SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com

Dy. Cit Vs. Sunil Tolaram

Dy. Cit Vs. Sunil Tolaram

SooperKanoon Citation : sooperkanoon.com/369782

Court : Mumbai

Decided On : Nov-20-2003

Reported in : (2004)90TTJ(Mumbai)48

Appeal No. : ITA No. 4956/Mum/l999 20 November 2003 A.Y. 1995-96

Appellant : Dy. Cit

Respondent : Sunil Tolaram

Advocate for Pet/Ap. : Narender Singh, *for the Assessee* JP. Bairagra, *for the Revenue.*

Judgement :
ORDER

H.S. Sjdhu, J.M.:

The revenue has filed the present appeal against the order of the Commissioner (Appeals), Central-V, Mumbai, dated 3-8-1999, for assessment year 1995-96, by which he cancelled penalty of Rs. 23,92,872 under section 271(1)(c) of the Income Tax Act, 1961, levied by the assessing officer.

2. The assessee is an individual. He had filed his return of income on 30-3-1996, declaring an income of Rs. 40,26,400. The assessment was finalised under section 143(3) on 27-3-1998 determining total income at Rs. 40,50,620. The assessing officer observed in the penalty order that in this case search operations

were carried out under section 132 of the Income Tax Act, 1961, at various business premises of the Kukreja group and at their residence on 25-10-1994. 'Kukrejas' are one of the prominent builders of Bombay and have to their credit several big building projects at New Bombay. The business is controlled by three brothers viz., Shri Omprakash T. Kukreja, Shri Mohan T. Kukreja and Shri Sunil T. Kukreja. The sources of income declared by the assessee for the year under consideration were share of profit from various partnership firms, rental income and disclosure under section 132(4) of the Income Tax Act, 1961, made during the course of search. The assessing officer further observed that during the course of search there were many incriminating pieces of evidence indicating charging of 'on-money' by Kukrejas on sale of flats, unaccounted expenses in various projects, loans taken by the group not recorded in books of account and Benami investments by Kukrejas. In the course of search, in his statement dated 6-2-1995, under section 132(4), Shri Sunil T. Kukreja, the assessee, had disclosed income of Rs. 40,00,000. In the assessment under section 143(3), the assessing officer made various additions on account of unaccounted cash found during the search, unexplained jewellery found during search, unexplained investment in electronic gadgets, unaccounted expenses appearing on p. 149 of Annex. A-1 and unaccounted expenses in Pali Hill bungalow.

3. In response to notice under section 271 read with section 274 of the Income Tax Act, 1961, dated 27-3-1998, the assessee submitted vide letter dated 17-4-1998, that he had made voluntary disclosure of Rs. 40,00,000 under section 132(4) and had declared it in his income tax return and as such that amount is not liable for penal action. The assessee further submitted that an addition of Rs. 40,24,225 was made and the difference of Rs. 24,225 was on account of unforeseen addition of making charges of jewellery Rs. 23,050 and, therefore, he requested that penalty proceedings initiated may be dropped. One more opportunity was given by the assessing officer to the assessee to make further submissions, if any, and the assessee reiterated the same arguments. The assessing officer rejected the explanation of the assessee. She observed that during the course of search, in his statement dated 26-10-1994, under section 132(4), the assessee did not declare any income for tax. On the concluding day of the search, i.e., 6-2-1995, the main member of the Kukreja group, Shri Omprakash

T. Kukreja, had declared income of Rs. 1 crore in the hands of the following family members:

1. Shri Omprakash T. Kukreja 30,00,000

2. Shri Mohan T. Kukreja 30,00,000

3. Shri Sunil T. Kukreja 40,00,000

The disclosure made by Shri Omprakash T. Kukreja was confirmed by the assessee in his statement recorded under section 132(4) on 6-2-1995. The assessing officer held that the provisions of Explanation 5 to section 271(1)(c) are attracted in this case and held that the assessee shall be deemed to have concealed the particulars of his income or furnishing inaccurate particulars of such income. She further held that the assessee's case is not covered by the immunity provided under clause (2) of the Explanation. She emphasized the point that neither Shri Omprakash Kukreja nor the assessee had specified the manner in which the declared income had been earned. The return should have been filed on 30-8-1995, but was filed by the assessee on 30-3-1996. The tax payable on the returned income was Rs. 15,85,560 and the assessee had paid advance tax to the tune of Rs. 14,66,880 in March, 1995 and requested the department to adjust the balance liability of advance tax out of the seized cash of Rs. 1,84,000, which according to the assessing officer, was not in accordance with the provisions of law. The assessee, according to her, had not paid the tax together with interest on the income declared under section 132(4) and thus the three vital conditions for getting immunity from penalty as per Explanation 5 to section 271(1)(c) were not satisfied in the present case. The assessing officer also held that the assessee should be deemed to have concealed the particulars of his income or furnishing inaccurate particulars of such income, because the assessee had not claimed that the assets found in his possession had been acquired by him out of income disclosed under section 132(4) and that the income disclosed by the assessee under section 132(4) related to the previous year relevant to the assessment year 1995-96, the previous year which was to end on or after the date of search. The assessing officer was, therefore, satisfied that on the facts and in the circumstances of the case this is a fit case for levying penalty under section

271(1)(c) and levied penalty amounting to Rs. 23,92,872 @ 150 per cent of the tax sought to be evaded on the concealed income of Rs. 40,24,225. Aggrieved by the penalty order dated 29-9-1998, the assessee preferred an appeal before the Commissioner (Appeals).

4. Before the Commissioner (Appeals), the assessee's representative filed written submissions with a paper book containing 36 pages. In the written submissions the assessee referred to the statement of late Shri Omprakash Tolaram recorded on 25/26-10-1994 and specifically referred to question No. 18 and its reply which have been reproduced in the order passed by the Commissioner (Appeals) as under:

'I have explained you the provisions of section 132(4) read with Explanation 5 to section 271(1)(c) of the Income Tax Act, 1961. Do you wish to state anything

Ans. I have understood the provisions of section 132(4) read with Explanation 5 to section 271(1)(c) of the Income Tax Act, 1961. I wish to request that I may be allowed some time to go through various documents in my office and various lockers yet to be opened. However, on the basis of various facts of the business activities of my group, I hereby offer additional unaccounted income of Rs. 60,00,000 for current financial year. Exact particulars and manner of earning shall be furnished after operation of the lockers and looking into the documents. The abovementioned additional income has been partly invested in the diamond jewellery mentioned above, partly in my residential bungalow and partly in various projects of my group, and I have reserved my right to submit the exact particulars in respect of additional income.'

It was further submitted that late Shri Omprakash Tolaram was actually the head of the family and another statement of his was recorded on 6-2-1995. The assessee's representative specifically referred to question No. 2 and the answer thereto which have been extracted by the Commissioner (Appeals) as under :

'Q. No. 2. I am drawing your attention to the fact that such proceeding in your case are concluding today. I am once again explaining to you provisions of section 271(1)(c), Explanation 5. Do you want to take benefit of this section and disclose

additional income for financial year 1994-95. If yes, please specify such income and mode of earning

Ans. We hereby offer an amount of Rs. 1,00,00,000 (one crore) as additional income for the financial year 1994-95. This income includes the offer of Rs. 60,00,000 (60 lakhs) made in the case of search while recording the statement under section 132(4) on 26-10-1994, by Shri Omprakash T. Kukreja. This income is disclosed in the hands of the following persons:

(1) Shri Omprakash Tolaram Rs. 30,00,000

(2) Shri Mohan T. Kukreja Rs. 30,00,000

(3) Shri Sunil T. Kukreja Rs. 40,00,000

The said income is earned out of various business activities as recorded in seized papers, books, diaries, etc. Part of this income is invested in diamond jewellery, seized during the course of the search and/or in the assets reflected in the seized material and cash found. Anything contrary to this effect as might have been stated earlier is corrected herein. I seek immunity from penalty and prosecution. '

The statement of the assessee was also recorded on 6-2-1995 and the assessee specifically referred to the following portion of the said statement :

'Q. No. 2. Please go through the statement of Shri Omprakash T. Kukreja made later and state as to what you have to say in respect of disclosure of Rs. 40,00,000 (Rupees forty lakhs) in your name.

A. 2. I have perused the statement of Shri Omprakash Kukreja made today and I hereby confirm the disclosure of additional income of Rs. 40,00,000 in my name and confirm the statement regarding the mode of earning of income and utilisation of such income.

Q. No. 3. Do you want to say anything else?

Ans. Yes, I seek immunity from penalty and prosecution on disclosure of additional income of Rs. 40,00,000.'

5. After considering the submissions of the assessee, the Commissioner (Appeals) cancelled the penalty levied by the assessing officer, holding as under :-

'18. I have carefully considered the reasonings of the assessing officer, the arguments of the appellant and the facts of the case. The first thing which has to be noted is that the assessing officer has treated Rs. 40,24,225 as concealed income of the appellant and has imposed penalty with reference to that. However, she has actually discussed only Explanation 5 to section 271(1)(c) for imposing penalty in the case of the appellant. She has not indicated how any amount in excess of Rs. 40,00,000 declared by the appellant under section 132(4) and included by him in his taxable income in the return of income submitted, could be treated as concealed income. It appears that the assessing officer has taken the figure of Rs. 40,24,225 from the assessment order in a mechanical manner without discussing how the amount of Rs. 40,24,225 could be considered as concealed income of the appellant. In this connection I have already discussed above that though the addition made by the assessing officer regarding cash was of Rs. 2,50,000 in the assessment order the assessing officer has proposed to make an addition only of Rs. 1,84,000. The difference between Rs. 2,50,000 and Rs. 1,84,000 cannot be said to be part of the concealed income, as neither in the assessment order nor in the penalty order has anything been discussed regarding the said difference. It does not matter that the appellant did not go in appeal against the assessment order but the fact remains that it has not been shown either in the assessment order or in the penalty order how the difference between Rs. 2,50,000 and Rs. 1,84,000 could constitute the concealed income of the appellant. If this difference amounting to Rs. 66,000 is overlooked, the addition made to the appellant's income would be less than Rs. 40,00,000. The appellant on his own has considered that probably the assessing officer wanted to impose penalty with reference to the making charges of jewellery amounting to Rs. 23,050 but here also the assessing officer has not discussed anything in the penalty order to demonstrate how she intended to impose penalty with reference to the making charges of Rs. 23,050. On the contrary the appellant had pleaded that the making charges were covered by withdrawals of the appellant from year to year and in any case the entire addition was based on presumption and estimate. Be it as it may, the fact remains that the assessing officer has only discussed Explanation 5 to

section 271(1)(c) and hence the concealed income in the present case could only be taken at Rs. 40,00,000 and the penalty had to be considered only in the context of Explanation 5 to section 271(1)(c). From the reading of the penalty order it is quite clear that the assessing officer has imposed penalty only under Explanation 5 to section 271(1)(c) and for this purpose she could take the concealed income only at Rs. 40,00,000. Since Rs. 40,00,000 were declared by the appellant under section 132(4) and were also included in the taxable income of the appellant in the return of income submitted, it is crystal clear that any adjudication in the present case with regard to levy of penalty has to be made only in the context of Explanation 5 to section 271(1)(c).

19. It is well-settled that penalty proceedings are quasi-criminal in nature and the opportunity of hearing to be granted to the assessee for imposing penalty, has to be real and not illusory. For this purpose the assessee must be initiated regarding the real default committed by him and the case which he is supposed to meet. In the present case there was no indication in the showcause notice that the assessing officer intended to invoke Explanation 5 to section 271(1)(c) in the appellant's case for the purpose of imposing penalty. There was also no indication in the body of the assessment order regarding the same. In view of this I do not accept the contention of the assessing officer that the appellant was all along aware that Explanation 5 was being invoked in this case. The reply of the appellant to the show-cause notice reproduced in para 4 of this order nowhere indicates that the appellant knew that the case for levy of penalty under Explanation 5 to section 271(1)(c) was to be met by him. I also do not accept the contention of the assessing officer that the default to mention Explanation 5 to section 271(1)(c) in the show-cause notice could be treated as cured by section 292B of the Income Tax Act. In fact, looking to the assessment order as well as the show-cause notice issued by the assessing officer, it has to be held that the appellant did not get any opportunity of hearing before the assessing officer to meet the case of levy of penalty under Explanation 5 to section 271(1)(c). Courts have also held that an opportunity of hearing has to be granted by the authority imposing the penalty and the fact that the appellant has got full opportunity of hearing before me cannot cure the initial and fatal defect in the penalty order. Lack of proper opportunity of hearing relates to the violation of principles of natural

justice and such a violation has to be held as fatal in nature. It is because of this that the ratio of the judgment of the Hon'ble Bombay High Court in CIT v. P.M Shah : [1993]203ITR792(Bom) and the ratio of the order of the Tribunal (Madras Bench), in Asstt. CIT v. Dr. T.N. Venkataraman (1995) 54 ITD 694 (Mad) is squarely applicable in the present case. The assessing officer is right in pointing out that the facts in the present case. The assessing officer is right in pointing out that the facts in the present case and the facts in the case reported at 137 Taxation 23) are quite different but she is not correct in arguing that the ratio of the order of the Tribunal (Madras Bench) reported at (1995) 54 ITD 694 (Mad) (supra) was not applicable in the present case. Since the Madras Bench of the Tribunal has followed the judgment of the Hon'ble Bombay High Court, I am of the view that the order of the Madras Bench of the Tribunal becomes almost binding on me, particularly because there is no contrary authority known to me. Therefore, following the ratio of the order of the Tribunal (Madras Bench) reported at (1995) 54 ITD 694 (Mad) (supra), I hold that there was a fatal defect in the penalty order and hence the same could not be upheld. The entire penalty of Rs. 23,92,872 is, therefore, cancelled and the appeal is allowed.'

The Commissioner (Appeals) went on to give some more reasons for the sake of completeness. He observed that if there was any ambiguity in the matter of manner of earning the disclosed income, it was the duty of the search party to have put further questions to late Shri Omprakash Kukreja and the assessee. Neither late Shri Omprakash Kukreja nor the assessee was further questioned on this point. Hence, the Commissioner (Appeals) did not accept the argument of the assessing officer that the assessee had not disclosed the manner of earning the disclosed income. In this connection, he referred to the decision of the Tribunal in the case of Mahendra Chimanlal Shah v. Assistant Commissioner (1994) 120 CTR (Ahd) 284. He further observed that in the present case it could not be said that the assessee had not paid the taxes together with interest on the disclosed income and if the cash seized was adjusted, there would be refund due to the assessee. He thus held that the assessee has satisfied all the conditions necessary for getting immunity from penalty under Explanation 5 to section 271(1)(c), except one condition of filing of return within the time prescribed under section 139(1). Here also, it was to be noted that the head of the family had been murdered in the very

month of October when the return of income was to be submitted. He also referred to the decision of Hon'ble Supreme Court in the case of Hindustan Steel Ltd., and observed that this is a case where the assessee declared income under section 132(4) in a bona fide manner and also fulfilled almost all the conditions for getting immunity from penalty under Explanation 5 to section 271(1)(c). Against the order of the first appellate authority cancelling the penalty under section 271(1)(c), the revenue has filed the present appeal.

6. The learned Departmental Representative argued that the first appellate authority erred in cancelling the penalty in dispute. He stated that the Commissioner (Appeals) erred in holding that levy of penalty is always discretionary without appreciating the fact that the Income Tax Act has not bestowed any such discretionary power to the assessing officer in respect of levy of penalty under section 271(1)(c) which is leviable if the assessee is found to have concealed the particulars of his income or furnished inaccurate particulars of his income. The only exception that can be made in this regard is when an assessee's case is covered by clause (1) or (2) of Explanation 5 to section 271(1)(c) and is, therefore, considered eligible for immunity from penalty under section 271(1)(c), which is not the case here. He further contended that the Commissioner (Appeals) has overlooked the fact that the assessee was required to fulfil all the conditions specified in clause (2) of Explanation 5 to section 271(1)(c) in order to get immunity from penalty under section 271(1)(c). He argued that the assessee's case is found to be conclusively covered by Explanation 5 and does not fall within the purview of the circumstances mentioned in clauses (1) and (2) of Explanation 5 and, therefore, levy of penalty under section 271(1)(c) became inevitable. He, therefore, supported the order of the assessing officer levying penalty under section 271(1)(c) and contended that the order passed by the first appellate authority deserves to be cancelled. Without prejudice to his aforesaid arguments, the learned Departmental Representative further stated that even assuming that the penalty order suffered from certain technical lapses, the Commissioner (Appeals) ought to have reinitiated penalty proceedings under section 271(1)(c) in view of the merits of the case.

7. On the other hand, the learned authorised representative relied upon the order passed by the first appellate authority and contended that the penalty under section 271(1)(c) imposed by the assessing officer has rightly been cancelled by the first appellate authority. He reiterated the assessee's submissions before the revenue authorities. He stated that the assessee was a partner in various firms which were legally bound to get their accounts audited as per the provisions of the Income Tax Act and hence the due date for filing of return in the case of the assessee was 31-10-1995. In this case search and seizure operations had commenced on 25-10-1994 and were completed on 6-2-1995. During this period the regular office work of the assessee and the group concerns was disrupted. On 18-10-1995, Shri Omprakash Tolaram was shot dead in the office premises in presence of remaining two partners and staff. This tragedy put the remaining members of the family and staff in great fear and disrupted the normal functioning of the office. The learned authorised representative further submitted that late Shri Omprakash Tolaram and the assessee being lay persons could not have understood the various complicated points of law inherent in Explanation 5 to section 271(1)(c) and they thought that on declaration of income they would get immunity from penalty and that was why they made a bona fide disclosure and also acted on the same. It was emphasised that the assessee had submitted his return of income voluntarily under section 139(1) without getting any notice under section 142(1) from the department. Tax had also been paid on the disclosed income. He further argued that the assessee's default if any was of a mere technical and venial nature for which the penalty of Rs. 23,92,872 could not be imposed. Finally, he stated that no interference is called for in the impugned order passed by the learned first appellate authority.

8. We have heard both sides and perused the orders passed by the revenue authorities. In this case, there was a search and seizure under section 132 of the Income Tax Act, 1961. The assessee disclosed a sum of Rs. 40,00,000 under section 132(4) and declared the same in the return of income filed for the assessment year under consideration. According to the assessing officer, the fact that the income is declared by the assessee in the return of income furnished after the search, cannot take the assessee out of a case of concealed particulars of income or furnishing of inaccurate particulars of income. She concluded that on

the basis of the facts and the position of law as discussed by her in the penalty order, there was no doubt that the assessee shall be deemed to have concealed the particulars of his income or furnishing inaccurate particulars of such income and that the immunity provided under clause (2) of Explanation 5 to section 271(1)(c) will not be available to the assessee. The Commissioner (Appeals) has considered the fact that there was no indication in the show-cause notice that the assessing officer intended to invoke Explanation 6 to section 271(1)(c) for the purpose of imposing penalty and was of the view that no opportunity had been given to the assessee to meet the case of levy of penalty under Explanation 5 to section 271(1)(c). In the case of Asstt. Commissioner v. Dr. D.N. Venkatraman (supra), referred to by the Commissioner (Appeals) in his order, the assessing officer had imposed penalty under section 271(1)(c) by invoking Explanation 5 but the notice of penalty did not mention that Explanation 5 was invoked. The Tribunal held that it was mandatory for the assessing officer to inform the assessee of facture of attraction of Explanation 5 to section 271(1)(c) and assumption of jurisdiction by him without doing so was invalid. The assessee had disclosed the amount of Rs. 40,00,000 and paid taxes thereon. For the difference in advance tax, the assessee had also requested the assessing officer to adjust the seized cash of Rs. 1,84,000. The Commissioner (Appeals) has observed in his order that if there was no other demand outstanding against the assessee, there was no reason why the seized cash of Rs. 1,84,000 could not be treated as advance tax for the assessment year 1995-96 and if it were so treated, there would not have been demand in the present case with regard to the disclosed income of Rs. 40,00,000. On verification of records, he also found that in the present case some refund relating to assessment year 1996-97 had been adjusted and the only demand outstanding for the assessment year 1995-96 was only Rs. 10,650, and if the seized cash of Rs. 1,84,000 was adjusted against the same, the assessee would be entitled for refund. He also mentioned that the Income Tax Act has not prescribed any time-limit for payment of taxes in respect of disclosed income. The assessee had fulfilled almost all the conditions prescribed in Explanation 5 to section 271(1)(c) for the benefit of immunity from penalty. The belated filing of return also could be understood in the background of the head of the family having been murdered in the month of October when the return was due to be filed. It

could be accepted that the assessee did not deliberately delay the filing of return. There was also no loss to the revenue because of late submission of the return by the assessee, as the assessee had paid almost his entire advance tax by 15-3-1995 and had requested the department to treat the seized cash of Rs. 1,84,000 as the remaining advance tax. Keeping in view all the facts and circumstances of the present case and the observations made by the first appellate authority, we are of the considered opinion that the Commissioner (Appeals) has cancelled the penalty in dispute for valid reasons and no interference is called for in his impugned order. Accordingly, we uphold his order.

9. In the result, the appeal of the revenue is dismissed.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com