(2008) 03 KL CK 0052

In the High Court Of Kerala

Case No : IT Ref. No. 3 of 2003

Commissioner of Income Tax APPELLANT

Vs

S.J. Prasad RESPONDENT

Date of Decision : 03-03-2008

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

Citation : (2008) 220 CTR 169

Hon'ble Judges : T.R. Ramachandran Nair, J;C.N. Ramachandran Nair, J

Bench : Division Bench

Advocate : P.K.R. Menon and George K. George, for the Appellant; P. Balachandran and Preetha S. Nair, for the Respondent

Final Decision : Allowed

Judgement

C.N. Ramachandran Nair, J.—This is a reference at the instance of the Revenue against the order of the Tribunal cancelling penalty levied on the assessee u/s 271(1)(c) of the IT Act for the asst. yr. 1990-91. The respondent is an advocate and power of attorney holder of the assessee by name M.K. Ali. A search was conducted in the assessee premises on 14th Feb., 1990 and during search cash for Rs. 5,75,000 was seized by the Department. In the course of search the assessee gave a statement declaring that the amount belonged to one Sri M.G. Abdul Rahiman, Poochakad House, Poochakad P.O. Pallikkara. However/later the assessee failed to establish his case that the amount belonged to the said Sri Abdul Rahiman, and therefore he filed a return on 27th Sept., 1990 declaring the amount as income from other sources. The AO initiated penalty proceedings u/s 271(1)(c) of the Act for concealment of Income. The assessee claimed immunity from penalty because of filing of return and payment of tax on the income declared. However, the AO noticed that there is concealment of income by virtue of operation of Expln. 5 to Section 271(1)(c) of the Act. However, he limited the penalty levied u/s 271(1)(c) of the Act to the minimum amount. Even though assessee filed appeal against penalty order, the same was rejected by the first appellate authority, namely, CIT(A). However, on second appeal by the assessee, the Tribunal cancelled the penalty on the assumption that prior to the due date for filing of return, the assessee returned the income and paid tax thereon. It is against this order of the Tribunal cancelling the penalty that Department has filed this reference.

2. We have heard senior counsel Sri P.K.R. Menon appearing for the Revenue and senior counsel Sri P. Balachandran appearing for the respondent assessee. The Revenue''s counsel rightly pointed out that the assumption of the Tribunal that for the year 1990-91 the return was due on 30th June, 1991 is obviously incorrect. In fact return was due on 30th June, 1990 and search having been made on 14th Feb., 1990, the assessee had enough opportunity to file return and remit tax on the income so declared. Besides this, the assessee in the course of search could have saved penalty by accounting the income at least on the date of search and then paid tax by declaring it. Even after search and seizure of cash by. the Department, the assessee proceeded to contend that the amount belonged to another person, but failed to prove the same. Even though counsel for the assessee relied on the decisions of the Supreme Court in Dilip N. Shroff Karta of N.D. Shroff Vs. Joint Commissioner of Income Tax, Special Range Mumbai and Another, and Sri T. Ashok Pai Vs. Commissioner of Income Tax, Bangalore, , we notice that facts in these two decisions are different and in either of the cases the Supreme Court has not considered the scope of Expln. 5 to Section 271(1)(c) of the Act. Penalty arising out of search is covered under Expln. 5 to Section 271(1)(c) of the Act which provides that if the assessee in the course of search does not disclose income and offer payment, the assessee is deemed to have concealed particulars of income even in the course of search. Obviously there is concealment of income by the assessee by virtue of operation of Expln. 5 to Section 271(1)(c) of the Act because assessee not only did not disclose income in the course of search, but even offered explanation that it belonged to another person which the assessee could not establish or prove. In the circumstances, concealment stands proved beyond any doubt by operation of presumption available under Expln. 5 to Section 271(1)(c) of the Act and consequently the assessee is liable for penalty under the said section.

3. Therefore the order of the Tribunal to the contrary is liable to be reversed. So far as the quantum of penalty is concerned, the officer has levied only minimum penalty and therefore there is no scope for interference with the quantum of penalty levied. In the circumstances we dispose of the reference by answering the question referred in favour of the Revenue and against the assessee.