

(2011) 11 AP CK 0118

In the Andhra Pradesh High Court

Case No : Reference Case No. 176 of 1996

Commissioner of Income Tax, Visakhapatnam

APPELLANT

Vs

M/s. Balarama Krishna Engineering Contractors Corporation,
Visakhapatnam

RESPONDENT

Date of Decision : 23-11-2011

Acts Referred:

Income Tax Act, 1961 — Section 144, 256(1), 271(1)

Citation : (2013) 356 ITR 524

Hon'ble Judges : V.V.S. Rao, J;B.N. Rao Nalla, J

Bench : Division Bench

Advocate : S.R. Ashok, for the Appellant;

Judgement

V.V.S. Rao

1. The Commissioner of Income Tax, Visakhapatnam, got the following question referred to this Court u/s 256(1) of the Income Tax Act, 1961 (the Act).

Whether on the facts and in the circumstances of the case, the Tribunal was justified in holding that penalty under Sec. 271(1)(c) of the I.T. Act cannot be levied in a case where the assessed income is a loss.

2. At the outset it is necessary to briefly mention the facts leading to the reference. The assessee firm is a civil contractor. They filed the return of income for assessment year 1990-1991 showing loss of Rs. 28,27,249/-. The Income Tax Officer completed assessment u/s 144 of the Act. While doing so, he added Rs. 19,15,002/- and reduced the addition of Rs. 10,00,000/- to Rs. 7,45,253/-, and determined the tax payable at Rs. 9,03,375/-. Penalty proceedings were also initiated separately u/s 271(1)(c) of the Act and an amount of Rs. 14,34,294/- was imposed as penalty by order dated 16.03.1993. The Commissioner of Income Tax (Appeals) confirmed the penalty vide order dated 31.12.1993. The Income Tax Appellate Tribunal (the Tribunal), however, allowed the appeal against penalty order taking a view that levy of penalty for concealment in case

where the assessed income is loss is not permissible under law.

3. In spite of service of notice, none appears for the respondent, and therefore, the respondent is set ex parte.

4. The Junior Standing Counsel for Income Tax Department would submit that even when assessee filed the loss return, the provisions of Section 271(1)(c) of the Act are attracted. Relying on Section 271(1)(iii) and Explanation 4 thereof, he would submit that the amount of income concealed which has effect of reducing the loss declared in the return or converting the loss into income would also amount to "the amount of tax sought to be evaded". He would further submit that Explanation 4 which was substituted by the Finance Act, 2002, with effect from 01.04.2003, is a clarificatory nature and therefore even in case of an assessee filing a loss return, the provisions of Section 271(1)(c) of the Act are attracted. He placed reliance on a Division Bench judgment of the Supreme Court in Commr. of Income Tax-I, Ahmedabad Vs. Gold Coin Health Food Pvt. Ltd.,

5. A plain reading of Section 271(1)(c)(iii) with Explanation 4 would reveal the following. If an assessee has concealed the particulars of his income or furnished inaccurate particulars of such income, in addition to tax payable by him, a sum which shall not be less than and which shall not be more than three times "the amount of tax sought to be evaded" by reason of such concealment shall be levied and collected as penalty. Even if a loss return is filed, if the amount of concealment has the effect of reducing the loss in the return or converting such loss into income, Section 271(1)(c) of the Act is attracted. It is well settled that a taxing statute has to be strictly interpreted by giving a plain meaning to the clear and unambiguous language used by the Legislature. The script of law cannot be read in such a manner which has the effect of changing the spirit of law. When Explanation 4(a) clearly speaks of the return of loss and also deals with the effect of concealment on such return of loss either decreasing loss or converting loss into income, it is not possible to give any other meaning. The question, however, remains as to whether Explanation 4(a), which was substituted by the Finance Act, 2002, with effect from 01.04.2003, is retrospective in operation, as we are dealing with a case pertaining to assessment year 1990-1991.

6. Gold Coin Health Food P. Ltd., was an appeal against the judgment of the Division Bench of Gujarat High Court, which having considered the question, "Whether on the facts and circumstances of the case, the Appellate Tribunal was right in law in holding that penalty u/s 271(1)(c) of the Income Tax Act, 1961, cannot be levied if the returned income is loss in the cases prior to the amendment in the year 2002", dismissed the Revenue's appeal holding that when the income disclosed and the income assessed is negative, no case would be made out for attracting the penalty u/s 271(1)(c) of the Act. In Virtual Soft Systems Ltd. Vs. Commissioner of Income Tax, Delhi-I, a Bench of two Judges while rejecting the plea of the Revenue that Explanation 4 to Section 271(1) as amended by Finance Act, 2002, was retrospective, took the view that penalty u/s 271(1)(c) of the Act cannot be levied if the returned income is a loss. Doubting

the ratio therein, Gold Coin Health Food P. Ltd., was referred to three Judge Bench.

7. The Revenue submitted that the purpose behind Section 271(1)(c) of the Act was to penalize the assessee for concealing the particulars and furnishing inaccurate particulars of income, whether the income returned is a profit or loss are really of no consequence and that Explanation 4 to Section 271(1)(c) was clarificatory in nature and would apply to all assessments even prior to assessment year 2003-2004. On consideration of the recommendations of Wanchoo Committee pursuant to which Explanation 4(a) was inserted, CBDT circular No. 204 , dated 24.07.1976, the Finance Act, 1979, the relevant clauses of the Finance Act, 2002, and the case law dealing with interpretation of statutes being prospective or retrospective, the three Judge Bench in Gold Coin Health Food P. Ltd., reversed Virtual Soft Systems Ltd., and held

A combined reading of the Committee's recommendations and the circular makes the position clear that Explanation 4(a) to Section 271(1)(c) intended to levy the penalty not only in a case where after addition of concealed income, a loss returned, after assessment becomes positive income but also in a case where addition of concealed income reduces the returned loss and finally the assessed income is also a loss or a minus figure. Therefore, even during the period between April 1, 1976 and April 1, 2003, the position was that the penalty was leviable even in a case where addition of concealed income reduces the returned loss.

(Emphasis supplied)

8. The ratio in Gold Coin Health Food P. Ltd., therefore, would leave no scope for us except to hold that penalty u/s 271(1)(c) of the Act would be attracted and can be levied even in a case where the assessed income is a loss. The reference is accordingly answered in the negative against the assessee and in favor of the Revenue.

9. The Reference Case stands disposed of accordingly without any order as to costs.