(2006) 08 P&H CK 0020

In the Punjab And Haryana At Chandigarh

Case No : IT Appeal No. 585 of 2005 & Income Tax Appeal No. 585 of 2005 (O and M) , 25 August 2006, A.Y. 1993-94

Ashok Kumar Gupta APPELLANT

Vs

Commissioner of Income Tax RESPONDENT

Date of Decision : 25-08-2006

Acts Referred:
Income Tax Act, 1961 — Section 132(1), 132(4), 139(1), 142(1), 143(1)

Citation : (2006) 205 CTR 613

Hon'ble Judges : Rajesh Bindal, J;Adarsh Kumar Goel, J

Bench : Division Bench

Advocate : P.C. Jain, for the Appellant; N.L. Sharda, for the Respondent

Final Decision : Dismissed

Judgement

Rajesh Bindal, J.

CM No. 23470-CII of 2005

1. For the reasons stated in the application, the delay in filing the appeal is condoned.

The application stands disposed of.

IT Appeal No. 585 of 2005

2. The appellant (hereinafter described as ''the assessee'') has approached this Court, by filing the present appeal, challenging order dt. 12th April,

2005 passed by the Income Tax Appellate Tribunal, Amritsar Bench, Amritsar (for short, ''the Tribunal'') in ITA No. 79/Asr/2004 for the asst. yr.

1993-94, raising the following substantial question of law:

Whether, under the facts and circumstances of the case, the Tribunal was justified in upholding the levy of penalty u/s 271(1)(c) to the extent of Rs.

4,42,928 while interpreting the Expln. 5 to Section 271(1)(c) for the asst. yr. 1993-94?

3. Briefly, the facts of the case are that search arid seizure operation was carried out at the residential and business premises of the assessee, who

was in the business of property dealing, on 26th March, 1993. During the course of search, large number of books of account and other

incriminating documents were found from the business as well as residential premises. Undisclosed cash and jewellery were also found and seized.

Statement of the assessee u/s 132(4) of the IT Act, 1961 (for short, ''the Act'') was also recorded wherein the assessee offered to surrender an

undisclosed income of Rs. 10 lacs for the purpose of taxation, which included cash and jewellery found at the time of search, deposits in the bank,

investment in household articles and the income reflecting from various transactions recorded in the seized papers. Thereafter, on 19th Jan., 1995,

return for the asst. yr. 1993-94 was filed declaring an income of Rs. 10,25,530, which included the surrendered income. This return was filed in

response to notice u/s 142(1) of the Act. In the assessment, certain additions were made by disallowing certain expenses, which were partly

deleted, whereas some of the additions were upheld upto the Tribunal.

4. As the assessee had concealed particulars of his income and it was only as a result of the search and seizure operation carried out at his

residential and business premises, that the assessee came forward to disclose his concealed income to the tune of Rs. 10 lacs, which may not be

even to the extent of his concealed income, a notice u/s 271(1)(c) of the Act was issued for levy of penalty on account of concealment of income.

After considering the explanation furnished by the assessee and also his reliance upon Expln. 5 to Section 271(1)(c) of the Act, the AO held that

the assessee does not fulfil the mandatory conditions as laid down in Expln. 5 to Section 271(1)(c) and penalty u/s 271(1)(c) was clearly leviable.

Accordingly, Rs. 4,42,928 was levied as penalty vide order dt. 27th Feb., 2003. Appeal against the order levying penalty was dismissed by the

Commissioner of Income Tax (Appeals) [for short, ''the CIT(A)''] vide order dt. 28th Nov., 2003 by observing as under:

I have considered the submissions of the appellant in the light of the details available on the record and relying upon my decision in the case of Sh.

Nand Kishore Mihindru decided vide order dt. 30th Sept., 2003 (supra) I find merits in the arguments of the appellant that the appellant has

specified the manner in which the income was earned but the immunity which is available is dependent on the other clause also i.e. payment of the

taxes on the income disclosed together with the interest thereon. The appellant asked for adjustment of seized cash of Rs. 1,90,000 towards the

tax payable as advance tax based on the decisions of the Hon''ble jurisdictional Tribunal but the same being not before AO the claim of the

appellant is not adjudicated. In the written submissions, the appellant has mentioned that the total tax worked out by the Department was of Rs.

4,21,498 but the said fact is factually incorrect because total tax along with the interest payable which was worked out as a result of Section

143(1)(a) order stood at a sum of Rs. 6,94,558 and after considering the self-assessment tax of Rs. 2,70,000 and even for the time being after

treating the seized cash of Rs. 1,90,000 as advance tax the appellant defaulted in clearing the tax along with interest on the amount so surrendered.

One of the basic conditions of Expln. 5 having not been complied with, therefore, I find merits in the order of the AO and the penalty worked out

at a sum of Rs. 4,42,928 is confirmed.

5. Before the Tribunal to explain the non-payment of tax and interest along with the return, the only plea raised by the assessee was that he did not

have sufficient funds to pay the tax. The Tribunal also dismissed the appeal of the assessee by recording the following observations:

We have considered the rival submissions and are of the view that the assessee has not complied with the conditions specified in Expln. 5 to

Section 271(1)(c) of the IT Act. The authorities below have referred to Expln. 5 to Section 271(1)(c) of the IT Act and are of the specific view

that the assessee has not paid the taxes together with interest in respect of the concealed income. It is essential condition before getting immunity

from penalty. The assessee even if made a statement u/s 132(4) of the IT Act in order to surrender Rs. 10 lacs as concealed income but he was

aware in statement to pay taxes and interest as per Expln. 5 to Section 271(1)(c) in order to get the immunity from penalty. The learned Counsel

for the assessee fairly admitted even before us that the assessee made short payment of the taxes. He has submitted that the assessee was not having sufficient funds, therefore, taxes could not be paid. However, there is no such explanation mentioned in Expln. 5 to Section 271(1)(c) of the

IT Act. Therefore, such plea cannot be entertained. We, therefore, reject his contention in this regard.

6. The relevant provisions of Section 271(1)(c) of the Act and Expln. 5 thereof are extracted below:

271 (1) If the AO or the CIT(A) or the CIT in the course of any proceedings under this Act, is satisfied that any person--

(a) and (b) xxxxxx

(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,--

xxxxxx

(i) and (ii) xxxxxx

(iii) in the cases referred to in Clause (c), in addition to tax, if any, payable by him, a sum which shall not be less than, but which shall not exceed

three times, the amount of tax sought to be evaded by reason of the concealment of particulars of his income or the furnishing of inaccurate

particulars of such income:

xxxxxx

Explanation 5.--Where in the course of a search u/s 132, the assessee is found to be the owner of any money, bullion, jewellery or other valuable

article or thing (hereafter in this Explanation referred to as assets) and the assessee claims that such assets have been acquired by him by utilising

(wholly or in part) his income,ï¿½

(a) for any previous year which has ended before the date of the search, but the return of income for such year has not been furnished before the

said date or, where such return has been furnished before the said date, such income has not been declared therein; or

(b) for any previous year which is to end on or after the date of the search,

then, notwithstanding that such income is declared by him in any return of income furnished on or after the date of the search, he shall, for the

purposes of imposition of a penalty under Clause (c) of Sub-section (1) of this section, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income, unless,ï¿½

(1) such income is, or the transactions resulting in such income are recorded,ï¿½

(i) in a case falling under Clause (a), before the date of the search; and

(ii) in a case falling under Clause (b), on or before such date, in the books of account, if any, maintained by him for any source of income or such

income is otherwise disclosed to the Chief CIT or CIT before the said date; or

(2) he, in the course of the search, makes a statement under Sub-section (4) of Section 132 that any money, bullion, jewellery or other valuable

article or thing found in his possession or under his control, has been acquired out of his income which has not been disclosed so far in his return of

income to be furnished before the expiry of time specified in Sub-section (1) of Section 139, and also specifies in the statement the manner in

which such income has been derived and pays the tax, together with interest, if any, in respect of such income.

7. We have heard learned Counsel for the parties and perused the record.

The only contention raised by learned Counsel for the assessee is that there is no requirement for payment of tax and interest thereon along with the

return. If the assessee has delayed the payment of tax, interest thereon has already been paid by the assessee and the entire amount was paid

before processing of the return u/s 143(1)(a) of the Act. Learned Counsel relied upon Commissioner of Income Tax Vs. Chhabra Emporium, and

Gebilal Kanhaialal (HUF) Vs. Assistant Commissioner of Income Tax, to support his argument.

8. On the other hand, learned Counsel for the Revenue, while referring to the admission made by the assessee during the course of arguments

before the Tribunal that the assessee was in default for payment of tax and interest for a sum of Rs. 88,234 even after deeming adjustment of Rs.

1,90,000, contended that since the assessee had failed to comply with the terms and conditions envisaged under Expln. 5 to Section 271(1)(c) of

the Act, penalty was rightly levied by the AO, which was upheld upto the Tribunal.

9. Search in the present case was conducted on 26th March, 1993. The assessment year involved is 1993-94 relating to previous year 1992-93,

for which return of income was required to be filed by 31st July, 1993. However, the assessee admittedly filed return only on 19th Jan., 1995 that too in response to notice u/s 142(1) of the Act issued on 15th Sept., 1993, meaning thereby the return was not filed within time. In the assessment,

framed on 26th March, 1996, tax of Rs. 4,93,293 was found to be payable by the assessee. In addition to this, interest of Rs. 3,48,793 was

levied. After reducing therefrom a sum of Rs. 6,94,558, already charged while processing the return u/s 143(1)(a) of the Act, balance demand of

Rs. 1,47,528 was calculated. From the statement on record, as furnished by the assessee himself as Annex. A. 8, it is evident that the assessee had

merely paid a sum of Rs. 2,50,000 before the due date for filing of return, in addition to Rs. 3,060 as tax deducted at source and requested for

adjustment of Rs. 1,90,000 in the seized amount against the advance tax, making a total of Rs. 4,43,060. Rest of the amount was paid by the

assessee later on, i.e., Rs. 1,20,000 on 17th Nov., 1994 and Rs. 84,000 on 31st Jan., 1996. Another sum of Rs. 50,000 was paid on 29th

March, 1996, after the assessment having been framed on 26th March, 1996. Further amount was paid thereafter in February, 2000 and January,

2003.

10. Section 271(1)(c) of the Act provides for levy of penalty, inter alia, for concealment of particulars of income, which could be upto three times

of the amount of tax sought to be evaded. By adding Expln. 5 to Section 271(1)(c) of the Act, a concession is sought to be given to an assessee,

who during the course of search and seizure operation, is found to have concealed particulars of his income, in case he surrenders such income by

making a statement during the course of search that such undisclosed money, bullion, jewellery or other valuable article or thing found at the time of

search is already recorded in the books of account or at the time of search, the assessee makes a statement that such money, bullion, jewellery or

other valuable article or thing have been acquired by him out of his undisclosed income and further specifies in the statement the manner in which

the income has been derived and pays the tax together with interest, if any, in respect of such income.

11. It is not in dispute that certain undisclosed assets were found from the premises of the assessee at the time of search and besides that certain

books of account and other documents were also found from which it was evident that the assessee had earned undisclosed income as well. In the statement made u/s 132(4) of the Act on the date of search, the assessee surrendered a sum of Rs. 10 lacs as concealed income for the year in

question. The date for filing of return for the assessment year in question had not yet expired. The assessee did not even file the return on or before

the due date. He filed the same on 19th Jan., 1995. What to talk of payment of tax and interest, if any, due from the undisclosed income, so

surrendered by the assessee on the due date, the assessee did not even pay the amount along with the belated return filed on 19th Jan., 1995.

From a reading of Expln. 5 to Section 271(1)(c) of the Act, it is evident that this concession is meant for the persons who after surrendering the

undisclosed income for the current year, pay the amount of tax along with interest, if any, on such income before the due date. This does not give

liberty to the assessee to plead that no penalty should be levied on him for concealment of income merely for the reason that having failed to pay

the due tax and the interest on the due date, the assessee paid the statutory interest thereon. In our view, the concession, as provided in Expln. 5,

referred to above, can be availed of only by an assessee who after surrendering the income, pays the tax immediately and not belatedly.

12. In Chhabra Emporium''s case (supra), relied upon by the assessee, the issue under consideration was whether Expln. 5 could be invoked by an

assessee where the surrender has been made during the course of search. The issue there was not about the time and payment of tax on the

amount of surrender so made. Accordingly, that case is distinguishable on facts.

13. In Gebilal Kanhaialal''s case (supra), the Tribunal had restored the penalty by rejecting the plea of concession, available under Expln. 5,

referred to above. The contention of the assessee before the High Court was that the amount of tax was paid before completion of assessment

which should be held to be sufficient for invoking Expln. 5, supra. To support his argument, he relied upon a judgment of Delhi High Court in

Chhabra Emporium''s case (supra), which was different on facts. The High Court accepted the plea of the assessee by recording the following

observations:

There is no dispute on the facts that search was continued till 1st Aug., 1987, and on 1st Aug., 1987, in the statement, the assessee has disclosed a

particular concealed income and surrendered it for the tax and tax has been paid along with interest. In these circumstances, the Tribunal has

committed error in restoring the penalty order of the AO.

14. We respectfully do not subscribe to the view taken by Rajasthan High Court for two reasons, namely, the facts in that case are distinguishable

and secondly, there is no discussion on the issue. In our view, if immunity from penalty is to be availed of by the assessee by invoking the

provisions of Expln. 5 to Section 271(1)(c) of the Act, tax on the surrendered income along with interest, if any, is required to be paid immediately

and in any case before the due date of return, in view of scheme of law which is clear from the language of the statute itself. The plea of non-

availability of funds for payment of tax due on the surrendered income, payment of tax along with interest before the date of assessment or

payment of interest for delayed payment of tax cannot be the circumstances which could be pleaded by the assessee to claim immunity from levy of

penalty in terms of Expln. 5, as referred to above An assessee, having surrendered his concealed income during the course of search and seizure

still neither files the return in time nor deposits the tax on surrendered income immediately after the surrender, cannot be given benefit of Expln. 5,

as referred to above.

Accordingly, finding no merit in the appeal, we dismiss the same while upholding the order passed by the Tribunal.