

(2010) 07 KAR CK 0003
In the Karnataka High Court
Case No : IT Appeal No. 1356 of 2006

J. Sumermal (HUF)

APPELLANT

Vs

Assistant Commissioner of Income Tax

RESPONDENT

Date of Decision : 26-07-2010

Acts Referred:

Income Tax Act, 1961 — Section 133 (6), 143 (2), 273 (1) (c)

Citation : (2010) 195 TAXMAN 210

Hon'ble Judges : N. Kumar, J;B.V. Nagarathna, J

Bench : Division Bench

Advocate : Anitha Sumenth, for the Appellant; M.V. Seshachala, for the Respondent

Final Decision : Dismissed

Judgement

N. Kumar, J.—The Assessee has appealed against the order passed by the Tribunal upholding the imposition of penalty u/s 273(1)(c) of the Income Tax Act, 1961 (hereinafter referred to as "the Act").

2. The Assessee is a Hindu undivided family, carrying business under the name and style of "Mahaveer Electric Agency" as a proprietary concern. The Assessee filed his return of income on 27-10-1998, admitting a total income of Rs. 46,46,946 which consisted of a long-term capital gain of Rs. 44,53,310. During the year of accounting, the Assessee completed the construction of a three-storied building at No. 15, Astabujam Road, Chennai. The Assessee disclosed in the accounting year 1998-99, the cost of construction of the three storied building at No. 15, Astabujam Road, Chennai as Rs. 12,50,000. The building consists of a ground floor, first floor and two residential flats in the second floor. A notice u/s 143(2) of the Act was served on the Assessee. The Assessee supported the cost admitted by him with a valuation report from Sri Pakkirsany, Chartered Engineer and Approved Valuer. As the said report was not in accordance with law, a reference was made u/s 133(6) to the Officer of the Valuation Department of Chennai, requesting him to inspect the building and

furnish a report on the cost of construction of the building. The Valuation Officer gave his report estimating the cost of construction at Rs. 41,10,000. The cost for the godowns was estimated by him at Rs. 23,22,000, while the cost for the residential flat was estimated at Rs. 17,88,000. From the aforesaid estimate, prima facie it is clear that the Assessee has under stated the cost of construction to an extent of Rs. 28,60,000 (Rs. 41,10,000 - Rs. 12,50,000). Thereafter, on 27-2-2001, a letter was sent to the Assessee calling upon him to file his objections as to why the difference of Rs. 28,06,000 in the cost of construction should not be assessed to tax under the provisions of Section 69B of the Act. The Assessee filed his objection statement and along with the objections he filed a valuation report admitting the cost of construction at Rs. 23 lakhs. It was explained that the difference in quantum between the earlier report and the later report was because the first report was based on the drawings and the second report was based on the actual measurement and the difference in the cost was met by a relative. By a letter dated 27-2-2001 the Assessee was asked to produce the actual ledger copy relating to the construction together with vouchers in support of the debits in this account. Neither the ledger copy nor any of the vouchers were produced by the Assessee. It is on the available material, that the Assessing Officer proceeded to assess accepting the cost of construction of the building at Rs. 41,10,000 and holding that the differential amount constitutes escaped assessment. The said order of the Assessing Officer was challenged in appeal by the Assessee. The appeal was partly allowed holding that the cost of construction is Rs. 32,05,000. Assessee did not challenge the said order but the revenue filed an appeal, which came to be dismissed. Thus, the said order became final. It is on the basis of the said order, that the penalty proceedings were initiated u/s 271(1)(c) of the Act and the Assessee appeared in pursuance of the notice issued and filed his objections and contested the proceedings. However, by an order dated 2-12-2003, the authority imposed a penalty of Rs. 6 lakhs. Aggrieved by the said order, the Assessee preferred an appeal and the appeal was allowed and penalty was set aside. Aggrieved by the same, revenue preferred an appeal before the Tribunal. The Tribunal allowed the appeal, set aside the order of the appellate authority and restored the imposition of penalty. Being aggrieved by the said order, the Assessee is before this Court.

3. This appeal was admitted on 21-6-2007 to consider the following substantial questions of law:

(i) Whether the order of penalty passed by the Assessing Authority u/s 271(1)(c) of the Income Tax Act and affirmed by the Appellate Tribunal without there being a finding with regard to satisfaction of the imposition of penalty on the differential costs as the same is undisclosed income for the accounting year 1998-99 is proper and just in law?

(ii) Whether the finding of the Appellate Tribunal on the concurrent finding of fact and imposition of penalty upon the differential costs on the basis of estimated cost of the building is proper and valid?

(iii) Whether the Appellate Tribunal is justified in affirming the order of penalty passed by the Assessing Authority when the assessment on the undisclosed income is set aside by the Appellate Tribunal?

4. learned Counsel appearing for the Appellant assailing the impugned order contended that the imposition of penalty cannot be automatic. Unless the explanation offered by the Assessee is found to be false or when he fails to offer an explanation then, or when a person is unable to substantiate or fails to prove that such explanation is bona fide by acceptable evidence, then only the penalty should be imposed u/s 271(1)(c) of the Act. Secondly, it was contended by relying on judgments of the Apex Court that the penalty cannot be levied on the basis of merely an estimate of a cost of construction. As in this case, none of the three valuation reports which are on record found to be accurate. Thirdly, it was contended that the construction activity was spread over for a period of two years and imposition of penalty treating the difference in the amount, concealing the income for one year is illegal. Lastly, it was contended that though the judgment of the appellate Tribunal runs to 50 pages, absolutely, no reasons are forthcoming for arriving at a conclusion to set aside the well reasoned order passed by the appellate Commissioner and therefore, she submitted that the appeal be allowed by setting aside the impugned order.

5. Per contra, learned Counsel appearing for the revenue submitted that when once the Assessee admits the total cost of construction as being Rs. 32,05,000 as determined by the appellate authority on the original side, the difference in the amount constitutes concealed income and the main provisions as contained in Section 69B of the Act is attracted and therefore, the order passed by the Tribunal is legal and valid and does not call for any interference in this appeal.

6. From the aforesaid facts, it is clear that the Assessee has built a three storied building. Only a sum of Rs. 12,50,000 was shown as the amount spent towards cost of construction. No accounts/no receipts were maintained. The said claim of Rs. 12,50,000 was based on a report of a registered valuer. At the time of processing the return, the authorities noticed that the said valuation report is not in accordance with law and the cost of construction of a three-storied building could not be Rs. 12,50,000. Therefore, after obtaining the valuation report by the Department from the approved valuer, who valued the estimated cost of construction at Rs. 41,10,000, a show-cause notice was issued to the Assessee calling upon him to explain as why the Department should not accept the said cost of construction. At that stage, the Assessee came up with yet another valuation report showing the valuation of Rs. 23,22,000 and the difference in the amount was shown as a loan which he has borrowed from a relative. He failed to substantiate his explanation even at that time by producing any acceptable evidence, books of account, receipts, ledgers and vouchers as the same were not produced. It is under those circumstances, that the Assessing Officer proceeded to assess the cost of construction by accepting the Department's valuers report at Rs. 41,10,000 and the said valuation was modified by the appellate authority

treating the cost of construction at Rs. 32,05,000. As far as the Assessee is concerned, he has accepted the said cost of construction. The argument is that though the Assessee accepted the cost of construction of Rs. 32,05,000, it was only to purchase peace with the Department and therefore that cannot be the basis for initiating penalty proceedings. Whether the Assessee accepted the said amount of the cost of construction to buy peace or not, the legal effect is that the total cost of construction is Rs. 32,05,000. The Assessee has in his first return shown the cost of construction as only Rs. 12,50,000 and after being asked to show cause as to why the cost of construction should not be treated as Rs. 41,10,000, as per the Government Valuer's report, he volunteered to give a second report showing that the cost of construction at Rs. 23 lakhs. Though an explanation was offered by showing that the first report was based on drawings and the second report was based on the actual measurement, even that has not been substantiated before the authorities. Therefore, it is a clear case of concealment of income by the Assessee. If the cost of construction is taken as Rs. 32,05,000, there is further concealment of income by the Assessee. The assessment order has attained finality. That is the basis for the penalty proceedings. It was not initiated on, the basis of the valuation report but was initiated on the basis of the order of the appellate authority, which has become final and which has declared to cost of construction at Rs. 32,05,000 which finding is accepted by the Assessee. Therefore, the judgments on which reliance have been placed by the learned Counsel have no application to this case as the penalty proceedings are not initiated on the basis of the difference in valuation reports.

7. The material on record clearly establishes in the first instance that there was a concealment of income and in the second instance after the finding of the appellate authority, the concealment of income continued. If only the Assessee had availed the opportunity given and produced the books of account, ledgers, receipts and vouchers and made an attempt to show how the figure of Rs. 12,50,000 or Rs. 23,22,000 was in fact the probable cost of construction a lenient view could have been taken by the authorities. In the reply filed to the show-cause notice, details of facts are missing and only the legal position is highlighted. It is in those circumstances that, it becomes clear that the explanation offered by the Assessee remains unsubstantiated. It is also clear from the material on record, that the so called loan taken from a close relative is found to be false.

8. In the instant case, as the record reveals what is disclosed as the cost of construction of a three storied building, consisting of ground floor, godown in the first floor and two residential flats in the second floor is Rs. 12,50,000, is based on the registered valuation report and it is not based on facts, account books, vouchers and receipts. When a show-cause notice was issued based on the Government valuer's report, voluntarily the Assessee came out with a valuation of Rs. 23,22,000 based on the second report of the valuer and he admitted the difference. The explanation offered is that the best registered valuer had

estimated the cost of construction based on the plan whereas, "the second valuation report was based on actual construction, which fact is not established by any material evidence on record. Therefore, the authorities rightly rejected the said contention". The Assessee accepted the cost of construction at Rs. 32,05,000. We are satisfied from the material on record that there was a deliberate attempt on the part of the Assessee to suppress the true facts from the assessing authority and they did not avail the opportunity to support their explanations by any acceptable evidence, at least by producing the accounts which they had maintained while putting up the construction. In that view of the matter, when the Assessee in the first instance admittedly increased the cost of construction as Rs. 23,22,000 from the initial figure of Rs. 12,50,000 and ultimately accepted Rs. 32,05,000, he cannot wriggle out of the admission by saying that to purchase peace with the Department the valuation was accepted.

9. The Apex Court in the case of M/s. K.P. Madhusudhanan Vs. Commissioner of Income Tax, Cochin, while interpreting the Explanation to Section 271(1)(c) of the Act has held as under:

The Explanation to Section 271(1)(c) is a part of Section 271. When the ITO or the AAC issues to an Assessee a notice u/s 271, he makes the Assessee aware that the provisions thereof are to be used against him. These provisions include the Explanation. By reason of the Explanation, where the total income returned by the Assessee is less than 80 per cent of the total income assessed u/s 143 or 144 or 147, reduced to the extent therein provided, the Assessee is deemed to have concealed the particulars of his income or furnished inaccurate particulars thereof, unless he proves that the failure to return the correct income did not arise from any fraud or neglect on his part. The Assessee is, therefore, by virtue of the notice u/s 271 put to notice that if he does not prove, in the circumstances stated in the Explanation, that his failure to return his correct income was not due to fraud or neglect, he shall be deemed to have concealed the particulars of his income or furnished inaccurate particulars thereof and, consequently, be liable to the penalty provided by that section. No express invocation of the Explanation to Section 271 in the notice u/s 271 is necessary before the provisions of the Explanation therein are applied.

10. In that view of the matter, in spite of the opportunities given to the Assessee, when he did not avail the opportunity and neither offered any explanation, the finding arrived at by the authorities imposing penalty cannot be found fault.

11. Insofar as the argument that even if penalty is to be imposed, it is to be distributed to the two accounting years is concerned, we find no merit. The specific case of the Assessee is that total cost of construction was Rs. 12,50,000, when he filed the returns. The returns for the year 1997-98 was processed, finalised and whatever was mentioned therein, was accepted and it had become final. It is only while assessing the return for the year 1998-99 the discrepancy was detected and notice was issued, opportunity was given reports were called for and findings were recorded. It is not the case of the Assessee that either Rs.

23,22,000 or Rs. 32,05,000 is spent by him for two years. "Merely because the construction was spread over for a period of two years, it is not a ground to set aside the impugned order. In the present case, we are satisfied that the Assessee is not entitled to that benefit also".

12. In that view of the matter, we do not see any merit in this appeal. Accordingly, the appeal is dismissed.

Substantial questions of law which are raised in this appeal are answered in favour of the revenue and against the Assessee.

No costs.