ORDER SHEET

G.A.NO.3510 OF 2015
WITH
ITAT 166 OF 2014
IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction (Income Tax)
ORIGINAL SIDE

COMMISSIONER OF INCOME TAX, KOL-XV
Versus
ARUN KUMAR KHETWAT

BEFORE:
The Hon'ble JUSTICE SOUMITRA PAL
The Hon'ble JUSTICE MIR DARA SHEKO
Date : 2nd December, 2015.

For appellant : Mr.P.K.Bhowmik,Advocate

For Respondent/assessee : Mr.Avratosh Majumdar,Advocate
Mr.Avra Mazumder,Advocate

Soumitra Pal, J.:-

The Department seeks admission of the instant appeal on the following substantial question of law:

"*Whether on the facts and circumstances of the case the Learned Tribunal was justified in law in deleting the penalty under Section 271(1)© of the Income Tax Act, 1961 as concealed income as detected by the Department during the survey operation and when the notice under Section 148 of the Act was issued, finding no other alternative the assessee surrendered income to avoid penal consequences ?*"

The assessment year is 2004-2005.

Heard Mr.Bhowmik, learned advocate for the appellant and Mr.Avratosh Majumdar, learned advocate for the respondent.

The facts are that the assessee filed return showing total income of Rs.2,04,380/- which was duly processed under Section 143(1) of the Income Tax Act, 1961. A survey under Section 133A of the Act was conducted at the business premises of the assessee and the concerned group companies. During the course of survey it was detected that the assessee made investment of Rs.30 lakhs with M/s.Khetawat Stock Broking Ltd, relevant to the assessment year 2004-05. On being confronted with source of investment, the assessee admitted that the source of investment was the undisclosed income from his business activities. It was found that he was the proprietor of one M/s. Scrap (India) and also directors of various group companies. After survey, the assessee filed a revised return showing a total income of Rs.32,04,350/- which included the additional income of Rs.30 lakhs. To bring the said undisclosed income to tax, notice under section 148 of the Income Tax Act was issued. In compliance with the said notice, the assessee filed a further return showing total income at Rs.32,04,350/- which was accepted and the assessment was completed under section 143(3)/147 of the Act with an assessed total income of Rs.32,25,090/-. After assessment was completed, penalty proceedings under section 271(1)(c) of the Act were initiated. In the said penalty proceedings, while imposing 100% tax on the said income it was held, inter alia, as under :

"I have considered the assessee's explanation as above. This explanation is not tenable because of the following reasons :-

a) First of all, the issue regarding additional income of Rs.30 lakhs arose only after detection of undisclosed investment made by the assessee during the course of survey operation u/s.133A of the I.T.Act, 1961.

b) The assessee did not come forward with additional income of Rs.30 lakhs which represent undisclosed investments in the normal return. The assessee has showed a gesture to disclosed additional income of Rs.30 lakhs only after the detection by the department.

c) In view of Para (a) & (b) above, it is crystal clear that the assessee has wilfully and deliberately concealed the particulars leading to computation of total income while submitting return u/s 139. Mere showing of additional income in a return filed in response to notice u/s 148 does not give immunity from penal action u/s 271(1)(c) to the assessee.

In view of the above, I consider this case as a fit one for imposition of penalty u/s 271(1)(c). I impose penalty u/s 271(1)(c) @ 100% of tax sought to be evaded…."

Aggrieved by the order imposing penalty, appeal was filed by the assessee before the CIT(A) which was allowed. The relevant portion of the order is as under:_

"*The appellant has filed his revised return disclosing its additional income admitted in the Survey, well within the time available to it under section 139(5) of the I.T.Act and well before the issue of notice under section 148 i.e. before completion of reassessment proceedings. The A.O. has on the other hand completed the assessment by just adding the additional income of Rs.30,00,000/- offered in the revised return and no additional facts other than the disclosure made during the Survey have been brought on record to justify initiation and subsequent levy of penalty u/s 271(1)(c). The appellant's disclosure followed up by filing revised return in fact reflects its bonafide intention as also the case for non-imposition of penalty. The A.O. in his order has imposed penalty simply by referring to the disclosure made in the course of Survey proceedings while ignoring the appellants plea for bona fide actions on one hand. On the other hand no factrs have been brought to establish the concealment of income independent of the Survey in the reassessment proceedings, which effectively had been initiated to regularize the revised Return filed by the assessee disclosing his additional income.*

While it may be true that had it not been for the Survey, the additional income might not have been disclosed, it was not right for the A.O. to have ignored the subsequent bona fides of the appellant and the absence of any positive evidenced of concealment being *brought to the fore by the A.O. in the assessment proceedings other than the fact of admission of additional income. In view of the decision of Hon'ble Supreme Court in Rajasthan Spinning & Weaving.supra, the A.O. still has to establish the conditions for the levy of penalty and considering the ratio of judgment of Delhi High Court in CIT vs SAS Pharmaceuticals, it is the assessment proceedings and ROI and not the Survey proceedings which are relevant for the levy of Penalty. The Ho'ble Mumbai Tribunal "E" Bench in the case of Suryodaya Motors P Ltd in ITA Nos 4280 & 4281/Mum/2009, had in similar circumstances where a revised return subsequent to the Survey was filed, set aside levy of Penalty.*

*Therefore, considering the totality of circumstances in the appellant's case and considering the judicial pronouncements as discussed in my order above the penalty levied by the A.O. u/s.271(1)(c) is hereby deleted.(**relief Rs.10,09,800**/-)."*

The Department, being aggrieved by the order of the CIT(A) preferred appeal which was dismissed by the Tribunal by holding, inter alia, as follows :-

"*We have heard both the counsel and perused the records. We find that in this case the assessee has disclosed all the facts and its full income in the revised I.T.return filed by him voluntarily for the A.Y.2004-05 before issuing of notice u/s 148 of the Act. He has also* *paid self assessment tax and tax demanded after the assessment completed. Thus we agree with the proposition that the additional income has been shown in the revised I.T. return before issuing of notice u/s 148 of the I.T.Act and that on facts and circumstances of the case the assessee has neither furnished inaccurate particulars of income nor concealed the income during the financial year. In this regard we find that the ld.CIT(A) has placed reliance upon the decision of Hon'ble Apex Court in the case of UOI vs Rajasthan Spinning and Weaving Mills in 224 CTR 1 (SC). In this case it has been explained that levy of penalty is not automatic and that it is for the Revenue to establish that conditions exist for imposition of penalty. It is for the AO to bring on record concealment or furnishing of inaccurate particulars of income and to bring out the conditions for imposition of penalty. In this case as has been mentioned earlier he has not been able to bring out that there was any concealment or furnishing of inaccurate particulars o0f income by the assessee during the course of assessment. In such circumstances, in our considered opinion no case has been made out that assessee has made any concealment or furnished any inaccurate particulars so as to invite the rigors of penalty u/s 271(1)(c) of IT Act. In this regard the decision of Hon'ble Delhi High Court in the case of CIT vs SAS Pharmaceuticals 39(1) ITCL 448(Dewl-HC) 2011 is also relevant. In this case it is expounded that* *whether there was any concealment or furnishing of inaccurate particulars of income the same has to be determined with reference to the return of income. In this case admittedly in the return of income there is no issue of concealment or furnishing of inaccurate particulars. In such circumstances in our considered opinion penalty u/s 271(1)(c) of the IT Act is not leviable. Accordingly, we find no infirmity in the order of the ld.CIT(A) and we uphold the same."*

Since admittedly the revised return for the said assessment year was filed by the assessee before issuance of notice under section 148, we are of the view that the order of the Tribunal requires no interference. The judgement in CIT v. Smt.Sova Bajoria : 232 ITR 202 (Cal), relied on by Mr.Bhowmik is inapplicable as therein the assessee had filed the second revised return after the assessment proceedings had begun, unlike the case in hand, where the proceedings under section 148 were yet to begin. Therefore, the application is dismissed. The appeal is not admitted.

(SOUMITRA PAL, J.)

I agree.

(MIR DARA SHEKO, J.)

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