

(2008) 06 SHI CK 0015
In the High Court Of Himachal Pradesh

Commissioner of Income Tax	Vs	APPELLANT
Sona Ram Malik		RESPONDENT

Date of Decision : 24-06-2008

Acts Referred:

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

Citation : (2008) 06 SHI CK 0015

Hon'ble Judges : Sanjay Karol, J;R.B. Misra, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Sanjay Karol, J.—The present appeal was admitted on the following substantial question of law:

1. Whether on the facts and in the circumstances of the case the Tribunal was right in deleting the penalty of Rs. 1,10,130 holding that the provisions of Explanation 1 of Section 271(1)(c) of the Income Tax Act, 1961 could not be invoked by the assessing officer.
2. The respondent assessee filed his Income Tax return on 11-9-1984 for the assessment year 1984-85 declaring an income of Rs. 25,444 which was accepted vide assessment order dt 14-3-1985, passed u/s 143(1) of the Income Tax Act, 1961 (hereinafter referred to as "the Act"). On 16-5-1986, during the search and seizure operation carried out u/s 132 of the Act, certain incriminating documents were found and seized which revealed that the assessee had not fully disclosed the true particulars of his income in the return for the year 1984-85 filed by him on 11-9-1984. In contemplation of action u/s 147 of the Act, notice dated 17-2-1988 u/s 148 of the Act was issued to the assessee. Since the assessee did not file any return, therefore a detailed questionnaire dated 9-1-1989 was issued and in response thereof not only did the assessee file a reply but also filed a revised return for the year 1984-85 showing the income to be Rs. 42,360.
3. After affording due opportunity to the assessee and considering the material

on record vide order dated 9-3-1990, the assessing officer assessed the income afresh and arrived at a conclusion that the assessee had failed to disclose an income of Rs. 2,07,770. The total income was assessed to be Rs. 2,31,950.

4. The assessment was contested in an appeal before the Commissioner (Appeals) who in terms of its order dt 18-1-1991 allowed a relief of Rs. 30,000. As per the said order the concealed income determined was Rs. 1,77,770. Admittedly, this assessment attained finality and stands accepted by the assessee.

5. However, since the assessee had concealed the income, the penalty proceedings u/s 271(1)(c) of the Act were initiated and after affording due opportunity the penalty was imposed.

6. The assessee assailed the same before the Commissioner (Appeal) vide Appeal No. 11/109-1991-92 who vide its order dated 8-11-1991 held that the assessing officer had sufficient material on record in the shape of incriminating documents on the basis of which the appellant had surrendered a sum of Rs. 1,35,000. The authority found the appellant to have conscious concealment of true particulars of income which were disclosed only after incriminating documents were found during the search and seizure operation carried out by the officials under the statute.

7. The assessee further assailed the same by way of an appeal (ITA No. 301/Chd/1992) before the Income Tax Appellate Tribunal, Chandigarh Bench (SMC) (hereinafter referred to as "the Tribunal"). The said appeal was allowed in terms of order dated 2-12-1999 in the following terms:

4.1 Now coming to the explanation of the assessee regarding Source of Rs. 1.35 lakhs being invested in L-14 vend, Garkhal unit, learned Counsel was asked to authenticate the facts on the basis of assessee's paper book that photocopies of affidavits of depositors were available before assessing officer, which he did. It is clearly borne out of affidavits that the assessee raised three loans totalling Rs. 1.80 lakhs and after utilization of Rs. 1 lakh out of loans by investing the amount in M/s Vijay Chandla Sona Ram, the assessee was still left with Rs. 80,000. Hence, to the extent of Rs. 80,000, the explanation has to be accepted. As regards explanation that the assessee was an old assessee and had Rs. 1.30 lakhs in cash, the same has not been found by assessing officer as false though he has disbelieved the said explanation. Learned Counsel has contended that as assessing officer had failed to invoke any specific Explanation to Section 271(1)(c), the penalty may be deleted. I feel that the contentions of learned Counsel have some force in the light of decisions reported in Commissioner of Income Tax Vs. P.M. Shah, and Commissioner of Income Tax Vs. Dharamchand L. Shah, The Tribunal in the case of T.N. Sridharan v. IAC (1999) 70 ITD 48 (Chennai) (TM) has also held that where Explanation 1 to Section 271(1)(c) was neither invoked in notice u/s 274 nor in penalty order Commissioner (Appeals) could not invoke the deeming provisions of Explanation 1 in order to sustain the penalty. It was

further held that the provisions of Explanation 1, as amended by the Finance Act, 1986 could not be applied to facts pertaining to assessment year 1983-84. In view of the foregoing, I feel that the assessee deserves to succeed on this legal plea. Thus, on the facts and circumstance of the case I feel that no penalty u/s 271(1) (SC) is exigible. The order of Commissioner (Appeal) is, therefore, set aside.

8. We have heard Mr. Vinay Kuthiala and Mr. Khanna, learned Counsel appearing for the parties.

9. The fact that the assessee had initially filed a return dated 11-9-1984 showing an income of Rs. 25,444 and also revised his return dated 2-2-1989 showing an income of Rs. 42,360 pursuant to the notice issued u/s 148 of the Act, is not disputed. It is also not disputed that the revised assessment framed by the assessing officer on 9-3-1990 as it stood modified in terms of order dated 18-1-1991 passed by the Commissioner (Appeal) stands accepted by the assessee and has attained finality.

10. It is also undisputed that the assessee had been issued notice u/s 271(1)(c) of the Act and had also been afforded adequate opportunity and the assessee had also placed on record written submission at the time of the hearing in support of his contention.

11. While deciding the assessee's appeal In terms of its order dated 2-12-1999, the Tribunal relied upon the decisions reported in Commissioner of Income Tax Vs. P.M. Shah, and Commissioner of Income Tax Vs. Dharamchand L. Shah, . The said decisions stand specifically overruled by the Apex Court in M/s. K.P. Madhusudhanan Vs. Commissioner of Income Tax, Cochin, . The Apex Court has held that the assessee who has been put to notice u/s 271 does not prove, in the circumstances stated in the Explanation to the said section, that his failure to return his correct income was not due to fraud or neglect, he shall be deemed to have concealed the particulars of his income or furnished inaccurate particulars thereof and, consequently, be liable to the penalty provided thereunder. The court further held that the Explanation was part of the Section and no express invocation of the Explanation to the Section was necessary before the provisions of the Explanation were applied. In fact, the court was dealing with almost a similar substantial question of law which has been framed in the present appeal and after considering the statutory provisions, as reproduced in para 7 of the said report, the court held as under:

10 We find it difficult to accept as correct the two judgments aforementioned. The Explanation to Section 271(1)(c). is a part of Section 271. When the Income Tax Officer or the Appellate Assistant Commissioner issues to an assessee a notice u/s 271, he makes the assessee aware that the provisions thereof are to be used against him. These provisions include the Explanation. By reason of the Explanation, where, the total income returned by the assessee is less than 80 per cent of the total income assessed u/s 143 or 144 or 147, reduced to the

extent therein provided, the assessee is deemed to have concealed the particulars of his income or furnished inaccurate particulars thereof, unless he proves that the failure to return the correct income did not arise from any fraud or neglect on his part. The assessee is, therefore, by virtue of the notice u/s 271 put to notice that if he does not prove, in the circumstances stated in the Explanation, that his failure to return his correct income was not due to fraud or neglect, he shall be deemed to have concealed the particulars of his income or furnished inaccurate particulars thereof and, consequently, be liable to the penalty provided by that section. We express invocation of the Explanation to Section 271 in the notice u/s 271 is, in our view, necessary before the provisions of the Explanation therein are applied. The High Court at Bombay was, therefore, in error in the view that it took and the Division Bench in the impugned judgment was right.

12. The point in issue therefore is no longer *res Integra* and stands decided conclusively by the Apex Court.

13. Mr. Khanna, learned senior Counsel for the assessee has argued that from the facts of the present case it cannot be stated that assessee had concealed the income but had in fact surrendered the income only to buy peace and avoid harassment. Therefore, according to him the statutory ingredients necessarily required for invocation of Section 271(1)(c) of the Act, were missing. In support of his contention, he has relied upon the decision rendered by the Apex Court in *Sir Shadi Lal Sugar and General Mills Ltd. and Another Vs. Commissioner of Income Tax, Delhi*,

14. We do not find favour with the same. To meet the submission of the learned Counsel, the relevant provisions of Section 271 (as applicable) are reproduced as under:

271. (1) If the assessing officer or the Commissioner (Appeal) or the Commissioner in the course of any proceedings under this Act, is satisfied that any person-

(b) has failed to comply with a notice under Sub-section (1) of Section 142 or Sub-section (2) of Section 143 or fails to comply with a direction issued under Sub-section (2A) of Section 142, or

(c) has concealed the particulars of his income or furnished inaccurate particulars of such income,

he may direct that such person shall pay by way of penalty,

(ii) in the cases referred to in Clause (b), in addition to tax, if any, payable by him, a sum of ten thousand rupees for each such failure;

(iii) in the cases referred to in Clause (c) in addition to tax, if any, payable by him, a sum which shall not be less than, but which shall not exceed three times, the amount of tax sought to be evaded by reason of the concealment of

particulars of his income or the furnishing of inaccurate particulars of such income.

Explanation J- Where in respect of any facts material to the computation of the total income of any person under this Act,-

(A) such person fails to offer an explanation or offers an explanation which is found by the assessing officer or the Commissioner (Appeal) or the Commissioner to be false or

(B) such person offers an explanation which he is not able to substantiate.

(Emphasis, italicised in print, supplied)

15. While framing the assessment, the Assistant Commissioner in terms of its order dated 9-3-1990 has specifically held that the statement of the assessee is not voluntarily and suo motu disclosure. The assessee's contention in this regard was also repelled by the appellate authorities including Tribunal which specifically held:

4. I have carefully considered the rival submissions, in the light of material placed before the Tribunal and the case law relied upon. There is no doubt that the assessee revised his return to higher figure but it was done only after search and seizure operations had been carried out on his premises. The assessee had not come forward to disclose income in the absence of search. Therefore, the subsequent return filed after issue of notice u/s 148 cannot be characterized as voluntary. Notice u/s 148 was issued on 17-2-1998 and detailed questionnaire was issued on 9-1-1989 and only thereafter return was filed on 2-2-1989. As regards contention of the assessee that surrender was made for buying peace and subject to no penalty, I feel that there cannot be such an agreement between the assessee and the revenue under law as there is no such provision, as held by the Apex Court in the case reported in Union of India and Another Vs. Banwari Lal Agarwal, .

(Emphasis, italicised in print, supplied)

16. Even the Apex Court in K.P. Madhusudhanon's case (supra) had distinguished the decision rendered in Sir Shadilal Sugar & General Mills Ltd. v. CIT (supra) and observed as under:

11. Learned Counsel for the assessee then drew our attention to the judgment of this court in Sir Shadilal & General Mills Ltd. v. CIT. He submitted that the assessee had agreed to the additions to his income referred to hereinabove to buy peace and it did not follow therefrom that the amount that was agreed to be added was concealed income is undoubtedly what was laid down by this court in the case of Sir Shadilal Sugar & General Mills Ltd. and that, therefore, the revenue was required to prove the mens rea of a quasi criminal offence. But it was because of the view taken in this and other judgments that the Explanation to Section 271 was added. By reason of the addition of that Explanation, the

view taken in this case can no longer be said to be applicable.

(Emphasis, italicised in print, supplied)

17. In Commissioner of Income Tax, Lucknow Vs. M/s. Onkar Saran and Sons, the Apex Court has held that in a case where a return was filed in response to a notice issued u/s 148, involved an element of concealment, the law applicable would be the law as it stood at the time when the original return was filed for the assessment year in question and not the law as it stood on the date on which the return was filed in response to the notice u/s 148. We may only note that the relevant provisions of law (reproduced hereinabove) applicable to the present case are same which were under consideration by the Apex Court in K.P. Madhusudhanan (supra).

18. The assessee had failed to substantiate the explanation which in any event was found to be false by the concerned authority. Admittedly, notice for initiation of proceedings u/s 271(1)(c) of the Act stood served which is evident from the orders dated 9-3-1990 and 25-6-1991. The assessee was having sufficient knowledge of the penalty proceedings and, therefore no separate notice was required to be issued in compliance of the explanation prior to the imposition of the penalty. In our view the Tribunal has wrongly allowed the appeal deleting the penalty of Rs. 1,10,130 by holding that the provisions of Explanation 1 of Section 271(1)(c) of the Act could not be invoked by the assessing officer. The said order is set aside. The question of law is answered accordingly. The appeal is accordingly allowed.