
(2007) 05 DEL CK 0260
In the Delhi High Court
Case No : Criminal M.M. No. 1702 of 1993

Rakesh Kalia

APPELLANT

Vs

Income Tax Officer and Others

RESPONDENT

Date of Decision : 02-05-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Income Tax Act, 1961 — Section 143(3), 154, 245D, 254, 271

Citation : (2007) 210 CTR 342 : (2007) 295 ITR 486 : (2007) 161 TAXMAN 111

Hon'ble Judges : A.K. Sikri, J

Bench : Single Bench

Advocate : S. Santhanam, for the Appellant; R.D. Jolly, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Sikri, J.—Petitioner, who is an Income Tax assessed, had filed return for the assessment year 1992-93 on 29.8.1992, the due date being 31.8.1992, declaring his total income as Rs. 49,300/- from salary and meeting fee etc. It was stated in this return that during this year he had received an amount of Rs. 2,55,000/- from the NRE account under the Foreign Remittance (Immunities) Scheme, 1991. The petitioner had filed original copy of declaration dated 30.1.1992 purportedly stamped and signed by the Branch Manager, State Bank of India, Race Course Road, Bangalore, as a proof of receipt of the said amount. On this return, Order of Assessment dated 26.2.1993 was passed and tax demand of Rs. 1,67,441/- was raised against the petitioner. In the assessment order, the Income Tax Officer (for short, "ITO") observed that the aforesaid amount of Rs. 2,55,000/- had actually come from the Resident Depositor's Account and not from the NRE account. The Chief Manager, State Bank of India, Race Course Road, Bangalore, also intimated vide his letter dated 22.12.1992 that no such declaration in favor of the petitioner had been issued by the Bank. The aforesaid sum of Rs. 2,55,000/- was, Therefore, added to the income of the petitioner as income from undisclosed sources. For this suppression, show-cause notice dated

11.3.1993 was also issued asking the petitioner to show-cause as to why prosecution u/s 276-C(1) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") be not initiated against him. The petitioner submitted his replies dated 15th and 18th March 1983 stating that he had not committed any willful fraud and lapse was only on the part of the Branch Manager, State Bank of India, Race Course Road, Bangalore. He also stated that in the meantime he had approached the Settlement Commission for settling his case. Not satisfied with this reply, Shri S.S. Jain, ITO, filed a criminal complaint u/s 276-C(1) of the Act against the petitioner alleging that the petitioner had willfully attempted to evade tax, penalty or interest chargeable/imposable under the Act and also willfully caused other circumstances to exist, which had an effect of enabling him to evade tax, penalty or interest chargeable/imposable under the Act or the payment thereof and was, thus, liable for having committed offence u/s 276-C(1) of the Act. On receipt of the complaint, cognizance thereof was taken and the learned ACMM summoned the petitioner vide order dated 31.3.1993. Challenging these summoning orders the present petition is filed u/s 482 of the Criminal Procedure Code seeking quashing of the said orders and proceedings in the criminal complaint.

2. The main ground which is taken in the petition is that the complainant altogether ignored the fact that the moment an application for settlement is filed before the Settlement Commission, the authority which is to decide whether or not a complaint should be filed or an action for prosecution should be taken, is the Settlement Commission and there is no jurisdiction with the complainant to launch such a prosecution till the decision of the said application by the Settlement Commission.

3. It may be noted that during the pendency of this petition, the Settlement Commission ultimately passed order dated 30.11.1994. Certain other developments also took place and for bringing these events on record the petitioner filed supplementary affidavit dated 22.4.1997. In this affidavit, following developments are brought on record:

(a) Order dated 30.11.1994 passed by the Settlement Commission u/s 245-D of the Act-

By this order, the application of the petitioner for settling the case has been dismissed. The petitioner, however, alleges in the affidavit that the Settlement Commission has not properly appreciated the case and dismissed the application relying upon the judgment of the Supreme Court in the case of Commissioner of Income Tax, Madras Vs. M/s. Express Newspaper Ltd., , which judgment is wrongly applied to the facts of this case.

(b) It is further pointed out that the Settlement Commission directed the petitioner to seek redressal of grievance before the Appellate Forum under the Act. Accordingly, the petitioner preferred an appeal before the Commissioner of Income Tax (Appeals), which was decided vide order dated 14.5.1996. This

appeal is also decided against the petitioner and he has preferred further appeal before the Income Tax Appellate Tribunal (ITAT).

(c) It is also mentioned that after passing the order of assessment, the assessing authority had imposed a penalty on the petitioner vide order dated 30.8.1993 u/s 271(1)(c) of the Act whereby total penalty of Rs. 1,37,493/- was levied. Against this order the petitioner had preferred appeal before the CIT (Appeals). This appeal was also dismissed vide order dated 16.7.1996, which order is challenged by the petitioner by filing an appeal before the ITAT.

4. Since the present petition could not be decided even thereafter, another additional affidavit was filed by the petitioner on 27.1.2001 bringing on record the decision of the ITAT rendered on 9.1.2001 whereby both the appeals preferred by the petitioner, as mentioned above, have been decided. By this order, the Tribunal has set aside penalty orders of the lower authorities and in view thereof the petitioner submits that the criminal proceedings against him warrant to be dropped.

5. Learned Counsel for the petitioner submitted that once penalty proceedings u/s 271(1)(c) of the Act are set aside, no prosecution for the same offence could be launched and in support he referred to the following three judgments, one of which is a judgment of this Court:

(i) RUCHI ASSOCIATES (P) LTD. and Another Vs. ASSTT. Commissioner of Income Tax,

(ii) Laxmi Stores Vs. Union of India (UOI), and

(iii) Patna Guinea House and Others Vs. Commissioner of Income Tax and Another,

6. Question as to whether on the exoneration of the accused persons in the departmental proceedings the criminal proceedings can continue or not is considered by me in a detailed judgment in the case of Sunil Gulati v. R.K. Vohra, being CrI.M.C. No. 2173/2004 and connected matters, rendered on 20.12.2006. After scanning through the relevant case law, following legal propositions were culled out:

1. On the same violation alleged against a person, if adjudication proceedings as well as criminal proceedings are permissible, both can be initiated simultaneously. For initiating criminal proceedings one does not have to wait for the outcome of the adjudication proceedings as the two proceedings are independent in nature.

2. The findings in the departmental proceedings would not amount to resjudicata and initiation of criminal proceedings in these circumstances can be treated as double jeopardy as they are not in the nature of "prosecution".

3. In case adjudication proceedings are decided against a person who is facing prosecution as well and the Tribunal has also upheld the findings of the

adjudicators/assessing authority, that would have no bearing on the criminal proceedings and the criminal proceedings are to be determined on its own merits in accordance with law, uninhibited by the findings of the Tribunal. It is because of the reason that in so far as criminal action is concerned, it has to be proved as per the strict standards fixed for criminal cases before the criminal court by producing necessary evidence.

4. In case of converse situation namely where the accused persons are exonerated by the competent authorities/Tribunal in adjudication proceedings, one will have to see the reasons for such exoneration to determine whether these criminal proceedings could still continue. If the exoneration in departmental adjudication is on technical ground or by giving benefit of doubt and not on merits or the adjudication proceedings were on different facts, it would have no bearing on criminal proceedings. If, on the other hand, the exoneration in the adjudication proceedings is on merits and it is found that allegations are not substantiated at all and the concerned person(s) is/are innocent, and the criminal prosecution is also on the same set of facts and circumstances, the criminal prosecution cannot be allowed to continue. The reason is obvious criminal complaint is filed by the departmental authorities alleging violation/contravention of the provisions of the Act on the part of the accused persons. However, if the departmental authorities themselves, in adjudication proceedings, record a categorical and unambiguous finding that there is no such contravention of the provisions of the Act, it would be unjust for such departmental authorities to continue with the criminal complaint and say that there is sufficient evidence to foist the accused persons with criminal liability when it is stated in the departmental proceedings that ex-facie there is no such violation. The yardstick would, Therefore, be to see as to whether charges in the departmental proceedings as well as criminal complaint are identical and the exoneration of the concerned person in the departmental proceedings is on merits holding that there is no contravention of the provisions of any Act.

Therefore, what is to be seen is whether or not the ITAT has exonerated the petitioner on merits in respect of the same allegations on the basis of which criminal complaint is filed.

7. Order dated 9.1.2001 passed by the ITAT would reveal that the petitioner was not exonerated of the charge on merits at that time. The said appeal was allowed only on the ground that before using the information collected by the ITO, full opportunity was not given to the petitioner to rebut the said evidence. Therefore, while setting aside the order, the case was remitted back to the ITO to re-decide the issue in accordance with law after giving full opportunity to the petitioner/assessed. It appears that after the aforesaid order was passed, the Assessing Officer again took up the fresh assessment proceedings u/s 254 read with Section 143(3) of the Act and opportunity was given to the petitioner. However, the assessing authority maintained the earlier order and added amount of Rs. 2,55,000/- as income from undisclosed sources in the fresh assessment orders

passed by him. He also initiated penalty proceedings u/s 271(1)(c) of the Act. Treating the petitioner's reply as unsatisfactory, the ITO stated that earlier order passed by him imposing penalty did not require any revision. Against these fresh assessment and penalty orders, the petitioner preferred appeals before the CIT (Appeals), who confirmed both the additions in the income as well as penalty. Still dissatisfied, the petitioner filed appeals before the ITAT. These appeals have been decided by the said Tribunal vide orders dated 16.9.2005. Copy of the order was placed on record at the time of arguments.

8. A perusal of the order passed by the ITAT would show that addition of Rs. 2,55,000/- as income from undisclosed sources has been upheld. However, insofar as imposition of penalty u/s 271(1)(c) of the Act is concerned, the orders of the assessing authority as well as the CIT (Appeals) are set aside and this order is passed on merits and not on technical ground. The operative portion of the order of the ITAT dismissing the appeal qua addition of income and allowing the appeal insofar as the penalty proceedings are concerned is as under:

10. I have gone through the order of the CIT (A) minutely and I agree with the factual findings given by him which have not been successfully contested before me on behalf of the assessed. The picture I got from a reading of the case right from its inception is that of an assessed, who has not complied with the legal requirement relating to the proof of the nature and source of the deposit in his bank account of Rs. 2,50,000 on some spacious plea or the other, despite sufficient opportunities given by the AO, in compliance with the directions of the Tribunal. The matter relates to the AY 1992-93, and the proceedings have been successfully dragged on by the assessed for nearly 14 years without complying with the simple requirement of proving the identity and creditworthiness of Arun L and the genuineness of the transaction.

11. The Ld. Counsel for the assessed as an alternative plea submitted that the assessed may be given a further opportunity by remanding the proceedings to the AO. I do not think any useful purpose would be served by accepting this plea. As already noted by me, the matter has taken 14 years without reaching any finality and without the assessed being able to comply with the requirements of the AO and what purpose the remand would serve except to delay proceedings further? I do not, Therefore, see any justification for accepting the alternative plea. I would hesitate to characterize the plea as preposterous.

12. As regards the penalty, the main contention advanced by the Ld. Counsel for the assessed was that the assessment order did not disclose the requisite satisfaction that the assessed has concealed his income or furnished inaccurate particulars thereof. The assessment order merely contained a sentence at the last para that "penalty proceedings u/s 271(1)(c) already imposed will stand as it is". The order of penalty passed on 27.3.02 shows that an opportunity was given to the assessed to reply to the penalty notice. The AO merely stated therein that the reply furnished by the assessed is not considered satisfactory and, Therefore, the order u/s 271(1)(c) earlier passed is not revised. In my opinion, the penalty

order cannot stand. It does not contain any finding of concealment or filing of inaccurate particulars of the income. The earlier penalty order passed consequent to the original assessment proceedings has been set aside by the Tribunal and cannot be revived. It was incumbent on the part of the AO, in the course of the fresh assessment proceedings, to record a satisfaction that the assessed concealed his income or furnished inaccurate particulars thereof. No such satisfaction is seen recorded in the fresh assessment order. Even in the penalty order, there is no finding of concealment of income or furnishing of inaccurate particulars thereof. The AO has merely stated that there is no change in the quantum of taxable income and, Therefore, the earlier penalty order passed is not revised. The ingredients necessary for a valid penalty order are missing. Merely because I have sustained the addition of Rs. 2,55,000, it is not possible for me to sustain the penalty, given the nature of the penalty order passed by the AO after the fresh assessment proceedings. The plea that no satisfaction has been recorded in the fresh assessment order finds support from the following judgments of the Hon''ble Delhi High Court:

1. Commissioner of Income Tax Vs. Ram Commercial Enterprises Ltd.,
2. CIT v. Super Metal Re-rollers 265 ITR 83.

9. Learned Counsel for the petitioner had referred to the judgment of the Supreme Court in the case of K.C. Builders and Another Vs. The Assistant Commissioner of Income Tax, . In this case, the Apex Court held that once penalties imposed on the assessed u/s 271(1)(c) of the Act are cancelled on the basis of the conclusive findings of the Appellate Tribunal that there is no concealment of income, prosecution of the assessed for an offence u/s 276CC of the Act for willful evasion of tax cannot be proceeded with thereafter : quashing of the prosecution is automatic. It is clear from this judgment that the criminal prosecution would not be allowed to continue if there is a conclusive finding of the Appellate Tribunal that there is no concealment of income. The reason given by the Court was "concealment" inherently carries with it the element of means rea. The Court further held:

In the instant case, the penalties levied u/s 271(1)(c), were cancelled by the respondent by giving effect to the order of the Income Tax Appellate Tribunal in I.T.A. Nos. 3129-3132. 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.

In our opinion, the appellants cannot be made to suffer and face the rigorous of criminal trial when the same cannot be sustained in the eyes of law because the entire prosecution in view of a conclusive finding of the Income Tax Tribunal that there is no concealment of income becomes devoid of jurisdiction and u/s 254 of the Act, a finding of the Appellate Tribunal supersedes the order of the Assessing Officer u/s 143(3) more so when the Assessing Officer cancelled the penalty levied.

In our view, once the finding of concealment and subsequent levy of penalties u/s 271(1)(c) of the Act has been struck down by the Tribunal, the Assessing Officer has no other alternative except to correct his order u/s 154 of the Act as per the directions of the Tribunal. As already noticed, the subject matter of the complaint before this Court is concealment of income arrived at on the basis of the finding of the Assessing Officer. If the Tribunal has set aside the order of concealment and penalties, there is no concealment in the eyes of law and, Therefore, the prosecution cannot be proceeded with by the complainant and further proceedings will be illegal and without jurisdiction. The Assistant Commissioner of Income Tax cannot proceed with the prosecution even after the order of concealment has been set aside by the Tribunal. When the Tribunal has set aside the levy of penalty, the criminal proceedings against the appellants cannot survive for further consideration. In our view, the High Court has taken the view that the charges have been framed and the matter is in the stage of further cross-examination and, Therefore, the prosecution may proceed with the trial. In our opinion, the view taken by the learned magistrate and the High Court is fallacious. In our view, if the trial is allowed to proceed further after the order of the Tribunal and the consequent cancellation of penalty, it will be an idle and empty formality to require the appellants to have the order of the Tribunal exhibited as a defense document inasmuch as the passing of the order as aforementioned is unsustainable and unquestionable.

10. Applying the aforesaid ratio into the facts of this case, it is clear that merely because there is an addition of income, it would not automatically follow that the assessed had "concealed" his income. Penalty proceedings u/s 271 of the Act or the prosecution u/s 276 of the Act is when "concealment of income by the assessed is proved". As held by the Supreme Court in the aforesaid case, "concealment" inherently carries with it the element of means rea. The Tribunal while reversing the order of the AO observed that he had not recorded satisfaction that the assessed concealed his income or furnished inaccurate particulars thereof. Even in the penalty order, there was no finding of concealment of income or furnishing of inaccurate particulars thereof. On this ground, the Tribunal set aside the penalty proceedings. Since the matter has been adjudicated upon and finally settled by the Tribunal holding that concealment was not proved and these findings can be treated as findings on merits, quashing of the prosecution becomes automatic in view of the dicta laid down by the Supreme Court in K.C. Builders (supra).

11. This petition is, accordingly, allowed and the complaint filed by the respondent is dismissed. No costs.