IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE C.N.RAMACHANDRAN NAIR
&
THE HONOURABLE MR. JUSTICE T.R.RAMACHANDRAN NAIR

MONDAY, THE 3RD MARCH 2008 / 13TH PHALGUNA 1929

ITR.No. 3 of 2003()

AGAINST THE ORDER IN RA.49/COCH/1998 IN
ITA.924/COCH/1992 of I.T.A.TRIBUNAL,COCHIN BENCH
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APPLICANT:

THE COMMISSIONER OF INCOME-TAX,
CALICUT.

BY ADV. SRI.P.K.R.MENON,SR.COUNSEL,GOI(TAXES)
SRI.GEORGE K. GEORGE, SC FOR IT

RESPONDENTS:

SHRI.S.J.PRASAD, ADVOCATE
POWER OF ATTORNEY HOLDER OF
SHRI.M.K.ALI, GOKUL BUILDINGS, KASARAGOD.

BY ADV. SRI.P.BALACHANDRAN (SR.)
SMT.PREETHA S.NAIR

THIS TAX REFERENCE HAVING BEEN FINALLY HEARD
ON 03/03/2008, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

C .N. RAMACHANDRAN NAIR &
T.R. RAMACHANDRAN NAIR, JJ.

I.T.R. No. 3 OF 2003

Dated this the 3rd day of March, 2008

JUDGMENT

C.N. Ramachandran Nair,J.

This is a reference at the instance of the revenue against the order of the Income-tax Appellate Tribunal cancelling penalty levied on the assessee under Section 271(1)(c) of the I.T. Act for the assessment year 1990-91. The respondent is an advocate and Power of Attorney Holder of the assessee by name M.K. Ali. A search was conducted in the assessee's premises on 14.2.1990 and during search cash for Rs. 5,75,000/- was seized by the department. In the course of search the assessee gave a statement declaring that the amount belonged to one Sri. M.G. Abdul Rahiman, Poochakad House, poochakad P.O., Pallikkara. However, later the assessee failed to estsablish his case that the amount belonged to the said Sri. Abdul Rahiman, and therefore he filed a return on 27.9.1990 declaring the amount as income from other sources. The assessing officer initiated penalty proceedings under Section 271(1)(c) of the Act for concealment of income. The assessee claimed immunity from penalty because of filing of return and payment of tax on the income declared. However, the assessing officer noticed that there is concealment of income by virtue of operation of Explanation 5 to Section 271(1)(c) of the Act. However, he limited the penalty levied under Section 271 (1)(c) of the Act to the minimum amount. Even though assessee filed appeal against penalty order, the same was rejected by the first appellate authority, namely, CIT (Appeals). However, on second appeal by the assessee, the Tribunal cancelled the penalty on the assumption that prior to the due date for filing of return, the assessee returned the income and paid tax thereon. It is against this order of the Tribunal cancelling the penalty that department has filed this reference.

2. We have heard senior counsel Sri.P.K.R. Menon appearing for the revenue and senior counsel Sri. P. Balachandran appearing for the respondent-assessee. The revenue's counsel rightly pointed out that the assumption of the Tribunal that for the year 1990-91 the return was due on 30.6.1991 is obviously incorrect. In fact return was due on 30.6.1990 and search having been made on 14.2.1990, the assessee had enough opportunity to file return and remit tax on the income so

declared. Besides this, the assessee in the course of search could have saved penalty by accounting the income at least on the date of search and then paid tax by declaring it. Even after search and seizure of cash by the department, the assessee proceeded to contend that the amount belonged to another person, but failed to prove the same. Even though counsel for the assessee relied on the decisions of the Supreme Court in DILIP N. SHROFF V. JOINT. COMMISSIONER OF INCOME TAX, 291 I.T.R. 519 AND T. ASHOK PAI V. CIT., 292 I.T.R. 11 (SC), we notice that facts in these two decisions are different and in either of the cases the Supreme Court has not considered the scope of Explanation 5 to Section 271(1)(c) of the Act. Penalty arising out of search is covered under Explanation 5 to Section 271(1)(c) of the Act which provides that if the assessee in the course of search does not disclose income and offer payment, the assessee is deemed to have concealed particulars of income even in the course of search. Obviously there is concealment of income by the assessee by virtue of operation of Explanation 5 to Section 271(1)(c) of the Act because assessee not only did not disclose income in the course of search, but even offered explanation that it belonged to another person which the assessee could not establish or prove. In the circumstances, concealment stands proved beyond any doubt by operation of presumption available under Explanation 5 to Section 271(1)(c) of the Act and consequently the assessee is liable for penalty under the said Section. Therefore the order of the Tribunal to the contrary is liable to be reversed. So far as the quantum of penalty is concerned, the Officer has levied only minimum penalty and therefore there is no scope for interference with the quantum of penalty levied. In the circumstances we dispose of the reference by answering the question referred in favour of the revenue and against the assessee.

A copy of this judgment under the seal of the High Court and signature of the Registrar shall be forwarded to the Income-tax Appellate Tribunal, Cochin Bench, Cochin.

(C.N.RAMACHANDRAN NAIR)
Judge.

(T.R.RAMACHANDRAN NAIR)
Judge.

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