

(2014) 02 AHC CK 0019
In the Allahabad High Court
Case No : IT Appeal No. 457 of 2005

CIT and Others

APPELLANT

Vs

Tricone Cements (P) Ltd.

RESPONDENT

Date of Decision : 13-02-2014

Acts Referred:

Income Tax Act, 1961 — Section 2(24), 260A, 271, 271(1)(c), 72

Citation : (2014) 02 AHC CK 0019

Hon'ble Judges : Mahesh Chandra Tripathi, J; Ashok Bhushan, J

Bench : Division Bench

Advocate : A.N. Mahajan, B. Agrawal and Dhananjay Awasthi, Advocates for the Appellant

Judgement

Ashok Bhushan, J.—This appeal under section 260A of the Income Tax Act has been filed by the appellant against the judgment and order of the Tribunal dt. 27-5-2005 in ITA No. 1433/Del/2004. The appeal has been admitted on the following substantial question of law Nos. 2 and 3 :

"(2) Whether in the facts and circumstances of the case, the Tribunal was legally correct to hold that the judgment of the Hon'ble Supreme Court in the case of Commissioner of Income Tax Vs. Prithipal Singh and Co., was applicable even after insertion of Explanation 4 to section 271 of the Act with effect from 1st April, 1976?

(3) Whether in the facts and circumstances of the case, the Tribunal is justified in law in ignoring that the Explanation 4 to section 271 brought on the statute with effect from 1-4-1976 is clarificatory in nature as Explanation so brought to the main provision is merely a mandate to explain or clarify certain ambiguities which have crept in the statutory provision [reliance Commissioner of Income Tax Vs. Mohan Meakin Breweries Ltd., (High Power Committee) and Laxmi Industries Ltd. and Others Vs. Income Tax Officer and Another, ?"

2. The brief facts giving rise to this appeal are : the assessee filed a return for

the assessment year 1995-96 showing a net loss of Rs. 61,85,614. While completing the assessment, the assessing officer also initiated penalty proceedings. Penalty of Rs. 40,00,000 was imposed under section 271(1)(c). The assessee filed an appeal. In the appeal, the assessee contended that there being no positive income, the imposition of penalty under section 271(1)(c) was not justified. Reliance was placed on the judgment of Punjab & Haryana High Court in Commissioner of Income Tax Vs. Prithipal Singh and Co., , which decision has been affirmed by the Apex Court in Commissioner of Income Tax Vs. Prithipal Singh and Co., . The Commissioner (Appeals) allowed the appeal. The Commissioner (Appeal) held that penalty was not imposable in view of the judgment of Punjab and Haryana High Court in Commissioner of Income Tax Vs. Prithipal Singh and Co., as affirmed by the Apex Court in CIT v. Prithipal Singh & Co. (supra). The Department filed an appeal before the Tribunal which appeal has been dismissed relying on the judgment of the Apex Court in CIT v. Prithipal Singh & Co. (supra).

3. Sri Dhananjay Awasthi, learned counsel for the appellant has placed reliance on the three Judges Bench judgment of the Apex Court in Commnr. of Income Tax-I, Ahmedabad Vs. Gold Coin Health Food Pvt. Ltd., as well as subsequent judgment of the Apex Court in Commissioner of Income Tax Vs. Unipol Chemicals Intermediates Ltd., . The Explanation 4(a) to section 271(1)(c) has been substituted by Finance Act, 2002 with effect from 1-4-2003. The amended Explanation 4(a) provides as follows :

"Explanation 4.--For the purposes of clause (iii) of this sub-section, the expression the amount of tax sought to be evaded,--

(a) in any case where the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished has the effect of reducing the loss declared in the return or converting that loss into income, means the tax that would have been chargeable on the income in respect of which particulars have been concealed or inaccurate particulars have been furnished had such income been the total income."

4. The Apex Court in CIT v. Gold Coin Health Food (P) Ltd. (supra) had occasion to consider import of Explanation 4 to section 271(1)(c) and also the judgment of the Apex Court in CIT v. Prithipal Singh & Co. (supra). It is useful to quote the following observations of the Apex Court in paras 7, 8, 9, 10, 11 and 12 :

"7.....Before proceeding further, it will be necessary to focus on the definition of the expression income in the statute. Section 2(24) defines Income which is an inclusive definition, and includes losses i.e., negative profit. The position has been elaborately dealt with by this Court in Commissioner of Income Tax (Central), Delhi Vs. Harprasad and Co. P. Ltd., . This Court held with reference to the charging provisions of the statute that the expression income should be understood to include losses. The expression profits and gains refers to positive income whereas losses represent negative profit or in other words minus income.

This aspect does not appear to have been noticed by the Bench in Virtuals case (supra). Reference to the order by this Court dismissing the Revenue Civil Appeal No. 7961 of 1996 in CIT v. Prithipal Singh & Co. (supra) is also not very important because that was in relation to the assessment year 1970-71 when Explanation 4 to section 271(1)(c) was not in existence. The view of this Court in Harprasads case (supra) leads to the irresistible conclusion that income also includes losses. Explanation 4(a) as it stood during the period 1-4-1976 to 1-4-2003 has to be considered in the background."

8. It appears that what the Finance Act intended was to make the position explicit which otherwise was implied. The recommendations of the Wanchoo Committee pursuant to which Explanation 4(a) was inserted with effect from 1st April, 1976 need to be noted. At para 2.74 it was noted as follows :

"2.74 We are not unaware that linking concealment penalty to tax sought to be evaded can, at times, lead to some anomalies. We would recommend that in cases where the concealed income is to be set off against losses incurred by an assessee under other heads of income or against losses brought forward from earlier years, and the total income thus gets reduced to a figure smaller than the concealed income or even to a minus figure, the tax sought to be evaded should be calculated as if the concealed income were the total income."

9. Reference to the Departmental Circular No. 204 dt. 24-7-1976 reported in (1977) 110 ITR (St) 21 has also substantial relevance. Same reads as follows :

"New Explanation 4 defines the amount of tax sought to be evaded. According to the definition, this expression will ordinarily mean the difference between the tax on the total income assessed and the tax that would have been chargeable had such total income been reduced by the amount of income in respect of which particulars have been concealed. In a case, however, where on setting off the concealed income against any loss incurred by the assessee under other heads of income or brought forward from earlier years, the total income is reduced to a figure lower than the concealed income or even to a minus figure, the tax sought to be evaded will mean the tax chargeable on the concealed income as if it were the total income. Another exception to the general definition of the expression tax sought to be evaded given earlier is a case to which Explanation 3 applies. Here, the tax sought to be evaded will be the tax chargeable on the entire total income assessed."

10. A combined reading of the Committees recommendations and the circular makes the position clear that Explanation 4(a) to section 271(1)(c) intended to levy the penalty not only in a case where after addition of concealed income, a loss returned, after assessment becomes positive income but also in a case where addition of concealed income reduces the returned loss and finally the assessed income is also a loss or a minus figure. Therefore, even during the period between 1-4-1976 to 1-4-2003 the position was that the penalty was leviable even in a case where addition of concealed income reduces the returned

loss.

11. When the word income is read to include losses as held in Haiprasads case (supra) it becomes crystal clear that even in a case where on account of addition of concealed income the returned loss stands reduced and even if the final assessed income is a loss, still penalty was leviable thereon even during the period 1-4-1976 to 1-4-2003. Even in the circular dt. 24-7-1976, referred to above, the position was clarified by CBDT. It is stated that in a case where on setting off the concealed income against any loss incurred by the assessee under any other head of income or brought forward from earlier years, the total income is reduced to a figure lower than the concealed income or even to a minus figure the penalty would be imposable because in such a case the tax sought to be evaded will be tax chargeable on concealed income as if it is total income.

12. Law is well settled that the applicable provision would be the law as it existed on the date of the filing of the return. It is of relevance to note that when any loss is returned in any return it need not necessarily be the loss of the concerned previous year. It may also include carried forward loss which is required to be set up against future income under section 72 of the Act. Therefore, the applicable law on the date of filing of the return cannot be confined only to the losses of the previous accounting years."

5. The Apex Court has also referred to circular dt. 24-7-1976 which clarified that in a case where on setting off the concealed income against any loss incurred by the assessee under any other head of income or brought forward from earlier years, the total income is reduced to a figure lower than the concealed income or even to a minus figure the penalty would be imposable. The Apex Court further did not approve the earlier judgment in CIT v. Prithipal Singh & Co. (supra). The law on the point having elaborately dealt by the three Judges Bench in CIT v. Gold Coin Health Food (P) Ltd. (supra), we are of the view that Tribunal was not justified in relying on the judgment of CIT v. Prithipal (supra). The Explanation 4(a) to section 271(1)(c) was clarificatory in nature, hence, penalty was rightly imposed by the assessing officer. Following the judgment of the Apex Court in CIT v. Gold Coin Health Food (P) Ltd. (supra), we answer both the above questions in favour of the Revenue and against the assessee. The appeal is allowed accordingly.