

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL NO. 152 of 2005

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE KS JHAVERI Sd/-

and

HONOURABLE MR.JUSTICE K.J.THAKER Sd/-

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| 1 | Whether Reporters of Local Papers may be allowed to see the judgment ? | Yes |
| 2 | To be referred to the Reporter or not ? | Yes |
| 3 | Whether their Lordships wish to see the fair copy of the judgment ? | No |
| 4 | Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ? | No |
| 5 | Whether it is to be circulated to the civil judge ? | No |
- =====

INCOME TAX OFFICER....Appellant(s)

Versus

BOMBAYWALA READYMADE STORES....Opponent(s)

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Appearance:

MR KM PARIKH, ADVOCATE for the Appellant(s) No. 1

MR JP SHAH, ADVOCATE for the Opponent(s) No. 1

MR MANISH J SHAH, ADVOCATE for the Opponent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE KS JHAVERI**
and
HONOURABLE MR.JUSTICE K.J.THAKER

Date : 03/11/2014

ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE K.J.THAKER)

1.By way of this Tax Appeal, the only argument canvassed by learned Counsel for the appellant Mr. K.M. Parikh is that there is concealment of Income by the opponent. Learned Counsel has relied on the ground B. of the Memo of the Appeal which reads as under :-

"B. That the Hon'ble Tribunal has substantially erred in law and on facts in upholding the order of the Ld. CIT (A) cancelling the penalty of Rs.4,95,410/- levied u/s.271(1)(c) of the I.T. Act holding that since no return of income had been filed by the assessee, the assessee could not be penalized for concealment of income or furnishing of inaccurate particulars of income in terms of section 271(1)(c) of the I.T. Act and further holding that since the income is assessed on estimate basis penalty for concealment of income is not leviable, ignoring the fact that the inaction of not filing return of income itself can be considered as act of concealment of particulars of

income, thus, provisions of section 27(1)(c) is attracted on the facts of the case.

It is submitted that the decision of the Hon'ble ITAT is against the objectives of penal provisions included in the Income Tax Act. The decision not only allows the assessee to go scot free even when discrepancies have been found in the business as a result of a search and which have been upheld in quantum appeal. It also encourages the assessee for not complying with the duty of filing return of income u/s. 139 of the I.T. Act. The decision of the Hon'ble ITAT in fact rewards the assessee for not filing the return.

It is further submitted it is the primary responsibility of the assessee to file the return of income. The correct income for a particular year is best known to the assessee only. In spite of several opportunities given to it, the assessee failed to file the return of income. The AO had therefore no option but to compute the income to the best of his judgment and information available to him. It is important to note that there is no contention on the part of the assessee that it has not earned income. The only contention is that income is estimated and hence penalty is not leviable. The computation of income has reached finality, according to which the assessee has substantial income chargeable under the Act. The estimate of income was resorted to by the AO only as a last resort after the assessee failed to disclose the income by filing return

of the income. Thus, the inaction on the part of the assessee itself is the act of concealment of particulars of income. The word "concealment" presupposes some act on the part of the assessee. In the present case, the inaction of not filing return of income itself can be considered as act of concealment of particulars of income. Thus, provision of section 271(1)(c) is attracted on the facts of the case. It is also pertinent to mention here that an assessee not filing the return of income and not showing the income therein cannot be better off or in advantageous position than the person filing the return of income and not showing the correct income in the return. Both the persons are equally responsible for concealment of particulars of income. Thus, even though Explanation 3 to section 271(1)(c) is not attracted, the provision of section itself, irrespective of any explanation, is attracted."

2. While admitting the matter on 19.09.2005, the following question of law was framed :-

"Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was justified in law in holding that since no return of income had been filed by the assessee, no penalty could be levied under Section 271(1)(c) of the Income Tax Act, 1961 for concealment of income?"

3. The facts which give rise to this Appeal are that during the course of search u/s. 132 of

the Income Tax Act, on 31.08.1984 excess stock was found on physical verification as against the book stock worked out as on the date of search. The Assessee did not file the return of income for the A.Y. relevant to the F.Y. in which the search had been conducted. The assessing officer completed the assessment for the relevant assessment year on the basis of materials available with him. Penalty proceedings were initiated u/s. 271(1)(c) for concealing particulars of income. The assessee preferred appeal before the CIT(A) against the assessment order where the CIT(A) scaled down the income from Rs.5,52,572/- to Rs.4,63,653/-. During the penalty proceedings the assessee did not respond to the notice issued. The Assessing Officer levied a penalty of Rs.4,95,410/- u/s. 271(1)(c) of the I.T. Act being 100% of the Tax sought to be evaded. The assessee preferred appeal before the CIT(A) against penalty so imposed. The CIT(A) deleted penalty on the ground that since the assessee is a regular assessee, explanation (3) to Section 271(1)(c) is not attracted. The concealment of income can be only with reference to return of income filed. In absence of any return filed, it cannot be held that assessee has concealed the particulars of income. It also held that since the income is assessed on estimate

basis penalty for concealment of income is not leviable and hence, this Appeal.

4. The question of law, i.e. 'Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was justified in law in holding that since no return of income had been filed by the assessee, no penalty could be levied under Section 271(1)(c) of the Income Tax, 1961 for concealment of income', is answered against the revenue for the following reasons, which has been elaborately discussed and the relevant Paragraph 8 reads as under :-

"8. Thus, being satisfied that the assessee has concealed the particulars of income, I hereby levy the penalty of Rs.4,95,410/- under section 271(1)(c) of the I.T. Act which is equal to 100% of the amount of tax sought to be evaded by the reason of concealment of particulars of income as discussed above. The amount payable by the assessee as a result of this order is calculated as per Annexure-A to this order attached. Issue D.N. & Challan.

5. The Appellate Authority, i.e. CIT (A) in Paragraph 5 while considering the provisions of Section 271(1)(c) gave the following reasons and relevant paragraph reads as under :-

"The concept of deemed concealment

was introduced in the I.T. Act with effect from 01.10.1984. In this case the deemed concealment if any would be on the date of search i.e. 31.8.84. As this date is prior to 1.10.84, the concept of deemed concealment under explanation 5 of section 271(1)(c) would not be applicable to the appellant. Further explanation 4 is not applicable to the appellant because explanation 3 itself is not applicable. Therefore neither the main section nor the explanation to sections are applicable to the facts of the case. Moreover the entire assessment i.e. the estimation of total income and the estimation of the stocks on the date of search is based on certain assumptions. In fact both the additions are on estimated basis. It is an accepted fact that whenever an addition is made on the basis of estimates, the penalty for concealment is not leviable. Moreover the decision relied upon by the assessing officer was in respect of the purchase of property and not stocks and therefore ratio laid down in that case is not applicable to the facts of the appellant's case. For all these reasons therefore in my opinion, there is no reason to levy a penalty u/s 271(1)(c) of the I.T. Act."

6. The penalties were upheld as it was only estimated value on which estimates of income tax was made and the books of accounts were rejected. There was no scope to levy the penalty under Section 271(1)(c), the appellant had been assessed by the Income

Tax. The Tribunal has very rightly considered that both the additions are on a estimated basis. Therefore, just cause estimates are made, penalty cannot be levied under Section 271(c).

7. We are unable to persuade ourselves to take a different view than that taken by the Tribunal as well as CIT (Appeals), (more particularly Paragraph 7). Hence, we are in complete agreement with the view taken by the Tribunal and hence, this Tax appeal stands dismissed in the above terms.

Sd/-
(K.S. JHAVERI, J.)

Sd/-
(K.J. THAKER, J.)

CAROLINE

