IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

INCOME TAX APPEAL No. 35 of 2003

A.R.ENTERPRISES P.LIMITED
V/S
COMMISSIONER OF INCOME TAX

Mr. ARUN BHANSALI, for the appellant / petitioner.

Mr. KK BISSA, for the respondent.

Date of Order : 5.2.2008

HON'BLE SHRI N P GUPTA,J.
HON'BLE SHRI DEO NARAYAN THANVI,J.

ORDER

REPORTABLE:

This is an appeal, by the assessee against the order of the learned Tribunal, upholding the imposition of penalty under Section 271(1)(c) of the Income Tax Act. The appeal was admitted on 16.9.2003, by framing following substantial questions of law:

> "(1) "Whether on the facts and in the circumstances of the case, levy of penalty under Section 271(1)(c) is justified?
>
> (ii) "Whether on the facts and in the circumstances of the case, the Tribunal was justified in coming to the conclusion that the assessee has not discharged his burden to disclose the presumption arising against him under explantion to Section 271(1)(c) of the Income Tax

Act, 1961?”

The facts of the case are, that the appellant filed return for the relevant assessment year. However, notices were issued to him under Sections 143(2) and 142(1) with detailed questionnaire. Thereafter, the evidence was recorded, enquiry was held, and assessment was made. That assessment was challenged in appeal, and on further appeal, there were remands also. However, the assessments have acquired finality on dismissal of D.B. Income Tax Appeals No.36 of 2003 and 34 of 2003.

In the assessment order, made by the Assessing Officer, the last para reads as under:

> “Assessed at Rs.38,34,610/- accordingly. Issue demand notice and challan. Give credit for TDS as per certificate on file. Charge interest under Sec.201 and 217(1A). Issue penalty notice u/s.271(1)(c) for concealing the particulars of income and u/s.273(2)(c) for non-filing of higher estimate.”

In compliance thereof, notice was issued to the assessee, and the assessee appeared, and contested proceedings. The notice related to the payment of two amounts, being a payment of Rs.2 lacs to M/s Radha Kishan Bal Kishan Muchhal of Indore, and the payment of Rs.3 lacs to M/s Pyroff Packaging (P) Ltd. of Bombay. These payments were disallowed, as they were found to be of other than

business consideration, and were added in the income of the assessee. From a look at the order of the Dy. Commissioner, Annex.1, it transpires, that since this involved "concealment/furnishing of inaccurate particulars of income", notice under Sec.274 read with Section 271 of the Income Tax Act was issued. The learned Dy. Commissioner considered the reply, and proceeded on the basis, that the Assessing Officer has thoroughly examined the explanation about the payment, and found, that the parties did not actually render any service to the assessee. The reasons in this regard were also considered. Then, the learned Dy. Commissioner concluded, that the assessee failed to furnish any explanation, as to why the penalty should not be imposed upon it, and that, as the addition made on account of payment to the above parties for no service rendered, involved furnishing of inaccurate particulars of income, resulting in concealment of his income, it attracted penalty under Section 271(1)(c). Thus, the penalty of Rs.2,75,000/-, being the minimum, i.e. the amount of tax sought to be evaded, was imposed.

Challenging this, an appeal was filed, and certain judgments were also cited. That appeal was allowed, relying upon the judgment of the ITAT, in case of M/s Aditya Mills v. IAC, reported in (1993) 45 TTJ (Jp) 363, wherein it has been held, that the penalty cannot be levied, if the assessee could not produce the evidence to establish the

rendering of any brokerage service by the other party, and that, inspite of the fact that disallowance has been confirmed, the penalty should not be levied.

This order was challenged by the Revenue, by filing the appeal before the ITAT. It may be observed here, that before the ITAT, three appeals were there, one being appeal of the assessee, seeking to challenge the assessment, other being by the Revenue, challenging certain benefits granted to the assessee, and third being appeal of the Revenue, seeking to challenge the setting aside of the penalty. The learned ITAT decided all the appeals against the assessee, and restored the penalty.

So far as the assessment orders are concerned, as observed above, the appeals against those orders have already been dismissed.

Regarding the penalty, all that has been said by the learned Tribunal is in para Nos.33, 37 and 39. In para Nos.33 and 34, the Tribunal discussed the sustainability of disallowance of the payments, made by the assessee. Then, in para 37, the learned Tribunal noticed the contentions of the parties, on the matter of penalty, and distinguished the case cited on behalf of the assessee, by finding inter alia, that in the case of CIT v. S.C. Mittal, (2001) 251 ITR 9 (SC), the Assessing Officer had detected payment of

commission claimed, which was not paid. Then in para 39, all that has been said by the Tribunal is, as under:-

> "39. After having discussed the factual and legal position, we have come to the conclusion that the commission paid to the persons mentioned in the order was not for business consideration and no services had been rendered by these two persons to the assessee. Therefore, the assessee has concealed the particulars of its income. The penalty is leviable u/s 271(1)(c) of the Act. The CIT (A) had grossly erred in cancelling the penalty levied by the AO u/s 271(1)(c) of the Act. The order of the CIT (A) is reversed and that of the AO is revived/sustained."

Assailing the impugned judgment, it is contended by the learned counsel for the appellant, that for initiating proceedings for penalty, according to language of Section 271(1), the Assessing Officer, or the Commissioner (Appeals), or the Commissioner, in the course of any proceedings, should be satisfied about any person, having concealed the particulars of his income, or having furnished inaccurate particulars of such income [Clause(c) of sub-section (1)], and submitted, that a positive satisfaction should be recorded by the authority, with respect to either of the eventualities. While in the present case, by referring to the original assessment order, available with us, in the file of the Appeal No.36, which has been decided today, as Annex.1, it is submitted that the Assessing Officer has not recorded any satisfaction, and in a routine manner, while making assessment of the income at a particular amount, directed

issuance of demand notice, giving credit for TDS & charging of interest, and in the same rhythm, without any application of mind, & directed issuing of penalty notice under Section 271(c), for concealing the particulars of income, which does not fulfil the requirements of Section 271(1) and, therefore, the entire proceedings are bad. Elaborating the argument, it was contended, that it is trite law, that simply because the Assessing Officer does not agree with the return, or makes any addition for whatever reason, ipso facto, would not entitle him to direct initiation of penalty proceedings by issuing notice. Rather, in the case, where there is found to be any concealment of income, or furnishing of inaccurate particulars, even that, ipso facto, does not render the assessee liable for penalty, as the imposition of penalty is not automatic. While in the present case, from the assessment order, it transpires, that things have proceeded, as if it was an automatic consequence of disallowance of the amounts, as claimed by the assessee, and therefore, the imposition of penalty is bad. The other submission made is, that the assessee had bonafidely claimed the deduction, and simply because the authorities in hierarchy, and this Court, did not accept the stand of the assessee, upheld the addition. If the penalty is imposed, it practically comes to, as if the mere fact of non-acceptance of a particular explanation of the assessee regarding deduction, ipso facto, attracts the penalty,

which is not the contemplation of law.

Learned counsel for the Revenue has supported the impugned order, and submitted, that the Assessing Officer had clearly recorded the satisfaction, by directing issuance of notice under Sec.271 (1)(c) of the Act, and pursuant thereto, separate notice was issued to the assessee, and since the assessee could not furnish the satisfactory explanation, as to why the penalty be not imposed, the penalty was imposed by the Assessing Officer, which was erroneously set aside by the learned Commissioner, and has rightly been restored by the learned Tribunal. Disallowance of the deductions, claimed by the assessee, and imposition of penalty, were entirely independent proceedings, and since the present is a clear case of concealment of particulars of income, and resultant furnishing of inaccurate particulars of income, penalty has rightly been imposed.

We have considered the submissions, and gone through the record available, so also the provisions of Section 271, and the judgment cited by the learned counsel for the assessee, being Dilip N. Shroff v. Joint Commissioner of Income Tax, reported in (2007) 6 SCC 329.

For ready reference, we may quote the provisions of Section 271(1)(c), which reads as under:

> "271(1) If the Assessing Officer or the Commissioner (Appeals) or the commissioner in the course of any proceedings under this Act, is satisfied that any person -
>
> xxxxx
>
> (c) has concealed the particulars of his income or furnished inaccurate particulars of such income,
>
> he may direct that such person shall pay by way of penalty...."

In our view, a bare reading of this Section does clearly show, that it contemplates existence of satisfaction, on the part of the authorities concerned, about existence of any of the eventualities, listed in Clauses (b), (c) & (d) of Sub-section (1). It is settled law, that mere fact that the Assessing Officer did not agree with the return submitted by the assessee, or made certain additions, by itself, would not entail initiation of penalty proceedings, as a mere consequence thereof. We make it clear, that we do not mean to say, that recording of satisfaction, as required by Section 271(1) should, by itself, be an independent act, but it can very well be comprised in the order of the assessment itself, as it can be in the course of any proceedings under this Act.

We may now refer to judgment of the Hon'ble Supreme Court in Dilip N. Shroff's case (supra), wherein in para

42, it has been held as under:

> "42. The legal history of Section 271(1)(c) of the Act traced from the 1922 Act prima facie shows that Explanations were applicable to both the parts. However, each case must be considered on its own facts. The role of Explanation having regard to the principle of statutory interpretation must be borne in mind before interpreting the aforementioned provisions. Clause (c) of sub-section (1) of Section 271 categorically states that the penalty would be leviable if the assessee conceals the particulars of his income or furnishes inaccurate particulars thereof. By reason of such concealment or furnishing of inaccurate particulars alone, the assessee does not ipso facto become liable for penalty. Imposition of penalty is not automatic. Levy of penalty is not only discretionary in nature but such discretion is required to be exercised on the part of the assessing officer keeping the relevant factors in mind. Some of those factors apart from being inherent in the nature of penalty proceedings as has been noticed in some of the decisions of this Court, inhere on the face of the statutory provisions. Penalty proceedings are not be initiated, as has been noticed by the Wanchoo Committee, only to harass the assessee. The approach of the assessing officer in this behalf must be fair and objective."

If the assessment order is read, much less appreciated, or construed, as per the requirements expressed by the Hon'ble Supreme Court in this para 42 above, to say the least, the order does not satisfy the requirements of Section 271(1), even for initiating any penalty proceedings. The various appellate orders and remand orders, available in the appellate file of the assessment matters, do show, that there was a bonafide dispute, going on between the assessee and the department, about the justifiability of the payments made, and it is very

significant to note here, that it is not the finding of any of the authorities, that the payment was not made to the persons concerned. The precise finding in the assessment proceedings is, that the payment was not made for business purposes, as it is not shown that the recipients did, or could render, any business advantage to the assessee. In such circumstances, when the payment has factually been made by the assessee, the question only was, as to whether he is entitled to deduction or not, and may be, that the authorities found, that the assessee is not entitled to deduction, resultantly the addition in the income was made, but then, for initiating penalty proceedings, that, by itself, is not enough; and beyond that, namely the deduction claimed by the assessee, has not been allowed, there is nothing more to show, as to why the penalty proceedings should be initiated against the assessee. In this very judgment, in Dilip N.Shroff's case (supra), the Hon'ble Supreme Court has dealt in detail, the meaning and import of the expressions “concealment of income” and “furnishing of inaccurate particulars” and have also considered the legislative history, and evolution of the provisions. In para 49, it was held, that this concealment or submitting inaccurate particulars, signifies a deliberate act or omission, on the part of the assessee. Such deliberate act must be either for the purpose of concealment of income, or furnishing of inaccurate particulars. Then in para 50, it was held, that furnishing

of an assessment of value of the property may not, by itself, be furnishing of inaccurate particulars. Even if the Explanations are taken recourse to, a finding has to be arrived at, having regard to clause (A) of Explanation 1 that the assessing officer is required to arrive at a finding, that the explanation offered by an assessee, in the event he offers one, was false. He must be found to have failed to prove, that such explanation is not only not bonafide, but all the facts relating to the same and material to the income, were not disclosed by him. Thus, apart from his explanation being not bonafide, it should have been found as of fact, that he has not disclosed all the facts, which were material to the computation of his income.

With all humility at our command, we are constrained to observe, that all these requirements are conspicuously missing.

Again, reverting back to the order of the learned Tribunal, in our view, even a closest reading of the order only shows, that the Tribunal has gone into the aspect of justifiability of expenditure, so as to entitle the assessee to deduction, and then, even in para 39, all that has been held is, that it came to the conclusion, that the commission paid to the persons, mentioned in the order, was not for business consideration, and no service had been

rendered by these two persons to the assessee, and from that itself, it has been concluded, by observing, that "therefore, the assessee has concealed the particulars of its income". Even at the cost of repetition, we find that a "concealment" as comprehended by the Hon'ble Supreme Court in Dilip N. Shroff's case (supra) as a deliberate act, is not the finding given by the learned Tribunal, rather, the finding is only, as if it was a necessary consequence, which cannot be sustained.

Thus, both the questions, as framed, are answered in favour of the assessee and against the Revenue.

The appeal is, therefore, allowed. The order of the learned Tribunal, and that of the Assessing Officer (DCIT) are quashed.

(DEO NARAYAN THANVI),J. **(N P GUPTA),J.**

RANKAWAT JK, PS