Kejriwal Bros. Vs. Assistant Commissioner of

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Court : Income Tax Appellate Tribunal ITAT Patna

Decided On : Mar-22-1996

Reported in : (1997)60ITD502(Pat.)

Appellant : Kejriwal Bros.

Respondent : Assistant Commissioner of

Judgement :
1. The assessee is in appeal for reversal of the impugned order dated 17-11-1992 of the Appellate Commissioner of Income-tax (for short Commissioner) confirming the penalty of Rs. 2,60,000 imposed under section 271(1)(c) of the Act relating to assessment year 1988-89.

2. Before we arrive at a decision about the correctness or otherwise of the impugned order of the Commissioner the facts have to be recorded from papers accompanying the appeal records.

3. There were search and seizure operations on the appellant-firm as well as its partners on 24-9-1987. During the course of search at the residential premises of one of the partners of the assessee-firm Shri Sheo Kumar Kejriwal a statement on oath under section 132(4) was recorded from him by the Authorised Officer who conducted the search operations. A question (question No. 6) was put by the Authorised Officer to the said partner as to whether apart from what has been found he would intend to make any disclosure of the concealed income or wealth in his individual capacity or in the HUF capacity or in the status of a partner of

various firms in which he is a partner. The said partner replied that a sum of Rs. 10 lacs in M/s. Bihar Coke Producing Co. would be surrendered for the assessment year 1988-89 and the tax will also be paid. He would like to surrender Rs. 5 lacs in M/s.

Kejriwal Brothers (this appellant-firm) for the assessment year 1988-89 and tax will be paid. He further stated that he was making the declaration on behalf of all the partners of the respective firms and that payments of tax on the surrendered amount would be his personal liability. There were some other answers also, but they are not relevant for the purpose of deciding this appeal. In page three of the statement, it is declared that the statement has been given in the name of God with knowledge of the contents/answers given and there has been no duress or threat; that is to say, the oath statement was voluntary.

Copy of the said oath statement which is party in Hindi and party in English has been placed by the assessee's counsel in the paper book from pages 1 to 3. Question No. 6 and the related answers are at pages 2 & 3 of the said paper book. When the return of income was filed the sum of Rs. 5 lacs was not declared. But the sum of Rs. 5 lacs was added to the returned income by the Assessing Officer (for short A.O.) in the assessment order. The relevant observations of the Assessing Officer are as under : "I have heard the assessee and have given my careful consideration to the submissions made by the assessee. It may be true that there was no seizure of any assets or cash by the department in course of search but then the declaration made by one of the partners of the assessee-firm in course of search was not referable to any undeclared assets or cash and, therefore, it is quite possible that the assessee had in mind about its own affairs to make the declaration to cover any undeclared income and, therefore, whatever may be the reason, the declaration under section 132(4) is a declaration and hence I have no alternative but to consider the sum of Rs. 5 lacs as income of the assessee for this year." The Assessing Officer while completing the assessment also initiated penalty proceedings under sections 271(1)(a), 271(1)(c) and 273(2)(c) of the Act. Not being satisfied with the addition of Rs. 5 lacs to the returned income, the appellant preferred an appeal before the Commissioner who agreed with the Assessing Officer and confirmed the addition made. The matter then rested before this Tribunal by way of second appeal (hereafter quantum appeal).

4. It was argued before the Commissioner challenging the addition of Rs. 5 lacs that one of the partners under section 132(4) cannot make the assessee-firm liable to be assessed in respect of that amount and that the department has to prove that such an income has been earned.

It was also contended that the oath statement of the said partner taken on the search day had no value because it was extracted under threat and duress. This Tribunal in quantum appeal after analysing the facts of the case and duly considering the submissions made by both sides and the law on the subject held that the assessee had been unable to discharge the onus for substantiating the retraction of statement dated 24-9-1987. This observation and finding of the Tribunal appears in para 12 at page 7 of the order dated 12-5-1995 passed in ITA No. 843 (Pat.)/1991. Thus in quantum appeal the assessee remained unsuccessful.

5. During the pendency of the quantum appeal before this Tribunal, the Assessing Officer issued show-cause notice before penalising the assessee under section 271(1)(c) of the Act for concealment of income of Rs. 5 lacs. A reply was submitted through one of the partners of the assessee-firm wherein it has been submitted that there has been neither concealment of income nor furnishing of inaccurate particulars of income warranting alleged statement of Shri Sheo Kumar Kejriwal given under section 132(4) of the Act. It was also contended before the Assessing Officer in penalty proceedings that the appellant-firm has not earned such alleged income of Rs. 5 lacs and hence question of such declaration or acceptance by the assessee-firm does not arise. In para 5 of the said letter, it was stated that on threat of being arrested by the police who surrounded the premises at the time of search operations the oath statement of that partner was taken under section 132(4) of the Act. It was prayed that the proceedings initiated under section 271(1)(c) may be dropped. Alternatively it was also prayed that the penalty proceedings be stayed till the disposal of the quantum appeal by this Tribunal. The Assessing Officer was not convinced with the reply given to the show-cause notice

issued by him and imposed penalty of Rs. 2,60,000 under section 271(1)(c) of the Act. The relevant portion of the undated penalty order of the Assessing Officer is very pertinent and we extract the same from the said order : "The facts stated by the assessee is not correct. He had made the statement under section 132(4) on his own accord as he might be having fear in his mind at the time of search that if concealed income is detected by the searching officer, he may be liable to consequences and that is why the preferred to make statement under section 132(4) to get immunity from the penal provisions of the Income-tax Act. Now he has simply changed his opinion for avoidance of payment of tax on the declared amount under section 132(4) of the Income-tax Act, 1961. In my opinion, the assessee is liable for penalty. Penalty leviable is calculated as under :Concealed income Rs. 5,00,000Tax on total income of Rs. 5,90,960 as URF Rs. 2,88,467Tax on total income of Rs. 90,960 excludingconcealed income Rs. 29,916 ---------------- Tax sought to be avoided Rs. 2,58,551Minimum penalty @ 100% Rs. 2,58,551Minimum penalty @ 200% Rs. 5,17,102 Considering the circumstances of the case I impose a penalty of Rs. 2,60,000 (Two lacs sixty thousand) only under section 271(1)(c) of the Income-tax Act, 1961." The imposition of penalty was challenged by way of first appeal before the Commissioner who, by a brief and cryptic order, confirmed the penalty. We reproduce the contents of para 2 from the impugned order of the Commissioner : "The A.R. of the appellant has contended that the statement was made by Shri Shiv Kumar under threat. There is not evidence to prove this claim. Shri Shiv Kumar knew the financial activities of the appellant-firm very well. In view of the facts of this case it is held that A.C. was quite justified in imposing the above penalty.

The appellant has rightly been held guilty of concealing the income to the extent of Rs. 5,00,000." 6. Opening the case for appellant-firm, the counsel for the assessee Shri A.K. Rastogi submitted that there has been on concealment of income warranting imposition of penalty under section 271(1)(c) of the Act. According to him on the basis of statement of one of the partners of the assessee-firm' the sum of Rs. 5 lacs cannot be assessed as income of the appellant-firm. But even if it is subjected to tax the same has to be limited for the assessment purpose only and that such a statement under section 132(4) cannot make the appellant-firm exigible for penalty of Rs. 2,60,000 under section 271(1)(c) of the Act, because the assessment proceedings and penalty proceedings both stand on different footing. Shri Rastogi contended that apart from reiterating the facts narrated in the assessment order, the Assessing Officer has not done anything more nor conducted any valid enquiry to establish whether there has been real and actual concealment of income by the appellant-firm. The assessee's counsel again reiterated that the statement of one of the partners, Shri Sheo Kumar Kejriwal was an involuntary statement given on the search day and the same was obtained under threat of arrest by the police who accompanied the search party surrounding the residential premises of the said partner. According to him, involuntary statement or statement recorded under duress or threat have no sanctity or validity in the eyes of law and on that basis, the appellant-firm cannot be penalised under the rigorous provisions of section 271(1)(c) of the Act. To save the assessee from the clutches of section 271(1)(c) of the Act, the assessee's counsel further contended that the case of appellant-firm was covered by the provision of section 24 of the Evidence Act which clearly lays down that any confessional statement recorded from an accused is irrelevant and cannot be used in criminal proceedings. It was streneously pleaded that the Commissioner fell in error in confirming the penalty of Rs. 2,60,000 imposed under section 271(1)(c) of the Act by the Assessing Officer and deserved cancellation by this Tribunal. The assessee's counsel further relied on the following case laws : 1. Anantharam Veerasinghaiah & Co. v. CIT [1980] 123 ITR 457/3 Taxman 56 (SC) 2. Sir Shadilal Sugar & General Mills Ltd. v. CIT [1987] 168 ITR 705/33 Taxman 460A (SC) 4. Asstt. CIT v. Mrs. Sushiladevi S. Agarwal [1994] 50 ITD 524 (Ahd.) 5. CIT v. Haji Gaffar Haji Dada Chini [1988] 169 ITR 33/[1987] 34 Taxman 167 (Bom.) (Nag. Bench) 9. Addl. CIT v. Jankidas Mohanlal [1984] 150 ITR 588/18 Taxman 409 (Pat.) 10. CIT v. Dharamchand L. Shah [1993] 204 ITR 462/70 Taxman 414 (Bom.) 7. The departmental representative on the other hand relied on the orders of both the lower tax authorities and urged for dismissal of the assessee's appeal being devoid of merits.

8. The arguments of the assessee's counsel have been very cogent and persuasive and we are inclined to cancel the penalty imposed by the Assessing Officer who erroneously invoked the provisions of section 271(1)(c) of the Act.

9. The case of the Assessing Officer in penalising the appellant-firm is the statement of Shri Sheo Kumar one of the partners of the assessee-firm who stated on oath recorded under section 132(4) before the Searching Officer during the course of search operations on 24-9-1987 that he would disclose a sum of Rs. 5 lacs and pay tax and further that he was making the statement for and on behalf of all the partners of the appellant-firm and that they would abide by it and would pay there tax of disclosed income. Since the sum of Rs. 5 lacs was not disclosed and was not offered for taxation the Assessing Officer took aid of the oath statement of the said partner of the appellant-firm given on search day and made the addition negativing the plea that the statement was recorded under threat and duress because it was not proved and established so. This addition on appeal before the Commissioner got seal of confirmation and again before this Tribunal also. The Tribunal in quantum appeal, in sum and substance, while agreeing with the Commissioner who confirmed the addition of Rs. 5 lacs held that the appellant-firm has failed to establish and discharge the onus about the threat being used on the said partner, Shri Sheo Kumar Kejriwal on the search day for giving such a statement about the disclosing of Rs. 5 lacs as income of the appellant-firm for the year under appeal.

10. The Act of concealing income is a conscious positive act and the same has to be established by the revenue by cogent material and evidence after the delinquent assessee furnishes explanation. In the instant case, the same is lacking and nowhere present. As is evident from the contents of the penalty order, the penalty had been imposed solely on the ground that an admission came from one of the partners about the probable disclosure of the income for the assessment year 1988-89; and since this was not done the Assessing Officer considered the same as concealed income and imposed penalty. We are afraid we cannot uphold the imposition of penalty for such types of addition even through confirmed in quantum appeal before this Tribunal as has been done by order dated 12-5-1995 in ITA No. 843 (Pat.)/1991.

11. It is true that this Tribunal upheld the additions of Rs. 5 lacs on the ground that the appellant-firm failed to discharge the onus that the statement under section 132(4) from Shri Sheo Kumar Kejriwal was extracted under duress or threat by the

authorised officer. No categorical finding is given by this Tribunal in its order dated 12-5-1995 in the quantum appeal that the sum of Rs. 5 lacs was the income of the appellant-firm of the previous year relevant to the assessment year 1988-89 and that it was concealed from the revenue while filling the return of income. The revenue, therefore, cannot get confirmation of the penalty or affirmation of the impugned order of the Commissioner on this score from this Tribunal.

12. We do agree that the income finally assessed and confirmed by this Tribunal is the real taxable income of the assessee-firm. Yet, in law that by itself does not establish the guilt of concealment of income by the assessee-firm authorising imposition of penalty under the provisions of section 271(1)(c) of the Act. There are variety of reasons for making additions or an assessee agreeing for the additions made by the Assessing Officer which may get seal of confirmation in appeals. But to say or hold that on account of such an addition the assessee is guilty of concealing income and has, therefore, to be penalised will not only be highly unfair and unjust, but atrocious too.

13. The Apex Court in the well known celebrated case of Sir Shadilal Sugar & General Mills Ltd. (supra) have held that mere agreeing to additions by an assessee does not amount to admission of concealment of income warranting imposition of penalty under the penal provisions of Income-tax Act. The word of the Assessing Officer in the assessment order regarding total income is, therefore, not the final word for imposition of penalty for concealing income. In the penalty proceedings it has firmly to be established by the Assessing Officer that there has been conscious concealment of income and it is only then that penalty can be imposed and sustained in appeals. It is by now well-settled through catena of decisions of Supreme Court and various High Courts in this country commencing from the most two celebrated decisions of the Apex Court; one in the case of CIT v. Khoday Eswarsa & Sons [1972] 83 ITR 369 and the other in the case of Anantharam Veerasinghaiah & Co.

(supra) that the findings contained in the assessment order do not operate as res judicata in penalty proceedings though this would be the relevant and admissible materials because considerations differ in assessment and penalty proceedings.

14. The penalty order, the relevant contents of which we have extracted above do not contain any independent finding based on valid inquiry regarding concealment of income to the extent of Rs. 5 lacs by the appellant-firm. The contents of the penalty order are a brief repetition from the assessment order and a reference to the offer in the statement under section 132(4) on search day from a partner for disclosing Rs. 5 lacs for assessment year 1988-89 which is retracted later on as being extracted under threat. In the instant case, there has been no attempt whatsoever by the Assessing Officer, as far as it could be gathered from the penalty order, to have a fresh look at the issue in the light of the explanation offered by the appellant-firm during the course of penalty proceedings. If one was to go purely by the findings contained in the assessment order then there could be no two opinions on the question that those findings miserably failed to establish the guilt of concealment. The assessment order merely said that the assessee has failed to establish any threat or duress in relation to the oath statement given on search day under section 132(4) of the Act and this Tribunal affirmed it. The case of Assessing Officer has been built up only on the basis of oath statement of one of the partners on search day that a sum of Rs. 5 lacs would be disclosed as income of the appellant-firm for the assessment year 1988-89; that the statement is given on behalf of all partners and that the tax liability of the appellant-firm will be his personal liability.

15. Apart from the answer given by Shri Sheo Kumar Kejriwal to question No. 6 on search day under section 132(4) that Rs. 5 lacs would be disclosed as income of the appellant-firm for the assessment year 1988-89, no other clinching legal evidence based on valid inquiry is placed on record by the Assessing Officer which could persuade us to agree with the Commissioner in confirming the impugned penalty imposed under section 271(1)(c) of the Act. We reiterate on the strength of the ratio laid down by the Apex Court in the case of Sir Shadilal Sugar & General Mills Ltd. (supra) that mere admission does not establish guilt of concealment of income authorising imposition of penalty under the concealment provisions of section 271(1)(c) of the Act.

16. If the findings in the assessment order are to be considered as sacrosanct and final then the Legislature would not have provided further hearing to be given to an

assessee before penalising him by enacting section 274 in the Income-tax Act, 1961. If we go by the contents of the assessment order and the findings recorded therein we have to say that the Assessing Officer even at assessment stage did not establish concealment of income at all. The sum of Rs. 5 lacs was simply added on the ground that since one of the partners stated on search day that the firm would offer Rs. 5 lacs for taxation purposes and having failed to do so the said sum represented the concealed income attracting section 271(1)(c) of the Act. If the answer given by the said partner is studied and analysed carefully and intelligently it would raise several queries and give more than one meaning or answers.

To us the statement of the said partner of the firm does not expose the appellant-firm to the guilt or charge of concealing income to the extent of Rs. 5 lacs. To assess a person on admission or concessions is one thing and to penalise is altogether a different thing. The Revenue has to firmly establish mens rea under the substantive provisions of section 271(1)(c), after the assessee furnishes an explanation denying the charge of concealment, as in this case. It is no doubt a heavy burden on the Revenue. But, nonetheless it has to be discharged as per the substantive provisions of section 271(1)(c) of the Act in spite of the Explanation I appended to the said provisions.

17. We are once again with the Revenue that the assessee has failed to prove that the statement of Shri Sheo Kumar Kejriwal, a partner of the appellant-firm on the search day was not voluntary but was extracted by the Search Officer under threat as alleged in the reply to the penalty show-cause notice issued by the Assessing Officer. Yet, that part of explanation or allegation against the Search Officer in the penalty reply was required to be examined and inquired into by the Assessing Officer in penalty proceedings. To that extent it can be said that the Assessing Officer did not give a reasonable opportunity of hearing to the assessee as has been held by the Full Bench of the Hon'ble Patna High Court in the case of CWT v. Jagdish Prasad Choudhary [1995] 211 ITR 472. The observations of His Lordships Justice Ashok Kumar Ganguly in the said Judgment at page 491 of the report are very pertinent and our order will not be complete unless we quote the observations. The observations are as under : "I hold that before levying penalty

under section 18(1)(a) of the said Act, the same conditions must be fulfilled. Therefore, the officer concerned must address himself to the aforesaid questions and these questions can be decided satisfactorily only upon an oral hearing being given to the assessee and not otherwise. A decision of the above questions without an oral hearing whether such hearing is demanded or not, will be an unfair decision. Any decision which is unfair and arbitrary falls four of the principles of Article 14 of the Constitution of India which envelops within itself the requirement of fairness which, in turn in these days is a requirement of the principles of natural justice. Therefore, having regard to the developments of the principles of natural justice as well as the dynamic interpretation of Article 14 of the Constitution by the Apex Court in a series of decisions. It is no longer open to the wealth-tax authorities acting under section 18(1)(a) read with section 18(2) of the said Act to decide the liability to penalty of an assessee merely on the basis of consideration of a written representation given by the assessee. In my opinion, he must offer the assessee an opportunity of total hearing and if that opportunity is not availed of by the assessee, that is of course a different matter but without offering the assessee an opportunity of oral hearing, the decision made on the basis of consideration of the written representation only, is bound to be an unfair one and, in my view, such a decision does not satisfy the mandatory requirement of section 18(2) of the said Act." 18. It is not necessary to discuss and analyse in detail the facts or the ratio and principle laid down by various Courts in numerous cases relied by the assessee's counsel that penalty proceedings are quasi-criminal in nature and the Revenue has to establish the guilt of concealment of income warranting imposition of penalty under section 27(1)(c) of the Act. This principle is far too well-settled and crystallised over the years and does not now require any authority or precedent to support the argument that conscious concealment has to be established by the Revenue, though Explanation I has been inserted to the said penal provisions.

19. From the above discussion, we are unable to uphold the brief and cryptic order passed by the Commissioner confirming the imposition of penalty of the sum of Rs. 2,60,000 under section 271(1)(c) of the Act.

We reverse the impugned order, cancel the penalty and direct the Assessing Officer to refund, as per law, the penalty amount, if any, paid in the meantime by the assessee-firm.