courtkutchehry.com

Company : CourtKutchehry
Website : www.courtkutchehry.com
Printed For :
Date : 30/08/2026

(2013) 08 AHC CK 0196

In the Allahabad High Court

Case No : ITA No. 9 of 2011

CIT APPELLANT

Vs

Shiv Kumar Jaiswal RESPONDENT

Date of Decision : 26-08-2013

Acts Referred:

Citation : (2013) 08 AHC CK 0196

Hon'ble Judges : Satish Chandra, J;Rajiv Sharma, J

Bench : Division Bench

Judgement

1. Present appeal u/s 260-A of the Income Tax Act 1961, has been preferred against the judgment and order dated 01.10.2010 passed by the Income Tax Appellate Tribunal, Lucknow in ITA No. 287/Luc/2009 for the Assessment Year 2004-05.

2. On 15.03.2012, a Coordinate Bench of this Court has admitted the instant appeal on the following substantial question of law:

''Whether the Income Tax Appellate Tribunal has erred in law in failing to appreciate that the assessee had not disclosed the income from sale of property at 278/91, Moti Nagar, Lucknow as income from the capital gains in his return of income and that therefore, he is liable for penalty u/s 271(1)(c) of the Income Tax Act, 1961.''

3. The brief facts of the case are that the assessee-Sri Shiv Kumar Jaiswal and his wife Smt. Asha Jaiswal were the owner of a property known as ''Hotel Asha Deep'' situated at 278/91, Moti Nagar, Aish Bagh Road, Lucknow. The said property was gifted by a registered gift deed to a family friend Sri Raj Kumar Chaurasia. For the purpose of stamp duty, the property was valued for a consideration of Rs. 1,74,17,340 on which stamp duty of Rs. 17,42,000 was paid by Sri Raj Kumar Chaurasia. Sri Raj Kumar Chaurasia has given a return gift of Rs. 75,00,000 to a minor son of the assessee by a registered Gift Deed.

4. The assessing officer has considered that it is a sale and invoked the provisions of Section 50(c) of the Income Tax Act for the purpose of computation of capital gain. Thus, the value of the stamp duty shown by the assessee was taken as a sale consideration and the assessing officer computed the long term capital gains for Rs. 34,41,001 u/s 48 of the Income Tax Act and considered the sale u/s 50(c) of the Act. On confrontation with the assessing officer, the assessee has made surrender of Rs. 6,88,200 only to purchase peace with the department and to avoid penalty etc. As compelled by the ITO, a sum of Rs. 6,88,200 was paid by filing revised computation, nonetheless, the assessing officer has levied the penalty of Rs. 7,60,000 u/s 271(1)(c) of the Income Tax Act, 1961. But the same was deleted by the First Appellate Authority as well as by the Tribunal vide its impugned order dated 01.10.2010. Being aggrieved, the department has filed the present appeal.

5. With this background, Sri D.D. Chopra, learned counsel for the department has justified the penalty order and submits that the gift amount is nothing but is a sale consideration. The assessee surrendered long term capital gain of Rs. 34,41,001 for the purpose of tax. This gift is not a return gift but a part of sale consideration. The transaction is nothing but a sale and purchase of the Hotel Property. He also submits that the surrender is not voluntarily. So, the penalty was rightly imposed by the assessing officer for this purpose, he has relied on the following cases:

1. Union of India (UOI) and Others Vs. Dharamendra Textile Processors and Others,

2. Banaras Chemical Factory Vs. Commissioner of Income Tax, and

3. Thirupathy Kumar Khemka and Raj Kumar Khemka Vs. The Commissioner of Income Tax,

Lastly, he made a request that the impugned orders passed by the lower authorities may kindly be set aside.

6. On the other hand, Sri Pritish Kumar, learned counsel for the assessee, at the strength of the written submissions, has justified the impugned order passed by the Tribunal. He submits that the surrender was made to buy peace. He read out the order passed by the Commissioner (Appeals), where it was mentioned that the assessee has made surrender only to purchase peace with the Department and after being compelled by the ITO, a sum of Rs. 6,88,200 was paid by revising the computation, as appears from the circumstances of the case. Hence, it is not a fit case for imposition of penalty because the concealment of income or particulars of income, is not found to be established from the material on record and the Department has also failed to prove by independent material that the assessee had concealed his income or particulars thereof.

7. Learned counsel also submits that the assessing officer agreed to the assessees proposal for the payment of the Tax but later, issued a notice to levy

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/cit-appellant-hash-shiv-kumar-...

penalty u/s 271(1)(c) of the Income Tax Act. In the instant case, the assessing officer levied the penalty of Rs. 7,60,000. He also submits that in the same assessment year, on 08.08.2003, the minor son of the assessee has also received a Gift of Rs. 15,00,000 from one Sri Mohd. Shoaib but the assessing officer has taken no cognizance of the said Gift. So, the approach of the assessing officer was not uniform. But in the instant case, the assessing officer has passed the penalty order in an arbitrary manner. He submits that the surrender was a compromise, just to purchase the peace without bringing out any independent material or evidence on record by the assessing officer The assessing officer simply relying on the surrender application of the assessee and wrongly levied the penalty. He also submits that the Hon''ble Supreme Court in the case of K.C. Builders and Another Vs. The Assistant Commissioner of Income Tax, defines the word concealment by observing that :

''The word concealment inherently carries with it the element of mens rea and further held that unless and until there is some evidence to show or some circumstances found from which it can be gathered that the omission was attributable to an intention or desire on the part of the assessee to hide or conceal the income so as to avoid the imposition of tax thereon. In order that a penalty u/s 271(1)(c) may be imposed''

Lastly, he made a request to dismiss the appeal filed by the department.

8. We have heard both the parties and gone through the material available on record.

9. In the instant case, all the particulars were available before the A.O. and on the basis of the particulars, the transaction was considered as sale and purchase. The gift was not found genuine and the same was considered as a consideration for the sale of the Hotel. In addition, the assessing officer has not discovered any material. There was no mens rea on the part of the assessee but it was a poor tax planning of the assessee.

10. In the case of Commissioner of Income Tax Vs. Suresh Chandra Mittal, it was observed that if the assessee had offered additional income to buy peace of mind and to avoid litigation, penalty u/s 271(1)(c) of the Act could not be levied.

11. In the instant case, there is no mala fide intention on the part of the assessee and the assessing officer has not brought any evidence on record to prove that there was concealment of income. Before surrender, the assessing officer and the assessee have reached to a compromise that no penal action be taken in the instant case but the assessing officer has levied the penalty without discovering any new facts. The gift given by one Sri Mohd. Shoaib was accepted by the assessing officer without taking any action. Thus, the surrender was on ''agreed basis'' as per the ratio laid down by this Court in the case of Commissioner of Income Tax Vs. Saran Khandsari Sugar Works, Moreover, in the instant case, the assessing officer did not ask about the amount of sale consideration minus gift in question.

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/cit-appellant-hash-shiv-kumar-…

12. In the light of above discussion and by considering the totality of the facts and circumstance, we find no reason to interfere with the impugned order passed by the appellate authorities. Thus, both the orders of the appellate authorities are hereby sustained along with the reasons mentioned therein.

The answer to the substantial question of law is in favour of the assessee and against the department.

In the result, appeal filed by the department is dismissed.

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/cit-appellant-hash-shiv-kumar-…