(2010) 09 P&H CK 0033

In the Punjab And Haryana At Chandigarh

Case No : IT Ref. No. 202 of 1999 (A.Y. 1989-90)

Commissioner of Income Tax	APPELLANT
Vs	
Bhandari Silk Store	RESPONDENT

Date of Decision : 23-09-2010

Acts Referred:
Income Tax Act, 1961 — Section 132, 132(4), 133A, 139(1), 144

Citation : (2011) 242 CTR 443 : (2011) 337 ITR 153

Hon'ble Judges : Ajay Kumar Mittal, J;Adarsh Kumar Goel, J

Bench : Division Bench

Judgement

Ajay Kumar Mittal, J.—Following question of law has been referred for opinion of this Court u/s 256(1) of the Income Tax Act, 1961 (in short "the Act") by the Income Tax Appellate Tribunal, Amritsar Bench, Amritsar (hereinafter referred to as "the Tribunal") arising out of its order dated 30-9-1998 in ITA No. 448/ Asr/1992 in respect of assessment year 1989-90:

Whether on the facts and in the circumstances of the case, the learned Tribunal is justified in law in confirming the order of the Commissioner (Appeals) deleting the penalty of Rs. 1,70,625 imposed u/s 271(1)(c) of the Income Tax Act, 1961?

2. The necessary facts for disposal of the reference may be noticed. Search and seizure operation was carried at the business premises of the Assessee and residential premises of the partners on 11-4-1989. The Assessee made disclosure statement u/s 132(4) of the Act whereby a surrender of Rs. 3,25,000 was made relating to assessment year 1989-90. A sum of Rs. 2,00,000 was declared on account of stocks not entered in the books of accounts whereas balance of Rs. 1,25,000 reflected other undisclosed income of the Assessee. However, this disclosure was included in the return of income filed for the assessment year in question. The assessing officer completed the assessment and also initiated penalty proceedings. The assessing officer concluded that since the Assessee did not fulfil the requirements laid down in Explanation 5 to Section 271(1)(c), the Assessee was liable to penalty. The assessing officer determined that tax on

income sought to be evaded amounting to Rs. 3,25,000 would attract tax of Rs. 1,70,625 by treating the Assessee firm as unregistered firm, imposed 100 per cent penalty of the tax sought to be evaded, i.e. Rs. 1,70,625. On appeal, the Commissioner (Appeals) (in short "the Commissioner (Appeals)") deleted the penalty. The appeal filed by the revenue was dismissed by the Tribunal.

3. The Tribunal while deleting the penalty bifurcated the surrender into two components, i.e. Rs. 2,00,000 on account of lesser value of stock shown in the books of account and Rs. 1,25,000 relating to general disclosure made by the Assessee. The Tribunal recorded that surrender of Rs. 2,00,000 was covered under Explanation 5 to Section 271(1)(c) whereas disclosure of Rs. 1,25,000 was reflected in the return of income filed by the Assessee relating to assessment year 1989-90. The relevant observations made in paras 12 and 13 of the order of the Tribunal while upholding deletion of penalty, read thus:

12. Coming to the case of the Appellant, the first disclosure of Rs. 2,00,000 relates to stock and another disclosure of Rs. 1,25,000 is a general disclosure of income. At this stage, we have to give a proper meaning to other valuable articles or things. The Explanation 5 relates to money, bullion, jewellery or other valuable articles or things. We are of the opinion that the stock can be included under the definition of other valuable articles or things. The item of stock belonging to Assessee is an article or thing which has a value with an ultimate intention of selling the same thing for a value in the market. The stock may or may not be recorded in the books of accounts. Therefore, unaccounted stock can be subject-matter of surrender. The learned Commissioner (Appeals) has given his finding that the Appellant has fulfilled all the conditions laid down regarding payment of taxes, inclusion of the amount in the returned income etc. Therefore, penalty on the surrender of Rs. 2,00,000 cannot be envisaged.

13. So far as the surrender of Rs. 1,25,000 is concerned, this is not covered under the Explanation 5 to Section 271(1)(c) because the offer is to cover overall addition and does not refer to the stock. In case, it is treated to be related to the stock, we agree with the learned Commissioner (Appeals) then in that case it is covered under Explanation 5. In case, it is not referred to the stock, then under such circumstances, the income offered forms part of the income returned and as such there is no concealment. Section 271(1)(c) deals with the penalty provision when during any proceedings under the Act, the assessing officer is satisfied that person has concealed the particulars of his income or furnished inaccurate particulars of income. The element of concealment is embedded in the return of income or in the statements attached with the return of income. If in the return of income, there is no concealment all particulars of income are correct then there is no concealment, and the assessing officer does not get jurisdiction to impose penalty u/s 271(1)(c). If during the year, due to survey action u/s 133A or due to any other action, the Appellant includes any income in his books of account and reflects same in the return of his income, the assessing officer cannot invoke 271(1)(c) under those situations. If he is not satisfied regarding

the accuracy of such income he may use Section 145 or 144 as the case may be but under no circumstances he can invoke Section 271(1)(c) under these circumstances. The entry of Rs. 1,25,000 has been reflected in the return of income and as such there is no element of concealment involved. Keeping in view the above discussion, penalty deleted by the Commissioner (Appeals) is confirmed.

4. Learned Counsel for the revenue has laid challenge to the aforesaid findings of the Tribunal on the plea that Explanation 5 to Section 271(1)(c) has been misinterpreted by the Tribunal. Further, it was submitted that disclosure of Rs. 1,25,000 having been made at the time of search would attract penalty u/s 271(1)(c) of the Act.

5. We have heard learned Counsel for the revenue and do not find any merit in the submissions made by him.

6. Explanation 5 to Sub-section (1) of Section 271 was inserted by the Taxation Laws (Amendment) Act, 1984 with effect from 1-10-1984. It was amended by the Taxation Laws (Amendment & Miscellaneous Provisions) Act, 1986 with effect from 10-9-1986. It would be apposite to reproduce Explanation 5 to Section 271(1)(c) of the Act as it existed at the relevant time which reads thus:

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 hereinafter in this Explanation referred to as assets and the Assessee claims that such assets have been acquired by him utilizing wholly or in part his income,--

(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) or Sub-section (1) of this section, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income, unless,--

(1) such income is, or the transactions resulting in such income are recorded,--

(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. Delhi High Court in Commissioner of Income Tax Vs. Chhabra Emporium, while defining the scope of Sub-clause (2) to Explanation 5 which is relevant in the present case, observed as under:

A bare reading of Sub-clause (2) to Explanation 5 makes it clear that if, during the course of search, a statement of the Assessee is recorded under Sub-section (4) of Section 132 in respect of any amount, cash, stock, jewellery or other valuable article or thing which is found in his possession or control and the Assessee admits in his statement that such income was acquired income or was acquired with the undisclosed income and pays the tax, together with interest if any on the said amount, he is granted an immunity for levy of penalty u/s 271(1)(c) of the Act.

8. The Tribunal while upholding deletion of penalty on surrender of Rs. 2,00,000 has categorically recorded in para 12 of the order that the surrender related to the stock which was included under the definition of other valuable articles or things and that the conditions enumerated, under Explanation 5 to Section 271(1)(c) were fulfilled. It is also not disputed that the statement of the Assessee was recorded u/s 132(4) of the Act on the date of search. Therefore, the Tribunal was right in upholding order of the Commissioner (Appeals) cancelling penalty on Rs. 2,00,000.

9. Adverting to surrender of Rs. 1,25,000, the same was taken to be not covered under Explanation 5 to Section 271(1)(c) of the Act. However, the Tribunal in para 10 of the order had referred to the statement made by the partner of the Assessee-firm on the date of search to the authorized officer. It reads thus:

10. Coming to the factual position of the case, search and seizure operation took place at the business premises of the Appellant. Authorized officer recorded at 2 AM on 12-4-1989, a statement u/s 132 from one of the partners of the Appellant-firm. The relevant portion of the statement is reproduced as follows:

Q. I wish to bring it to your notice the provision of Section 132(4) of the Income Tax Act. Do you want to avail of the immunity under the above clause which has been explained by me to you in the local language.

Ans. A sum of Rs. 2 lacs (Rs. two lakhs only) is to be shown as an additional income which will accrue other than the normal income as on 31-3-89 as per books of accounts. This additional income Rs. 2,00,000 will be added in the stock as I have got apprehension in my mind that the stock available in my shop is artificially more than the books of accounts.

After the statement was recorded there was a note signed by the authorized officer and partner of the firm which reads as under:

At 2 AM on 12-4-1989 when search and seizure party was going to leave the business premises of M/s Bhandari Silk Store, Shri Vijay Kumar, partner further affirmed an addition of Rs. 1,25,000 (Rs. one lakh twenty-five thousand only). It means that the total addition which is to be made as on 31-3-1989 i.e. for the assessment year 1989-90 there will be an addition of Rs. 3,25,000 over and above the normal income which will accrue to the firm after the close of the books. This addition is subject to penalty u/s 271(1)(c) and no prosecution.

10. It has been noticed by the Tribunal that the Assessee had disclosed this amount at the time the search party was leaving the premises of the Assessee at 2 AM on 12-4-1989. It was further recorded that the time for filing return of income for the assessment year 1989-90 u/s 139(1) had not expired on the date of search and the Assessee having disclosed the amount of Rs. 1,25,000 in the return filed for the assessment year 1989-90 and paid all taxes etc. could not be held to have concealed the particular of income which were liable to penalty u/s 271(1)(c). The Tribunal was, thus, right in upholding cancellation of penalty on this amount as well.

11. In the light of the finding recorded by the Tribunal in which no perversity or illegality could be shown by the learned Counsel for the revenue, the Tribunal was right in deleting the penalty.

12. Accordingly, the question referred is answered against the revenue and in favour of the Assessee.

13. The reference stands disposed of.

