

Assistant Commissioner of Vs. Oriental

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Court : Income Tax Appellate Tribunal ITAT Indore

Decided On : Dec-08-1994

Reported in : (1995)52ITD631Indore

Judge : O Jain, S Chandra

Appellant : Assistant Commissioner of

Respondent : Oriental

Judgement :

1. These appeals by the revenue pertain to the assessment years 1982-83 to 1984-85 and arise out of the consolidated order of the CIT(A) dated 3rd November, 1989. Briefly stated, search operations were carried out by the income-tax authorities at the business premises of the assessee on 5th Feb., 1985. Prior to that search, assessments for the assessment years 1982-83 and 1983-84 were completed under Section 143(3) of the Act. For the assessment year 1984-85, the assessee had filed return of income on 24th August, 1984. It appears that assessment for this year could not be completed before the search operations were carried out.

During the search operations, some excess stock was found. The value of such stock was estimated by the assessee at Rs. 1.50 lakhs. The assessee had offered the said amount for taxation and had requested that it may be spread over as under :- 2. On 19th Feb., 1985, the assessee had filed a petition before CIT Under Section 273A making prayer for the spread over of the abovesaid income as

already indicated earlier. This petition was not decided and in the meantime the assessee had filed revised return for the said assessment years under the Amnesty Scheme by making addition of the value of the excess stock as already stated above and deposited the tax thereon.

3. The Income-tax Officer did not accept the assessee's claim that the income of Rs. 1.50 lakhs offered by the assessee has to be spread over a number of years. He was of the view that the said income pertains to the assessment year 1985-86. Since part of the income was offered for taxation in the assessment years 1982-83, 1983-84 and 1984-85, the ITO had included the offered income as a protective measure with the observation that this income would be considered for assessment in the assessment year 1985-86. In addition to the income offered by the assessee, as stated above, the ITO, in the assessment year 1984-85, had also made an addition of Rs. 82,275 to the trading result.

4. On the strength of the above addition, the Assessing Officer had initiated proceedings under Section 271(1)(c) of the Income-tax Act, 1961, and had levied the penalty of Rs. 25,000, Rs. 25,000 and Rs. 1,00,000 for the assessment years 1982-83, 1983-84 and 1984-85 respectively.

5. The assessee preferred appeal before the CIT(A). It was submitted that petition under Section 273A was filed by the assessee within 15 days of the search operations and the same has yet not been disposed of by the 1d. Commissioner. It was also pointed out that the actual difference in the valuation of the stock was about Rs. 81,000, whereas the assessee had offered the sum of Rs. 1.50 lakhs, just to avoid litigation and buy peace. It was the case of the assessee that since the disclosure was made within 15 days of the search operations and the disclosure was true having been accepted by the Department, the assessee was entitled to the benefit of Explanation 2 to Section 273A and as such no penalty is leviable. It was also contended that the assessee should not be allowed to suffer simply because the Commissioner has failed to dispose of the assessee's application filed under Section 273A. It was also contended that the disclosure made by the assessee was voluntary. The 1d. CIT(A) was of the opinion that since the disclosure was made within the stipulated period of 15 days, the benefit of

Explanation 2 to Section 273A cannot be denied to the assessee. He observed that the deeming fiction under the said provision cannot be ignored and the benefit cannot be denied, simply because the Commissioner has yet not disposed the assessee's application. He also noted that in the inventory prepared at the time of search operations, there were some calculation mistakes and on reconciliation made in assessment year 1985-86, the excess stock was found only to the tune of Rs. 68,890 only, against which the assessee had made the disclosure of Rs. 1.50 lakhs. Thus, the CIT(A) concluded that penalty cannot be maintained in respect of the addition on account of the disclosure made by the assessee. As regards the addition of Rs. 82,275, it was observed that the said addition was made by application of gross profit rate on enhanced turn-over. According to him, it could not be made the basis for imposition of penalty. Thus, the entire penalty levied in the three years under consideration was cancelled.

7. Ld. Departmental Representative has argued that the returns filed by the assessee were not voluntary. He has highlighted the point that the income on account of excess stock was disclosed by the assessee, after the same was detected in the search operation and as such concealment is fully established and, therefore, the Assessing Officer was justified in levying the penalty. He has also submitted that penalty is leviable even if an addition is made on the basis of estimate. In that connection, reference was made to the decision of the Hon'ble Madhya Pradesh High Court in the case of CIT(Addl) v. Smt. Chandrakanta [1994] 205 ITR 607 (MP).

8. The Id. counsel for the assessee has submitted that the addition of Rs. 82,275 made in the assessment year 1984-85 has been deleted by the Tribunal vide order dated 22-7-1992 in ITA No. 343/Ind./1989. A copy of that order has been placed on record. Thus, in the appeals under consideration we have to consider the levy of penalty in respect of the addition made on account of the disclosure made by the assessee.

9. The imposition of penalty has been challenged on behalf of the assessee on a variety of grounds. The submissions of the assessee can be summarised as follows :- (i) That search and seizure operations were carried out on 5th Feb.,

1985, which date falls in the assessment year 1986-87. Since excess stock was found during that assessment year, the income or addition on account of excess stock cannot be treated as income of the assessment years under consideration and as such no penalty is leviable in these years.

(ii) That the excess stock found on reconciliation of the inventory with the books of the assessee works out to about Rs. 81,000 only, whereas the assessee had offered the income of Rs. 1.50 lakhs. Since the actual concealment found was only to the tune of Rs. 81,000, the penalty is not leviable on the income of Rs. 1.50 lakhs, which was disclosed by the assessee.

(iii) That application under Section 273A of the Act was moved within 15 days of the search operations, wherein the assessee had offered the sum of Rs. 1.50 lakhs for taxation. The amount offered by the assessee has been accepted in the assessment proceedings and as such the disclosure made by the assessee was correct. It has been pointed out that Explanation 2 to Section 273A was inserted by the Taxation Laws (Amendment) Act, 1984, with effect from 1st October, 1984, and was omitted by the Finance Act, 1985, with effect from 24th May, 1985. The application under Section 273A was moved by the assessee within the currency of that Explanation and within the time stipulated in the said provision and as such it has to be held that the disclosure of income was made by the assessee before detection of concealment and for that reason no penalty is leviable. It was also stated that till date, the application moved by the assessee has not been disposed of by the Commissioner. According to the assessee, he should not suffer on account of the inaction of the Commissioner and it must be taken that the disclosure was made by the assessee before detection of concealment.

(iv) That the income disclosed by the assessee was assessed by the Assessing Officer on protective basis, inasmuch as he was of the opinion that the income pertains to the assessment year 1985-86. It has been contended that an assessment can be made on protective basis, but no protective penalty can be levied. In support of this contention, reference was made to the decision of the Calcutta High Court in the case of CIT v. Super Steel (Sales) Co. [1989] 178 ITR 451, and the decision of Gauhati High Court in Metal Stores v. CIT [1990] 186 ITR

612.

(v) That since the Assessing Officer was of the opinion that the income offered by the assessee does not pertain to the assessment years under consideration, the initiation of penalty itself was bad in law and no penalty can be levied on that basis.

(vi) In the alternative, it was submitted that the assessee had also filed returns under the Amnesty Scheme and by virtue of the application moved under Section 273A within the time stipulated in Explanation 2 to that section, it has to be held that there was no detection of any concealment of income and as such the benefit of Amnesty Scheme is also available to the assessee and for that reason also, the penalty is not leviable.

10. In rejoinder, the 1d. DR has submitted that vide order dated 22nd February, 1989, in the appeal filed by the assessee, the CIT(A) had held that the assessment should be considered as substantive instead of protective and he had accepted the assessee's claim for spread over of the income. It was, thus, argued that the levy of penalty would be justified.

11. We have considered the rival submissions as also the material available on record and the decisions cited before us. On consideration of the submissions advanced by the parties, we find considerable force in the contention advanced on behalf of the assessee. As already stated above, the search operations were carried out on 5th February, 1985.

Thus, concealment of income, if any, was detected beyond the assessment years under consideration. It is not doubt true that the assessee had offered the sum of Rs. 1.50 lakhs for taxation and had made a request for spread over of the said income over a number of years. However, no material could be brought on record that income offered by the assessee actually pertains to the assessment years under consideration. Unless it is established that the income offered by the assessee did pertain to the assessment years under consideration, no penalty can be levied under Section 271(1)(c). In taking this view, we get support from the decision of the Gujarat High Court in the case of CIT v. Navnitlal Pochalal, wherein

it was held that in the absence of any material on record to prove that the amount of agreed addition was income of the assessee for the concerned year and/ or there was any fraud or negligence on his part, penalty was not justified.

12. The order of the CIT(A) shows that on reconciliation of the inventory prepared at the time of the search operations and the books of the assessee, the actual value of the stock found in excess was much less than Rs. 1.50 lakhs offered by the assessee. According to the assessee, the difference was to the tune of Rs. 81,000 only, whereas the CIT(A) has mentioned the figure of Rs. 68,890. In our opinion, in case the penalty is leviable, it can be levied only in respect of the correct value of the stock actually found in excess.

13. It is undisputed that the assessee had moved an application under Section 273A on 19th Feb., 1985. A copy of that application is available at pages 2 to 5 of the assessee's compilation. The application categorically mentions that the petition may be considered under Section 273A, read with Explanation 2 of the Act. The said Explanation, which remained on the statute book for a short period reads as under : Explanation 2 : Where any books of account, other documents, money, bullion, jewellery or other valuable article or thing belonging to a person are seized under Section 132 and within 15 days of such seizure, the person makes a full and true disclosure of his income to the Commissioner such person shall, for the purposes of Clause (b) of this sub-section, be deemed to have, prior to the detection by the Income-tax Officer of the concealment of particulars of income or of the inaccuracy of particulars furnished in respect of such income voluntarily and in good faith, a disclosure of such particulars.

14. The scope and intendment of the Explanation was explained by the Central Board of Direct Taxes in Circular No. 394 dated 14th September, 1984. (See 150/ITR : 23 (Statute Section)). Paragraph 37.2 of the said circular reads as under : Under one of the amendments, a new Explanation 2 has been inserted in Section 273A(1) of the Act. The new Explanation provides that where any books of account, other documents, money, bullion, jewellery or other valuable article or thing belonging to a person are seized under Section 132 of the Income-tax Act and within 15 days of such seizure, the person makes a full and true disclosure of

his income to the Commissioner, such person shall for the purposes of Clause (b) of Sub-section (1) of Section 273A, be deemed to have made, prior to the detection by the Income-tax Officer of the concealment of particulars of income or of the inaccuracy of the particulars furnished in respect of such income, voluntarily and in good faith, a disclosure of such particulars.

15. Since the assessee had made correct disclosure within 15 days of the search operation, it has to be held under the provisions of the said Explanation that the disclosure was made prior to the detection by the ITO of the concealment of particulars of income. Though the 1d.

Commissioner has yet not passed any order on the said application of the assessee, we find force in the assessee's stand that the assessee should not be made to suffer on account of inaction of the income-tax authorities. In taking this view, we stand fortified from the decision of the Madras High Court in Umayal Ramanathan v. ITO [1992] 194 ITR 462. In that case also, the assessee had moved an application under Section 273A within the period stipulated in Explanation 2 to that section. The Commissioner passed no orders on the assessee's petition.

However, the prosecution was launched under Sections 276C and 277 of the Act. Considering the situation, the Hon'ble Court had held as under : As such, it can be safely taken for granted that an order under Section 273A ought to have been passed by the Commissioner with the result that the petitioner as per the provisions of Section 279(1 A) of the Act will be immune from prosecution in respect of the offences under Sections 276C and 277 of the Act.

16. Applying the ratio of the aforesaid decision, it has to be held that the assessee would be immune from the penalty under Section 271 (1)(c).

17. It is the accepted position that income offered by the assessee for the assessment year under consideration was assessed by the ITO on protective basis. In the assessment order for the assessment year 1982-83, the ITO had observed as under :- In fact on 5-2-1985 search and seizure operations under Section 131 were carried out in the business premises of the assessee. During the

said operations the position of stock as on 5-2-1985 was verified by physical stock taking. As per inventory total value of stock found at the shop and 3 godowns worked out to Rs. 6,92,064. As against the above figure of stock the assessee estimated the excess stock as on 5-2-1988 at Rs. 1,50,000 and spread over the said amount in 4 years. In respect of the assessment year under consideration the amount of Rs. 30,000 has been offered as income being portion of the unexplained excess stock found on 5-2-1985. The claim of the assessee for spread over has no force. Unexplained excess stock found on 5-2-1985 has to be dealt within the assessment for assessment year 1985-86 as per the provisions of the IT Act. No part of the unexplained excess of stock as on 5-2-1985 can be considered for assessment in this year. However, as the assessee has indicated income of Rs. 30,000, the same will be considered for assessment as a protective measure.

Similar observations were made in the assessment orders for the assessment years 1983-84 and 1984-85. From these observations, it is evident that the ITO was not satisfied that the income pertains to the assessment years under consideration. The income was assessed in the hands of the assessee for the reason that the same was offered by the assessee. Since it was not assessed on substantive basis, we are of the opinion that the penalty on such income is not leviable, inasmuch as the decisions already referred above, which were cited on behalf of the assessee lay down the proposition that there cannot be a protective penalty.

18. From the facts already stated earlier, it is established that the ITO was not satisfied that the income offered by the assessee pertains to the assessment years under consideration. He was of the opinion that this income relates to the assessment year 1985-86. For initiating penalty under Section 271(1)(c), it is necessary for the Assessing Officer to record his satisfaction in the assessment proceedings that there was concealment of income and the concealment of income was for the concerned assessment year. These two conditions constitute the basis and foundation of the proceedings for levy of penalty. Since the very basis for initiating the proceedings for levying penalty is lacking, we are of the opinion that the initiation of the penalty itself was bad in law and as a consequence

thereof, the levy of penalty cannot be maintained.

19. For the reasons already discussed, we are of the opinion that the levy of penalty cannot be sustained. We, therefore, decline to interfere with the order passed by the CIT(A).

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