

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC
&
THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

MONDAY, THE 20TH DAY OF JUNE 2016/30TH JYAISHTA, 1938

I.T.A.No.50 of 2009

AGAINST THE ORDER IN ITA 424/2005 of I.T.A.TRIBUNAL, COCHIN BENCH, DATED 05-09-2008

APPELLANT/APPELLANT/RESPONDENT:

THE COMMISSIONER OF INCOME TAX,
COCHIN.

BY ADV.SRI.JOSE JOSEPH, SC, FOR INCOME TAX

RESPONDENT/APPELLANT:

SAMURAI TECHNO TRADING (P) LTD.,
KOCHI-20.

R,R BY ADV. SRI.V.PHILIP MATHEW

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 20-06-2016,
ALONG WITH ITA 80/2009, ITA 72/2009, THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:

APPENDIX

PETITIONER'S ANNEXURE:

ANNEXURE A & B: COPY OF TRIBUNAL'S ORDER AND ORDER OF ASSESSING OFFICER GIVING EFFECT TO THE ITAT's ORDER.

ANNEXURE C: COPY OF PENALTY ORDER DATED 28.5.2004 FOR THE ASSESSMENT YEAR 1993-1994.

ANNEXURE D: COPY OF ORDER DATED 20.9.2004 OF THE COMMISSIONER OF INCOME TAX (APPEALS).

ANNEXURE E: COPY OF THE ORDER DATED 5.9.2008 OF THE INCOME TAX APPELLATE TRIBUNAL, COCHIN BENCH IN ITA NO.424/COCH/2005.

// TRUE COPY //

P.A.TO JUDGE

ANTONY DOMINIC & DAMA SESHADRI NAIDU, JJ. 'CR'

I.T.A.Nos.50, 72 & 80 of 2009

Dated this the 20th day of June, 2016

JUDGMENT

Antony Dominic, J.

The Revenue has filed these appeals challenging the common order passed by the Income Tax Appellate Tribunal, Cochin Bench, in I.T.A.Nos.424 to 426/05. By the impugned order, the appeals filed by the respondent assessee, challenging the orders passed by the Commissioner of Income Tax (Appeals) confirming the penalty levied on them under Section 271(1)(c) of the Income Tax Act for the assessment years 1993-1994 to 1995-1996, was allowed.

2. We heard the Senior Counsel for the Revenue and the learned counsel appearing for the assessee.

3. On facts, briefly we may state that insofar as the assessment year 1993-1994 is concerned, the return of income was filed by the assessee declaring a total income of Rs.16,060/-. The return was scrutinized under Section 143(1)(a) and in the assessment made under Section 143(3), additions were made

under 14 heads and the total income was finally fixed at Rs.23,93,510/-. The assessee carried the matter in appeal before the CIT (Appeals), who deleted six items of additions and, as a result, the total income got reduced to 13,32,000/-. Both sides filed appeals before the Tribunal, which restored two items of additions. Thus, the total income stood enhanced to Rs.21,32,000/-.

4. Insofar as the assessment year 1994-1995 is concerned, the assessee filed its return declaring the total income of 21,39,850/-. The case was taken up for scrutiny and in the assessment made under Section 143(3), the total income was fixed at Rs.68,32,870/-. In the appeal filed before the CIT (Appeals), deduction of Rs.50,000/- out of the additions made was allowed. In the further appeal filed before the Tribunal, addition of Rs.15,44,350/- was ordered to be deleted and the total income got reduced to Rs.52,38,520/-.

5. Insofar as the assessment year 1995-1996 is concerned, the total income declared by the assessee was Rs.12,31,670/- and

after scrutiny and assessment, the total income was finally fixed at Rs.56,26,000/-. First appeal filed by the assessee was dismissed and in the further appeal filed before the Tribunal, some of the additions were ordered to be deleted and the total income got reduced to Rs.49,30,910/-.

6. It is based on the above orders that penalty proceedings under Section 271(1)(c) of the Act were initiated for the assessment years 1993-1994, 1994-1995 and 1995-1996. The penalty order passed for the assessment year 1993-1994 show that, according to the officer, in response to the notices that were issued though a representative of the assessee had appeared, he had not adduced any evidence either in writing or orally. On that factual basis, he reached the conclusion that this was a fit case for imposing penalty under Section 271(1)(c). Accordingly, a penalty of Rs.17,92,870/- was levied. So far as the assessment year 1994-1995 is concerned, in the absence of any written or oral evidence, penalty of Rs.17,81,735/- was levied. On similar reasoning, for the

assessment year 1995-1996, also a penalty of Rs.17,01,651/- was levied.

7. The assessee carried the matter in appeal before the First Appellate Authority. Insofar as the assessment year 1993-1994 is concerned, the First Appellate Authority has, in paragraph 2 of its order, stated that he has verified the income tax records maintained by the Department and that in the records he saw a letter filed by the assessee on 22.4.1996 in response to the notice under Section 271(1)(c) issued by the Assessing Officer on 28.3.1996. Similarly, in the common order passed by the First Appellate Authority in the appeals arising out of the penalty levied for the assessment years 1994-1995 and 1995-1996 also, in paragraph 8(1) the First Appellate Authority has stated that it is seen that the appellant had filed "the following reply on 18.10.1999 in response to the penalty notice under Section 271(1)(c) issued in the course of the assessment proceedings for the AY 1994-1995". Again, the First Appellate Authority has stated that for the AY 1995-1996 the

assessee has filed a reply on 17.4.1998. After holding so, in respect of all the three assessment years, the First Appellate Authority examined the case of the assessee on merits and confirmed the order passed by the primary authority.

8. It was aggrieved by the orders passed in appeals, the assessee had carried the matters in further appeals before the Tribunal in I.TA.Nos.424 to 426/2005. By the impugned common order, the Tribunal held that in the facts and circumstances of the case, there was no justification to levy penalty in these cases. The reasoning of the Tribunal is reflected in paragraphs 7 and 8 of its order, which reads thus:

7. We heard the parties. There is no dispute that all the additions have been made in the normal course of assessments on the basis of details furnished by the assessee itself. The Assessing Officer has pointed out deficiencies regarding the evidences and materials to support various claims of expenditure by way of deductions made by the assessee. But for those lapses, the Assessing Officer has already disallowed the claims of the assessee and made corresponding additions but the question is whether those additions made by the assessing authority by way of disallowances of expenditure will

automatically attract the provisions of section 271(1)(c) of the Act so as to hold that the assessee is liable for concealment of income or furnishing of inaccurate particulars of income.

8. In these cases, the Profit and Loss Accounts have been prepared by the assessee on the basis of the regular books of accounts maintained by it. The returns of income have been prepared and filed on the basis of those books of accounts. Many of the items of expenditure debited in the books of accounts have not been supported with convincing vouchers and evidences, observed by the Assessing Officer. This may justify the disallowance of expenditure and consequent additions. But, such disallowances by themselves are not concrete and material evidences to hold that the assessee had concealed the particulars of income or it furnished inaccurate particulars regarding the income. Regarding the appreciation of sufficient evidences in a tax proceeding is also a matter of judgment. Any difference of opinion in such matters does not automatically make out a case that the opinion of the assessee was just blasphemous and the view of the Assessing Officer is so sacred that every addition or disallowance made by the Assessing Officer points towards concealment of income or furnishing of inaccurate particulars by the assessee. Penalty is a penal proceeding and can be resorted to only if the guilt is established against the assessee by a reasonable standard. Suppose, if the assessee has not maintained books of accounts at all and the income is estimated and assessed, is it possible to hold that such an addition made by the Assessing Officer on estimate basis would be a reasonable basis for imposing penalty? No. In the case of an assessee, who has not maintained the books of accounts at all, the deficiency does not hold him

responsible for penalty. The case of the assessee before us is far better; in the sense that he has maintained books of accounts and deficiencies have been pointed out only in respect of certain expenses claimed by way of expenditure. Penalty cannot be levied on such flexible grounds."

9. It is aggrieved by the order that is passed by the Tribunal, these appeals are filed, and the main question of law raised is whether in the facts and circumstances of the case, the Tribunal was justified in setting aside the penalty levied under Section 271(1)(c). According to us, this question of law raised before us has to be answered in the light of Section 271(1)(c). Section 271(1)(c) provides for levy of penalty and this section together with Explanation 1 thereto read thus:

"271. Failure to furnish returns, comply with notices, concealment of income, etc. -- (1) If the Assessing Officer or the Deputy Commissioner (Appeals) or the Commissioner (Appeals) in the course of any proceedings under this Act, is satisfied that any person -

(a)

(b)

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

(d)

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

.....
.....
.....

Explanation 1 - Where in respect of any facts material to the computation of the total income of any person under this Act, -

(A) such person fails to offer an explanation or offers an explanation which is found by the Assessing Officer or the Commissioner (Appeals) or the Principal Commissioner or Commissioner to be false, or

(B) such person offers an explanation which is not able to substantiate and fails to prove that such explanation is bona fide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him,

then, the amount added or disallowed in computing the total income of such person as a result thereof shall, for the purposes of clause (c) of this subsection, be deemed to represent the income in respect of which particulars have been concealed."

10. Reading of the above provision shows that if any one of the officers mentioned therein are satisfied that any person has concealed the particulars of income or furnished inaccurate

particulars of such income, he may direct that such person shall pay by way of penalty, the amount that are indicated in clauses II or III, as the case may be. While appreciating the scope of clause (c), one has to take into account the provisions of Explanation (1) which is in two parts. This Explanation clarifies that where in respect of any facts material to the computation of the total income of any person, (A) such person fails to offer an explanation or offers an explanation and the officer concerned has found it to be false, or (B) such person offers an explanation which he is unable to substantiate and fails to prove that such explanation is bonafide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him. Once these provisions of Clauses (A) or (B) are satisfied, then, the amount added or disallowed in computing the total income of such person as a result thereof shall, for the purpose of Section 271(c) be deemed to represent the income in respect of which particulars have been concealed.

11. In so far as these cases are concerned, admittedly, there is no finding in the impugned orders attracting clause (A) of Explanation (1). Therefore, we have to find out whether clause (B) is attracted or not. Clause B takes in three parts. First part is that an explanation has been offered and the assessee is not able to substantiate it. The second part is that the assessee has failed to prove that such explanation offered by him is bona fide and the third part is that the assessee has failed to prove that all the facts relating to the same and material to the computation of his total income have been disclosed by him.

12. Turning now to the precedents that are relevant, we find that Section 271(1)(c) was considered by the Apex Court in its judgment in Commissioner of Income Tax v. Reliance Petroproducts Pvt. Ltd. [2010] 322 ITR 158(SC). In that judgment, after extracting the relevant part of Section 271(1)(c), the Apex Court has held that a glance at this provision would suggest that in order to be covered by this Section, there has to be concealment of particulars of

income of the assessee or that the assessee must have furnished inaccurate particulars of his income. It was also held that the meaning of the word “particulars” used in the Section would embrace the details of the claim made. Thereafter, the Apex Court has proceeded to explain the provision thus:

“We have already seen the meaning of the word “particulars” in the earlier part of this judgment. Reading the words in conjunction, they must mean the details supplied in the return, which are not accurate, not exact or correct, not according to truth or erroneous. We must hasten to add here that in this case, there is no finding that any details supplied by the assessee in its return were found to be incorrect or erroneous or false. Such not being the case, there would be no question of inviting the penalty under Section 271(1)(c) of the Act. A mere making of the claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assessee. Such claim made in the return cannot amount to the inaccurate particulars.

It was tried to be suggested that section 14A of the Act specifically excluded the deductions in respect of the expenditure incurred by the assessee in relation to income which does not form part of the total income under the Act. It was further pointed out that the dividends from the shares did not form the part of the total income. It was, therefore, reiterated before us that the Assessing Officer had correctly reached the

conclusion that since the assessee had claimed excessive deductions knowing that they are incorrect; it amounted to concealment of income. It was tried to be argued that the falsehood in accounts can take either of the two forms; (i) an item of receipt may be suppressed fraudulently; (ii) an item of expenditure may be falsely (or in an exaggerated amount) claimed, and both types attempt to reduce the taxable income and, therefore, both types amount to concealment of particulars of one's income as well as furnishing of inaccurate particulars of income. We do not agree, as the assessee had furnished all the details of its expenditure as well as income in its return, which details, in themselves, were not found to be inaccurate nor could be viewed as the concealment of income on its part. It was up to the authorities to accept its claim in the return or not. Merely because the assessee had claimed the expenditure, which claim was not accepted or was not acceptable to the Revenue, that by itself would not, in our opinion, attract the penalty under Section 271(1)(c). If we accept the contention of the Revenue then in case of every return where the claim made is not accepted by the Assessing Officer for any reason, the assessee will invite penalty under Section 271(1)(c). That is clearly not the intendment of the Legislature."

13. The Rajasthan High Court has in its judgment in Commissioner of Income Tax v. Raj Trading Co. [1996] 217 ITR 208 held that furnishing incorrect particulars and concealing the particulars of income are different things. It was also held that the

words “furnishing inaccurate particulars of income” refer to the particulars of his income which have been furnished by the assessee and the requirement of “concealment of income” is that income has not been declared at all or is not even recorded in the books of accounts or in a particular case, the concealment of the particulars of income may be from the books of account as well as from the return furnished. In the judgment in New Sorathia Engineering Co. v. Commissioner of Income Tax [2006] 282 ITR 642 (Guj), the Gujarat High Court has taken the view that it was incumbent upon the Assessing Officer to come to a positive finding as to whether there was concealment of income by the assessee or whether any inaccurate particulars of such income had been furnished by the assessee and that in the absence of such positive finding, penalty levied under Section 271(1)(c) is liable to be struck down.

14. We may also mention that the Senior Counsel for the Revenue had relied on the Apex Court judgment in Commissioner of

Income Tax v. Mssadilal Ram Bharose [1987] 165 ITR 22 where the Apex Court held that it is not the requirement of law that any and every explanation by the assessee must be accepted and that the explanation submitted by the assessee must be an acceptable explanation, acceptable to a fact-finding body.

15. Bearing the above principles in mind, we may now proceed to examine the correctness of the impugned orders. As we have already stated, in order to attract Section 271(1)(C) read with clause B of Explanation (1), there must be a positive finding that in the explanation has been offered, the three elements noticed above have been established. Insofar as these cases are concerned, admittedly the Assessing Officer has proceeded to levy the penalty on the basis that in the absence of an explanation submitted by the assessee he was satisfied that, these are cases fit for penalty under Section 271(1)(C). There is no finding that there are any concealment of any particulars of income or that the assessee has furnished inaccurate particulars of income to attract Section 271

(1)(c). That the assumption of the Assessing Officer is factually erroneous as is evident from the orders passed by the First Appellate Authority, which refers to the explanations submitted by the assessee and the contentions therein. Thus, there is absence of a finding rendered by the Assessing Officer, bringing the case within the scope of clause (B) of Explanation (1) to Section 271(1)(c). Secondly, the Assessing Officer has levied penalty ignoring the explanations submitted by the assessee. Consequently, as held by the Apex Court in *Commissioner of Income Tax v Reliance Petro Products Pvt. Ltd.* [(2010) 322 ITR 158] and the Gujarat High Court in *New Sorathia's case (supra)*, referring to its earlier judgment in *CIT v. Manu Engineering Works* [1980] 122 ITR 306 (Guj), the penalty order was liable to be vacated on that ground itself.

16. We may here reiterate that merely because of the assessee has made certain claims, which were not accepted or was not acceptable to the Revenue, that itself would not attract the penalty under Section 271(1)(c). If that is the interpretation

accepted that in every return where the claim made is not accepted for some reason, the assessee will be inviting penalty under Section 271(1)(c).

Therefore, for the aforesaid reasons, according to us, the Tribunal was justified in setting aside the penalty levied on the assessee and allowing the appeals. We, therefore, confirm the orders of the Tribunal and answer the question of law raised in favour of the assessee and against the Revenue.

**ANTONY DOMINIC
JUDGE**

**DAMA SESHADRI NAIDU
JUDGE**

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