(2001) 04 RAJ CK 0103

In the Rajasthan High Court

Case No : Income Tax Reference No. 226 of 1985

B.L. Murarka APPELLANT

Vs

Commissioner of Income Tax RESPONDENT

Date of Decision : 19-04-2001

Acts Referred:
Income Tax Act, 1961 — Section 256(1), 256(2), 271(1)

Citation : (2001) 251 ITR 225

Hon'ble Judges : Sunil Kumar Garg, J;Rajesh Balia, J

Bench : Division Bench

Advocate : J.K. Ranka, for the Appellant; J.K. Singhvi, for the Respondent

Judgement

R. Balia, J.—Heard learned counsel for the parties.

2. This is an application u/s 256(2) of the Income Tax Act, 1961 (for short "the Act of 1961"), rejecting the application made by the asses-see-applicant for stating the case and referring the following questions said to be of law and arising out of the Tribunal''s order passed in I. T. A. No. 1408/JP of 1980, dated May 18, 1983 :

"1. Whether, on the facts and circumstances of the case, there was any material for the finding that the assessee had concealed any income or furnished inaccurate particulars of income under the meaning of Section 271(1)(c) of the Income Tax Act, 1961 ?

2. Whether it is lawful to impose penalty when even after additions by the Department there was still no taxable income and the assessee not liable to pay any tax ?

3. Whether it is lawful for the Third Member of the Tribunal to agree to imposition of penalty while holding the view that when the assessee''s explanation is read as a whole an inference cannot be drawn that the assessee is guilty of either concealment of income or furnishing of inaccurate particulars ?

4. Whether penalty u/s 271(1)(c) is exigible when the asses-see''s explanations for the substantial portion of the alleged suppressed sales had been accepted and only for a small portion, the explanations were not accepted ?"

3. The assessee has filed a return of loss for the assessment year 1974-75. The loss computed by the assessee amounted to Rs. 52,280 for the purpose of carrying forward. The assessee has shown his gross sales at Rs. 8,99,350 on which gross profit was shown at Rs. 1,17,159 disclosing the gross profit rate at 13.2 per cent. During the course of survey, the books of account of the assessee were seized from the premises of the assessee on the basis of which the Income Tax Officer was of the opinion that it disclosed undisclosed sales amounting to Rs. 3,35,000. The Income Tax Officer rejected the result as per books of account and estimated the gross turnover at Rs. 12,50,000, and applied thereon a gross profit rate of 15 per cent, and on that basis the assessment was made. Notwithstanding making additions in the returned income as aforesaid the net taxable income was still assessed as nil. Separate computation for unabsorbed loss to be carried forward was shown in the assessment order. However, ultimately in the quantum assessment additions on account of undisclosed turnover were restricted to Rs. 70,340 and the gross profit rate applicable thereto was accepted at 13.2 per cent, as disclosed by the assessee in his return which resulted in addition in the gross profit of the assessee to the tune of Rs. 9,314 only.

4. As the Assessing Officer was satisfied that the assessee has not disclosed truly and correctly particulars of his income, he initiated proceedings u/s 271(1)(c) of the Act of 1961 for levying penalty on the alleged concealment of the particulars of the income. The Assessing Officer has levied penalty of Rs. 32,840. For that purpose, the Income Tax Officer had taken into consideration the then existing assessment computing the gross profit by applying the gross profit rate of 15 per cent, on the estimated sale of Rs, 10,00,000 and which has resulted in the increased profit of Rs. 32,840. In substance, the penalty was levied on the basis of the estimated additions made in the gross profit. This order of the Assessing Officer was affirmed by the Commissioner of Income Tax (Appeals).

5. On further appeal, there was a difference of opinion between the Judicial Member and the Accountant Member of the Tribunal. The Judicial Member had confined the levy of penalty to the extent it was referable to additions made on account of additions made in the gross profit, the gross profit declared by the assessee as noticed above on estimated concealed sales of Rs. 70,340. However, the Accountant Member had taken into account the additions made in its entirety. On this difference of opinion about the basic amount to which particulars of income be held to have been concealed, the matter was referred to a Third Member, who agreed with the opinion of the Judicial Member and sustained the penalty of Rs. 9,314. However, he also opined that though the question has not been referred to him, in his opinion it was not a case of concealment at all. He has recorded his finding as under :

"Neither the order of the Appellate Assistant Commissioner in the quantum appeal nor the order of the Tribunal in the quantum appeal precisely establish that there has been a concealment of income and that to the extent of Rs. 32,840. Thirdly, the explanation given by the assessee in the fetter dated October 30, 1976, has to be read as a whole and when this explanation is read as a whole, an inference cannot be drawn that the assessee is guilty of either concealment of income or furnishing inaccurate particulars of income."

6. The Tribunal has not countenanced the contention of the assessee that even after making additions in the trading results, the net assessment of the income did not make him liable to pay any tax for the assessment year in question and no tax being payable to him, the penalty could not have been imposed u/s 271(1)(c). It could have only been imposed if any tax was payable, but not otherwise.

7. In the aforesaid circumstances, the assessee made an application before the Tribunal to refer the aforesaid questions stated to be questions of law arising out of the Tribunal''s order. The Tribunal was of the opinion that the Tribunal has only recorded a pure finding of fact that to the extent additions in the turnover were sustained, the same were not accounted for in his books of account- Thus, a finding of fact was recorded about concealment of particulars of his income to the tune income was imbedded in the concealed turnover. No question of law arises from such a finding. The application was, therefore, rejected.

8. Hence, this application u/s 256(2) of the Income Tax Act, 1961.

9. Having heard learned counsel for the assessee as well as learned counsel for the Revenue and perusing the material made available to us, we are of the opinion that the order of the Tribunal dated November 16, 1983, rejecting the application u/s 256(1) and holding that no question of law arises out of its appellate order in penalty proceedings is erroneous. In our opinion, the questions of law do arise from the order of the Tribunal passed in appeal arising from penalty proceedings.

10. At the outset it may be stated that question No. 2 is a pure question of law keeping in view the provisions of Section 271(1)(c)(iii). The fact is not in dispute that even after making additions in the trading results by estimating the profit on the basis of estimating higher turnover and after recording a finding that there has been concealment of particulars of such excess amount of turnover, the net effect of such additions has been that no tax was payable as a result of final assessment. At the relevant time Clause (iii) of Section 271(1)(c) which reads as under :

"In the cases referred to in Clause (c) in addition to any tax payable by him, a sum which shall not be less than, but which shall not exceed twice, the amount of the income in respect of which the particulars have been concealed or inaccurate particulars have been furnished".

11. The contention raised by the assessee, directly gives rise to an interpretation

of the expression "in addition to any tax payable by him" in the aforesaid provision. A question involving interpretation of a statute is always a question of law and if arises out of the Tribunal''s order and required to be referred to the High Court for its opinion, the Tribunal is bound to refer the same to the High Court unless the answer to such question is self-evident or has been answered by the apex court, which binds all.

12. We have noticed above that the assessee had raised the contention before the Tribunal that since as a result of assessment made even after additions on account of additions in his gross turnover, no tax was payable by him the question of paying any penalty in addition to tax payable by him could not arise.

13. Learned counsel for the assessee has brought to our notice the judgment of the Punjab and Haryana High Court in Commissioner of Income Tax Vs. Prithipal Singh and Co., wherein a Bench of the Punjab and Haryana High Court has taken the view that the word "income" in Clauses (c) and (iii) of section 271(1) of the Income Tax Act, 1961, refers to positive income only. Evasion of tax is the sine qua non for imposition of penalty. Clause (iii) of Section 271(1) deals with cases referred to in Clause (c) under Sub-section (1) of Section 271 of the Act and it clearly provides therein that the penalty or further sum payable by a person would be in addition to any tax payable by him.

14. Learned counsel points out that the appeal against this judgment has been dismissed by the Supreme Court. He also places reliance on another decision of the Kerala High Court in Commissioner of Income Tax Vs. N. Krishnan, , wherein the Bench of the Kerala High Court has expressed a similar opinion by holding that it is clear from a perusal of Section 271(1)(c) of the Income Tax Act, 1961, that penalty could be determined with reference to the amount of tax payable and unless tax payable is determined, penalty could not be quantified. Where a loss assessment is made, the question of determining the amount of tax payable does not arise and therefore no penalty could be determined.

15. Thus, while two High Courts have taken the view which the assessee is canvassing, there being no decision of this court, in our opinion, the following question does arise for consideration in this application :

"Whether, in the facts and circumstances, the Tribunal was justified in sustaining the penalty u/s 271(1)(c)(iii) even in the case where no positive income has been assessed, and no tax was payable by the assessee ?"

16. The suggested questions Nos. 1, 3 and 4, in our opinion, are overlapping and repeat of the same question. The real question that arises for consideration is framed as under :

"Whether there was any material on the basis of which explanation furnished by the assessee against the additions made in the assessment could be rejected in the penalty proceedings, particularly when the basic finding about additions in the gross turnover was on vascillating estimate ?"

17. Where a finding of fact is challenged on the ground that no material exists for reaching such finding, it also gives rise to a question of law, is well established. Therefore, the above question, in our opinion, also arises from the appellate order of the Tribunal.

18. Accordingly, this application is allowed and we direct the Income Tax Appellate Tribunal, Jaipur Bench, Jaipur, to state the case and refer the aforesaid two questions of law to this court for its opinion.

19. There shall be no order as to costs.

