

Assistant Commissioner of Income Tax Vs. Shyam Lal Saraf (Also Shyam Lal Saraf V. Ito.).

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Court : Delhi

Decided On : Nov-09-1992

Reported in : (1993)46TTJ(Del)385

Appeal No. : ITA No. 4025/Del/1988; Asst. yr. 1980-81 (ITA No. 3841/Del/1988; Asst. yr. 1980-81)

Appellant : Assistant Commissioner of Income Tax

Respondent : Shyam Lal Saraf (Also Shyam Lal Saraf V. Ito.).

Judgement :

ORDER

R. M. MEHTA, A.M. :

These are cross-appeals directed against the order passed by the CIT(A) raising for our consideration the common issue of penalty imposed on the assessed by the ITO under S. 271(1)(c) and on further appeal a substantial reduction being effected by the first appellate authority. Both the parties are aggrieved, the Revenue in respect of the relief allowed and the assessed in respect of the penalty sustained.

2. Taking up for consideration the assesseds appeal first, the same pertains to the addition in respect of a cash credit of Rs. 10,000 alleged to have been received by the assessed from his wife, Smt. Laxmi Devi, the notional addition of Rs. 1,100 on the account of the interest pertaining to the said cash credit and last of all the addition of Rs. 5,100 sustained on account of household expenses. It may be mentioned as a fact that the aforesaid additions were duly confirmed by the Tribunal in the quantum appeal.

3. As regards the first item, namely, the cash credit of Rs. 10,000, the ITO made the addition nothing in the process process that the same could not be proved by the assessed in spite of the specific opportunities having been provided to him. On further appeal, the CIT(A) upheld the addition and on second appeal before the Tribunal, the assessed did not meet with any success. It would be relevant to record the observations of the Tribunal while confirming the addition as follows :

'Before us since no material has been put forward on behalf of the assessed to show that the requisites of a genuine cash credit had been established, we find no warrant or justification for interference with the orders of the Income-tax authorities in this regard. This addition is, therefore, maintained.'

4. The learned counsel for the assessed at the outset stated that Smt. Laxmi Devi, the creditor, was a person of means and this facts was further substantiated by the order of the Tribunal in the quantum appeal, whereby they had discussed the background leading to the acquisition of a silver bar by her and in the ultimate analysis accepting that a part of it vis. to the extent of 29.960 kgs. stood established. A reference was also made to the gold ornaments owned by Smt. Laxmi Devi as also the disclosure made by her under the VDS 1975. On the aforesaid facts, it was contended that the penalty vis-a-vis Rs. 10,000 be cancelled.

5. As regards the notional addition on account of interest amounting to Rs. 1,100, the submission of the

learned counsel was that the said addition had been wrongly made, inasmuch as, the assessed had not claimed any deduction and, in fact, no interest had been paid on the cash credit. The further submission on the part of the learned counsel was that, on the assumption that the amount of Rs. 10,000 belonged to the assessed, there could be no addition since it would amount to payment of interest to self.

6. As regards the addition on account of household expenses, the arguments advanced by the learned counsel were that the said addition being made purely on estimate, the question of penalty under S. 271(1)(c) did not arise. A reference was made to the further fact that in the asst. yr. 1977-78, the total withdrawals of the assessed and his son had been considered, whereas in the assessment year under appeal, it was only the figure of withdrawals effected by the assessment year under appeal, it was only the figure of withdrawals effected by the assessed which was taken into account. He also referred to the provisions of S. 69C of the IT Act for the proposition that the burden was on the Revenue to show that expenditure over and above what had been stated, had been incurred. In view of the aforesaid submissions pertaining to the three items in question, the learned counsel contended that no penalty was liable to be levied.

7. The learned Departmental Representative, on the other hand, supported the order passed by the CIT(A). According to him, the additions in question had been duly confirmed by the Tribunal and as the assessed had not been able to prove his case by any cogent evidence or other proof, the penalty was required to be upheld.

8. We have examined the rival submissions and have also perused the material on record to which our attention was invited by the parties. In so far as the cash credit of Rs. 10,000 is concerned, we are of the view that the penalty under S. 271(1)(c) is exigible, inasmuch as the assessed has not been able to discharge the onus that lay on him to prove the genuineness of the aforesaid cash credit. It may be noted that the alleged cash creditor happens to be the wife of the assessed and there could be no valid reason for not being able to place on record the relevant evidence with a view to substantiate the genuineness of the amount deposited. A perusal of the orders passed by the IT authorities as also by the Tribunal in the quantum appeal goes to show that no attempt was made at any stage to bring on record any evidence, whatsoever. That being the situation, the penalty under S. 271(1)(c) viz. on the addition of Rs. 10,000 is confirmed.

9. We are, however, not in a position to sustain the penalty in so far as it pertains to the other two items. The addition of Rs. 1,100 vis-a-vis the cash credit of Rs. 10,000 is a notional one. The learned counsel has categorically stated that the assessed has not claimed any deduction and, in fact, no interest has been paid. That being the situation and in view of the fact that the addition of Rs. 10,000 has been confirmed, the only conclusion which can be arrived at is that the amount of Rs. 1,100 represented a payment to 'self'. No doubt, the addition has been sustained in the quantum proceedings, but in so far as the penalty under S. 271(1)(c) is concerned, we cancel the same.

10. As regards the withdrawals towards household expenses perusal of the orders of the tax authorities as also that of the Tribunal shows that the same is purely on an estimated basis and there is no cogent evidence on record to show that any specific expenditure had been incurred outside the books of account. Then again, the ITO in para 18 of the assessment order refers to the withdrawals made by the assessed and his son, Shri Krishan Kumar in asst. yr. 1977-78, totalling Rs. 10,421 whereas in the assessment year under appeal, he has made the addition by referring to only the withdrawals of the assessed without any reference to the withdrawals made by his son. That being the situation, we are unable to sustain the penalty under S. 271(1)(c) in respect of the aforesaid item.

11. We now come to the Revenues appeal and the grievance herein pertains to the relief allowed by the CIT(A) by cancelling the entire penalty in respect of an addition on account of four silver bars, which were found during the course of the search operations in October, 1975 and stated by the assessed to be belonging to himself, his wife, Smt. Laxmi Devi, his daughter-in-law, Smt. Sushila Devi, and lastly to his daughter, Smt. Kamlesh Kumari. At this stage, we may mention that the ITO, in the course of assessment proceedings, accepted a part of the investment in the silver bar by Smt. Laxmi Devi by holding that she had silver to the

extent of 19.42 kgs. He, however, rejected the case made out in respect of the other three and, in the ultimate analysis, made an addition of Rs. 2,34,272 (Rs. 2,79,000 minus Rs. 44,728) by applying a rate of Rs. 2,300 per kg. On further appeal, the CIT(A) upheld the addition, but, on second appeal, the Tribunal accepted the investment in bars stated to be belonging to the assesseds daughter, Smt. Kamlesh Kumari and daughter-in-law, Smt. Sushila Devi, but the silver bar alleged to be belonging to the assessed and part of the addition made by the ITO and sustained by the CIT(A) in respect of the silver bar stated to be belonging to the assesseds wife, Smt. Laxmi Devi, was confirmed. The ITO on the basis of these facts imposed a penalty of Rs. 2,00,000 under S. 271(1)(c).

12. On further appeal, the assesseds counsel tendered detailed arguments before the CIT(A) and wherein the following were highlighted :

(i) That the Tribunal had accepted the assesseds Explanationn in respect of the silver bars, belonging to Smt. Kamlesh Kumari and Smt. Sushila Devi, the daughter and daughter-in-law of the assessed.

(ii) That in respect of the silver bar stated to be belonging to the assessed and a part of the one belonging to his wife, Smt. Laxmi Devi and in respect of which the addition had been sustained by the Tribunal, it was a case of non-acceptance of the Explanationn.

(iii) That in the wealth-tax proceedings, the AAC had accepted the assesseds Explanationn with regard to the acquisition of silver bars.

(iv) That in an order under S. 35 of the WT Act on 20th Aug., 1986, the AAC had held that the assessed was entitled to the deduction of the loan taken from the three ladies, namely, his wife, his daughter and his daughter-in-law.

(v) That the advancing of loans to the assessed by the three ladies was duly reflected in the WT returns.

(vi) That no fresh assets had been created inasmuch as after examining the totality of the circumstances, it would be noticed that not only in the case of the appellant, but in the case of the ladies as well, the total assets remained more or less the same and it was a case conversion of gold ornaments into silver bars.

(vii) That it was not a case where no Explanationn was offered or a case where the Explanationn offered was found false. It was also not a case where the Explanationn offered was not substantiated.

13. On the basis of the aforesaid arguments, it was contended that no penalty under S. 271(1)(c) was exigible.

14. The CIT(A), after examining the submissions with relevance to the material on record, in the ultimate analysis concluded that penalty in respect of the addition of Rs. 93,311 sustained by the Tribunal vis-a-vis the silver bar stated to be belonging to the assessed and a part of the silver bar 'belonging to his wife, Smt. Laxmi Devi' was required to be cancelled. In doing so, he observed as under :

'..... Even the addition on account of silver bars is to be divided into two parts viz. silver bar weighing 30.052 kgs. claimed to be belonging to Shri Shyam Lal, acquired out of the loans from the ladies valued at Rs. 69,119 and value of silver claimed to be belonging to Smt. Laxmi Devi weighing 10.518 kgs. Rs. 24,191. It is true that at the original stage, total amount was treated as unexplained but at the final appellate stage before the learned Tribunal only a part of it was treated as unexplained. It is also correct on the part of the appellant to say that penalty cannot be levied for concealment merely on the basis of an assessment order and that the onus lies on the Departmental to prove concealment and existence of means rea. The appellants Explanationn has been to the effect that four silver bars had been purchased out of loans raised from three ladies who, in turn, raised capital by selling their ornaments which had originally been disclosed in their WT returns. This Explanationn has been accepted in part and has been rejected in part at the appellate stage. The part rejection is based on absence of documentary evidence. This may be a sound basis for making an addition for unexplained investment, but this does not prove in itself that income earned during this year has

been suppressed and concealed. In other words, it is not proved conclusively that the silver in question was purchased from the income which was earned during this year which was not disclosed to the Department.

4.1 The observations of learned Tribunal that this is not a conclusive proof of loan but whether served as a secondary evidence taking into account the probabilities of the case, is germane to the issue. The loans have been accepted in the WT assessments of the ladies by the learned AAC. Argument about the totality of assets not increasing but only being converted from gold to silver is also plausible. Thus, as far as the additions on account of silver bars are concerned, to my mind, the material on record may be sufficient for making additions in the quantum assessment but is not conclusive proof of concealment of income earned during the relevant assessment year but not disclosed. It is a well settled law that the onus to be discharged in penalty proceedings by the Revenue is higher than in assessment proceedings. In the penalty proceedings, the Revenue has to establish that the assessed was guilty of concealing the particulars of income. Merely because the Explanation put forth by the assessed has been rejected, would not follow that the penalty is exigible. The nature of penalty proceedings continues to be quasi-criminal and existence of means read or guilty mind is to be established before the penalty is levied. The penalty proceedings being penal in nature, there must be some positive cogent material or evidence to prove the guilt. If the only evidence on record is rejection of Explanation, it is not sufficient material for attracting penal provisions. Findings in assessment proceedings may be prima facie evidence but cannot be held to be conclusive for levy of penalty and penalty cannot be imposed solely on such findings.'

15. The learned Departmental Representative, at the outset supported the penalty order passed by the ITO. According to her, the CIT(A) had gone wrong in cancelling the penalty, inasmuch as the WT returns had been filed after the date of search. A reference was also made to the specific findings recorded by the Tribunal in the quantum appeal, whereby the addition of Rs. 93,311 had been upheld. It was contended that the assessed had not been able to discharge the onus which lay on him vide Explanation 1 to S. 271(1)(c) inasmuch as no evidence had been placed on record either in the quantum appeal or in the penalty proceedings. The further submission was that mere filing of the Explanation had not discharged the said onus. In support of these arguments, she placed reliance on two decisions of the Hon able Allahabad High Court in the cases of Addl. CIT vs . D. D. Lamba & Co. : [1981]128ITR564(All) and Addl. CIT vs . Ram Prakash : [1981]128ITR559(All) .

16. The learned counsel for the assessed, on the other hand, supported the action of the CIT(A) in cancelling the penalty vis-a-vis the addition of Rs. 93,311 sustained by the Tribunal. It was stated that the search and seizure operations took place at the residence, which was not only occupied by the assessed and his wife but by their married children, their wives and in turn their children. The submission, in other words, was that whatever was found and seized during the course of the raid, could not be attributed in entirety to the assessed. The further submission was that the WT returns for asst. yr. 1980-81 fell due for filing in June, 1980 and that was the precise reason why they could be filed only after the date of the search which was in Oct., 1979. The further argument advanced by the learned counsel was that the law pertaining to the assessment year under appeal was the one as on 1st April, 1976 and Explanation 1 which was relied upon by the Revenue was not on the Statute book at that point of time. He also referred at length to the order passed by the Tribunal in the quantum appeal submitting in the process that there was no finding recorded to the effect that the Explanation was not bone fide or false or unsubstantiated.

17. We have examined the rival submissions and have also perused the material on record to which our attention was invited by the parties. The decisions cited at the bar have also been duly considered. In our opinion, this is a case to which penalty proceedings under S. 271(1)(c) are not attracted. We have perused at length the orders passed by the tax authorities as also by the Tribunal in the quantum proceedings and we do not find any mention to the effect that the Explanation given by the assessed was either false or unsubstantiated or not bona fide. According to us, it is a case of non-acceptance of the Explanation offered and which, as the CIT(A) has rightly mentioned, may be good enough for sustaining an addition but the same may not hold good in penalty proceedings under S. 271(1)(c). We have already reproduced the extract from the order of the CIT(A) whereby he has proceeded to cancel the penalty and there are obvious findings of fact

recorded therein, such as the disclosure of the loans as also the silver bars in the WT returns by the ladies and the corresponding deduction of the latter in the WT assessments of the assessed himself. There is also the further finding of fact that, during the course of search operations, no part of the ornaments were found at the premises and by this we refer to the Explanation of the assessed that the silver bar in his case had been purchased out of the loans taken from the three ladies, who, in turn, raised funds by selling their ornaments, which had already been disclosed in their respective WT returns. In the final analysis, we uphold the action of the CIT(A) in cancelling the penalty vis-a-vis the addition of Rs. 93,311 under S. 271(1)(c), which came to be sustained by the Tribunal in the quantum appeal.

18. Before we part with these appeals, we would like to mention that in the Revenues appeal in column 5 of Form No. 36, the section under which the appeal had been preferred, had been typed as 143(3) whereas the same should have been stated as S. 271(1)(c). The learned counsel for the assessed raised preliminary objection, but after some arguments from both the sides, this matter was sorted out by accepting the plea of the Departmental Representative to the effect that the same be treated as an appeal under S. 271(1)(c) since, it was mistake in typing due to inadvertence.

19. In the result, the assesseds appeal is partly allowed, whereas that of the Revenue is rejected.

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