
(2017) 01 CAL CK 0037

In the Calcutta High Court

Case No : G.A No. 1684 of 2016 ITAT No. 206 of 2016

Principal Commissioner of Income Tax

APPELLANT

Vs

M/s Gopal Das Kothari

RESPONDENT

Date of Decision : 31-01-2017

Acts Referred:

Income Tax Act, 1961 — Section 132(4), Section 271(1)(c)

Citation : (2017) 391 ITR 390

Hon'ble Judges : Aniruddha Bose and Arindam Sinha, JJ.

Bench : Division Bench

Advocate : Mr. Khaitan learned Sr. Advocate, for the Assessee; Mr. Chowdhary, Advocate, for the Revenue

Final Decision : Dismissed

Judgement

Aniruddha Sinha, J. - The Revenue being aggrieved by order dated 16th December, 2015 passed by the Income Tax Appellate Tribunal, "A" Bench, Kolkata, seeks to prefer an appeal therefrom on the following questions as suggested:-

"(i) Whether the on the facts and circumstances of the case the Learned Income Tax Appellate Tribunal has was justified in law in confirming the order of the CIT (Appeal) in deleting the penalty levied under Section 271(1) (c) of the Income Tax Act, 1961 on the ground that the assessee is entitled to immunity from penalty on account of Explanation 5 to Section 271 (1) (c) of the Income Tax Act, 1961 when the assessee's case does not come under the purview of the exceptions provided therein?

(ii) Tribunal is justified in holding that the disclosures made by the offering incomes in the returns under Section 153A of the Income Tax Act, 1961 is tantamount to extension of disclosure made under Section 132(4) of the Income Tax Act, 1961?"

2. The Tribunal by the said order dealt with three appeals of the Revenue

pertaining to several assessment years between 2002-03 to 2006-07.

3. The facts are that search and seizure operations were conducted on 23rd August, 2006, 25th April, 2007 and 3rd May, 2007 under Section 132 of the Income Tax Act, 1961. The three assessees made disclosure statements under Section 132(4) of the Act. The Revenue seeks to prefer appeal only in respect of ITA nos. 378 to 382/Kol/2011 pertaining to the assessment years 2002-03 to 2006-07 of the respondent assessee being one of the three assessees in the appeal decided by the Tribunal. The facts peculiar to the case of the assessee are that additional income was offered in disclosure statement under Section 132(4) of the Act for each of the assessment years. The assessment officer levied penalty in respect of income returned, additional income offered during assessment proceedings and income assessed under Section 153C of the Act on the ground that but for the search the assessee would not have come forward for disclosure of the undisclosed incomes. CIT(A) deleted the penalty for the assessment years stating that the assessee had satisfied all the conditions stipulated in clause 2 to Explanation 5 under Section 271(1) of the Act and accordingly is entitled to immunity from levy of penalty as it had made disclosure statement under Section 132(4) of the Act and had disclosed the income in the return filed in response to notice under Section 153C of the Act. The assessee had explained the manner in which such undisclosed income had been earned and paid taxes due thereon.

4. Mr. Chowdhury, learned Advocate appearing on behalf of the Revenue submitted that the manner in which the undisclosed incomes had been derived could not be explained by the assessee. According to him the exception provided in clause 2 of Explanation 5 under Section 271(1) did not apply to the assessee. He further argued that at best immunity is available to the assessee only for the year of search for which the due date of filing return had not expired. Such immunity is not available for the earlier years where returns had been filed.

5. Mr. Chowdhary, relied on the case of CIT v. Smt. Meera Devi reported in (2012) 26 taxmann.com 132 (Delhi) in particular paragraph 21 therein which is set out below:-

"21. The above extracts would show that the assessees did not disclose the income or the assets any time in the returns filed by them. Furthermore, the search conducted was not in their premises; it was in the premises of someone else. Having regard to the restricted nature of the phrase "books of account" the particulars found in the premises of someone else could not be said to have been "in the course of search", because the present assessees' premises were not searched. Nor did they make any disclosure or statement, or surrender their income, during the course of search. They filed a return, which for the first time, disclosed the hitherto concealed income. Their explanations were not of the kind which therefore, fell within the exception to Explanation 5 of Section 271 (1) (c). The reliance placed by the assessees on the judgment of this court in Chhabra Emporium's case (supra) is in apposite, because in that case, the assessee

surrendered the amount during, or immediately after the search. P.R. Mitrani's case (*supra*) does not help the assessee, because this Court is not holding that the presumption which has to be taken under the provision is irrebuttable, or sweeping. The court is merely construing the Parliamentary purpose for the fifth Explanation, and also interpreting the nature of the exceptions which allow the assessee the benefit. Clearly, the assessee in this case cannot claim any such benefit."

6. He also relied on the case CIT v. Prasanna Dugar reported in (2015) 59 taxmann.com 99 (Calcutta) being a judgment of a Division Bench of this court to which one of us was a party (Arindam Sinha, J.). He submitted, the said judgment was on identical issue decided in favour of the Revenue. He submitted that by order dated 15th May, 2015 the Supreme Court had dismissed the Special Leave Petition arising out of Prasanna Dugar (*supra*).

7. Mr. Khaitan, learned Senior Advocate appearing on behalf of the assessee drew our attention to the finding in the order of CIT(A) which is reproduced below:-

"I find that the income of Rs.99 lakh, assessed u/s 143(3)/153C/153A for the Assessment Year under appeal, is wholly covered by the disclosure made u/s 132(4) of the I.T. Act for the Assessment year under appeal. Appellant had specified that such income was earned from hosiery business, paper business and house property. Appellant has committed to payment of tax by way of filing return of income in response to notice u/s 153C where appellant declared income of Rs.39 lakh. The tax on such income was already secured by the Assessing Officer in the form of seizure of cash at the time of search itself. This seized cash was later applied for payment of tax by the Assessing Officer and therefore I find that appellant has fulfilled all the conditions to fall under exception (2) to Explanation 5 of section 271(1)(c). Therefore, penalty u/s 271(1)(c) cannot be levied in case of appellant. I therefore cancel the penalty of Rs.11,66,880/- levied by the Assessing Officer."

8. There was no contrary finding by the Tribunal.

9. To meet the other submission of the Revenue he relied on a judgment delivered by a Division Bench of this court to which one of us was a party (Arindam Sinha, J.), in the case of CIT v. Brijendra Gupta reported in (2015) 61 taxmann.com 180 (Calcutta) and submitted there being no dispute on facts, the only question considered by the Tribunal was covered by the said judgment. He relied on paragraphs 5 and 6 which are reproduced below:-

"5. We are, in this case, concerned with Clause(ii). One of the conditions is that the assessee makes a statement under sub-Section (4) of Section 132 that the assets unearthed have been acquired out of his income which has not been disclosed so far in his returns of income already filed. The difficulty arises by the use of the expression "to be furnished before the expiry of time specified in sub-Section (1) 139". A confusion is likely to arise as to whether the departure has

been sought to be made by the legislature only for those cases where the statement as regards undisclosed income was made pertaining to a previous year for which time to file return under Section 139 had not expired. But that was not the intention because the expression "unless" appears after Clauses (a) and (b) of Explanation which provides for imposition of penalty. Therefore, "unless" has to apply to the provision for imposition of penalty. Therefore, the aforesaid expression "to be furnished" has to be interpreted as "required to be furnished". Only in that case the Section will make a meaning otherwise the Section does not make any meaning.

6. We are supported in our view by the judgment of the Madras High Court in the case of CIT v. S.D.V. Chandru [2004] 266 ITR 175/136 Taxman 537 wherein a Division Bench opined that "The additional words which refer to the time specified in section 139(1) are only a reiteration of the legal requirement regarding the time within which returns should normally be filed."

10. We do not find any application of Smt. Meera Devi (supra) to the present case. The requirement of clause (2) in Explanation 5 under Section 271 (1) was not fulfilled in the facts of that case. The assessee did not make any disclosure or statement or surrender income during the course of search. They filed a return, which for the first time disclosed the hitherto concealed income. In those facts the Delhi High Court held that their explanations were not the kind which fell within the exception to Explanation 5. So far as Prasanna Dugar (supra) is concerned, we find with dismay that the said judgment relates to application of Explanation 5A under Section 271 (1) while application of exception clause(2) in Explanation 5 is the case before us.

11. The contention of the Revenue sought to be raised by the questions suggested stand already answered by Brijendra Gupta (supra). As such we do not find the case involves a substantial question of law. The application and appeal are accordingly dismissed.