

Kothari and Company Vs. Cit

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Court : Madhya Pradesh

Decided On : Apr-07-2006

Reported in : (2006)204CTR(MP)298

Appeal No. : IT Appeal No. 52 of 2001 7 April 2006

Appellant : Kothari and Company

Respondent : Cit

Advocate for Def. : Shri. A.P. Patankar

Advocate for Pet/Ap. : S.C. Bagadia with D.K. Chhabra, *for the Assessee* A.P. Patankar, *for the Revenue*

Judgement :

ORDER

A.M. Sapre, J.

This is an appeal filed by the assessee under section 260A of the Income Tax Act, 1961 (hereinafter for brevity called 'the Act'), against an order dated 9-4-2001, passed by Tribunal, Indore in ITA No. 111/Ind/1996. This appeal was admitted for final hearing on following substantial question of law :

'Whether penalty under section 271D which was brought on the statute book with effect from 1-4-1989 could have been imposed on the assessee in respect of

transactions taken place prior to 1-4-1989 ?'

2. Facts of this appeal lie in a narrow compass. However, they need to be taken note of in brief coupled with the legal changes brought about in relevant sections applicable to the facts of this case.

3. The appellant is an assessee under the Income Tax Act and is being assessed as such. The dispute in this case relates to assessment year 1989-90 which corresponds to previous year ending on 31-3-1989 i.e., 1-4-1988 to 31-3-1989.

4. It is not in dispute that assessee during the period in question, i.e., between 1-4-1988 to 31-3-1989 accepted the amounts in excess of Rs. 10,000 (now Rs. 20,000) in cash by way of loan/deposit and repaid in cash thereby committed breaches of section 269SS and section 269T of the Act. The details of amount accepted in cash and repaid in cash are as follows :

Amount accepted in cash Rs.

Amount repaid in cash Rs.

1.

Anil Kumar Samarathmal

40,000

2.

Babulal Girdharilal

21,000

3.

S.M. Maheshwari

25,000

4.

Bhupendra Kumar Lodha

21,000

6.

Madanlal Jain

20,000

20,000

6.

Kanakmal Jain

20,000

20,000

7.

Shantilal Jain

20,000

20,000

8.

Anil Jain

20,000

20,000

9.

Suryakant Jain

20,000

20,000

10.

Sagarmal Jain

20,000

20,000

Total

2,27,000

1,20,000

5. Since the aforesaid acceptance and its repayment were in breach of section 269SS and section 269T ibid and hence, show-cause notice was issued by Jt. CIT to the assessee on 7-2-1994 under sections 271D and 271E of the Act, proposing as to why penalty as contemplated under these two sections be not imposed The assessee filed the reply and contested the proposed action for imposition of penalty inter alia on the ground that firstly transactions in question being genuine and entered into in excusable circumstances they do not constitute any breach and secondly, provisions in question under which the proposed action is initiated do not apply to the assessment year 1989-90.

6. The Dy. CIT by order, dated 30-8-1994 (Annex.-A) did not accept any of the contentions of the assessee and proceeded to impose a penalty of Rs. 2,27,000 and Rs. 1,20,000 under section 271D and section 271E ibid on the assessee for allegedly violating the provisions of section 269SS and section 269T of the Act. Aggrieved, the assessee filed an appeal to Commissioner (Appeals). By order dated 8-11-1995 (Annex.-B), the appeal was dismissed by Commissioner (Appeals). Aggrieved, the assessee filed further appeal to Tribunal. By impugned order, the Tribunal dismissed the appeal. It was held by the Tribunal that since on the date of issuance of notice (7-2-1994) section 271D and section 271E of the Act

were in force and hence assessing officer was competent to issue notice under those sections. It was also held that if contention of assessee is accepted then in that event he will go unpunished. It is against this order; the assessee has felt aggrieved and filed this appeal. As stated supra, the appeal was admitted for final hearing on aforementioned substantial question of law.

7. Heard Shri S.C. Bagadia, learned senior counsel with Shri D.K. Chhabra, learned counsel for the appellant and Shri A.P. Patankar, learned counsel for the respondent.

8. Shri S.C. Bagadia, learned senior counsel, in the first instance contended that no penalty under section 271D and section 271E of the Act could be imposed on the assessee for the reason that the breach/default under sections 269SS and 269T were committed by the assessee during the period 1-4-1988 to 31-3-1989, when section 271D and section 271E *ibid* were not in force. According to learned counsel, the proper provision in force relating to imposition of penalty at the relevant time, i.e., the time when default/breach was committed, were section 276DD and section 276E *ibid* though omitted from the Act with effect from 1-4-1989. It, was, therefore, argued that the only provision under which the action could be taken against the assessee for the alleged violation of section 269SS and section 269T were section 276DD and section 276E which were in force on the date of alleged breach/violation committed by the assessee, and that too by filing a complaint before competent Magistrate prior to 1-4-1989. Learned counsel contended that since on the date of alleged violation/breach, section 271D and section 271E were not on the statute book, and hence no action for imposition of any penalty under these two sections could be taken against the assessee by the competent authority (Jt. CIT) after 1-4-1989 as has actually been done in this case. He also contended that, 271D and section 271E were not retrospective in operation and licence breaches committed prior to their enactment i.e. (1-4-1989) would not be covered by these sections. Placing reliance on the decisions reported in *Rayala Corporation (P) Ltd. v. Director of Enforcement* AIR 1970 SC 494, *Kolhapur Cane Sugar Works v. Union of India* : 2000(119)ELT257(SC) *Sulemanji Ganibhai v. CIT* 1979 MPLJ 416 and *B.N. Sharma v. CIT* : [1997]226ITR442(SC) , learned counsel contended that, if the law laid down in

these cases coupled with law laid down by Supreme Court in the case of General Finance Co. v. Asstt. Commissioner : [2002]257ITR338(SC) is applied to the facts involved in this case in its proper perspective then in that event, the impugned order upholding the penalty proceedings initiated against the assessee under section 271D and section 271E are liable to be quashed being without jurisdiction.

9. In reply, learned counsel for the revenue placing reliance on the decision of Supreme Court reported in General Finance Co. v. Assistant Commissioner (supra), contended that impugned orders do not call for any interference. According to learned counsel, penalty proceedings were rightly initiated against the assessee under section 271D/section 271E *ibid* because, these were the only two sections which were in force on the date of issuance of notice in question i.e. 7-2-1994.

10. Having heard learned counsel for the parties and having perused record of the case, we are inclined to allow the appeal and set aside the impugned orders by answering the question of law framed in appellant's favour and against the respondent.

11. There are six sections which are relevant for the disposal of this appeal. They are (i) section 269SS, (ii) section 269T, (iii) section 276DD, (iv) section 276E, (v) section 271D and (vi) section 271E. They are reproduced *infra* to the extent necessary :

'(i) Section 269SS

No person shall, after the 30-6-1984, take or accept from any other person (hereafter in this section referred to as the depositor), any loan or deposit otherwise than by an account payee cheque or account payee bank draft if,-

(a) the amount of such loan or deposit or the aggregate amount of such loan and deposit, or

(b) on the date of taking or accepting such loan or deposit, any loan or deposit taken or accepted earlier by such person from the depositor is remaining Unpaid whether repayment has fallen due or not, the amount or the aggregate amount

remaining unpaid, or

(c) the amount or the aggregate amount referred to in clause (a) together with the amount or the aggregate amount referred to in clause (b), is twenty thousand rupees or more

Provided

(a) to (e) -----

Provided further

(ii) Section 269T

(1)..

(2) No branch of a banking company or a cooperative bank and no other company or co-operative society and no firm or other person shall repay any loan or deposit made with it otherwise than by an account payee cheque or account payee bank draft drawn in the name of the person who has made the loan or deposit if-

(a) the amount of the loan or deposit together with the interest, if any, payable thereon, or

(b) the aggregate annount of the loans or deposits held by such person with the branch of the banking company or co-operative bank or, as the case may be, the other company or co-operative society or the firm, or other person either in his own name or jointly with any other person on the date of such repayment together with the interest, if any, payable on such loans or deposits, is twenty thousand rupees or more

Provided -----

Provided further -----

(iii) Section 276DD

If a person takes or accepts any loan or deposit in contravention of the provisions of section 269SS, he shall be punishable with imprisonment for a term which may extend to two years and shall also be liable to fine equal to the amount of such loan or deposit.'

(Omitted by the Direct Tax Laws (Amendment) Act, 1987, with effect from 1-4-1989)

(iv) Section 276E'

If a person repays any deposit referred to in section 269T otherwise than in accordance with the provisions of that section, he shall be punishable with imprisonment for a term which may extend to two years and shall also be liable to fine equal to the amount of such deposit.'

(Omitted by the Direct Tax Laws (Amendment) Act, 1987 with effect from 1-4-1989)

(v) Section 271D

(1) If a person takes or accepts any loan or deposit in contravention of the provisions of section 269SS, he shall be liable to pay, by way of penalty, a sum equal to the amount of the loan or deposit so taken or accepted.

(2) Any penalty imposable under sub-section (1) shall be imposed by the Jt. CIT

(Inserted by Direct Tax Laws (Amendment) Act, 1987, (with effect from 1-4-1989)

(vi) Section 271E

(1) If a person repays any loan or deposit referred to in section 269T otherwise than in accordance with the provisions of that section, he shall be liable to pay, by way of penalty, a sum equal to the amount of the loan or deposit so repaid.

(2) Any penalty unposable under sub-section (1) shall be imposed by the Jt. CIT.'

(Inserted by Direct Tax Laws (Amendment) Act, 1987, with effect from 1-4-1989)

12. It is clear from aforequoted sections, that section 276DD and section 276E were in the Act upto 1-4-1989 and were omitted with effect from 1-4-1989. It is also clear that in their place, section 271D and section 271E were substituted by the Direct Tax Laws (Amendment) Act, 1987 w.e.f, 1-4-1989. It is further clear that earlier, i.e., prior to 1-4-1989, the breaches committed by the assessee of section 269SS and section 269T were being dealt with under section 276DD and section 276E whereas after 1-4-1989 they are dealt with under section 271D and section 271E of the Act for initiation of penal actions against the assessee. It is also clear that section 276DD and section 276E provided punishment of imprisonment for a term which may extend to two years and also fine equal to the amount of such loan or deposit, whereas, section 271D and section 271E now provides for imposition of penalty equal to the sum of the amount. of loan/deposit so taken or accepted. The power to impose this penalty now vests with Jt. CIT by virtue of sub-section (2) of section 271D and section 271E. In other words, if earlier, i.e. upto 1-4-1989 the breaches of section 269SS and section 269T attracted prosecution, i.e., imprisonment and fine, to be imposed by the Courts, the same is now replaced by penalty in terms of money and that too by Jt. CIT after 1-4-1989.

13. What is the true interpretation of these four penalty sections fell for consideration before the Supreme Court in the case of General Finance Co. v. Asstt. Commissioner (supra). In this case, assessee accepted in cash certain deposits of more than Ps. 10,000 on different dates in 1985 contrary to the provisions of section 269SS of the Act. A complaint of offence under section 276DD was therefore, filed by the IT department against the assessee in the court of Chief Judicial Magistrate on 31-3-1989. The assessee felt aggrieved of the filing of complaint sought for its quashing by filing a petition under section 482 of Cr.PC read with Art. 227 of the Constitution of India before the High Court. The High Court dismissed the petition holding that provisions of section 276DD under which the assessee had been prosecuted were in force during the accounting year 1985 when the alleged breach was committed and since section 276DD stood omitted only with effect from 1-4-1989 and, therefore, prosecution already filed against the assessee prior to 1-4-1989 was valid in law. The assessee felt aggrieved filed an appeal to Supreme Court of India. Reversing the decision of High Court and quashing the proceedings for prosecution by allowing the appeal filed by the

assessee, their Lordships field as follows :

'Though we find the submissions of learned counsel to be forceful, we are constrained to follow the two decisions of the Constitution Benches of this court in *Rayala Corporation (P) Ltd.* AIR 1970 SC 494 and *Kolhapur Cane Sugar Works Ltd.* : 2000(119)ELT257(SC) . This view has held the field for over three decades and reiterated even as late as two years ago Non compliance with section 269SS of the Act attracted prosecution as well as penalty. Omission of the provision regarding prosecution will not affect the levy of penalty. The advantage arising out of application of the ratio of the two decisions resulting in prosecution in cases of non-compliance with section 269SS of the Act is only transitional affecting a few cases arising prior to 1-4-1989. Such cases may be few and far between. Hence, we find this is not an appropriate case for reference to, the larger Bench.

The net result of this discussion is that the view taken by the High Court is not consistent with what has been stated by this court in the two decisions aforesaid and the principle underlying section 6 of the General Clauses Act as saving the right to initiate proceedings for liabilities incurred during the currency of the Act, will not apply to omission of a provision in an Act but only to repeal, omission being different from repeal as held in the aforesaid decisions. In the Income Tax Act, section 276DD stood omitted from the Act but not repealed and hence, a prosecution could not have been launched or continued by invoking section 6 of the General Clauses Act after its omission.

Hence, we allow this appeal, set aside the order of the High Court and quash the proceedings for prosecution.'

14. Mere perusal of law laid down by Supreme Court in the case of *General Finance Co.* (supra) would show that their Lordships quashed the prosecution though filed prior to 1-4-1989 in respect of breaches committed in the year 1989 by the assessee inter alia on the ground that after 1-4-1989 proceedings for prosecution cannot continue against the assessee. In other words, it is the view of the Supreme Court that since section 276DD. was omitted with effect from 1-4-1989 without there being any saving clause, it will amount to omission and not repeal. In these circumstances, the rigour contained in section 6 of General

Clauses Act would not apply so as to save even those proceedings legally initiated prior to 1-4-1989 under section 276DD *ibid*. As a consequence, such proceedings have to be quashed being not maintainable for adjudication on merits by the Magistrates on and after 1-4-1989.

15. We may also take note of two cases of Supreme Court reported as *B.N. Sharma v. CIT* (*supra*) and *CIT v. Onkar Saran & Sons* : [1992]195ITR1(SC) . In these two cases, question arose before the Supreme Court as to which law of penalty would be applicable to a case when assessee commits a default under the Act. Their Lordships held in *Onkar Saran's* case (*supra*) that in such cases, i.e., when there is change in penal laws then, it is the law obtaining on the date of the filing of the return which contains the concealment or misstatement as the case may be that is relevant and not the date on which the penalty proceedings are initiated. This is what their Lordships held in the case of *B.N. Sharma* (*supra*) after placing reliance on the law laid down in the case of *Onkar Saran* (*supra*) :

'It is, however, held by this court in *CIT v. Onkar Saran & Sons* : [1992]195ITR1(SC) that in such cases it is the law obtaining on the, date of the filing of the retuin which contains the concealment or misstatement, as the case may be, that is relevant and not the date on which the penalty proceedings are initiated. Accordingly, the question is answered in following words :

'the amount of penalty imposable should be worked out on the basis of the law in force at the time of filing of the return whether original and/or revised which contained the alleged concealment or misstatement'.'

16. To same effect, the Madhya Pradesh High Court in the case reported in *Sulemanji Ganibhai v. CIT* (*supra*) had already taken the same view on similar facts even prior to the decision of Supreme Court in the case of *B.N. Sharma* (*supra*). The learned Chief Justice G.P. Singh, speaking for the Bench held as under

'An assessee incurs penalty under section 271(1)(c), Income Tax Act when he conceals the particulars of income. There can be no concealment until there is a duty to disclose. An assessee conceals particulars when he suppresses

particulars to the prejudice of revenue. The duty to disclose particulars arises at the time of filing return under section 139(1) and if at that time he conceals particulars or furnishes inaccurate ones he incurs penalty under section 271(1)(c). The quantum of penalty must depend on law applicable when penalty is incurred. Any subsequent change in law unless it is retrospective will not be relevant in determining the quantum. The order of the Income Tax Officer or Assistant Commissioner only quantifies penalty already incurred. The law to be applied is that in force at the date when default which attracts penalty is committed.

The assessee filed his return for assessment year 1966-67 on 4-7-1966. In that return he did not disclose income from truck business or 20-2-1969 he filed a revised return in which income from truck business was shown. On the finding that while filing return in 1966 the assessee concealed his income he was held liable to penalty under section 271(1)(c). The department applied the law amended by Finance Act of 1968 in determining the quantum of penalty.

Held, that the quantum was to be determined by the law applicable in 1966 that the revised return not being under section 139(5) had to be ignored and that the amendment of 1968 not being retrospective was not applicable.'

17. Keeping in view the law laid down by Supreme Court in aforementioned cases, when we apply the principles laid down therein to the facts involved in this case then it is noticed that breaches of sections 269SS and 269T were committed by the assessee during the period 1-4-1988 to 31-3-1989, i.e., prior to 1-4-1989, whereas, the assessing officer, i.e., Jt. CIT initiated the penalty proceedings under section 271D and section 271E on 7-2-1994, i.e., after 1-4-1989. In other words, no prosecution under section 276DD was filed in the court of Magistrate against the assessee prior to 1-4-1989. Though in this case that issue did not arise for consideration but assuming that if the prosecution had been filed by the department under section 276DD prior to 1-4-1989 against the assessee as was legally required, even then the same would have been quashed or was liable to be quashed in the light of law laid down by Supreme Court in the case of General Finance Co. (supra). It was not maintainable after 1-4-1989.

18. Similarly, in the light of law laid down in Onkar Saran and Sulemanji (supra), it was only section 276DD which could be made applicable to this case for initiation of prosecution against the assessee and that too by filing a complaint before Magistrate prior to 1-4-1989. It is for the reason that the relevant date for determining the applicability of law in penalty cases was the date on which the breaches were committed by the assessee of any particular provision of the Act. In this case, the breaches of section 269SS and section 269T were committed by the assessee between 1-4-1988 to 31-3-1989. During this period, section 276DD was in force for prosecuting the assessee for the breaches of section 269SS and section 269T of the Act. In these circumstances, as observed supra, the Department was under legal obligation to initiate the proceedings under section 276DD and that too prior to 1-4-1989.

19. In our considered opinion, section 271D and section 271E could not be invoked by the Jt. CIT against the assessee for imposing the penalty because firstly these two sections were not on the statute book prior to 1-4-1989, i.e., during the period when assessee committed breach of section 269SS and section 269T. Secondly, these two sections were brought in force with effect from 1-4-1989 and thirdly, these two sections were not retrospective in operation so as to empower the assessing officer to cover the breaches in question, but they were prospective in operation with effect from 1-4-1989. When the sections were not in force on the date of commission of offence then in that event, no action could be taken under those sections against the assessee by the department. In other words, section 271D/supra 271E ibid could be invoked by the department only in respect of those breaches committed by any assessee after 1-4-1989 but not in relation to breaches if committed prior to 1-4-1989. Indeed, this legal position is clear from mere reading of the three decisions quoted supra.

20. As taken note of supra, here is a case where if the prosecution had been filed prior to 1-4-1989 against the appellant (assessee) under section 276DD, the same would have been held bad in law in the light of law laid down by Supreme Court in General Finance case (supra). Likewise no penal action under section 271D could be taken against the assessee because the law laid down in Onkar Saran (supra), clearly holds that section 271D has no application in such case, as the same was

not in force on the date of breach.

21. Accordingly and in view of foregoing discussion, we are of the considered opinion that initiation and imposition of penalty proceedings by the Jt. CIT under section 271D and section 271E of the Act, by issuance of notice on 7-2-1994 against the assessee for the alleged breaches of section 269SS and section 269T ibid committed during the period prior to 1-4-1989 were entirely without jurisdiction and hence, liable to be quashed.

22. True it is that despite the breaches having been committed and proved on merits, the assessee cannot be proceeded with for any penal action under any of the two sections i.e., section 276DD or section 271D ibid. Although, it has never been the intention of the legislature while enacting penal statute in any Act, yet, if the interpretation already made by Supreme Court on the subject leads to such result in some case due to peculiar facts involved, then effect has to be, given to such interpretation, irrespective of hardship to the subject. This court can only interpret the law in force in the light of law laid down by Supreme Court and apply the same to the facts of this case leaving the law makers to take note of this anomaly and make suitable amendment in the Income Tax Act in case, if they feel appropriate to do so.

23. As a result of foregoing discussion, the appeal succeeds and is allowed. Impugned order is set aside.