
(2016) 03 GUJ CK 0205
In the Gujarat High Court
Case No : Tax Appeal No. 543 of 2012

Nayan C. Shah

APPELLANT

Vs

Income Tax Officer

RESPONDENT

Date of Decision : 29-03-2016

Acts Referred:

Citation : (2016) 386 ITR 304

Hon'ble Judges : Ms. Harsha Devani and G.R. Udhwani, JJ.

Bench : Division Bench

Advocate : Mr Amit K. Dave and Mr K.T. Dave, Advocates, for the Appellant; Mr. Varun K. Patel, Advocate, for the Respondent

Final Decision : Allowed

Judgement

Ms. Harsha Devani, J.(Oral)—This appeal under section 260A of the Income Tax Act, 1961 (hereinafter referred to as "the Act") is directed against the order dated 07.03.2012 passed by the Income Tax Appellate Tribunal, Ahmedabad Bench "C", Ahmedabad (hereinafter referred to as the "Tribunal") in ITA No.2822/Ahd/2011, whereby the appeal preferred by the revenue has been dismissed.

2. This court, by an order dated 18.03.2014, admitted the appeal on the following substantial question of law:

"Whether on the facts and in the circumstances of the case as well as in law, the Appellate Tribunal was justified in reversing the order of CIT(A) and restoring the order passed by Assessing Officer levying penalty of Rs. 4,44,510/- under section 271(1)(c) of the Act?"

3. The assessee, a partnership firm is engaged in the business of construction. During the course of assessment proceedings, the Assessing Officer, on verification of details submitted in respect of labour payment, noticed that in some cases, the tax deducted at source from certain parties to whom labour payments were made, were not deposited into Government account as per the

provisions of section 200(1) of the Act. He, therefore, held that the assessee had clearly violated provisions of section 40(a)(ia) of the Act and accordingly, made a total addition of Rs. 13,20,588/- to the total income of the assessee. The Assessing Officer, thereafter, initiated penalty proceedings by issuance of notice under section 274 read with section 271 of the Act on 24.10.2008 to the respondent ? assessee. The assessee submitted its reply in response to the show cause notice the details whereof are reproduced in paragraph 2 of the impugned order. The Assessing Officer, however, was not convinced by the reasons put forth by the assessee and accordingly, levied minimum penalty of Rs. 4,44,510/- under section 271(1)(c) of the Act. The assessee carried the matter in appeal before the Commissioner of Income Tax (Appeals), who by an order dated 16.09.2011, allowed the appeal by holding that out of an amount of Rs. 13,20,588/-, tax was deducted at source in respect of Rs. 6,18,300/- and was deposited in the Government account on 24.04.2006, that is, before the due date of filing of return and thus, was covered by the decision of the Tribunal in *Kanubhai Ramjibhai v. ITO*, 49 DTR 70 (Ahd)(Trib.). As regards the balance amount of TDS, the Commissioner (Appeals) took note of the fact that the same was deposited in the Government account on the amount of Rs. 13,20,588/- on 1.12.2008 and was allowable in assessment year 2007-08, and was accordingly of the view that no penalty is warranted under section 271(1)(c) of the Act for technical breach of law and deleted the penalty imposed by the Assessing Officer. The revenue carried the matter in appeal before the Tribunal, which held that the assessee had suppressed the actual particulars of income by not making disallowance under section 40(a)(ia) of the Act and restored the penalty order passed by the Assessing Officer. Being aggrieved, the appellant ? assessee has preferred the present appeal.

4. Mr. K. T. Dave, learned advocate for the appellant submitted that the Tribunal has failed to appreciate that the default, if any, was technical and venial in nature inasmuch as, the disallowance to the extent of Rs. 6,18,300/- was allowed in assessment year 2007-08 vide order under section 154 dated 03.02.2009, whereas in respect of the balance amount of Rs. 7,94,590/-, the tax deducted at source was made and deposited with interest on 01.12.2008 so that it was admissible in assessment year 2009-10. It was submitted that the entire exercise taking all the years together was revenue neutral on account of uniform rate of tax @ 30% applicable in all these years. It was further submitted that the Tribunal has failed to appreciate that the entire disallowance of Rs. 7,94,590/- was not disallowable under section 40(a)(ia) of the Act and hence, no penalty under section 271(1)(c) of the Act was attracted. It was, accordingly, urged that the breach being technical and venial in nature, the Commissioner (Appeals) was wholly justified in deleting the penalty and that the Tribunal was not justified in restoring the penalty imposed by the Assessing Officer.

4.1 In support of his submissions, the learned advocate placed reliance upon an unreported decision of this court in the case of *Commissioner of Income Tax IV v. L. G. Chaudhary* rendered on 15.01.2013 in Tax Appeal No.536 of 2012 wherein,

the court observed that the disallowance was due to non-payment of TDS, which was at the most a technical default and that, there was nothing to indicate any concealment of the income or furnishing of inaccurate particulars of income by the assessee and that the Assessing Officer was not justified in levying the penalty. The court, accordingly, did not find any reason to interfere in the appeal and held that both the authorities, namely, CIT (Appeals) and the Tribunal have rightly deleted the penalty.

5. Opposing the appeal, Mr. Varun Patel, learned standing counsel for the respondent, reiterated the findings recorded by the Assessing Officer and the Tribunal. It was submitted that in the present case, while the appellant ? assessee had deposited Rs. 6,18,300/- on 24.04.2006, that is, before the due date of filing of return of income for the assessment year under consideration, the balance amount out of Rs. 13,12,588/- had not been deposited in the year under consideration and was deposited only in the subsequent year. Referring to the findings recorded by the Assessing Officer, it was pointed out that the appellant, on his own, did not bring the aforesaid facts to the notice of the Assessing Officer and that such facts were discovered only during the course of assessment proceedings. It was pointed out that the addition/disallowance made on account of non-deduction of tax at source and non-payment of the tax deducted at source into the Government account within the stipulated time as per the provisions of section 40(a)(ia) of the Act, are found out by the Assessing Officer only during the course of assessment proceedings. Under the circumstances, the Assessing Officer was justified in holding that the assessee had furnished inaccurate particulars of income as contemplated under section 271(1)(c) of the Act and that the Tribunal was wholly justified in affirming the findings recorded by the Assessing Officer. According to the learned counsel, the question as to whether the assessee has furnished inaccurate particulars is a question of fact, which does not give rise to any question of law. It was, accordingly, urged that the question is required to be answered in favour of the revenue and against the appellant and that the appeal deserves to be dismissed.

6. The facts are not in dispute. The assessee filed return of income declaring total income of Rs. 8,28,646/-, whereas, by an order dated 24.10.2008 under section 143(3) of the Act the assessment was completed by assessing the total income at Rs. 24,84,970/-. While framing assessment under section 143(3) of the Act, the Assessing Officer invoked the provisions of section 40(a)(ia) of the Act and made disallowance of Rs. 14,29,890/-. The assessee pointed out that out of the total amount of Rs. 14,29,890/-, tax was deducted at source in respect of Rs. 6,18,300/- and was deposited on 24.4.2006, that is, before the due date for filing of return of income, whereas in respect of the balance amount of Rs. 7,94,590/-, the tax was deducted at source and paid in the subsequent year and accordingly, such expenditure was allowed in the subsequent year. The Assessing Officer, for the reason that the discrepancy in not deducting the tax at source and paying the same into the Government account had not been disclosed by the assessee and that the same was revealed only during the course of the

assessment proceedings, formed the opinion that the assessee had furnished inaccurate particulars of income and levied penalty under section 271(1)(c) of the Act. The Tribunal, while upholding the finding recorded by the Assessing Officer, has found that this was not a case wherein the claim made by the assessee was allowable under the provisions of the Act and that the assessee was required to deduct tax in accordance with the statutory provisions and deposit the same within the stipulated time limit as prescribed, which has not been done by the assessee. The Tribunal has, accordingly, come to the conclusion that the assessee had suppressed accurate particulars of income by not making disallowance under section 40(a)(ia) of the Act.

7. As noticed herein above, the Commissioner (Appeals) had deleted the penalty on the ground that the default being technical and venial in nature inasmuch as the entire amount of tax which was required to be deducted at source was deducted and deposited in the Government account. According to the Commissioner (Appeals) for a technical breach, levy of penalty was not warranted. Thus, the assessee while filing the return of income, did not make disallowance under section 40(a)(ia) of the Act in relation to the amounts paid on which it had not deducted the tax at source. It is the case of the assessee before the Assessing Officer as well as the authorities concerned that each and every particular of income was accurately furnished and there was a true disclosure of all particulars by it and that the disallowance was only on a technical ground, inasmuch as, though the disallowance was made in the assessment year 2006-07, the amount was allowed as a deduction in the subsequent assessment year.

8. At this juncture it may be apposite to refer to the decision of the Supreme Court in the case of Commissioner of Income Tax v. Reliance Petroproducts Pvt. Ltd., (2010) 322 ITR 158, wherein the court while interpreting the provisions of section 271(1)(c) of the Act, has held that a glance at the said provision would suggest that in order to be covered by it, there has to be concealment of the particulars of the income of the assessee. Secondly, the assessee must have furnished inaccurate particulars of his income. In the facts of that case, the court found that it was not a case of concealment of the particulars of the income, nor was it the case of the revenue either. However, the counsel for the revenue suggested that by making an incorrect claim for the expenditure on interest, the assessee had furnished inaccurate particulars of income. The court observed that it had to only see as to whether in that case, as a matter of fact, the assessee had given inaccurate particulars. The court noted that as per Law Lexicon, the meaning of the word "particular" is a detail or details (in the plural sense); the details of a claim, or the separate items of an account. Therefore, the word "particular" used in section 271(1)(c) would embrace the meaning of the details of the claim made. The court further observed that in Webster's Dictionary, the word "inaccurate" has been defined as: "not accurate, not exact or correct; not according to truth; erroneous; as an inaccurate statement, copy or transcript." The court observed that reading the words "inaccurate" and "particulars" in

conjunction, they must mean the details supplied in the return, which are not accurate, not exact or correct, not according to truth or erroneous. The court noted that it was an admitted position that no information given in the return was found to be incorrect or inaccurate. It was not as if any statement made or any detail supplied was found to be factually incorrect and accordingly, held that, prima facie, the assessee could not be held guilty of furnishing inaccurate particulars. The court repelled the contention raised by the counsel for the revenue that "submitting an incorrect claim in law for the expenditure on interest would amount to giving inaccurate particulars of such income". The court held that in order to expose the assessee to the penalty unless the case is strictly covered by the provision, the penalty provision cannot be invoked. By any stretch of imagination, making an incorrect claim in law cannot tantamount to furnishing inaccurate particulars. Therefore, it is obvious that it must be shown that the conditions under section 271(1)(c) must exist before the penalty is imposed. The court further observed that there can be no dispute that everything would depend upon the return filed because that is the only document, where the assessee can furnish the particulars of his income.

9. Reverting to the facts of the present case, the Assessing Officer, in the penalty order, has observed that the addition/disallowance made on account of non-deduction of tax deducted at source and non-payment of the tax deducted at source into the Government account within the stipulated time as per the provisions of section 40(a)(ia) of the Act, are totally found out by the Assessing Officer only during the course of assessment proceedings and had not been disclosed by the assessee. He, accordingly, has formed the opinion that the assessee has furnished inaccurate particulars of income. However, he has not stated as to what are the inaccurate particulars of income in the return filed by the appellant.

10. From the facts as emerging from the record, it appears that the assessee has made a claim of expenditure in relation to the payments made, which he may not have been entitled to claim in view of the provisions of section 40(a)(ia) of the Act, as tax on part of such amount had not been deducted at source and deposited in the Government account before the due date for filing return income. However, as held by the Supreme Court in the above decision, merely submitting an incorrect claim in law for the expenditure would not amount to furnishing inaccurate particulars of income. The impugned order passed by the Tribunal, therefore, cannot be sustained.

11. Another notable aspect of the matter is that while the Assessing Officer has imposed penalty on the ground that the assessee has furnished inaccurate particulars of income, the Tribunal has set aside the order of the Commissioner (Appeals) by holding that the assessee has suppressed the actual particulars of income by not making disallowance under section 40(a)(ia) of the Act. Thus, the Assessing Officer has imposed penalty on the ground of furnishing inaccurate particulars, whereas the Tribunal has upheld the order of the Assessing Officer on

the ground of concealment of particulars. It is by now well settled that while issuing a notice under section 271(1)(c) of the Act, the Assessing Officer is required to specify as to what is the default on the part of the assessee, as to whether the case is one of furnishing inaccurate particulars, or whether it is a case of concealment of income, or both. In the facts of the present case, the Assessing Officer has proceeded on the footing that inaccurate particulars were filed by the assessee, whereas the Tribunal has held that the assessee had suppressed particulars for the year under consideration. Under the circumstances, the Tribunal, having confirmed the penalty imposed by the Assessing Officer on the ground of suppression of actual particulars in respect of which the assessee was not put to notice, the order of the Tribunal is rendered unsustainable on this ground also.

12. In the light of the aforesaid discussion, the court is of the view that the view expressed by the Commissioner (Appeals) to the effect that the breach in question was technical and venial in nature, requires to be upheld and the impugned order passed by the Tribunal upholding the levy of penalty on the ground of suppression of particulars, deserves to be set aside.

13. For the foregoing reasons, the appeal succeeds and is accordingly allowed. The question is answered in the negative, that is, in favour of the assessee and against the revenue. It is accordingly held that the Appellate Tribunal was not justified in reversing the order of Commissioner (Appeals) and restoring the order passed by the Assessing Officer levying penalty of Rs. 4,44,510/- under section 271(1)(c) of the Act. The impugned order passed by the Tribunal is hereby quashed and set aside and consequentially the order passed by the Commissioner (Appeals) is hereby restored. There shall be no order as to costs.