(2020) 08 BOM CK 0015

In the Bombay High Court

Case No : Income Tax Appeal No. 1742 Of 2011

Omprakash T. Mehta		APPELLANT
	Vs	
Income Tax Officer 21 (3) (4)		RESPONDENT

Date of Decision : 17-08-2020

Acts Referred:

Income Tax Act, 1961 — Section 2(47), 2(47)(i), 147, 148, 254, 260(A), 271(1)(c), 274

Transfer Of Property Act, 1881 — Section 53(A)

Citation : (2020) 08 BOM CK 0015

Hon'ble Judges : Ujjal Bhuyan, J;Milind N. Jadhav, J

Bench : Division Bench

Advocate : Nishant Thakkar, Jasmin Amalsadvala, Pooja, Nahush Shah, A.R.Malhotra, N.A. Kazi

Final Decision : Allowed

Judgement

,,,,

Milind N. Jadhav, J",,,,

1. Heard Mr. Nishant Thakkar, learned counsel for the appellant and Mr. A.R. Malhotra, learned standing counsel, Revenue for the respondent.",,,,

2. This appeal has been preferred by the appellant (also referred to as the assessee) under the provisions of Section 260-A of the Income Tax Act,",,,,

1961 (briefly â??the Actâ?? hereinafter) against the order dated 31.05.2010 passed by the Income Tax Appellate Tribunal at Mumbai,,,,

(â??Tribunalâ?? for short) for the Assessment Year 2005-06.,,,,

3. The appeal has been preferred by the assessee projecting the following question as substantial question of law :,,,,

â??Whether the Tribunal was right in law in confirming the levy of penalty under

Section 271(1)(c) of the Act ?â??,,,,

4. For appreciation of the question proposed, it would be apposite to deal with the relevant facts :-",,,,

(i) Appellant is an assessee under the Act. Appellant alongwith 4 others executed an agreement for sale dated 07.12.2004 in respect of a plot of land,,,,

at Vasai. The total consideration stated in the agreement was Rs.2,60,00,000.00 and conveyance was to be executed only upon receipt of the entire",,,,

consideration. The appellantâ??s share in the sale consideration of the said plot of land was 49.2%. During the financial year under consideration, a",,,,

sum of Rs.1,05,01,111.00 was received out of the total consideration of Rs.2,60,00,000.00. Hence during the said financial year conveyance was not",,,,

executed and possession was not handed over of the said plot.,,,,

(ii) In the return of income filed by the appellant for the Assessment Year 2005-06, appellant offered to tax his share in the consideration received",,,,

during the previous year i.e. Rs.51,66,548.00.",,,,

(iii) Respondent by notice dated 18.04.2007, called upon the appellant to furnish details of capital gains earned during the year under consideration i.e.",,,,

Assessment Year 2005-06. Appellant furnished the requisite information alongwith a copy of the sale agreement to the respondent and after,,,,

scrutinizing the same respondent accepted the capital gains arising on execution of the sale agreement as offered by appellant. Accordingly,",,,,

assessment order was passed.,,,,

(iv) During the Assessment Year 2006-07, a further consideration of Rs.1,30,00,000.00 was received out of the balance remaining total consideration.",,,,

Appellant filed return of income for the Assessment Year 2006-07 and offered to tax his share out of Rs.1,30,00,000.00 received during the year, viz;",,,,

Rs.63,96,000.00.",,,,

(v) During the financial year relevant to Assessment Year 2007-08 another installment of Rs.15,00,000.00 out of the balance was received and",,,,

appellant offered his share in the said amount (i.e. Rs.7,38,000.00) to tax in the return of income filed for the Assessment Year 2007-08.",,,,

(vi) The final outstanding balance amount of consideration i.e. Rs.9,98,889.00 (Rs.2,60,00,000â?" Rs.2,50,01,111) was not received and therefore",,,,

conveyance was not executed between the parties. However, during Assessment

Year 2006-07 physical possession of the said plot of land was",,,,

forcibly taken over by the purchaser.,,,,

(vii) Respondent raised an objection with the manner in which capital gains arising from the sale agreement with respect to the said plot was offered,,,,

to tax by the appellant on receipt basis. After following the procedure, respondent issued notice dated 21.04.2008 under the provisions of Section 148",,,,

of the Act seeking to reopen the assessment for the Assessment Year 2005-06 under Section 147 of the Act.,,,,

(viii) Appellant by letter dated 02.06.2008 requested the respondent to treat the original return filed by the appellant as the return in compliance to the,,,,

notice under Section 148 of the Act. By a further letter dated 09.08.2008, appellant called upon the respondent to furnish reasons for issuing the",,,,

statutory notice under Section 148 of the Act.,,,,

(ix) However, appellant revised his income tax returns for the Assessment Years 2005-06 to 2007-08 withdrawing the amount of capital gains and",,,,

offering to tax capital gains on the entire sale consideration of Rs.2,60,00,000.00 for the financial year relevant to Assessment Year 2006-07. Thus,",,,,

the appellant filed revised returns of income for the Assessment Years 2005-06, 2006-07 and 2007-08 on the above basis respectively.",,,,

(x) Respondent by letter dated 03.11.2008 informed the appellant that the revised returns would not be accepted in view of the appellantâ??s letter,,,,

dated 02.06.2008 by which the appellant had requested the respondent to consider the original return as the return in compliance to the notice under,,,,

Section 148 of the Act.,,,,

(xi) Appellant thereafter submitted a revised working of capital gains for the Assessment Years 2005-06 and 2006-07 and requested the respondent to,,,,

complete the assessment for the 3 years, viz; Assessment Years 2005-06, 2006-07 and 2007-08.",,,,

(xii) Respondent completed the reassessment for the Assessment Year 2005-06 on 26.11.2008 and taxed the appellantâ??s share of capital gains,,,,

arising on the entire sale consideration of Rs.2,60,00,000.00 for the said Assessment Year 2005-06. However, while completing the above assessment",,,,

respondent also initiated penalty proceedings against the appellant for furnishing inaccurate particulars of income as a result of deferring the charge on,,,, capital gains arising pursuant to execution of the sale agreement with respect to the said plot of land.,,,,

(xiii) The assessments for the Assessment Years 2006-07 and 2007-08 were completed keeping in mind the reassessment completed for the,,,,

Assessment Year 2005-06.,,,,

(xiv) After completing the above reassessment for the Assessment Year 2005-06, respondent issued notice dated 26.11.2008 under Section 271(1)(c)",,,,

of Act calling upon the appellant to show cause as to why penalty should not be levied and called upon the appellant to attend the hearing for penalty,,,,

proceedings by another notice dated 02.04.2009.,,,,

(xv) By letter dated 13.04.2009, appellant furnished detailed reasons and circumstances under which the revised returns of income for the Assessment",,,,

Years 2005-06 to 2007-08 came to be filed and also the details of taxes alongwith amounts that were due as a result of the revised returns which had,,,,

promptly been paid by the appellant without raising any dispute. By another letter dated 13.04.2009 appellant also brought to the notice of the,,,,

respondent that during the course of the original assessment proceedings for the Assessment Year 2005-06, appellant had furnished a copy of the sale",,,,

agreement and the same had been enquired into by the respondent viz-a-viz capital gains offered to tax by the appellant.,,,,

5. Mr. Nishant Thakkar, learned counsel appearing for the appellant at the outset has submitted a brief chronology of the dates and events and taken

us through the same, which is reproduced herein :-",,,,

Sr.

No.",Date,Particulars,Exh.,Pg. Nos.

1,07-12-2004,"Agreement to sell land in Vasai for

Rs.2.6 crores- Appellantâ??s share

in land = 49.2%. Appellant receives

only Rs.51.66 Lakhs during F.Y. 2004-

05.",A,19-27

2,31-10-2005,"Return for A.Y. 2005-06 offering

Rs.51,66,548/- and claiming exemption

u/s. 54EC of the Act.",B,28-30

3,31-03-2005,"Assessment Order for A.Y. 2005-06

accepting Assesseeâ??s claim",D,33-35

4,28-10-2006,"Return for A.Y. 2006-07 filed offering

Rs.63,96,000/- as capital gains on

Vasai Land being amount received

during the year",E,36-42

5,16-11-2007,"Return for A.Y. 2007-08 filed offering

Rs.7,38,000/- as capital gains on Vasai

land being amount received during the

year.",F,43-45

6,21-04-2008,"148 Notice issued by Respondents for

A.Y. 2005-06 to bring to tax the entire

gains in A.Y. 2005-06",,

7,20-08-2008,"Revised return filed for A.Y. 2006-07

â?" withdrawing offer of capital gains

in view of offer of entire gains to be

made in A.Y. 2005- 06 â?" revision

not accepted in view of reopening of

A.Y. 2005-06",I,50-56

8,21-08-2008,"Revised return filed for A.Y. 2005-06

offering the entire gains to tax â?" not

accepted since the return was barred

by limitation",J,57-63

9,22-08-2008,"Revised return filed for A.Y. 2007-08

â?" withdrawing offer of capital gains

in view of offer of entire gains to be

made in A.Y. 2005- 06 â?" revision

not accepted in view of reopening of

A.Y. 2005-06.",K,64-66

10,22-08-2008,"Letter to Respondent to consider revised return",L,67-68

11,03-11-2008,Reasons for Re-opening,M,69-70

12,26-11-2008,"Revised working of capital gains

submitted (Investment in NABARD)

A.Y.2005-06",N,71-74

,,,,

,,,,

13,20-10-2008,"Revised working of capital gains

submitted (Investment in NABARD)

A.Y.2006-07",O,75-80

14,26-11-2008,"Re-assessment Order Passed for

A.Y. 2005-06",P,81-86

15,19-12-2008,"Re-assessment Order Passed for

A.Y. 2006-07",Q,87-89

16,26-11-2008,"SCN as to why penalty should not be

issued",R,90

17,02-04-2009,Second Show Cause Notice,S,92

18,13-04-2009,Assesseeâ??s Response to SCN,T,93-94

19,24-04-2009,Second Letter by Assessee,U,95-96

20,28-05-2009,Penalty Order for A.Y. 2005-06,V,97-99

21,13-06-2009,"Form 35 a/w SOF AND GOA â?

CIT Appeal Filed against Penalty

Order",W,100-106

22,27-11-2009,CIT (Appeals) Order,X,107-111

23,04-01-2010,Form 36 â?" GOA ITAT Appeal Filed,Y,112-114

24,31-05-2010,ITAT Order,Z,136-146

25,,"MA Filed challenging the

Tribunalâ??s Order",,

26,27-08-2010,MA Order,AA,147-159

6. Per contra, Shri A.R.Malhotra, learned standing counsel, Revenue appearing

on behalf of the respondent defended both the orders passed by th

CIT Appeals and ITAT in upholding the levy of penalty by the respondent-Assessing Officer on the appellant. He submitted that there was deliberate

attempt on the part of the assessee to submit inaccurate particulars of income so as to reduce the appellantâ??s taxable income. He laid emphasis on

the explanation appended to Section 271(1)(c) and submitted that the said explanation imposes the element of strict liability on the assessee for

furnishing inaccurate particulars of income while filing return. Shri Malhotra referred to and relied upon the following judgments in support of his

submissions.",,,,

,,,,

A,"Samson Maritime Ltd. Vs.

Commissioner of Income Tax City 7",Bombay High Court,,

B,"Dr. Aminâ??s Pathology

Laboratory Vs. P.N.Prasad, Joint

Commissioner of Income Tax","(2001) 252 ITR 673

(Bombay)",,

C,"Union of India Vs. Dharamendra

Textile Processors","(2008) 174 Taxman

571 (SC)",,

some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then,",,,,

notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by",,,,

the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee",,,,

and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other",,,,

than a right expressly provided by the terms of the contract:,,,,

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part,,,,

performance thereof.â??,,,,

In order that the provisions of Section 53A of the T.P. Act be attracted, first and foremost, the transferee must, in part performance of the",,,,

contract, have taken possession of the property or any part thereof. Secondly, the transferee must have performed or be willing to perform",,,,

his part of the agreement. It is only if these two important conditions, among others, are satisfied that the provisions of Section 53A can be",,,,

said to be attracted on the facts of a given case.,,,,

Section 271(1)(c) is as under :,,,,

271(1) If the Assessing Officer or the Commissioner (Appeals) or the Commissioner in the course of any proceedings under this Act, is",,,,

satisfied that any person-,,,,

(c) has concealed the particulars of his income or furnished inaccurate particulars of such income, he may direct that such person shall pay",,,,

by way of penalty, -",,,,

(i)......,,,,

(ii)......,,,,

(iii) in the cases referred to in clause (c) or clause (d), in addition to tax, if any, payable by him, a sum which shall not be less than, but",,,,

which shall not exceed three times, the amount of tax sought to be evaded by reason of the concealment of particulars of his income or",,,,

fringe benefits or the furnishing of inaccurate particulars of such income or fringe benefits.""",,,,

9. Since imposition of penalty is under Section 271 (1) (c) of the Act, as per this provision, if the Assessing Officer or the Commissioner (Appeals) or",,,,

the Principal Commissioner or Commissioner in the course of any proceedings under the Act is satisfied that any person had concealed the particulars,,,,

of his income or furnished inaccurate particulars of such income, he may direct that such person shall pay by way of penalty, in addition to the tax",,,,

payable by him, a sum which shall not be less than but which shall not exceed three times the amount of tax sought to be evaded by reason of",,,,

concealment of particulars of his income or furnishing of inaccurate particulars of such income.,,,,

10. The two key expressions in Section 271(1)(c) of the Act are â??concealment of particulars of his incomeâ? and â??furnishing inaccurate,,,,

particulars of such incomeâ?. These two expressions comprise of the two limbs for imposition of penalty under Section 271(1)(c) of the Act. Gujarat,,,,

High Court in the case of Manu Engineering Vs. CIT, 122 ITR 306 and Delhi High Court in Virgo Marketing P. Ltd. Vs. CIT, 171 Taxmann 156 held",,,,

that levy of penalty has to be clear as to the limb for which the penalty is levied. If the Assessing Officer proposes to invoke the first limb, then the",,,,

notice has to be appropriately marked. Similarly, if the Assessing Officer wants to invoke the second limb then the notice has also to be appropriately",,,,

marked. If there is no striking off of the inapplicable portion in the notice which is in printed format, it would lead to an inference as to non -",,,,

application of mind. In such a case, penalty would not be sustainable.",,,,

11. Supreme Court in the case of Ashok Pai Vs. CIT, 292 ITR 11 observed that concealment of income and furnishing of inaccurate particulars of",,,,

income in Section 271(1)(c) of the Act carry different connotations.,,,,

12. Let us now advert to the substantial question of law proposed by the appellant. Through this question, appellant is contending that the Tribunal",,,,

ought to have held that the order of penalty passed under Section 271(1) (c) of the Act was bad in law in view of the fact that at the time of initiation,,,,

of penalty proceedings as well as at the time of imposition of penalty, Assessing Officer was not clear as to which limb of Section 271 (1)(c) of the",,,,

Act was attracted. At the time of hearing, learned counsel for the appellant argued that in the show-cause notice the inapplicable portion was not",,,,

struck off; thus it was not indicated in the notice whether the penalty was sought to be imposed for concealment of particulars of income or for,,,,

furnishing inaccurate particulars of income, which has vitiated the impugned order of penalty. We have already noted and analyzed the two limbs of",,,,

Section 271(1)(c) of the Act and also the fact that the two limbs i.e. concealment of particulars of income and furnishing inaccurate particulars of,,,,

income carry different connotations. We have also noticed that the Assessing Officer has to indicate in the statutory notice for which of the two limbs,,,,

he proposes to impose the penalty and for this the notice has to be appropriately marked. If in the printed format of the notice the inapplicable portion,,,,

is not struck off thus not indicating for which limb the penalty is proposed to be imposed, it would lead to an inference as to non-application of mind,",,,,

thus vitiating imposition of penalty.,,,,

13. In Goa Coastal Resorts & Recreation Pvt. Ltd. (supra) both the lower

appellate authorities had categorically held that there was no record of,,,,

satisfaction of the Assessing Officer that there was any concealment of income or that any inaccurate particulars were furnished by the assessee. In,,,,

such circumstances, this Court held that the two lower appellate authorities had correctly ordered dropping of penalty proceedings against the",,,,

assessee. It was in that context that this Court noted that in the notice issued in printed format the inapplicable portion was not struck off. Therefore in,,,,

that case, this Court found that in addition to the notice being defective, there was no finding or satisfaction recorded in relation to concealment or",,,,

furnishing of inaccurate particulars of income.,,,,

14. This Court in a recent judgment passed in the case of Ventura Textiles Ltd. vs. Commissioner of Income Tax â?" Mumbai City â?" 11 in Income,,,,

Tax Appeal No.958 of 2017 dated 12.06.2020 was concerned with a similar question with respect to issuance of the statutory show-cause notice,,,,

under Section 274 read with Section 271 of the Act proposing to impose penalty. While dealing with the basic question of validity of the notice, this",,,,

Court in paragraph Nos.23 to 25 held as under :-,,,,

â??23. The statutory show-cause notice under Section 274 read with Section 271 of the Act proposing to impose penalty was issued on the,,,,

same day when the assessment order was passed i.e., on 28.02.2006. The said notice was in printed form. Though at the bottom of the notice",,,,

it was mentioned 'delete inappropriate words and paragraphs', unfortunately, the Assessing Officer omitted to strike off the inapplicable",,,,

portion in the notice i.e., whether the penalty was sought to be imposed for concealment of particulars of income or for furnishing",,,,

inaccurate particulars of such income. Such omission certainly reflects a mechanical approach and non-application of mind on the part of,,,,

the Assessing Officer.,,,,

24. However, the moot question is whether the assessee had notice as to why penalty was sought to be imposed on it?",,,,

25. This brings us to the basic question as to what is a notice or what do we mean by notice. Concise Oxford English Dictionary, Indian",,,,

Edition, explains notice to mean the fact of observing or paying attention to something; advanced notification or warning; a displayed sheet",,,,

or placard giving news or information. It means to become aware of. In other words, to put someone on notice would mean warn someone",,,,

of something about or likely to occur. Black's Law Dictionary, Eighth Edition, defines the expression 'notice' to mean having actual",,,,

knowledge of a fact; has received information about it; has reason to know it; knows about the related fact. In CST Vs. Subhash &,,,,

Company, (2003) 3 SCC 454 , Supreme Court deliberated upon the concept of notice and observed that the term 'notice' has originated from",,,,

the Latin word â??notifiaâ? which means â??being knownâ? or â??a knowingâ?. Thereafter, Supreme Court referred to the definition of",,,,

the word 'notice' in various general and judicial dictionaries. Without adverting to the large number of definitions, suffice it to say notice",,,,

would mean information, warning or announcement of something impending; notice in its legal sense may be defined as information",,,,

concerning a fact communicated to a party by an authorized person or actually derived by him from a proper source; the term â??noticeâ?,,,,

in its full legal sense embraces a knowledge of circumstances that ought to induce suspicion or belief as well as direct information of that,,,,

fact.â??,,,,

15. In the present case, concealment of particulars of income was not the charge against the appellant, the charge being furnishing of inaccurate",,,,

particulars of income. As discussed above, it is trite that penalty cannot be imposed for alleged breach of one limb of Section 271(1)(c) of the Act",,,,

while penalty proceedings were initiated for breach of the other limb of Section 271(1)(c). This has certainly vitiated the order of penalty.,,,,

16. On the ground that while the charge against the assessee was of furnishing inaccurate particulars of income whereas the penalty was imposed,,,,

additionally for concealment of income, the order of penalty as upheld by the lower appellate authorities could be justifiably interfered with, still we",,,,

would like to examine whether there was furnishing of inaccurate particulars of income by the assessee in the first place because that was the core,,,,

charge against the assessee.,,,,

17. In CIT Vs Reliance Petroproducts Pvt. Ltd., 322 ITR 158 (SC)S,upreme Court examined the meaning of the words 'particulars' and 'inaccurate'.",,,,

As per Law Lexicon, the word 'particulars' means 'detail or details; the details of a claim or the separate items of an account'. Therefore, it was held",,,, that the word 'particulars' used in Section 271(1)(c) of the Act would embrace the meaning of the details of the claim made. Referring to Webster's,,,,

Dictionary where 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', Supreme Court held that the two words i.e., 'inaccurate' and 'particulars' read in conjunction must mean that the details",,,,

supplied in the return are not accurate, not exact or correct, not according to truth or erroneous. It was held that mere making of a claim which is not",,,,

sustainable in law by itself would not amount to furnishing inaccurate particulars regarding the income of the assessee. Therefore, such claim made in",,,,

the return cannot amount to furnishing inaccurate particulars of income. Elaborating further, Supreme Court held that if such stand of the Revenue",,,,

was accepted then in case of every return where the claim made is not accepted by the Assessing Officer for any reason, the assessee will invite",,,,

penalty under Section 271(1)(c) of the Act which is clearly not the intendment of the Legislature.,,,,

18. This decision was followed by this Court in CIT Vs. M/s. Mansukh Dyeing & Printing Mills, Income Tax Appeal No.1133 of 2008, decided on",,,,

24.06.2013. In CIT Vs. DCM Ltd., 359 ITR 101, Delhi High Court applied the said decision of the Supreme Court and further observed that law does",,,,

not debar an assessee from making a claim which he believes is plausible and when he knows that it is going to be examined by the Assessing,,,,

Officer. In such a case a liberal view is required to be taken as necessarily the claim is bound to be carefully scrutinized both on facts and in law.,,,,

Threat of penalty cannot become a gag and / or haunt an assessee for making a claim which may be erroneous or wrong. Again, in CIT Vs.Shahabad",,,,

Co-operative Sugar Mills Ltd., 322 ITR 73, Punjab & Haryana High Court held that making of wrong claim is not at par with concealment or giving of",,,,

inaccurate information which may call for levy of penalty under Section 271(1)(c) of the Act.,,,,

19. Reverting back to the present case it is quite evident that assessee had declared the full facts and the sale agreement at the first instance; the full,,,,

factual matrix or facts were before the Assessing Officer while passing the asessment order. It is clear from the facts that the appellant had never,,,,

suppressed any material fact from the respondent. Hence we are inclined to accept the submissions of the appellant. It is another matter that the claim,,,, based on such facts was found to be inadmissible. This is not the same thing as furnishing inaccurate particulars of income as contemplated under,,,,

Section 271(1) (c) of the Act.,,,,

20. Thus, on a careful examination of the entire matter, we answer the substantial question of law in favour of the appellant / assessee. Therefore, on",,,,

an overall consideration, the appeal would stand allowed and the order of penalty as affirmed by the two lower appellate authorities would",,,,

consequently stand interfered with.,,,,

21. Accordingly, the appeal is allowed. However, there shall be no order as to costs.",,,,

