
(2008) 07 SHI CK 0002
In the High Court Of Himachal Pradesh

Commissioner of Income Tax	Vs	APPELLANT
Himachal Oxygen (P) Ltd.		RESPONDENT

Date of Decision : 17-07-2008

Acts Referred:

Income Tax Act, 1961 — Section 271(1)(c)

Citation : (2008) 07 SHI CK 0002

Hon'ble Judges : V.K. Ahuja, J;Deepak Gupta, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Deepak Gupta, J.—By this judgment we are disposing of the aforesaid two appeals since both the appeals have been admitted on the following identical substantial question of law:

1. Whether on the facts and circumstances of the case the Tribunal was right in holding that as there was no taxable income or tax assessed for payment during a particular year, the question of evasion and consequently penalty did not arise?
2. In IT Appeal No. 4 of 2002, the assessee filed a loss return for the assessment year 1991-92. The assessing officer did not accept the return and found that in fact there was positive income to the extent of Rs. 3,54,134. However, since the assessee was entitled to claim brought forward depreciation for the year 1988-89, the income was declared to be nil. The assessing officer also initiated penalty proceedings in terms of Section 271(1)(c) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") for non-disclosure on the ground that the assessee had furnished inaccurate particulars/concealed the material particulars along with his return.

Thereafter, the assessing officer levied penalty of Rs. 8.98,618. On an appeal being carried to the Commissioner (Appeals), the Commissioner (Appeals) allowed the appeal and held that no penalty could be levied since no positive income had been declared. The appeal filed by the revenue before the Tribunal,

was also rejected.

3. In IT Appeal No. 7 of 2002, the assessee filed return of income declaring total loss of Rs. 4,34,383. The assessing officer assessed the loss of Rs. 23,016. In this case also, the penalty proceedings were initiated on similar grounds.

A penalty of Rs. 2,39,817 was imposed by the assessing officer vide order dated 3-10-1994. The Commissioner (Appeals), vide order dated 16-6-1995, cancelled the said penalty. The appeal filed by the revenue was dismissed by the Tribunal on 8-11-2001.

4. Admittedly, in both the cases, no positive income was declared by the assessee. In fact, in both the cases, the assessee had filed return(s) claiming loss. In the case of M/s Kalinga Cables Industries, the assessing officer had also assessed the income as a loss though a loss was assessed at an amount less than that claimed by the assessee. In the case of M/s Himachal Oxygen (P) Ltd., though the assessing officer for the assessment year in question assessed positive income but after adjusting the depreciation, the net income was declared to be nil.

5. The question framed in both the cases is no longer *res integra* and this issue is concluded by a judgment of the Apex Court delivered in *Virtual Soft Systems Ltd. v. CIT* 2007 (9) SCC 665 and, therefore, we are not dealing with the contentions raised by both the parties in great detail. We may however notice that as far as the case of M/s Himachal Oxygen (P) Ltd. is concerned, Shri Vinay Kuthiala, has tried to distinguish the aforesaid authority mainly on the ground that the Income Tax Officer had assessed the income for the assessment year in positive terms and only after depreciation, this was deemed to be nil income. In our considered view, this will make no difference. Even in *Virtual Soft Systems Ltd.* case (*supra*), the assessee himself had filed the positive return of Rs. 1,32,44,507.29 and only after claiming depreciation was a nil return declared. Therefore, what is important is the final return and not whether the assessee in that particular year has filed positive return or not. After discussing the entire law, the Apex Court in *Virtual Soft Systems Ltd.* case (*supra*) held as follows:

Explanation 4 to Section 271(1)(c) as it stood prior to its amendment by the Finance Act, 2002, requires to be carefully compared with the said Explanation as amended by the Finance Act, 2002. The comparison of the Explanation as it stood before 2002 and after 2002 by itself shows clearly that it is only after the amendment made by the Finance Act, 2002, that the Explanation dealt with the situation of an assessee having returned a loss and where, even after addition of concealed income by the assessee, the end result was still an assessed loss. This situation was not dealt with at all by the Explanation to Section 271(1)(c) as it stood prior to its amendment by the Finance Act, 2002. Further, a plain reading of Clause (a) of Explanation 4 to Section 271 as it stood prior to the 2002 Amendment, shows that this Clause applied to a situation where an assessee has returned a loss which by reason of the addition of the concealed income thereto

by the assessing officer, is converted into a positive figure of the assessed income on which the assessee is required to pay tax. In contrast, Clause (c) of the said Explanation 4 applies only to a situation where the assessee has returned a positive income, which stands enhanced by reason of the concealed income added thereto by the assessing officer in the assessment order. Consequently, both under Clause (a) and Clause (c) of the said Explanation 4, the assessee can be penalized only if he has a positive assessed income on which tax is payable. The only difference between Clause (a) and Clause (c) is that Clause (a) applied to an assessee who had filed a loss return, and Clause (c) to an assessee who has filed a positive return. However, the end result in both the cases was the same, i.e., a positive assessed income on which the assessee was required to pay tax. It is this basic condition precedent for the imposition of the penalty, i.e., existence of liability to pay tax which existed prior to 2002, which has been done away with for the first time by the Finance Act, 2002.

In para 58, the Apex Court held as follows:

For the reasons stated above, the appeals are accepted and the impugned judgment is set aside, it is held that prior to its amendment by the Finance Act, 2002, in the absence of any positive income and no tax being levied, penalty for concealment of income could not be levied. The view taken by the Karnataka High Court in *P.R. Basavappa and Sons Vs. Commissioner of Income Tax*, and *Commissioner of Income Tax Vs. Chemiequip Ltd.*, does not lay down the correct law.

6. A bare perusal of these two paras clearly shows that the appellate court has held that after 1976 and prior to the Finance Act of 2002 coming into force, in the absence of any positive income being assessed, no penalty for concealment of income could be levied. In view of the clear-cut pronouncement of the Apex Court, the appeal(s) are rejected. No order as to costs.