(2001) 08 DEL CK 0022

In the Delhi High Court

Case No : Income Tax R. No''s. 309-311 of 1982

Commissioner of Income Tax APPELLANT

Vs

Sohan Singh RESPONDENT

Date of Decision : 07-08-2001

Acts Referred:

Citation : (2002) 174 CTR 58 : (2002) 254 ITR 117 : (2002) 123 TAXMAN 876

Hon'ble Judges : Dr. Arijit Pasayat, C.J;D.K. Jain, J

Bench : Division Bench

Advocate : Sanjiv Khanna and Ajay Jha, for the Appellant; None, for the Respondent

Judgement

Arijit Pasayat, C.J.—Pursuant to the direction given by this court u/s 256(2) of the Income Tax Act, 1961 (in short "the Act"), the following question has been referred for the opinion of this court, in the three reference applications filed by the Revenue before the Income Tax Appellate Tribunal, Delhi Bench-C ("the Tribunal" for short) :

"Whether, on the facts and in the circumstances of the case and having regard to the conclusion arrived at by the Tribunal in the appeals against the assessments, the Tribunal was justified in cancelling the penalties imposed on the assessed for the assessment years 1963-64, 1965-66 and 1966-67 ?"

2. The dispute relates to the assessment years 1963-64, 1965-66 and 1966-67.

3. The factual position in a nutshell is as follows :

S. Sohan Singh, the assessed, is an individual. The previous year in respect of each of the assessment years concerned ended on March 31, 1963, March 31, 1965 and March 31, 1966, respectively. Assessments were reopened by the Income Tax Officer (in short "the ITO") u/s 147 of the Act on the ground that the income had escaped assessment. After reopening of the assessment in each of the years, the Income Tax Officer clubbed the income of the firm, Preetpal Singh and Co., with the income of the assessed. These additions were made on the ground that the income of the partnership was really that Of the assessed. The partnership was constituted as evidenced by a deed of partnership dated December 7, 1961, with two partners, namely, Smt. Sat-want Kaur and Shri Surinder Singh. Three minor partners, namely, Shri Preetpal Singh, Shri Harvinder Pal Singh and Miss Kamal Anand, were admitted to the benefits of the partnership. Smt. Satwant Kaur is mother of the assessed. Shri Surinder Singh is his sister''s son. He was also an ex-employee of the assessed. The three minors were children of the assessed. The firm discontinued its business on the death of Smt. Satwant Kaur on February 27, 1967. Income of the firm was assessed, but such assessment was made on protective basis as the Income Tax Officer was of the view that the firm was a benami concern of the assessed. In the assessment proceedings of the firm, the Income Tax Officer examined Shri Surinder Singh and after taking into account various statements, he clubbed the income of the firm with that of the assessed. Various reasons were given by the Income Tax Officer for coming to the conclusion regarding benami character of the firm. On appeal, the Appellate Assistant Commissioner ("the AAC" in short) refused to grant relief and on further appeal before the Tribunal, the action of the Income Tax Officer was confirmed. The Income Tax Officer, before the completion of reassessment, issued show-cause notices to the assessed to show cause why penalty should not be levied u/s 271(1)(c) of the Act. In the penalty proceedings, the Inspecting Assistant Commissioner ("the IAC in short) informed the assessed about the requirements of the Explanation to Section 271(1)(c), indicating that the said provision was applicable to the facts of the case. The assessed was required to show cause why penalty should not be imposed on the assessed under that provision. In reply, the stand of the assessed was that penalty proceedings were independent of the assessment proceedings and simply because assessment orders have been passed in the case of the firm considering it as a benami concern, that would not be sufficient to hold that the assessed concealed income of the firm from his assessment. It was further submitted that none of the reasons for which the Income Tax Officer held the firm to be benami was factually correct and the inference drawn was not correct. However, penalties were levied u/s 271(1)(c) of the Act. The matter was carried in appeal before the Tribunal which held that there was nothing on record to show that fraud, gross or willful neglect could be attributed to the assessed in not returning the correct income in his returns. The prayer for reference made by the Revenue was rejected. However, on being moved u/s 256(2) of the Act, this court directed the Tribunal to refer the question as set out above.

4. We have heard learned counsel for the Revenue. There is no appearance on behalf of the assessed in spite of notice. Though there cannot be any quarrel with the proposition that evidence recorded in the assessment proceedings is not conclusive for determining the question as to whether penalty is to be levied or not, they are not totally irrelevant. They could be taken note of. What is required is that the assessed must offer an Explanation to show that there was no fraud,

gross or willful negligence involved in not returning the correct income in his return. The Explanation offered has to be examined by the Assessing Officer. It is not sufficient if any fanciful or totally untenable Explanation is offered. If no Explanation is offered or the Explanation offered is found to be untenable or unacceptable, the Assessing Officer may, considering the background facts, impose penalty if he comes to the conclusion that fraud, gross or willful negligence was involved. That finding would be essentially one of facts and if the finding is factual as recorded by the Tribunal obviously no question of law arises. But when the conclusion is arrived at by ignoring relevant material or where irrelevant material is taken into consideration, a question of law arises. From the order of the Tribunal it appears that great emphasis was laid on the fact regarding grant of registration to the firm. We find from the orders passed by the Tribunal relating to the assessment that it was clearly noted that the mere fact that registration was granted does not stand in the way of coming to the conclusion that the firm is a benami concern of the assessed. With reference to the materials brought before it, the Tribunal had come to a definite conclusion about the benami character. The Tribunal itself proceeded on the basis that no positive evidence about the flow of capital invested by the partners was on record and so far as the enjoyment of the profits is concerned there is also no positive evidence to show that the profits were enjoyed by the assessed. These conclusions are at variance with those recorded by the Tribunal in the appeal relating to the assessment. It was, inter alia, observed as follows : "In addition to this it is on record that both Smt. Satwant Kaur and Shri Surinder Singh gave away all the profits earned by them by way of gifts to the children of the assessed". It was also noted by the Tribunal that accountability of the partners to the assessed was not discharged and the same was proved on record by way of gifting of their shares by the two major partners to the minor sons and daughter of the assessed and investment of the profits by all partners in the firms controlled by the assessed. Obviously, the onus lies on the assessed to prove that there was no fraud, gross or willful negligence which can be attributed to the assessed. This was the initial onus which lay on the assessed. The Tribunal, Therefore, does not appear to have examined the matter in the background of the Explanation to Section 271(1)(c) of the Act, operative at the relevant point of time, in its proper perspective. In the circumstances, we think it would be appropriate for the Tribunal to rehear the appeals and decide the matter afresh, keeping in view the relevant provisions. The reference applications are accordingly disposed of.

