(1995) 07 AHC CK 0103

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 240 of 1994

Sunil Kumar Malhotra APPELLANT

Vs

Commissioner of Income Tax and Another RESPONDENT

Date of Decision : 04-07-1995

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 132(4), 271(1), 69

Citation : (1995) 07 AHC CK 0103

Hon'ble Judges : M.C. Agarwal, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

1. By this petition under Article 226 of the Constitution of India, the petitioner challenges an order dated September 25, 1991, passed by the Assessing Officer levying on the petitioner a penalty of Rs. 58,518 u/s 271(1)(c) of the Income Tax Act, 1961 ("the Act") and an order dated November 12, 1993, passed by the Commissioner of Income Tax, Kanpur, dismissing the petitioner''s revision petition against the first mentioned order.

2. Counter and rejoinder affidavits have been exchanged and I have heard learned counsel on either side at length and the petition is, therefore, finally disposed of at the admission stage.

3. The petitioner is assessed to Income Tax and the impugned orders relate to the assessment year 1988-89. A search under the provisions of the Act was conducted at the business premises of the assessee and the other members of his family and during the course of that search certain loose papers were found showing receipt of certain sums of money. During the course of a search, the petitioner surrendered a sum of Rs. 1,00,000. On March 27, 1991, the petitioner filed a return of income-for the assessment year 1988-89 showing income of Rs. 1,30,630. The assessment was completed on the same day making an addition of Rs. 2,11,448 on account of unexplained investment u/s 69 of the Income Tax

Act. That assessment was not challenged. The Assessing Officer initiated proceedings for the levy of penalty u/s 271(1)(c) and as the penalty order, copy of which is annexure ''II'' to the writ petition, shows the petitioner''s explanation was that the addition of Rs. 2,11,448 is covered by the surrender of Rs. 1,00,000 u/s 132(4) and the cash in hand found in the books of account. The Assessing Officer gave the benefit of Rs. 1,00,000 that were surrendered u/s 132(4) of the Act, but treated the balance of Rs. 1,11,148 as the concealed income of the assessee and levied the minimum amount of penalty leviable under the law, i.e., Rs. 58,518. Against this order, the petitioner chose to file a revision petition before the Commissioner of Income Tax who by the impugned order dismissed the revision petition. In the present petition several grounds have been raised but at the hearing before me only two points were pressed. The first was that during the search no valuable article or thing was recovered and the addition to the petitioner''s income was based on some entries in a loose paper and such paper did not amount to valuable article or thing and hence no penalty could be levied on that basis. Reliance is placed on an order of the Commissioner of Income Tax (Appeals) for the immediately preceding year, i.e., 1987-88, for which the penalty of Rs. 54,470 was cancelled holding that Explanation 5 to Section 271(1)(c) was applicable only where a valuable article or thing was found and loose papers do not constitute valuable article or thing. Learned counsel for the petitioner placed reliance on Bhagwandas Narayandas Vs. Commissioner of Income Tax, Ahmedabad and Others, , in which it was held that fixed deposit receipts and title deeds for immovable property are not assets within the meaning of Section 132(5) of the Act and Rule 112A of the Income Tax Rules. Learned counsel for the petitioner, therefore, contended that on this view no penalty could have been levied for the year in question. The contention is thoroughly untenable. The petitioner has not filed a copy of the assessment order and, therefore, the exact basis on which the addition of Rs. 2,11,448 was made is not known. However, he has annexed with the petition a copy of one of the loose papers which is annexure "I" to the writ petition and it is probably on a calculation of the receipt recorded thereon that the said addition was made u/s 69 of the Act. Section 69 provides that where in the financial year immediately preceding the assessment year the assessee had made investments which are not recorded in the books of account, if any, maintained by him for any source of income, and the assessee offers no explanation about the nature and the source of the investments or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the value of the investments may be deemed to be the income of the assessee of such financial year. It is by virtue of this provision that on the basis of entries in the loose papers recovered during the search the assessee''s investment was worked out and the addition was made. If any valuable article in the form of money, bullion or jewellery, etc., was actually recovered, the addition would have been made u/s 69A of the Act. The petitioner has also not annexed with the writ petition a copy of his explanation furnished in response to the notice u/s 271(1)(c). The Assessing Officer has given the benefit of the sum of Rs. 1,00,000 surrendered u/s 132(4) as provided in Section 271(1) (c), Explanation 5. The question of applying the said Explanation to the remaining addition of Rs. 1,11,148 does not arise and the Assessing Officer had not done that. Therefore, the argument that the said Explanation was not applicable to that sum carries us nowhere. By virtue of Explanation 1 to Section 271(1)(c) where in respect of any facts material to the computation of the total income of any person, such person furnishes an explanation which he is not able to substantiate and fails to prove that such explanation is bona fide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him, then the amount added or disallowed in computing the total income of such person shall, for the purpose of Clause (c) of that sub-section, be deemed to represent the income in respect of which particulars have been concealed. As the penalty order shows the petitioner''s contention was that the addition of Rs. 1,11,448 was covered by the cash in hand found as per books of account. This explanation has not been accepted as correct and even before the Commissioner of Income Tax in the revision proceedings, it was not established that the entries in the loose papers tallied with the books of account so that the cash in hand as shown therein could be related to the entries in the loose papers so that no separate addition should have been made. As already stated, the petitioner does not seem to have challenged the addition by preferring an appeal against the assessment order. Whether the addition of Rs. 1,11,448 was justified and whether the assessee''s explanation that that amount was covered by the cash in hand shown as per books of account are questions of fact which cannot be reinvestigated in the exercise of jurisdiction under Article 226 of the Constitution of India. As a matter of fact, learned counsel did not even make an attempt to show that the explanation was bona fide.

4. It was next contended that the Commissioner of Income Tax (Appeals) having held for the immediately preceding year that no penalty could be levied, the Commissioner should have taken a similar view while deciding the revision petition. A perusal of the impugned order shows that the orders passed by the Commissioner of Income Tax (Appeals) for the earlier year were not placed before him and the order on a question of law could not be binding in independent proceedings for another year. The question of invoking the principles of res judicata, therefore, did not arise.

5. Lastly, it was contended that the return was filed after an agreement with the Assessing Officer and that is why the assessment was made on the very date on which the return was filed. It appears to have been so made because the limitation was to expire a few days hence and the necessary exercise for the assessment seems to have already been done. The return declared an income of Rs. 1,36,630 while the assessment was made by addition of a further sum of Rs. 2,11,448. It, therefore, cannot be said that the assessee declared an income to which there was already an agreement with the Assessing Officer and the income assessed was income agreed between the parties. As already stated there was no appeal and no contention was ever raised to the effect that the addition of Rs. 2,11,448 was made in violation of an agreement under which the income of the

year was agreed to be assessed at Rs. 1,30,630 only. Patently the petitioner had declared a lower income and the income assessed was increased by Rs. 2,11,448 to which the assessee did not object. The explanation that the addition to the extent of Rs. 1,11,448 was covered by cash in hand has not been accepted and has not even been found to be bona fide.

6. For the above reasons, I find no error in the order passed by the Commissioner of Income Tax dismissing the petitioner''s revision petition against the penalty order itself which may justify the exercise of extraordinary jurisdiction under Article 226 of the Constitution of India. The writ petition thus, has no force and is hereby dismissed with costs. The interim order dated March 16, 1994, is vacated.

