
(2010) 04 MAD CK 0165

In the Madras High Court

Case No : Tax Case (Appeal) No's. 824 and 825 of 2004

S.V. Kalyanam

APPELLANT

Vs

The Income Tax Officer

RESPONDENT

Date of Decision : 01-04-2010

Acts Referred:

Income Tax Act, 1961 — Section 142(1), 144, 148, 230A, 27(1)

Citation : (2011) 237 CTR 491 : (2010) 327 ITR 477

Hon'ble Judges : Prabha Sridevan, J;P.P.S. Janarthana Raja, J

Bench : Division Bench

Advocate : T.N. Seetharaman, for the Appellant; J. Naresh Kumar, for the Respondent

Judgement

P.P.S. Janarthana Raja, J.—The appellant has filed the above Tax Case Appeals against the order of the Income Tax Appellate Tribunal,

Chennai "A" Bench, dated 17.06.2004 in ITA. No. 286/Mds/2004 & 287/Mds/2004.

2. Both the tax case appeals related to the same assessee and they are also connected and hence, these appeals are disposed of by this common

judgment.

3. When the above appeals came up for admission on 11.10.2004, this Court admitted the same on the following substantial questions of law:

T.C.(A) No. 824 of 2004

1. Whether the Appellate Tribunal was right in law in sustaining the investment in the residential flat as unexplained, when the appellant had

explained the nature and source of the investment and duly supported the explanation and discharged the onus cast on him u/s 69 of the Income

Tax Act, 1961

2. Whether the Appellate Tribunal was right in law in upholding the addition of the amount being the appellant's son's earnings confirmed by him in

a declaration before the assessing officer, as the appellant's income?

3. Whether the Appellate Tribunal was right in law in sustaining the entire addition as unexplained in the hands of the appellant disregarding the fact

that the appellant and the wife are joint owners of the property?

T.C.(A) No. 825 of 2004

1. Whether on the facts and circumstances of the case, the Income Tax Appellate Tribunal was right in upholding the levy of penalty u/s 27(1)(c) of

the Income Tax Act, 1961?

4. The brief facts arising out of the case are as under:

T.C. No. 824 of 2004

The appellant/assessee is an individual. He was working as Administrative hand in various cine production units. The relevant assessment year is

1996-1997. The corresponding accounting year ended on 31.03.1996. He is the owner of the house property situated at 27-H, Puram Prakasam

Road, Balaji Nagar, Royapettah, Chennai-600 004. The appellant/assessee approached the Department for Tax clearance certificate u/s 230A of

the Income Tax Act to effect a registered mortgage in favour of M/s Vellalar Co-operative Bank Limited, Chennai in connection with loan. The

said certificate was also issued on 23.01.2001. While processing the certificate u/s 230A, the assessing officer found that the abovesaid property

has been acquired by the appellant/assessee on 16.08.1995. The appellant/assessee is not regularly assessed to tax. Therefore, the assessing

officer sent a letter calling for the source of acquiring the property on 16.08.1995. The value of the property stated in the application was Rs.

9,71,500/-. But the assessee failed to furnish any explanation with proof. Therefore, the assessing officer has issued a notice u/s 148 of the Income

Tax Act for the purpose of reassessment, which was served on 05.01.2002. The assessee did not file any return of income even after issuance of

notice u/s 148 of the Act. Later, the assessing officer issued notice u/s 142(1) of the Act on 08.1.2001, calling for explanation regarding the

sources of fund for purchasing the house property and the details regarding occupation. One Pratap, who is Chartered Accountant, appeared on

15.11.2001 and stated that he was unable to collect the particulars and sought time. Subsequently, there was no proper response from the

assessee. Therefore, the assessing officer has passed the assessment order u/s 144 of the Act. While completing the assessment, the assessing

officer made addition of Rs. 4,800/- towards the income from house property and also Rs. 11,31,410/- towards unexplained investment under the

head ""other sources"" and also initiated penalty u/s 271(1)(c). Aggrieved by that order, the assessee has filed an appeal before the Commissioner of

Income Tax. The Commissioner of Income Tax sustained the addition to the extent of Rs. 2,64,068/- out of Rs. 11.36,310/-. Aggrieved by that

order, the assessee has filed further appeal before the Income Tax Appellate Tribunal. The Tribunal dismissed the same, confirming the order of

the CIT (A). Aggrieved by that order, the assessee filed the present Tax Case Appeal.

5. The learned Counsel appearing for the appellant/assessee submitted that the order of the Tribunal is wrong, illegal and without basis and

justification. He further submitted that the Tribunal erred in confirming the addition of Rs. 2,64,068/- as "unexplained investment". He further

submitted that the Tribunal ought to have considered the explanation offered by the assessee that he had purchased a house out of his own savings,

contribution made by his son as well as from the sale of his wife's jewellery. He further submitted that the property was purchased in the joint

name by sale deed dated 16.08.1995. Even in the application in Form-34A, it was stated that the property was owned by the husband/assessee

as well as the wife of the assessee and all the authorities have not considered the same. Therefore, the order passed by the the authorities below

are not in conformity with law and the same has to be set aside.

6. The learned Standing counsel appearing for the Revenue submitted that the Tribunal has considered all the facts and circumstances of the case

and correctly confirmed the addition of Rs. 2,64,068/- as "unexplained investment", which is based on valid materials and evidence and the same

has to be confirmed.

7. Heard the learned Counsel appearing on either side and perused the documents on record.

8. The assessing officer has made addition of Rs. 11,31,510/- under the head

"other sources". The details regarding the same are as under:

Property"": The assessee has acquired House Property identified as 27H, Puram Prakasam Road, Balaji Nagar, Royapettah, Chennai-14 and a

portion of the property is understood to have been let out. Income from let out portion of the property estimated at Rs. 4,800/-.

Other Sources: The property mentioned above was acquired by the assessee on 16.8.95 for Rs. 9,71,500/-. The assessee was granted sufficient

opportunity from time to time to offer explanation for the sources from which he met the funds required for purchase of the said property. For want

of proper and satisfactory explanation to prove the sources of funds for acquiring the property the entire purchase cost of the property including

stamp duty and registration charges will be treated as unexplained and brought to tax.

i Cost of property viz., 27H, Puram Prakasam Road,

ii Balaji Nagar, Chennai-14. Rs. 9,71,500/-

iii Stamp duty at 13% on the said property Rs. 1,26,295/-

iv Registration charges at 1% Rs. 9,715/-

v Drawing towards household expenses and other

vi expenses in the family estimated at Rs. 24,000/-

Total Rs. 11,31,510/-

Gross total Income:

Income from property Rs. 4,800/-

Income from other sources Rs. 11,32,510/-

Total Income Estimated Rs. 11,36,510/-

The Commissioner of Income Tax (Appeals), considering the facts and circumstances of the case and also taking into consideration the fact that

the assessee was unable to produce the material evidence to explain the source of income for the purpose of investment, directed the assessing

officer to send a report. The Assessing Officer also sent a detailed report regarding the same. After considering the same, the Commissioner of

Income Tax (Appeals) granted substantial relief and only sustained the addition of Rs. 2,64,068/- and the details regarding the same are as under:

Maturity of Fixed Deposit : Rs. 5,20,432/-

Loan from friends & relatives : Rs. 1,57,000/-

Sale of jewellery : Rs. 30,000/-

Total Rs. 7,07,432/-

Out of the value of the house of Rs. 9,71,500/-, the CIT(Appeals) accepted the explanation to the extent of Rs. 7,07,432/- and remaining sum of

Rs. 2,64,068/- alone was confirmed under the head "income under other sources". In respect of the said amount, the assessee gave explanation

that he had saved a sum of Rs. 57,600/- out of his salary income, the savings of his son at Rs. 1,50,750/- and also from sale of the wife's jewellery

a sum of Rs. 70,000/-. In respect of the saving, it was contended that the assessee was in-charge of the administration unit in various cine

productions. The salary of the assessee was Rs. 2,500/- to Rs. 4,000/- per month. Out of the said sum, he saved 30% of the salary. After taking

into consideration the age and also the fact that he was in-charge of the various cine production units, he would have certainly saved money out of

his salary income. Therefore, the explanation offered that the assessee saved a sum of Rs. 57,600/- and the same was used for the purpose of

investment, is believable and therefore, the Tribunal ought to have accepted the same. In respect of the contribution made by the son, it is stated

that he was earning Rs. 1000/- to 3,000/- per month from 1988-89 to 1993-94 and has also filed confirmation letter saying that he saved Rs.

1,50,750/- from the aforesaid period and the same was given to his father to enable him to purchase a house. The explanation offered by the

assessee is very reasonable and the Tribunal ought to have accepted the same. In respect of the jewellery, the authorities below accepted only Rs.

30,000/-. There is no dispute regarding the sale of jewellery. Therefore, the Tribunal should have accepted the explanation. But the Tribunal has

not given any independent finding, but simply affirmed the order of the Commissioner of Income Tax (Appeals) and without considering the explanation offered by the assessee in detail. It is pertinent to note that the whole enquiry had started only not at the instance of the Department, because the assessee himself has come forward for obtaining Tax Clearance Certificate u/s 230A of the Act. Then only, the department made enquiry regarding the investment and the assessing officer also made addition u/s 69 of the Act. Section 69 is a deeming provision and it confers a discretion on the Income Tax officer in the matter of treating the source of investment. The scope of the Section was considered by the Supreme Court in the case of Commissioner of Income Tax, Ernakulam Vs. P.K. Noorjahan (Smt), , wherein in paragraph 2, it has been held as follows:

Shri Ranbir Chandra, learned Counsel appearing for the Revenue, has urged that the Tribunal as well as the High Court were in error in their interpretation of section 69 of the Act. The submission is that once the explanation offered by the assessee for the sources of the investments was found to be non-acceptable the only course open to the Income Tax Officer was to treat the value of the investments to be the income of the assessee. The submission is that the word "may" in section 69 should be read as "shall". We are unable to agree. As pointed out by the Tribunal, in the corresponding clause in the Bill which was introduced in Parliament, the word "shall" had been used but during the course of consideration of the Bill and on the recommendation of the Select Committee, the said word was substituted by the word "may". This clearly indicates that the intention of Parliament in enacting section 69 was to confer a discretion on the Income Tax Officer in the matter of treating the source of investment which has not been satisfactorily explained by the assessee as the income of the assessee and the Income Tax Officer is not obliged to treat such source of investment as income in every case where the explanation offered by the assessee is found to be not satisfactory. The question whether the source of the investment should be treated as income or not u/s 69 has to be considered in the light of the facts of each case. In other words, a discretion has been conferred on the Income Tax Officer u/s 69 of the Act to treat the source of investment as the income of the assessee if the explanation offered by the assessee is not found satisfactory and the said discretion has to be exercised keeping in view the facts and

circumstances of the particular case.

After taking into consideration the principles enunciated in the above judgment, we are of the view that the Tribunal ought to have accepted the

explanation offered by the appellant/assessee for the sources of income. If the explanation is unreasonable regarding investment, the addition can be

made. In the present case, explanation offered by the assessee is reasonable and also believable and further inquiry initiated only by the revenue

because the assessee had applied for Tax Clearance Certificate u/s 230A of the Act. Further it is seen that in the application made by the appellant

for obtaining Clearance Certificate u/s 230A of the Act, it is stated that the properties owned jointly by the appellant as well as his wife and the

said property was purchased in the joint name and it was also mentioned in Column No. 34-A that it was owned jointly. There is no dispute

regarding the same. Though the issue of joint ownership was argued, the authorities below had not considered the matter. The Tribunal ought to

have considered the same and without considering all the relevant materials, the Tribunal confirmed the order of the CIT (Appeals). In these

circumstances, the order passed by the Tribunal is not in accordance with law and the same is set aside. We answer all the questions referred to

above in favour of the assessee and as against the revenue and the above tax case appeal in T.C(A) No. 824 of 2004 is allowed.

T.C. No. 825 of 2004

9. After completing the assessment u/s 144 of the Act read with Section 147, the assessing officer also initiated penalty u/s 271(1)(c) of the Act.

The assessing officer levied penalty of Rs. 4,28,524/- u/s 271(1)(c) of the Act on the ground that there was concealment of income. Though

penalty notices were served on various dates, there was no proper response from the appellant/ assessee. In the absence of any response, the

assessing officer concluded that the appellant has not offered any explanation and was of the view that the assessee has concealed the particulars

of income for the assessment year 1996-1997 and therefore, the assessing officer levied minimum penalty. Aggrieved by that order, the appellant/

assessee has filed an appeal before the Commissioner of Income Tax (Appeals). The Commissioner of Appeals confirmed the penalty imposed by

the assessing officer but modified the quantum of penalty and in para 2, it has

been held as follows:

The addition towards unexplained investment has been sustained because the appellant could not furnish explanation for the investment as required

u/s 69. No further explanation has been adduced in the penalty proceedings. Therefore, penalty u/s 271(1)(c) is leviable. The minimum penalty

imposed by the assessing officer is confirmed with a direction to re-compute the penalty amount after taking into account the relief given in the

quantum appeal.

Aggrieved by that, the assessee has filed an appeal before the Appellate Tribunal. The Tribunal had dismissed the appeal and confirmed the order

of the CIT(Appeals). Hence, the appellant/assessee has filed the present Tax Case Appeal.

10. The learned Counsel appearing for the appellant/assessee submitted that the order passed by the Tribunal is illegal, wrong and without basis

and justification. He further submitted that the Tribunal has erred in confirming the levy of penalty. The authorities below ought to have considered

the explanation offered by the assessee and mere rejection of the explanation will not be sufficient to levy penalty. The Tribunal had not considered

the relevant materials and hence, the Tribunal ought to have cancelled the penalty and the order passed by the Tribunal is not in accordance with

law and the same has to be set aside.

11. The learned Counsel appearing for the Revenue submitted that the Tribunal has considered all the facts and circumstances of the case and

correctly confirmed the penalty levied u/s 271(1)(c) of the Act. He further submitted that enough opportunity was given to the assessee and the

same was not utilised by him and therefore, the assessing officer is justified in levying penalty, which is based on valid materials and evidence and

the same has to be confirmed.

12. We heard the learned Counsel on either side and perused the materials available on record.

13. The amount of penalty involved in the case is Rs. 79,628/-. The Tribunal considered the matter and confirmed the order of the CIT(Appeals)

and held as follows:

We observe from records that the assessee, apart from not filing the return of income, has also failed to respond to various notices issued by the

Assessing Officer by just to putting the entire blame on the Chartered Accountant and taking the plea of his advanced age. It is the personal onus of the assessee to take adequate action to file the return of income and to respond to the notices issued by the Assessing Officer which the assessee has utterly failed. We do not find any reasonable cause for the assessee to remain unresponsive to the multiple notices issued by the Assessing Officer. However, the CIT (Appeals) after calling for the remand report from the Assessing officer, has deleted major portion of the additions and directed the Assessing officer to levy minimum penalty on the sustained amount only. The assessee, therefore, has no ground to seek deletion of the penalty before us. The plea of old age and failure on the part of the CA employed by him to represent his case could not be taken as reasonable cause for the failure on the part of the assessee to comply with the notices and concealing the particulars of income. Hence, we hold that the Assessing Officer is justified in levying the penalty and accordingly the same is confirmed.

From a reading of the above order, it is clear that the Tribunal has not given any independent findings and it has stated that the appellant/assessee has not responded to the notice issued by the assessing officer. Therefore, the assessee has no ground to seek deletion of penalty. The Tribunal is the highest fact finding authority and should have given independent findings and considered the relevant materials on record before confirming the order of the lower authorities. Here, in this case, addition was made u/s 69 of the Income Tax Act. Section 69 is the deeming provision and the same cannot be extended to the penalty proceedings. The Department cannot presume that there is a concealment. There must be independent finding. Further, the appellant had explained the source of income and therefore, it cannot be taken that there was concealment of income. Mere rejection of explanation would not be a ground for levying penalty. Inquiry by the revenue was initiated only after the assessee came to the Department for obtaining Tax Clearance Certificate and hence facts are disclosed. Further, as we have already deleted the additions made in quantum appeal in the above tax case, the penalty also shall stand deleted accordingly. In view of the same, we answer the question referred in favour of the assessee and against the Revenue.

14. Under these circumstances, we answer all the questions in the above tax case in favour of the assessee and against the revenue. Accordingly, the above Tax Cases are allowed. No costs.