalty under Section 271 (1) (c) specially on the ground that in absence of any explanation in respect of surrender of income first part of clause (A) under Section 271 (1)(C) was attracted. Therefore, the levy of penalty was justified. The said case is on own footing also does not help the appellant.

In view of above, we have carefully gone through the orders of Commissioner of Income Tax (Appeals)-II as well as the Tribunal where absence of notice have been recorded simply holding that an explanation given by the assessee for submitting the revised return was acceptable. The present case is not a case of mentioning of inaccurate particulars or concealment.

We do not find any substantial question of law in the appeal. The appeal is **dismissed**.

Order Date :- 15.1.2014

Jaswant