
(1997) 01 MAD CK 0079

In the Madras High Court

Case No : Tax Case Petition No's. 324 to 328 of 1996

Commissioner of Income Tax

APPELLANT

Vs

V. Gopal

RESPONDENT

Date of Decision : 21-01-1997

Acts Referred:

Income Tax Act, 1961 — Section 132, 143(3), 147(1), 148, 271(1)

Citation : (1997) 225 ITR 63

Hon'ble Judges : S.M. Siddick, J;K.A. Thanikkachalam, J

Bench : Division Bench

Advocate : C.V. Rajan, for the Appellant; T.C. A. Ramanujam, R. Srinivasan and TCA Sangeetha, for the Respondent

Judgement

Thanikkachalam, J.—In these tax case petitions, the Department requests this Court to direct the Tribunal to refer the following common

question of law, for the asst. yrs. 1980-81, 1981-82 and 1982-83, for the opinion of this Court, under s. 256(1) of the IT Act, 1961, hereinafter

referred to as the ""Act"" ?

Whether, on the facts and in the circumstances of the case, the Tribunal is correct in law in cancelling the penalty levied under s. 271(1)(c) of the

IT Act, 1961 ?

2. The assessee is an individual, carrying on tailoring business. For the asst. yr. 1980-81, he filed his return of income, admitting a total income of

Rs. 20,873 and the original assessment under s. 143(3) of the Act was completed on a total income of Rs. 26,170. For the asst. yr. 1981-82, the

returned income was Rs. 29,550 and the original assessment under s. 143(3) was made on a total income of Rs. 31,590. On 5th Oct., 1992, the

Department conducted search proceedings under s. 132 of the Act in the

premises of the assessee. In the course of the proceedings, incriminating documents including the order books and collection Chittai were seized and they revealed large scale suppression of tailoring receipts.

Reassessment proceedings were taken for the asst. yrs. 1980-81 and 1981-82 under s. 147(1) of the Act by issuing notice under s. 148 to bring

to tax the escaped income in respect of suppression of receipts from tailoring business and other investments. In response to the notices, the

assessee filed returns of income showing a total income of Rs. 48,810 including a sum of Rs. 27,664 admitted as "income from other sources" for

the asst. yr. 1980-81 and a total income of Rs. 60,570 including Rs. 27,676 admitted as "income from other sources" for the asst. yr. 1981-82.

The assessments were completed for the asst. yrs. 1980-81 and 1981-82 on a total income of Rs. 1,84,960 and Rs. 2,34,140 respectively.

3. In the reassessments, additions were made not only in respect of various investments including investments in the names of his family members.

For the asst. yr. 1982-83, the assessee filed return disclosing a total income of Rs. 32,170 and the regular assessment was completed on a total

income of Rs. 5,06,290. As a result of the appellate orders, the total income for the three assessment years involved herein were reduced as under

:

Assessment year Income determined in the appeals

Rs.

1980-81 1,20,480

1981-82 1,64,210

1982-83 2,80,850

4. In the course of the reassessment proceedings, the AO initiated penalty proceedings under s. 271(1)(c) of the Act for all the three assessment

years. Considering the relief allowed by the CIT(A) and the Tribunal and after affording an opportunity of being heard to the assessee, the AO

levied under s. 271(1)(c) of the Act penalties for these three assessment years.

5. Against the penalty orders, the assessee filed appeals to the CIT(A). The CIT(A) held that there was clear suppression of tailoring receipts and

the assessee had deliberately concealed income and the income declared in the original returns were not correct. The CIT was also of the view that

the suppressed receipts appeared in the form of unexplained investment and, therefore, the additions sustained were asset-oriented additions.

Accordingly, he held that the penalty was exigible only in respect of suppression in the tailoring charges as appearing in the form of unexplained

investments. The CIT(A) thus confirmed and penalty levied under s. 271(1)(c) and sustained the penalties for the three assessment years as under :

Asst. yr. Penalty as per the appellate order

Rs.

1980-81 57,375

1981-82 76,837

1982-83 1,19,942

As against the order passed by the CIT, both the Department as well as the assessee preferred appeals before the Tribunal. The Tribunal called

for a remand report from the AO. On considering the remand report and the facts on record, the Tribunal held that the CIT was not justified in

sustaining the minimum penalty for the assessment years under consideration, and that therefore, the penalty sustained by him was not warranted in

law.

Accordingly the Tribunal reversed the order of the CIT in levying penalty and allowed the appeals filed by the assessee and dismissed the appeals

filed by the Department.

6. The learned standing counsel appearing for the Department submitted that the question raised for reference is a pure question of law and,

therefore, a statement should be called for from the Tribunal. There was concealment of income with regard to the stitching charges as can be seen

from the difference between the original return filed and the revised return filed by the assessee. The Tribunal overlooked the fact that but for the

search proceedings conducted by the Department, the suppression of tailoring receipts would not have come to light. The assessee had

systematically and deliberately understated his income from tailoring business by not recording the same in the account books. The fact that the

CIT in quantum appeal sustained the penalty, would go to show that there is clear concealment of income by the assessee in the present case. In

the remand report submitted by the Asstt. CIT, the assessee was not exonerated

from the charge of suppression of the tailoring receipts. There is variation between the income returned and the income finally determined. It was only due to suppression of tailoring receipts. The seized materials brought to light that there was systematic suppression of tailoring receipts in various years. But for the search operation, the omission to account for the tailoring receipt could not have been detected. The assessee himself had admitted the omitted collection would be Rs. 40,383 as against Rs. 50,000 estimated by the AO in the appeal before the CIT(A). In the quantum proceedings, the CIT(A) categorically held that there was suppression of tailoring receipts and addition was made thereon. It cannot be said that the estimate was made with regard to the suppressed tailoring receipt without materials. Inasmuch as a question of law does arise out of the order of the Tribunal, a statement may be called for from the Tribunal.

7. On the other hand, Mr. TCA Ramanujam, assisted by M/s R. Srinivasan and TCA Sangeetha, learned counsel appearing for the assessee, submitted that whatever happened prior to the calling of the remand report by the Tribunal would be of no relevance. The remand report clearly shows that the tailoring receipts related to earlier years and the entire receipts do not relate to the assessment years under consideration. The omission to mention the entire tailoring receipts was due to several facts, which were enumerated in the remand report. The finding of the Tribunal that there was no concealment is on the basis of question of fact, which was not challenged by the Department. Inasmuch as the account books were seized and impounded in the criminal Court, the assessee was not having an opportunity to explain the alleged suppression in the quantum appeal. That would not lead to the conclusion that the suppression was found out only during the search operation. Even during the search operation the assessee voluntarily surrendered the books to the Department. The Department estimated the stitching charges of the articles found in the business premises as well as in the residence which were lying without being delivered since there was no demand by the customers due to various reasons. When there was no stitching charges, that was not recorded in the book. The reason for the same was explained in a detailed letter dt. 26th April, 1995, sent by the assessee. The reasons that are made

good for making an addition would not be good for levying penalty.

For levying penalty under s. 271(1)(c) of the Act, the Department must prove that the assessee had deliberately concealed the income. The

explanation offered by the assessee would go to show that there was no mens rea in the matter of non-disclosure of the stitching charges, which

could not be recovered in the nature of business done by the assessee. Under such circumstances, only after considering all these facts, the

Tribunal came to the conclusion that no penalty is leviable under s. 271(1)(c) of the Act. In order to support his contentions, the learned counsel

appearing for the assessee relied upon the following decisions :

The Commissioner of Income Tax, Bihar and Orissa, Patna Vs. S.P. Jain, ; The Commissioner of Income Tax Madras Vs. Khoday Eswarsa and

Sons, ; Commissioner of Income Tax (Central), Calcutta Vs. Ashoka Marketing Ltd., , H.V. Venugopal Chettiar Vs. Commissioner of Income

Tax, , Commissioner of Income Tax Vs. Adamkhan, , Newton Chikli Collieries Ltd. Vs. Commissioner of Income Tax, Madhya Pradesh and

Bhopal, ; Commissioner of Income Tax (Central), Calcutta Vs. Daulatram Rawatmull,

8. We have heard both the learned standing counsel appearing for the Department as well as the learned counsel appearing for the assessee. For

the asst. yrs. 1980-81 to 1982-83, the Tribunal cancelled the minimum penalties levied under ss. 271(1)(c) of the Act. The assessee is doing

tailoring business. According to the Department, there was suppression of tailoring charges, which were not recorded in the books of accounts.

During search operation under s. 132 of the Act, it came to light that the assessee deliberately failed to disclose the tailoring charges for the

assessment years under consideration. The investment made in the name of third parties would also reveal that the said investment would have

been made out of the suppressed income. But for the search operation, it would not have been possible for the Department to find out the

suppression of income by the assessee. According to the assessee, the books were seized from the business premises and taken over to the

residence of the assessee and it is from the residence of the assessee, the Department found out that there were certain old materials, after stitching

were not delivered to the customers. The Department was under the impression

that the tailoring charges collected for such materials were not disclosed. According to the assessee, due to various reasons, as stated in the remand report, stitching charges were unable to be collected by the assessee and such uncollected amount would relate not only to the assessment years under consideration, but also to the earlier years. Hence, it was submitted that there was no suppression of tailoring charges as alleged by the Department. In so far as investment made in the name of third parties, the additions were deleted. The suppression is only with regard to tailoring charges said to have been collected by the assessee from the customers, which were in fact, not collected. Therefore, whatever happened prior to the calling of the remand report would be of no assistance in the matter of deciding whether any penalty is leviable in the case of the assessee under s. 271(1)(c) of the Act.

9. Since all the relevant order books were not available, only the collection Chittai was available, therefore, the assessment was made by estimating the tailoring charges on a guess work according to the Tribunal. The assessee sent a letter, dt. 26th April, 1995, giving explanation in detail as to how there was no suppression in his case. Since the assessee made a complaint before the Tribunal that the assessee was not given an opportunity to explain his case before the authorities below, due to the fact that books were impounded and pending in a criminal proceedings, the Tribunal called for a remand report. The Asstt. CIT in his remand report points out that in the absence of other books, the missing number of orders received and the period during which such orders received were adopted hypothetically at the time of assessment proceedings to estimate the assessee's income from tailoring receipts.

Account books relating to the accounting year 1979-80, for the asst. yr. 1980-81 were in the custody of the criminal Court. No opportunity was given to the assessee to reconcile the omission of receipts pointed out. The Tribunal pointed out that in the list of omissions supplied, the assessee was able to find out mistakes as many as 39 for the asst. yr. 1981-82; 72 for the asst. yr. 1981-82 and 217 for the asst. yr. 1982-83, and on examination, they are found to be correct. The assessee has offered the following explanation regarding the balance of omission of numbers in the collection Chittai. They are as under :

1. Certain customers at times never turned up to take delivery of the finished articles for no reasons.
2. At times, when cards issued were lost, customers never turned up at all.
3. When cloth material to be stitched is spoiled, customers rejected the material and delivery has not been effected.
4. In the case of "VIP" customers free service has been rendered and delivery has been effected without delivery cards.
5. At times orders booked are used to be cancelled for various reasons like change of materials, wrong measurements taken, etc., and fresh orders are booked entirely in different order numbers.

A spot inspection was effected by deputing Inspector in order to verify the assessee's statement regarding rejected and non-delivery of finished articles. The Inspector inspected the business premises and submitted a report. The report is dt. 25th April, 1995. In the said report, it is stated as under :

As directed by the Asstt. CIT, I visited the business premises of Shri V. Gopal, G. Tex. Alagarkoil Road, Madurai, to verify the veracity of the assessee's claim of unclaimed orders for stitching of clothes.

In the stitching section of the business premises, I found clothes in hangers and gunny bags relating to the orders of the earlier years, which have not been claimed by persons who have given orders for stitching.

It is not traceable to find out which unclaimed stitched cloth relates to which earlier year.

The abovesaid report would go to show that clothes found in hangers and gunny bags pertaining to the orders booked in the earlier years remained

unclaimed by customers, who placed the orders. But it was difficult to correlate which items related to which particular year. The assessee, in his

covering letter dt. 26th Jan., 1986, sent along with the revised return, has mentioned that it was only with a view to purchase peace with the

Department, certain items of income were shown in the revised return. Another letter dt. 23rd Dec., 1987, would also reveal the detailed

explanation offered by the assessee. In the asst. yr. 1980-81, major portions of the additions were deleted both by the CIT(A) and the Tribunal.

That was also the position with regard to the asst. yrs. 1981-82 and 1982-83. It was pointed out that the Tribunal held that the investments

standing in the names of relatives of the assessee should not be included in the hands of the assessee. Even according to the CIT(A), he is restricting the quantum of penalty with reference to the suppressed income from tailoring charges worked out by the assessee without adequate materials and documents. Thus, the suppression was with regard to tailoring charges on which penalty was said to be levied. The reason for not stating the estimated income in tailoring business was explained by the assessee convincingly as stated above. It was also recognised that the kind of business in which the assessee has indulged would incur losses of that nature as stated in his explanation. Therefore, the Tribunal on considering the facts, came to the conclusion that there was no warrant to hold that the assessee suppressed the tailoring charges so as to warrant initiation of proceedings under s. 271(1)(c) of the Act. It was pointed out that there was no mens rea in not disclosing the alleged tailoring charges, which were said to be not received by the assessee according to his explanation. On the basis of these indefinite facts, we are also of the opinion that the application of the provision under s. 271(1)(c) of the Act is not possible. We have also gone through the various decisions cited by the learned counsel appearing for the assessee in order to support his contention that no penalty is leviable under s. 271(1)(c) of the Act. Thus, in view of the fact that the penalty levied under s. 271(1)(c) of the Act was cancelled by the Tribunal on the basis of appraisal of facts, we consider that no referable question of law arises out of the order of the Tribunal so as to warrant calling for statement from the Tribunal. It is also significant to note that the Department is not questioning the finding given by the Tribunal on the basis of facts. Under such circumstances, we are unable to call for the statement from the Tribunal.

10. In the result, these tax case petitions are dismissed. No costs. b Commissioner of Income Tax (Central), Calcutta Vs. Ashoka Marketing Ltd.,

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