(2005) 05 KL CK 0002

In the High Court Of Kerala

Case No : IT Appeal No. 112 of 1999

Commissioner of Income Tax, Trivandrum — APPELLANT

Vs

N. Nandakumar — RESPONDENT

Date of Decision : 18-05-2005

Acts Referred:
Income Tax Act, 1961 — Section 142(1), 148, 271, 271(1)(c), 44AB

Citation : (2005) 147 TAXMAN 398

Hon'ble Judges : K.T. Sankaran, J;J.B. Koshy, J

Bench : Division Bench

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

Final Decision : Allowed

Judgement

J.B. Koshy, J.—The questions of law raised in this appeal by the appellant are the following:

1. Whether, on the facts and in the circumstances of the case, the Tribunal is right in law and fact in holding that ''no penalty could be levied in respect of the two amounts totalling Rs. 1,92,341?

2. Whether, on the facts and in the circumstances of the case and in the absence of a finding of bona fide in the absence of findings (or consideration) contemplated under Explanation 1(B) to section 271(1)(c), Tribunal is justified in relying on the same and in reaching the conclusion?

3. Whether, on the facts and in the circumstances of the case and when the statute contemplates a finding of ''bona fide'' (in discharge of onus) on the assessee, does the finding that ''there is nothing to show that the assessee''s claim of receipt of tin sheets on loan from the sister concern is not bona fide'', ''Merely because there is no entries in the books it would not be correct to say that the explanation was not bona fide would amount to finding of '' bona fide''?

4. Whether, on the facts and in the circumstances of the case and in the light of Explanation to section 271(1)(c) does the decision relied on by the Tribunal have application to the facts of the case?

The concerned assessment order is for the year 1987-88 and the assessee is an individual engaged in the business of fabrication of tin containers and also in the purchase and sale of tin sheets. He is also a partner of the firm M/s. Sastha Enterprises, in which he and his wife are the only partners. For the assessment year 1987-88, the assessee did not file return despite notice u/s 148. The Assessing Officer, therefore, issued notice u/s 142(1). On receipt of the same, assessee filed a return of income on 12-10-1989 disclosing a total income of Rs. 53,191 along with the audit report u/s 44AB. The Assessing Officer scrutinised the books of account, and noticed inflation of the cash balance in the cash book and also investment in unaccounted purchase of tin sheets and tin containers. The following were added:

"(i) Inflation of cash balance in cash book

Rs.

30,802

(ii) Investment in unaccounted purchase of tin sheets

Rs.

1,62,393

(iii) Unaccounted purchase of tin containers

Rs.

29,948"

The assessment became complete. The explanation offered by the assessee regarding movement of goods from the firm run in the same premises etc. was not accepted. The Assessing Officer also levied penalty u/s 271(1)(c) amounting to Rs. 1,20,000. That was affirmed by the Commissioner. However, the Tribunal set aside the penalty imposed on account of unaccounted purchase of tin sheets and tin containers. The explanation offered by the assessee with regard to the above was as follows

I have got a sister concern by name Sastha Enterprises, which has also quota for import of tin sheets. They are not making any sales and the tin sheets when required in Aji Industries is transferred from Sastha Enterprises. If a loan of tin sheets is taken and repaid, both the loan taken as well as the repayment will be treated as purchase and sales from respective concerns and will be liable to sales tax on both transactions. To avoid being assessee to sales-tax the quantity borrowed or returned will not be entered in the stock register.

2. The Tribunal was of the view that even though the assessee could not prove

the books of account of M/s. Sastha Enterprises that he had received on loan tin sheets and tin from that concern, the Department did not prove that there is concealment of income. In paragraph 9 the Tribunal found as follows:

In the case of Commissioner of Income Tax Vs. India Sea Foods, the Full Bench of the Kerala High Court has held that for levying penalty u/s 271(1)(c) there should be a conscious concealment of income on the part of the assessee. In that case the Court observed as under:

''Penalty proceedings are penal in nature. The elementary principles of criminal law will apply. It is a quasi-criminal proceeding, there should be conscious concealment. The provisions should be construed strictly. Even after the addition of the Explanation to section 271(1)(c) of the income tax Act, 1961, conscious concealment is necessary and the presumption under Explanation to section 271(1)(c) can be discharged by the assessee proving that the failure to return the correct income does not arise from any fraud or gross or wilful neglect and the quantum of proof necessary would be that required in a civil case, namely preponderance of probabilities.''

True, the assessee could not prove with the books of account of M/s. Sastha Enterprises that he had received on loan tin sheets and tins from that concern. Even if the amounts representing as the cost of investments in sheets and tins could be assessed as the income of the assessee, can it be said that the failure to return those amounts as his income arose from any fraud or gross or wilful neglect on his part? We do not think so. In the light of the decision of the jurisdictional High Court, we have to hold that conscious concealment has not been established in this case in respect of the addition on account of the investments in sheets and tins. We thus hold that no penalty could be levied in respect of the two amounts totalling to Rs. 1,92,341. We direct the Assessing Officer to restrict the penalty to the minimum amount as leviable on the concealed income of Rs. 30,802 only."

(Emphasis supplied)

3. It can be seen that the Tribunal relied on the decision of a Full Bench of this Court in Commissioner of Income Tax Vs. India Sea Foods, and placed burden on the part of the Revenue. The above decision was rendered on the provisions of law as existed before 1976 amendment and the Full Bench relied on the decision of the Apex Court in Sir Shadi Lal Sugar and General Mills Ltd. and Another Vs. Commissioner of Income Tax, Delhi, 1. But the Supreme Court in M/s. K.P. Madhusudhanan Vs. Commissioner of Income Tax, Cochin, held that the decision in Sir Shadilal Sugar & General Mills Ltd.''s case (supra) is no more good law after addition of the Explanation to section 271. The relevant portion of section 271 is as follows:

Failure to furnish returns, comply with notices concealment of income, etc. - (1) If the income tax Officer or the Appellate Assistant Commissioner, in the course of any proceedings under this Act, is satisfied that any person-

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

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

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(iii) in the cases referred to in clause (c), in addition to any tax payable by him, a sum which shall not be less than, but which shall not exceed twice, 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:

Provided that if in a case falling under clause (c), the amount of income (as determined by the income tax Officer on assessment) in respect of which the particulars have been concealed or inaccurate particulars have been furnished exceeds a sum of twenty-five thousand rupees, the income tax Officer shall not issue any direction for payment by way of penalty without the previous approval of the Inspecting Assistant Commissioner:

Explanation 1. -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 income tax Officer or the Appellate Assistant Commissioner to be false, or

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

then, the amount added or disallowed in computing the total income of such person as a result thereof shall, for the purposes of clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed:

Provided that nothing contained in this Explanation shall apply to a case referred to in clause (B) in respect of any amount added or disallowed as a result of the rejection of any explanation offered by such person, if such explanation is bona fide and all the facts relating to the same and material to the computation of his total income have been disclosed by him.

The Supreme Court in the above decision affirmed the decision of this Court in Commissioner of Income Tax Vs. K.P. Madhusudanan, wherein it was held that the initial burden of discharging the onus of rebuttal is on the assessee. It is true that a certificate was produced by the sister concern owned by the assessee and his wife regarding the internal transaction. There was no supporting documents. The Tribunal did not find that the initial burden was discharged. Paragraph 9 of the order of the Tribunal shows that relying on the Full Bench decision, the Tribunal found that the Department was not able to prove that the explanation offered by the assessee is not correct. The observation of the Tribunal regarding initial burden to prove is against the provisions of section 271(1)(c) as amended. In Deputy Commissioner of Income Tax Vs. K. Suresh Kumar, a Division Bench of this Court also held that the initial burden is on the assessee to prove that the explanation offered is bona fide. Here the Tribunal erroneously casts the burden on the Department, whereas there is no finding that the initial burden was discharged by the assessee. In this case, admittedly, there are no registers or account books to show that the goods of the sister concern were taken on loan basis and such transactions are not reflected in any of the books of account. A fanciful explanation without any basis or supporting evidence will not discharge the burden of the assessee. It is for the assessee to substantiate the explanation offered. He failed to do so. Therefore, all the questions raised are answered in favour of the Revenue.

In the above circumstances and in view of the law laid down by the Apex Court in K.P. Madhusudanan''s case (supra), we are of the view that the Tribunal went wrong in setting aside the penalty imposed with regard to unaccounted value of tin sheets and tin containers. Hence the appeal is allowed. The order of the Assistant Commissioner is restored.

