

A.F.R.

Court No. - 35

Case :- INCOME TAX APPEAL No. - 111 of 2017

Appellant :- The Pr. Commissioner Of Income Tax-I, Kanpur

Respondent :- Shri Prakash Chandra Sharma Prop. M/S Prakash Box Factory

Counsel for Appellant :- Shubham Agrawal

Counsel for Respondent :- Rahul Agrawal

Hon'ble Bharati Sapru,J.

Hon'ble Saumitra Dayal Singh,J.

Heard Sri Subham Agrawal, learned counsel for the appellant and Sri Rahul Agarwal, learned counsel for the respondent.

This appeal has been filed by the revenue under Section 260-A of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') against the order of the Income Tax Appellate Tribunal, Lucknow Bench dated 31.10.2016 for the A.Y. 2012-13, by which the Tribunal has allowed the assessee's appeal and deleted the penalty imposed under Section 271 (1) (c) of the Act. The instant appeal was admitted on the following questions of law:

“(1) Whether the Income Tax Appellate Tribunal was justified in deleting the penalty under Section 271(1) (c) of the Act amounting to Rs. 25,00,000/- by ignoring that the assessee has not voluntarily withdrawn the benefit claimed under Section 54F of the Act, but has revised the computation only after he has been cornered in the scrutiny proceedings and that too after one and a half year of the scrutiny proceedings?

(2) Whether the penalty under Section 271(1)(c) of the Act can be levied on the assessee in the present case in which there was both the case of furnishing of inaccurate particulars of income by making the wrong claim under Section 54F of the Act and the assessee has also deliberately and willfully concealed the

particulars of various components of his income?”

The assessee is an individual engaged in the business of manufacture of sale and playing cards. On 17.11.2012, he filed his return of income for A.Y 2012-13. Initially, the said return was processed under Section 143(1) of the Act. In that return the assessee had disclosed long term capital gain at Rs. 1,11,14,748/- but at the same time he had claimed deduction in respect of the same. Later, scrutiny assessment proceedings were initiated under Section 143 (3) of the Act.

It is on record that on 22.12.2014 the assessee was asked to furnish his explanation in respect of the long term capital gain claimed by him. It is at that stage that the assessee disclosed to his assessing officer that he had committed a mistake in claiming deduction in respect of long term capital gain.

It may be noted that there is no dispute as to long term capital gain having arisen to the assessee. The revenue's doubt was confined to the allowability of the deduction claimed under Section 54F of the Act.

The assessee admitted his mistake in claiming deduction under Section 54F of the Act against purchase of a land/plot from Kanpur Development Authority. Upon such admission, there remained nothing to be adjudicated by the assessing officer in that regard. Consequently, by the assessment order dated 28.03.2015 the assessing

officer made an addition to the income of the assessee on account of long term capital gain of Rs. 1,11,14,748/-. He also issued a direction to initiate penalty proceedings under Section 27(1)(c) of the Act.

Then, in the penalty proceedings a show cause notice was issued on 28.03.2015 and a further notice appears to have been issued on 05.05.2015 in response to which the assessee, amongst others, submitted as under:-

“3. That the assessee declared in his income tax return an income under the head “LONG TERM CAPITAL GAIN” as Nil from sale products of Shyam Nagar land situated at 175-E-11, Sujataganj, Kanpur after claiming an exemption u/s 54-F of the Income Tax Act, 1961 as per advise of his counsel against purchase of KDA land. Subsequently during the course of hearing of assessment proceedings, the assessee consulted another counsel Sri Santosh Kumar Gupta, Advocate and engaged him as his new counsel. After discussions with newly engaged counsel, it is advised by him that the opinion provided by the then counsel regarding exemption 54-E on account of purchase of KDA land is not correct and purchase of KDA land is not entitled for exemption. The assessee has claimed wrong exemption claim as per old counsel advise. He immediately given opinion to the assessee that the “LONG TERM CAPITAL GAIN” should have been recomputed after considering the withdrawal of exemption and advised to pay tax thereupon. The assessee immediately acted upon his advise, recomputed his total income. The income under the head “LONG TERM CAPITAL GAIN” is revised and recomputed at Rs. 1,13,08,351/-. As per new counsel advise assessee revised his total income and tax liability paid thereupon. A covering letter revising the income on 16.2.2015 submitted before the assessing authority to this effect. The assessee acted upon bonafide regarding this claim of exemption u/s 54-F as per advise of his old counsel. The details in

original return were filed by the assessee regarding sale of impugned Shyam Nagar property and claim of exemption u/s 54-F as per advise of old counsel in his original computation of total income. No facts were concealed. But as soon as new engaged counsel advised and pointed out the mistake of claiming exemption, the income is revised immediately and due tax paid thereupon. Therefore on amount assessed by your goodself vide assessment order dated 28.3.2015 under the head income from "LONG TERM CAPITAL GAIN" amounting Rs. 1,13,08,351/- is an income already included by the assessee, the same as revised income, during the course of assessment proceedings. Therefore, the addition is not an concealment on his part but bonafide inclusion in his total income by way of revision as per advise of new counsel.

4. That under the facts and circumstances as stated hereinabove, the income assessed under the head "LONG TERM CAPITAL GAIN" amounting to Rs. 1,13,08,351/- is actually and factually included into total income before completion of assessment by the assessee himself as per advise of newly engaged counsel and is not within the purview of neither furnishing inaccurate particulars of income nor any concealment of income in his part liable to be penalized.

5. That assessee do hereby filing an affidavit in confirmation to the fact, as stated hereinabove proceeding paras from 1 to 4.

In the premises set-forth-above, it is humbly prayed that the penalty proceedings initiated u/s 271(1)(c) of the Income Tax Act, 1961 vide show cause notice dated 5.5.2015 may very kindly be dropped."

(emphasis supplied)

Thus, clearly, the assessee took up a stand that he had, subsequent to his filing the return been advised that he was not entitled to claim deduction under Section 54F of the Act in respect of long term capital gain but that at the relevant time he had claimed it upon legal advise given to him by his earlier counsel. It was also claimed

that the assessee had not furnished any inaccurate particulars of income nor concealed any fact in relation thereto.

The assessing officer found while the assessment proceedings remained pending for a fairly long period of time, vide order sheet entry dated 22.12.2014, the assessee had been specifically required to furnish the details of long term capital gain earned by him alongwith supporting evidence. It was only two months after issuance of the aforesaid notice that on 16.02.2015, the assessee filed a revised computation declaring long term capital gain of Rs. 1,13,08,351/-, after withdrawing his claim of deduction under Section 54F of the Act.

The assessing officer, therefore, concluded that the revised computation filed by the assessee in respect of long term capital gain was not voluntary, but the assessee had in fact been constrained to accept the correct computation. Then, in paragraph 10 of the penalty order, the assessing officer recorded his finding as under:-

“10. During the course of assessment proceedings, the assessee has never been able to justify as to why such income was not declared by him. However, during the course of penalty proceedings, it was submitted by the assessee that the wrong claim was made by him due to the advice of his previous counsel. When asked to produce the counsel for examination, the assessee submitted that his counsel Shri Raj Kumar Gupta has expired on 16.10.2014 and the assessee was not in a position to produce his at this stage. Therefore, the assessee could not furnish any evidence in support of his claim with regard to the previous counsel. The claim of the assessee regarding

wrong advice given by the previous counsel is prima facie not appreciable. No counsel is supposed to give any wrong advice to his client. It is the assessee who is finally responsible to make any claim in the return of income, whether right or wrong. Moreover, the assessee also failed to substantiate his claim on this account. Therefore, from the above discussion, it is amply evident that the assessee has deliberately and willfully concealed the particular of various components of his income which were detected by the department during the course of assessment proceedings in his case. By this act, assessee exposed himself for imposition of penalty under Section 271(1)(C) of the Act."
(emphasis supplied)

Thus, the assessing officer recorded a finding that the revised computation filed by the assessee was not voluntary and that the assessee had been forced to admit that the long term capital gain that had arisen to him was taxable under the Act. He rejected the explanation furnished by the assessee that the deduction had been wrongly claimed under the advise of his earlier counsel, one Sri Raj Kumar Gupta, who at the time of assessment being concluded was dead. The assessing officer found that there was no evidence in support of the explanation so furnished by the assessee. He also noted that it was the assessee who was ultimately responsible for the claim made by him which in the present case was found to be wholly unsubstantiated. On such reasoning the assessing officer concluded that the assessee had deliberately and willfully concealed the particulars of various components of his income that were detected by the revenue during the course of the assessment proceedings. On such

reasoning the assessing officer imposed the penalty under Section 271 (1)(c) of the Act.

Against the aforesaid penalty order, the assessee preferred an appeal before the CIT (Appeals) Kanpur. The said appeal was dismissed by the Commissioner (Appeals) Kanpur vide his order dated 28.06.2016. The explanation furnished by the assessee of wrong legal advice tendered to him by his earlier counsel (who had died on 16.10.2014), was again rejected. The CIT (Appeals) also reasoned that the onus/burden was on the assessee to explain the circumstances in which a false claim had been made by the assessee. It was not discharged. Accordingly, the appeal was dismissed.

Upon further appeal filed by the assessee before the Tribunal, the same was allowed. The penalty has been deleted because the assessing officer had not specified (in the penalty order) whether penalty had been imposed on the charge of concealment of particulars of income or on the charge of furnishing inaccurate particulars of income. In this regard, it would be useful to extract the relevant part of the order of the Tribunal.

“6. It is a settled position of law that the assessment proceedings and penalty proceedings are different. Even if the quantum addition is sustained does not mean that automatically penalty will be levied on the assessee. Penalty is leviable if the assessee has concealed its income or has furnished inaccurate particulars of such income and the charge has to be specific. It is incumbent upon the Assessing Officer to specify whether the assessee has concealed any income which has been unearthed by the Department

*or the Assessing Officer has to point out whether the assessee has furnished inaccurate particulars of income. Here in this case, from a perusal of the order of the Assessing Officer, which has been reproduced above, we note that the Assessing Officer has specifically made a finding that **“the assessee has furnished inaccurate particulars and concealed such income”**. The Assessing Officer erred in not specifying the charge on which the penalty has been attracted and spell out the facts supporting his finding in it against the assessee. It should have been either concealment of income or furnishing of inaccurate particulars of income not both since both charges are different. Here in this case both the charges have been leveled together without spelling out what specific charge was established by the Assessing Officer. For the aforesaid view, we rely on the cases of CIT Vs. Manu Engineering Works, 122 ITR 306 (Guj.) and New Sorathia Engineering Co. Vs. CIT, 282 ITR 642 (Guj.). In view of the above, we are inclined to delete the penalty levied under Section 271(1)(c) of the Act.”*

Assailing the aforesaid finding recorded by the Tribunal, Sri Shubham Agarwal, learned counsel for the revenue submits that in the instant case the assessing officer had specifically charged the assessee of having concealed particulars of his income. Relying on the finding recorded in the penalty order, as extracted above, he submits that it admits of no doubt that the assessing officer imposed the penalty on account of concealment of income alone.

Then, he submits that the mere observation recorded in the next paragraph of the penalty order i.e. paragraph 11 is merely an observation made in the passing. According to him, even if that observation is read to be inconsistent with the first part of the penalty order

wherein the assessing officer had clearly considered the explanation furnished by the assessee together with the material and evidence on record and thereafter recorded his finding that the assessee had concealed the particulars of his income, the later observation in the penalty order that the assessee had furnished inaccurate particulars of his income, could not have led to the conclusion drawn by the Tribunal that the charge of penalty had not been specified by the assessing officer.

Next, it has been submitted by learned counsel for the revenue that there is no denial by the assessee that he was not entitled to claim deduction under Section 54-F of the Act.

Then, the explanation furnished by the assessee that such claim came to be made on account of mistake by the previous counsel had been rightly rejected by revenue authorities and even the Tribunal has not accepted that explanation. Last, it has been submitted that the assessee did not even so much as make an attempt to justify or explain the time consumed by him in discovering the alleged mistake. While, the notice under Section 143(2) of the Act had been issued to the assessee on 19.8.2013 he submitted revised computation of long term capital gain only much later on 16.2.2015.

In support of his submission, learned counsel for the revenue has relied on a judgment of the Supreme Court in the case of **MAK Data (P) Ltd. Vs. CIT** reported in

(2013) 358 ITR 593 to submit that mere surrender of income after it's detection of incriminating documents cannot lead to avoidance of penalty proceedings on a plea that such surrender had been made to 'buy peace' or 'avoid litigation' or to find 'amicable solution' etc. According to learned counsel for the revenue, the assessee never discharged his burden to prove that there was no concealment of income by him. He has further relied on a judgment of the Rajasthan High Court in the case of **J.P. Sharma and Sons Vs. Commissioner of Income Tax, Rajasthan** reported in **(1985) ITR 333 (Raj.)**. In particular reliance has been placed on the following passage of that judgment.

“If the ITO, as a result of investigation made by him during the assessment proceedings, discovers that inaccurate particulars have been supplied by the assessee or there is an omission to supply the correct particulars on his part and the revised return is filed by the assessee after such a discovery is made by the ITO, then, of course, in such circumstances, the filing of the revised return cannot remove the effect of contumacious conduct on the part of the assessee while filing the original return and penalty is leviable in such a case.”

“The relevant question is as to what was the intention of the assessee at the time of filing of the original return and if the assessee honestly and bona fide kept the ITO informed about the dispute between the assessee-firm and the Northern Railway, and the litigation between them and arbitration proceedings which took place in the course of that litigation, then, there is no reason to hold that the assessee was guilty of deliberate concealment of income at the time of filing of the original return.”

Opposing the appeal, Sri Rahul Agarwal, learned

counsel for the assessee has submitted that the defect in the penalty order noted by the Tribunal goes to the very root of the penalty order and it was not curable. According to him, the penalty under Section 271(1)(c) of the Act may be imposed in either of two eventualities. First, the penalty could have been imposed if the assessee had concealed particulars of his income. Second, penalty under that provision could have been imposed if the assessee had furnished inaccurate particulars of his income. According to him, the aforesaid two eventualities are mutually exclusive and cannot co-exist in any given set of facts. Thus, either the assessee may be found to have concealed particulars of his income and thus invited penalty or he may be found to have furnished inaccurate particulars of his income and thus exposed himself to penalty proceedings. According to him, the assessee cannot, at the same time both conceal particulars of his income and also furnish inaccurate particulars of his income. In this regard, reliance has been placed, on two judgments of the Gujarat High Court in the case of ***Commissioner of Income Tax, Gujarat-III Vs. Manu Engineering Works*** reported in (1980) 122 ITR 306 (Guj.) and ***New Sorathia Engineering Co. Vs. Commissioner of Income Tax*** reported in (2006) 282 ITR 642 (Guj.)

Having considered the arguments so advanced by learned counsel for the parties, we first find that while the

assessing officer had imposed penalty under Section 271(1)(c) of the Act after returning findings on facts, the Tribunal has deleted the penalty on the legal plea that such a penalty could not have been imposed because the assessing officer had erred in not specifying the charge on which the penalty had been imposed.

In this regard, we find the Gujarat High Court had in the case of ***CIT Vs. Manu Engineering Works (supra)*** held as under:-

“We find from the order of the IAC, in the penalty proceedings, that is, the final conclusion as expressed in paragraph 4 of the order:

“I am of the opinion that it will have to be said that the assessee had concealed its income and/or that it had furnished inaccurate particulars of such income”. Now, the language of “and/or” may be proper in using a notice as to penalty order or framing of charge in a criminal case or a quasi criminal case, but it was incumbent upon the IAC 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. No such clear-cut finding was reached by the IAC was liable to be struck down”.

(emphasis supplied)

Normally, penalty under Section 271(1)(c) may be imposed either if the assessee had concealed the particulars of his income or it had furnished inaccurate particulars of its income. In case the assessing officer alleged 'concealment' of such particulars it would have to be alleged and established as a fact that the assessee did something so as to hide or not disclose such particulars. Similarly, in case the assessing officer alleged furnishing

of inaccurate particulars of income he would have to establish which particulars of income furnished was/were inaccurate as may have had a material bearing on determination/assessment of the true income of the assessee.

As a possibility, it is difficult to lay down, as a rule, that in a given set of facts the assessing officer may never be able to successfully allege and establish that an assessee had both 'concealment particulars of his income' and also 'furnished inaccurate particulars of income'. These are contingencies or facts and circumstances that must be specifically alleged and found to be existing in the peculiar facts of each case. There can be no presumption as to their co-existence or existence of even one of the two contingencies or infringements.

Therefore, we are unable to accept the argument advanced by learned counsel for the assessee that the two charges that may invite a penalty under Section 271(1)(c) of the Act can never co-exist. It is too broad a proposition to merit acceptance or rejection in the facts of the present case.

Also, in the facts of this case, we find no independent reasoning has been recorded by the assessing authority to conclude that the assessee had furnished inaccurate particulars of his income. At the same time, finding as to concealment of particulars of

income was duly supported with reasoning (as extracted above).

Thus, in view of specific finding recorded by the assessing officer in paragraph 10 of the penalty order which finding is based on appraisal of facts and is supported by reasoning given by the assessing officer, it could not be held (by the Tribunal) that the assessing officer had not specified the charge on which penalty was attracted or had not spelled out the facts to support the finding recorded against the assessee.

The further finding recorded by the assessing officer that the assessee had furnished inaccurate particulars of his income is nothing more than an observation made in the passing. Even if it is treated as a finding recorded by the assessing officer then, the same is not founded or based on any reasoning. Also, this finding is independent of the earlier finding recorded by the assessing officer as to concealment of particulars of income. The two findings are clearly separate and independent of each other.

In that view of the matter, we find the judgment of the Gujarat High Court in case of ***CIT Vs. Manu Engineering Works (supra)*** is wholly distinguishable as in that case as a fact it was found that positive finding had not been recorded by the assessing officer either as to concealment or as to furnishing inaccurate particulars of income by that assessee. In the present case a positive finding of concealment of particulars of income has been

recorded by the assessing officer.

However, the issue whether the charge of concealment of particulars of income could survive independently or despite the observation made by the assessing officer in the later part of the penalty order has not been examined by the Tribunal. Thus, though the charge of furnishing inaccurate particulars of income may be held to be totally unfounded on facts and reasoning recorded by the assessing officer, yet, in the facts of this case, the charge of concealment of particulars of income being independent of the charge of furnishing inaccurate particulars of his income was specifically found established by the assessing officer. The Tribunal has erred in not examining that issue.

Therefore, according to us, the Tribunal has erred in setting aside the entire penalty order. It should have examined the other grounds of appeal raised by the assessee including the ground that mere rejection of a claim or withdrawal of a claim did not amount to evidence or proof of concealment.

We find that the Tribunal has not adjudicated the challenge raised by the assessee to the imposition of penalty for concealment, on merits. Since, the Tribunal has not examined that issue on merits, further submissions made by learned counsel for the revenue seeking to establish concealment on part of the assessee and denial made by learned counsel for the assessee,

does not merit our consideration in the present appeal. Those issues have to be left open to be decided by the Tribunal afresh upon remand that is proposed to be made to it. Question no.1 therefore, does not arise. It is being left unanswered at present.

Question no.2 on which this appeal was admitted is answered thus: the assessing officer having imposed penalty for concealment of particulars of income upon reasoning given by him, the said order could not have been set aside in entirety merely because the assessing officer, in the later part of the penalty order also mentioned that the assessee had furnished inaccurate particulars of his income.

The appeal is **allowed**. However, in view of the fact that the Tribunal has not recorded any finding on the grounds of appeal raised by the assessee whether as a fact the assessee had concealed particulars of his income, the matter is remitted to the Tribunal to decide the appeal afresh on that issue. It is requested to the Tribunal to proceed to hear and decide that issue in accordance with law, within a period of six months from the date of production of a certified copy of this order.

Order Date :- 19.12.2017

Lbm/-