

(2006) 08 GUJ CK 0057
In the Gujarat High Court
Case No : IT Ref. No. 269 of 1995

Deepak Construction Company

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 23-08-2006

Acts Referred:

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

Citation : (2007) 293 ITR 285

Hon'ble Judges : R.S. Garg, J;M.R. Shah, J

Bench : Division Bench

Advocate : S.N. Divetia, for the Appellant; B.B. Naik, for the Respondent

Judgement

R.S. Garg, J.—The Tribunal, Ahmedabad Bench "A", at the instance of the assessee, has referred the following question for the opinion of this Court in IT Appeal No. 163/Ahd/1990 relating to the asst. yr. 1983-84:

Whether, on the facts and in the circumstances of the case, the Tribunal was right in confirming the levy of penalty of Rs. 67,002 u/s 271(1)(c)?

2. The short facts necessary for disposal of the present reference are that the assessee firm, which is engaged in the activity of construction of work, submitted a return of income, declaring the total income of Rs. 1,27,824 on 30th Oct., 1984. The assessment could not be completed upto October, 1985. The AO issued a notice to show cause to the assessee on 24th Feb., 1986 requiring the assessee to make compliance by 5th March, 1986. The said show-cause notice has been reproduced in verbatim in the assessment order dt. 31st March, 1986, the show-cause notice was also relating to the squared up cash credits, which were listed in tabular form in the said assessment order. Such squared up cash credits were detailed in the show-cause notice. After the service of the notice to show cause, the assessee filed a revised return on 7th March, 1986, declaring the total income to the tune of Rs. 2,27,824, which included a sum of Rs. 1 lakh in addition to the earlier income. Before the AO, the benefit of Amnesty Scheme

was also claimed to avoid the liability of penalty proceedings u/s 271(1)(c) of the IT Act ("the Act" for short).

The AO accepted the revised return and assessed the present assessee for the sum of Rs. 2,27,824, but opened penalty proceedings u/s 271(1)(c) of the Act. The assessee, vide its reply dt. 4th Nov., 1986, stated that the firm had filed the return for the accounting years 1983-84 to 1985-86 in terms of the circulars of the CBDT and, therefore, he was entitled to immunity and the penalty could not be levied. The explanation offered by the assessee was not palatable to the officer, therefore, he levied the minimum penalty of Rs. 67,002 only by his order dt. 30th March, 1988. The assessee, being aggrieved by the said order, took up the matter in appeal to the CIT(A); on dismissal of the same the matter was brought before the Tribunal. As the Tribunal rejected the submissions made by the assessee, the assessee made an application u/s 256(1) of the Act for a reference to the High Court. Accordingly, on the aforesaid question, the reference has been made.

3. Mr. Divetia, learned Counsel for the assessee, submits that from Circular No. 450, dt. 13th Feb., 1986 [(1986) 54 CTR 27] issued by the CBDT, it would clearly appear that the Government wanted to realise maximum tax and therefore, it provided certain benefits and protection to the assessee if they were to file the revised returns or were to disclose their income honestly. Referring to Circular No. 451, dt. 17th Feb., 1986 (1986) 57 CTR 82, specially, to question Nos. 4, 19 and 30, it was submitted that the explanations offered by the CBDT in the said circular, would provide a solace to the assessee and the penalty proceedings deserve to be quashed.

4. On the other hand, Mr. B.B. Naik, learned Counsel for the Revenue, submits that a fair understanding of Circular Nos. 450 and 451 would make it clear that protection is provided to an honest taxpayer or to a person who voluntarily comes up for making the payment of the tax, and not to a person who, after being cornered on detection of suppression of the income, starts blowing trumpet of honesty. He submits that in the present case, the assessee did not file the revised return of his own to show his honesty, but, had submitted the revised return after the service of the notice to show cause. He also submits that there would be a distinction between the word "detection" and "determination" and in this case, the detection stands proved prior to filing of the revised return and, therefore, the determination, at a subsequent stage, would not change the factual scenario.

5. To appreciate the rival contentions of the parties, we would firstly reproduce question Nos. 4, 19 and 30 with their respective answers:

Question No. 4. - The Income Tax circulars are not very clear as to whether the immunity from penalty and prosecution is guaranteed to the assessee unlike the circular in respect of wealth-tax which appears to be clear on this point?

Answer. - The immunity from penalty and prosecution applies in all cases

whether of Income Tax or of wealth-tax where the assessee admits the truth and pays taxes properly.

Question No. 19 - Kindly clarify the expression "before detection by the Department"?

Answer. - If the ITO has already found material to show that there has been concealment, that would mean the Department has detected the concealment. If the ITO only had prima facie belief, that would not mean concealment has been detected.

Question No. 30. - Whether an assessee could make a declaration in respect of assets or income which is not the subject-matter of seizure?

Answer. - Yes, if it has not been already found out in the course of the search.

Reply to question No. 4 simply said that the immunity from penalty and prosecution applies in all cases whether of Income Tax or of wealth-tax where the assessee admits the truth and pays the taxes properly. Question No. 19 and its answer by the CBDT would make it clear that the expression "before detection by the Department" would simply mean that if the ITO has already found material to show that there has been concealment, that would mean the Department has detected the concealment. The further explanation was that if the ITO only had prima facie belief, that would not mean concealment has been detected.

In reply to question No. 30, the CBDT simply said that the assessee could make a declaration in respect of assets or income which was not the subject-matter of seizure if it has not been already found out in the course of search. Thrust of the CBDT was that the facts have not been detected nor suppression has been detected nor some material has been brought on record, the assessee would be entitled to make a declaration in respect of the assets or income, which is not the subject-matter of seizure if it has not been already found in the course of search. Question No. 30, in fact, related to search, while question No. 19 related to interpretation of the words "before detection by the Department."

6. A perusal of the notice dt. 24th Feb., 1986 would show that the AO had already detected concealment of the income. He had made the following observations : "on scrutiny of squared up accounts and details filed by you it is noticed that following new deposits have been received and paid back by you during the accounting year itself. He also observed that, "detailed scrutiny of above data makes it crystal clear that you have introduced unaccounted money on various dates as under and taken out of books before close of the accounting year". He lastly observed that, "I intend to add this cash credit of Rs. 1,64,500 to the income disclosed by you, as income from undisclosed sources".

From the abovereferred observations made by the AO, it would precipitate on the records that the concealment of income was already detected, but, before determining the additional income for the purposes of tax, the AO, in accordance

with the provisions of the Act and the principles of natural justice, was requiring the assessee to prove the genuineness of all the deposits by 3rd March, 1986, he required certain particulars and details.

7. After this notice dt. 24th Feb., 1986, was served upon the assessee, he came out of his slumber, started acting honest and submitted the revised return. It is not the case of the assessee either before the AO or before the Tribunal that much before service of the show-cause notice, honesty prevailed upon him and to the call of good conscience, he filed the revised return. The revised return, in fact, was a reaction to the notice issued by the AO on 24th Feb., 1986.

8. At this stage, we will be failing in our duty if we do not refer to yet another argument of Mr. Divetia. He submits that the notice to show cause was in relation to the sum of Rs. 1,64,500, but, without any further explanation from the assessee, the AO relied upon the revised return and added the sum of Rs. 1 lakh only. He submits that if that be so, it must be held that nothing was detected before the final order was made.

9. The submission of the learned Counsel for the assessee runs contrary to the answer to question No. 19, the argument virtually violates the true spirit of the said circular. The circular said that "before detection by the Department", which would simply mean that if the ITO has not found any material to show that there has been concealment and he only has a prima facie belief, then, that would not be a detection. The circular does not say that after the concealment is detected and a notice is issued, then too, filing of the revised return would amount to filing the return in accordance with the Amnesty Scheme and the detection of the facts would stand washed away.

10. One must not forget that detection of the fact and determination of the fact stand on different pedestals. The detection may lead to certain proceedings and the determination would amount to a finding. In the present case, the ITO had already detected concealment of the income, but, before determining the amount finally, he issued a notice to show cause to the assessee to prove the genuineness of the alleged transactions. The detection led to the notice and the service of the notice led to the filing of the revised return, the revised return led to the determination. Therefore, the detection cannot be put at par with the determination.

11. Mr. Divetia, learned Counsel for the assessee, placed his strong reliance upon a judgment of the Calcutta High Court reported in the matter of Anand Kumar Saraf and Others Vs. Commissioner of Income Tax and Others, In the said matter, a search was conducted in the assessee's premises; before the scrutiny of the documents so seized by the authorities, the revised return disclosing his income and wealth, was filed and payment of tax was made in time. The High Court found that the assessee was entitled to the benefits of Amnesty Scheme. On p. 574 of the judgment, the High Court made the following observations:

The mere stigma of search and seizure cannot shut out the assessee from the

amnesty. The Scheme is an inducement to evaders to make a clean breast of past evasions and square up accounts with the Revenue. The persons who are left out from this opportunity are those whose concealments have come to light beforehand by investigations and search and seizure operations carried out by the Revenue. The clarifications of the board in its answer to question No. 19 as to the meaning of the expression "before detection by the Department" show that if the assessing authority has a prima facie belief that would not mean detection. The dictionary meaning of the word "detect" is "to discover the true especially hidden or disguised character" or "to discover or determine the existence, presence or fact" (see Webster's Third New International Dictionary, 1976 edition). In the instant case, certain documents and papers were seized. They might or might not reveal concealment. Even the seizure could not lead to a prima facie belief as to concealment as the contents, purport and the implications of the documents were yet to be gone into. Therefore, at the point of time the return under the Amnesty Scheme was filed, the AO admittedly had no idea as to whether the seized papers would reveal any concealment. The mere fact that the petitioner appellant's case was awaiting a probe with reference to his past records as well as extrinsic sources could not lead to his ouster from the scope of the Scheme.

The learned Counsel for the assessee vehemently argued that nothing was detected in the present matter, therefore, and as the revised return was relied upon by the AO, no penalty proceedings could be initiated.

12. The facts of the said case were totally different. The law laid down by the judgment is in reference to the facts. Stray sentences cannot be read out of context. In the said matter, before any action could be taken by the Department on the material obtained by it in the process of search and seizure, wisdom dawned upon the assessee and he filed the revised return and paid the tax in time. The High Court observed that one could not be sure that the seized material would lead to any detection of the undisclosed income or wealth and as nothing could be detected before scrutiny of the seized material, there was no detection. The High Court, placing its reliance upon the dictionary meaning of the word "detect", observed that the word "detect" would mean "to discover the true especially hidden or disguised character" or would mean "to discover or determine the existence, presence or fact". If the very same dictionary meaning is applied to the facts of the present case, it would clearly appear that much before issuing the notice to show cause to the assessee, the facts were already detected. Hidden or disguised character of the income was already discovered and the Department had already discovered or detected the existence and presence of a particular fact. The AO had already held even before issuing the notice that the return was not reflecting the income correctly and there was concealment. On perusal of the notice to show cause, it would clearly appear that the AO had already decided the question that there was concealment of the income, but, before the final determination, he wanted to give an opportunity to the assessee to satisfy the authority in relation to the genuineness of the said

entries. Acceptance of the revised return without much ado would not mean that the Department had not detected the concealment. In the present case, the detection of concealment led to the notice to show cause and service of show-cause notice upon the assessee, even for the sake of repetition we would say, led to filing of the revised return.

13. Taking into consideration that the detection was much before the filing of the revised return, we cannot hold that the assessee would be entitled to any benefits of the Amnesty Scheme.

14. It is also to be noted that after the submission of the revised return, on 7th March, 1986, the assessee submitted the revised return and on 18th March, he filed the reply to the notice to show cause and prior thereto, he had submitted his explanation on 10th March, 1986. It is to be seen from para 3 of the assessment order wherein the AO has observed that prior to submission of the revised return, in letter dt. 30th March, 1986, the assessee explained the reasons as to why he disclosed the income. The AO accepted the said contention and computed the income as per the revised return, but that does not mean that the concealment was not detected.

15. Taking into consideration the totality of the circumstances and the conduct exhibited by the assessee, we are of the opinion that the subordinate Tribunals were not unjustified in initiating the penalty proceedings u/s 271(1)(c) of the Act and imposing the penalty. The question is answered against the interest of the assessee and in favour of the Revenue. The reference is disposed of with costs of Rs. 10,000 payable by the assessee to the Revenue.