
(2007) 01 DEL CK 0121

In the Delhi High Court

Case No : Criminal Rev. P. No. 33 of 2005

Income Tax Officer

APPELLANT

Vs

Rajan and Co.

RESPONDENT

Date of Decision : 02-01-2007

Acts Referred:

Income Tax Act, 1961 — Section 260A, 271(1)(c), 276(1), 276C, 276C(1)

Citation : (2007) 160 TAXMAN 333

Hon'ble Judges : Badar Durrez Ahmed, J

Bench : Single Bench

Advocate : R.D. Jolly, for the Appellant; P.N. Monga, Manu Monga, Pushkar Sood and Varun Kathuria, for the Respondent

Final Decision : Dismissed

Judgement

1. This revision petition is directed against the order dated 25-9-2004 passed by the learned Additional Sessions Judge whereby the respondents have been discharged of the offences under sections 276C(1) and 277 of the income tax Act, 1961 (hereinafter referred to as "the said Act"). The income tax Department is aggrieved by this order. The point taken, at the outset by Mr. Jolly, who appeared on behalf of the petitioner, is that the respondents have been discharged on the purported ground that since penalty has been deleted by the order passed by the income tax Appellate Tribunal (hereinafter referred to as "ITAT"), the criminal prosecution under sections 276(1) and 277 of the said Act cannot continue. The learned Additional Sessions Judge in coming to the aforesaid conclusion of discharging the respondents took into consideration several decisions of the Supreme Court. In particular, he considered the decision in K.C. Builders and Another Vs. The Assistant Commissioner of Income Tax, . He also took into consideration the case of G.L. Didwania and Another Vs. Income Tax Officer and Another, After referring to these decisions, the learned Additional Sessions Judge observed as under:--

Keeping in view the decision of the Apex Court on this point, once the penalty

has been deleted by the orders of CIT (Appeals) and by the ITAT, it will not be appropriate in the eyes of law to let the criminal prosecution continue in the case.

After further reference to the provisions of sections 276C(1) and 277 of the income tax Act, the learned Additional Sessions Judge observed as under: It may be noted that mens rea is absolutely essential in such like cases and once the penalty has been deleted by the final fact finding body, the element of mens rea attributable on the part of the accused company is not sustainable in the eyes of law. Once the penalty, levied by the lower authority has been struck down and knocked off by the order of the highest fact finding body, no purpose would be served to let the criminal prosecution go on.

Keeping in view the entire conspectus of facts and circumstances of the matter, no prima facie case under sections 276C(1) and 277 of income tax Act is made out against the revisionists/accused persons.

In view of foregoing reasons and discussion, the prosecution against M/s. Rajan and Company, Bharat Bhushan, Shashi Bala Aggarwal and S.K. Aggarwal is truncated at this stage and all the above accused persons stand discharged from the case.

Before adverting to the arguments advanced by the learned counsel for the parties, the facts need to be stated. The assessment year involved in this case is 1990-91. While computing the assessable income in respect of the said assessment year, the Assessing Officer, inter alia, made an addition of Rs. 3,20,868 in the trading account on account of suppression of sales. He also made an addition of Rs. 40,630 on account of commission disallowed to Smt. Archana Gupta, as being a bogus payment. The assessment order dated 26-3-1993 referred to the two additions in the following manner: This would mean addition of Rs. 3,20,868 to the total income of the assessee on account of suppression of sales. Penalty proceedings u/s 271(1)(c) are accordingly initiated."

Under the circumstances, it is held that the commission paid to the extent of Rs. 40,630 is not genuine but only is an accommodatory entry in the name of Smt. Archana Gupta, prop. Attraction for giving a colour of genuineness to the commission paid or otherwise no services were actually rendered by her. Hence, this amount is disallowed and added to the income of the assessee.

A reading of the aforesaid conclusions indicates that while in respect of addition of Rs. 3,20,868 the Assessing Officer consciously noted that penalty proceedings u/s 271(1)(c) are to be initiated, there is no such recording which is specific to the addition of Rs. 40,630 on account of disallowed commission. Though, at the end of the assessment order, the following sentence is appended:--

Penalty proceedings u/s 271(1)(c) are initiated separately.

2. Being aggrieved by these additions an appeal was preferred before the

CIT(Appeals) by the assessee. The CIT(Appeals) enhanced both the additions. Thereafter, the assessee approached the ITAT and the ITAT deleted the enhancements on both counts. Insofar as the addition in the trading account was concerned, the same was set aside in its entirety and the issue was remanded to the Assessing Officer with some directions. In other words, the ITAT did not maintain the addition insofar as the trading account was concerned. The addition of the disallowed commission was maintained in terms of the assessment order. This finding is final because neither party preferred any appeal with regard to the same before the High Court.

3. The penalty proceedings initiated u/s 271(1)(c) of the said Act culminated in the order dated 28-9-1999 passed by the Assessing Officer whereby penalty was imposed on account of both the additions, i.e., the addition in the trading account as well as the addition resultant on the disallowance of commission. Being aggrieved by this order the assessee preferred an appeal before the Commissioner of income tax (Appeals) which was disposed of by an order dated 4-4-2002. The CIT(Appeals) deleted the penalty pertaining to the addition in the trading account. However, he upheld the penalty with regard to the disallowance of commission of Rs. 40,630. The exact words used by the CIT(Appeals) are as under:--

I have considered the submissions of the appellant and the facts on record. I have also perused the orders of the Id. CIT(A) and the Id. ITAT. The Id. ITAT and CIT(A) considered the facts in total relating to payment of commission to Smt. Archana Gupta. The CIT(A) gave a categorical finding that the alleged recipient of the commission had actually not rendered any services to the appellant. Although the Id. ITAT reduced the enhanced figure of disallowance, however, confirmed the addition to the tune of Rs. 40,630. On these facts the logical conclusion that emerges is that the appellant firm could be held to be guilty of furnishing inaccurate particulars deliberately in respect of commission payment to the extent of Rs. 40,630. Accordingly, I find that the Assessing Officer was justified in levying penalty u/s 271(1)(c) of the Act in respect of the said addition of Rs. 40,630.

4. Being aggrieved by the maintenance of the penalty with regard to the commission payment to the extent of Rs. 40,630 the assessee preferred an appeal before the ITAT. However, it must be noted that the department did not file any appeal against this order which means that the finding with regard to deletion of penalty pertaining to the trading account addition became final. The ITAT by its order dated 6-4-2004, allowed the appeal of the assessee with regard to the penalty in respect of the commission payment of Rs. 40,630 made to Smt. Archana Gupta relating to the assessment year 1990-91 and came to the conclusion that the same could not be maintained. However, a reading of the order passed by the Tribunal indicates that the same was passed on the basis that no satisfaction had been recorded by the Assessing Officer with regard to the addition on account of disallowance of commission of Rs. 40,630. Following

the High Court decision in Commissioner of Income Tax Vs. Ram Commercial Enterprises Ltd., the ITAT deleted the penalty on the ground that no satisfaction had been recorded by the Assessing Officer and, therefore, the penalty proceedings could not have been initiated. The conclusion arrived at by the Tribunal was as under:--

Therefore, in view of these facts and circumstances, and in view of the decision of the jurisdictional High Court in the case of Ram Commercial Enterprises (supra), we hold that without recording satisfaction as contemplated u/s 271(1)(c), penalty levied and confirmed by the lower authorities was not justified. Therefore, the same is cancelled.

It is based on this order passed by the Tribunal that the learned Additional Sessions Judge reached the conclusion that the respondents were entitled to be discharged. He did so on the ground that as the penalty has been deleted, the prosecution cannot be continued. He placed reliance on K.C. Builders" case (supra).

5. Mr. Jolly appearing on behalf of the petitioner submitted that he too is relying on K.C. Builders" case (supra) and, in particular, he referred to the following passage:

... It is settled law that levy of penalties and prosecution u/s 276C are simultaneous. Hence, once the penalties are cancelled on the ground that there is no concealment, the quashing of prosecution u/s 276C is automatic. (p. 573)

He submits that K.C. Builders" case (supra) is an authority for the proposition that when there is a finding by the Tribunal to the effect that there is no concealment then a clear case for discontinuing the criminal prosecution is made out. According to him, K.C. Builders" case (supra) does not hold that where there is no finding on merits but the penalty is deleted thereof on a technicality that no satisfaction is recorded in the assessment order, even then the criminal prosecution ought to be terminated.

6. Mr. Jolly reiterated that in the present case the ITAT has merely followed the decision of the Delhi High Court in Ram Commercial Enterprises Ltd."s case (supra) and has deleted the penalty on the ground that there was no specific recording of satisfaction in the assessment order. He submitted that it is not a case where the ITAT had gone through the merits and demerits of the findings recorded by the Assessing Officer and the CIT(Appeals) and then come to the conclusion, on facts, that there was no concealment or furnishing of inaccurate particulars and that the ingredients of section 271(1)(c) were not satisfied.

7. Mr. Jolly also placed reliance on the case of P. Jayappan Vs. S.K. Perumal, First Income Tax Officer, Tuticorin, . In that decision the Supreme Court had observed, with reference to its earlier decision in Uttam Chand and Others Vs. Income Tax Officer, Central Circle, Amritsar, that once prosecution has been initiated, it may yet be quashed in the light of a finding favourable to the assessee recorded by

an authority under the Act subsequently in respect of the relevant assessment proceedings. However, Mr. Jolly stated that this decision in P. Jayappan's case (supra) also noted that the decision in Uttam Chand's case (supra) was not an authority for the proposition that no proceedings could be initiated at all u/s 276C(1) and section 277 of the said Act as long as some proceeding was pending under the Act in which there was a chance of success of the assessee. The Supreme Court in P. Jayappan's case (supra) observed that a mere expectation of success in some proceeding in an appeal under the Act would not come in the way of institution of criminal proceedings under sections 276C and 277 of the Act. Mr. Jolly also referred to the provisions of section 278E of the said Act to show that a presumption is raised as to the culpable state of mind and that presumption can only be rebutted in the course of trial by leading evidence and the burden off doing so has to be discharged by the accused. Therefore, he submitted, before that stage is reached, the respondents ought not to have been discharged.

8. Mr. Monga, who appeared on behalf of all the respondents submitted that the present case was clearly covered by the decisions in K.C. Builders' case (supra) and Bandhu Machinery (P.) Ltd. v. Asstt. CIT [Crl. Appeal No. 368 of 2003 dated 10-3-2003]. Mr. Monga submitted that once the penalty is deleted then prosecution cannot be sustained any further. He submitted that this is clearly stated in K.C. Builders' case (supra). He also submitted that in Bandhu Machinery (P.) Ltd.'s case (supra), the following order was passed:

Order

Leave granted.

The question raised in this case for consideration is when penalty levied u/s 271(1)(c) of the income tax Act, for concealment of income has been cancelled by the appellate authority whether a prosecution can be continued u/s 276C of the Act.

In somewhat similar circumstances this Court in Uttam Chand and Others Vs. Income Tax Officer, Central Circle, Amritsar, took the view that having not proceeded to levy penalty, it would be incongruous to continue with the prosecution. Therefore, we are of the view that the proceedings should not have been proceeded with and the prosecution should have been quashed. Therefore, we set aside the order of the High Court and quash the proceedings.

The appeal is allowed accordingly.

Reading the above order, Mr. Monga submitted that the specific question raised was - whether a prosecution can be continued u/s 276C of the Act when penalty levied u/s 271(1)(c) of the Act for concealment of income had been cancelled by the Appellate Authority? The answer given by the Supreme Court was in the negative. The Supreme Court in giving this answer followed its earlier decision in Uttam Chand's case (supra).

9. Mr. Monga further submitted that it is not as if the penalty was deleted merely on a technicality. He submitted that the Assessing Officer had consciously decided not to initiate penalty proceedings in respect of the addition pertaining to disallowance of commission. This fact needs to be contrasted with the fact that the same Assessing Officer for the same assessment year consciously chose to initiate penalty proceedings in respect of the addition to the trading account. Therefore, according to Mr. Monga, this is not a case where no decision on merits qua penalty had been reached. He submits that the Assessing Officer consciously decided not to initiate penalty proceedings once he found that there was no necessity for doing so. This non-initiation of penalty proceedings has been given a stamp of finality by the ITAT Order by deleting the penalty which had been added by the CIT(Appeals). Therefore, according to Mr. Monga, on merits no penalty could be levied on the assessee and this finding has attained finality inasmuch as even the appeal preferred by the department before this Court u/s 260A of the income tax Act, was dismissed.

10. Considering the arguments advanced by the counsel for the parties, the decision of the Supreme Court in K.C. Builders" case (supra) would be clearly applicable. The decision referred to by Mr. Jolly in the case of P. Jayappan (supra), in my view, does not contain anything that would militate against the respondents. In P. Jayappan"s case (supra), the Supreme Court had observed that a mere expectation of success in some proceedings in an appeal under the Act would not come in the way of institution of criminal proceedings under sections 276C and 277 of the Act. In the present case, the criminal proceedings have not been set aside on the ground that the respondents had an expectation of success in a proceeding under the Act. The learned Additional Sessions Judge had, relying upon the decision of the Tribunal in deleting the penalty, set aside the criminal proceedings on the ground that once penalty proceedings have been set aside by the final fact finding authority then no case was made out for continuing the criminal proceedings. This is entirely different from the situation contemplated in P. Jayappan"s case (supra).

11. Reverting to the discussion of the Supreme Court decision in K.C. Builders" case (supra) and Bandhu Machinery (P.) Ltd."s case (supra), it must be noted that the Supreme Court had categorically stated in K.C. Builders" case (supra) that the levy of penalties and prosecution u/s 276C were simultaneous and that once the penalties were cancelled on the ground that there was no concealment, the quashing of proceedings u/s 276C was automatic. In Bandhu Machinery (P.) Ltd."s case (supra), a specific question was raised as to whether when penalty levied u/s 271(1)(c) of the said for concealment of income had been cancelled by the Appellate Authority, whether a prosecution could be continued u/s 276C of the said Act. The Supreme Court, relying upon its earlier decision in Uttam Chand"s case (supra) held that not having proceeded to levy penalty, it would be incongruous to continue with the prosecution. Clearly, the Supreme Court was of the view that once penalty proceedings u/s 271(1)(c) of the said Act stood cancelled, the prosecution u/s 276C of the said Act could not continue. At this

juncture, it would be relevant to point out that while the learned Additional Sessions Judge had terminated the criminal proceedings on the basis of the order passed by the ITAT, the department had continued the proceedings further by filing an appeal before this Court against the said order of the ITAT passed on 6-4-2004. The said appeal was numbered as ITA 4/2005 and the same was disposed of by a judgment of a Division Bench of this Court on 3-3-2005. After narrating the entire sequence of events and quoting relevant portions of the ITAT order dated 6-4-2004, this Court dismissed the appeal filed by the department in the following manner:

4. The Tribunal while granting this relief to the appellant had relied upon the judgment of the Supreme Court in the case of Commissioner of Income Tax, Madras, and Another Vs. S.V. Angidi Chettiar, It is a settled principle of law and the provisions of section 271(1)(c) on their plain reading would require proper application of mind and recording of at least bare minimum opinion on the part of the Assessing Officer that a case for initiation of penalty proceedings was made as there was concealment of income, or that incorrect particulars had been furnished by the assessee, with intention to avoid payment of tax. In the present case the Assessing Officer had recorded satisfaction with regard to one sum while with regard to the other be made no such indication, as is clear from the above reproduced relevant portion of the order of the Assessing Officer.

5. We find no merit in this appeal as it raises no question of law, much less a substantial question of law, as such an interpretation is clear from the bare reading of the provisions and it has already been the subject-matter of pronouncements by various courts. The view consistently is in the above terms. Thus, in view of the judgment of this Court in Commissioner of Income Tax Vs. S.R. Fragrances Ltd., this appeal is dismissed, while leaving the parties to bear their own costs.

The aforesaid judgment delivered by a Division Bench of this Court has come subsequent to the order passed by the learned Additional Sessions Judge and, it, in my view, amounts to the final nail in the coffin of the petitioner's case. It is evident that a Division Bench of this Court upheld the deletion of the penalty by the ITAT after considering all the relevant circumstances. A finding has been recorded by the Division Bench that in the present case the Assessing Officer had not recorded any satisfaction with regard to the penalty associated with the disallowance of commission of Rs. 40,630. While doing so, the Division Bench had noted that a plain reading of the provisions of section 271(1)(c) of the said Act would require proper application of mind and recording of at least a bare minimum opinion on the part of the Assessing Officer that a case for initiation of penalty was made out as there was concealment of income or that incorrect particulars had been furnished by the assessee with the intention to avoid payment of tax. It is obvious that the Division Bench did not discern any such application of mind and recording of the bare minimum opinion on the part of the Assessing Officer. In this background, the submission made by Mr. Monga has to

be accepted that the penalty was deleted not merely on a technicality but on merits. This being the position, I need not go into the question as to whether a prosecution u/s 276C of the said Act can be continued in a case where the penalty proceedings u/s 271(1)(c) of the said Act have been terminated merely on the ground of some technicality and not on merits. In this context, Mr. Jolly had also submitted that the ratio in Ram Commercial Enterprises Ltd.'s case (supra) had been doubted by a subsequent Division Bench of this Court and the question has now been referred to a Full Bench. However, in view of the conclusion arrived at above that the penalty was deleted not just on a technicality but on merits, I need not go into this issue. Insofar as the present case is concerned, it is fully covered by the decision in K.C. Builders' case (supra) and Bandhu Machinery (P.) Ltd.'s case (supra).

12. Accordingly, the impugned order passed by the learned Additional Sessions Judge does not require any interference.

This revision petition is dismissed.