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ito Vs. Late C.D. Joseph

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Court : Kerala

Decided On : Nov-27-2002

Reported in : (2003)179CTR(Ker)137; [2004]266ITR609(Ker)

Appeal No. : IT Appeal No. 8 of 1999 27 November 2002 A.Y. 1989-90

Appellant : ito

Respondent : Late C.D. Joseph

Advocate for Pet/Ap. : P.K. Ravindranatha Menon & George K George, *for the Revenue* P. Balachandran, *for the Assessee*

Judgement :

K. Balakrishnan Nair, J.

This is an appeal filed by the revenue challenging the decision of the Tribunal affirming the decision of the Commissioner (Appeals), which set aside the order of penalty imposed by the assessing officer on the respondent. The brief facts of the case as disclosed by the pleadings of the appellant are the following :

2. The assessee is the proprietor of Chemmannur Jewellery, Thrissur. The assessment year concerned is 1989-90. The assessee filed a return of income showing a net loss of Rs. 1,27,600. The total turnover was Rs. 1,44,26,152 and the gross profit declared was only Rs. 7,99,933. The assessing officer felt that it is

too low as the percentage of gross profit worked out to be only at the rate of 5.54%. Therefore, the assessing officer started investigation by calling for various details including books of account. Finally, the bill books were impounded under section 131(1) on 28-11-1991, by the assessing authority for further investigation. The assessee, on the very next day, i.e., 27-11-1991, preferred a petition before the Commissioner under section 273A making an offer of Rs. 15 lakhs by way of income from business to cover the undisclosed income for the relevant year. He also offered an additional amount of Rs. 1 lakh towards probable disallowance out of expenditure charged to profit and loss account. The assessing officer, taking into account, the above offer and also on the basis of the investigation held by him, completed the assessment on a total income of Rs. 16,25,000. The assessment was completed by order dated 24-3-1992. In the said order, it was also stated that separate proceedings for imposing penalty under section 271(1)(c) shall be initiated.

3. Later, a show-cause notice under section 274 read with section 271(1)(c) was issued to the assessee on 24-3-1992, by the assessing officer. The assessee replied on 20-4-1992. The assessee was heard and taking into account the explanation and other relevant materials, the assessing officer took the view that the assessee had concealed the particulars of his income and has furnished inaccurate particulars of income attracting penalty under section 271(1)(c) and the minimum penalty of Rs. 9,05,373 was imposed on the assessee. Annexure A dated 28-9-1992, is the said order imposing penalty on the respondent-assessee.

4. The assessee filed an appeal before the Commissioner (Appeals), Cochin, and the same was allowed by the appellate authority by Annexure B order dated 9-1-1995. The Commissioner (Appeals), in the said order, held as follows :

'From all facts, in my opinion, there was no clear establishment of concealment by the assessing officer and hence the assessing officer was not justified in levying penalty under section 271(1)(c). In view of the decision of the Tribunal on similar facts in the case of Alapat Palathingal Fashion Jewellery and the decision of the Supreme Court in the case of Shadilal Sugar & General Mills Ltd. v. CIT : [1987]168ITR705(SC) and the decision of the Kerala High Court in the case of CIT

v. Saraf Trading Corpn. (1987) 167 ITR 909, I am of the opinion that the assessing officer was not justified in levying penalty under section 271(1)(c) as he had not completely established the concealment on the part of the appellant and hence the order levying the penalty under section 271(1)(c) is cancelled. In the result, the appeal is allowed.'

5. The aggrieved Income Tax Officer appealed to the Tribunal mainly on two grounds. It was submitted that the burden was wrongly shifted to the assessing officer to prove concealment. It was also submitted that the first appellate authority did not consider the effect of the Explanation to section 271(1)(c). But, the Tribunal, by Annexure C order dated 27-10-1998, affirmed the order of the first appellate authority. The Tribunal held as follows :

'On the facts and in the light of the ratio of the decisions relied on by the learned representative of the assessee, we are inclined to hold that no case of concealment has been established in this case in order to invoke the provisions of section 271(1)(c) and that the Commissioner (Appeals) was justified in cancelling the penalty levied under the above section. His order is accordingly upheld.

In the result, the revenue fails and the appeal filed by it is dismissed.'

6. The revenue appeals to this court stating that the following substantial questions of law arise out the decision of the Tribunal :

'1. Whether, on the facts and in the circumstances of the case and also in the light of Explanation to section 271(1)(c), the Tribunal is right in law in cancelling the penalty ?

2. Whether, on the facts and in the circumstances of the case and the question agitated before the Tribunal being the levy of penalty under section 271(1)(c) should not the Tribunal have on its own considered the question under the relevant Explanation to section 271(1)(c) or remitted the question to be considered under the relevant Explanation to section 271(1)(c) ?

3. Whether, on the facts and in the circumstances of the case, the Tribunal is right in law and fact in holding that 'no concealment has been established in this case in

order to invoke the provisions of section 271(1)(c) and is not the above finding wrong and against/without considering the relevant Explanation to section 271(1)(c) ?

4. Whether, on the facts and in the circumstances of the case and in the light of the decision of the Kerala High Court reported in Kerala Chemicals & Proteins Ltd. v. CIT : [1999]235ITR467(Ker) and the specific ground relying on Explanation to section 271(1)(c), being canvassed before the Tribunal is not the Tribunal bound to consider the relevant Explanation to section 271(1)(c), the same being part of the provision itself ?'

Questions 2 to 4 practically deal with the same point, as to the omission of the Tribunal to consider the effect of the Explanation to section 271(1)(c).

7. We heard both sides. The assessee relied on the decisions in CIT v. Suresh Chandra Mittal : [2000]241ITR124(MP) , CIT v. Suresh Chandra Mittal : [2001]251ITR9(SC) and CIT v. Sureshkumar Barisal & Anr. . The revenue, on the other hand, relied on the decisions in Western Automobiles (India) v. CIT : [1978]112ITR1048(Bom) , CIT v. K. Mahim : [1984]149ITR737(Ker) , CIT v. P.T. Antony & Sons : [1985]151ITR34(Ker) , CIT v. M. George & Brothers : [1986]160ITR511(Ker) , Addl. CIT v. Jeevan Lal Sah : [1994]205ITR244(SC) , Kerala Chemicals & Proteins Ltd v. CIT : [1999]235ITR467(Ker) , CIT v. A. Sreenivasa Pai : [2000]242ITR29(Ker) , K.P. Madhusudhanan v. CIT : [2001]251ITR99(SC) , Dy. CIT v. K Sureshkumar : [2002]253ITR640(Ker) . Every decision has to be understood in the light of the facts of that particular case. As rightly said by the Honourable Supreme Court in Willie Slaney v. State of Madhya Pradesh : 1956 CriLJ291 , 'there is no such thing as a judicial precedent on facts that counsel and even Judges, are sometimes, prone to argue and to act as if they were'. A decision is available as precedent only if it decides a question of law. In other words, the principles laid down for arriving at a decision alone will bind as a precedent. In view of the above principles, we are not referring to all the decisions mentioned above, but will be considering only those decisions which are strictly relevant. But, before considering those decisions, it will be beneficial to refer to the relevant statutory provision. The relevant portion of section 271 as it stood at the

relevant time reads as follows :

(1) If the assessing officer or the Commissioner (Appeals) in the course of any proceedings under this Act, is satisfied that any person

(a) .....

(b) .....

(c) has concealed the particulars of his income or furnished inaccurate particulars of such income,

he may direct that such person shall pay by way of penalty,

(i) .....

(ii) .....

(iii) in the cases referred to in clause (c), in addition to any tax payable by him, a sum which shall not be less than, but which shall not exceed three times, the amount of tax sought to be evaded by reason of the concealment of particulars of his income or the furnishing of inaccurate particulars of such income.

Explanation 1Where in respect of any facts material to the computation of the total income of any person under this Act,

(A) such person fails to offer an explanation or offers an explanation which is found by the assessing officer or the Dy. Commissioner (Appeals) or the Commissioner (Appeals) to be false, or

(B) such person offers an explanation which he is not able to substantiate and fails to prove that such explanation is bona fide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him,

then, the amount added or disallowed in computing the total income of such person as a result thereof shall, for the purposes of clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been

concealed.'

(Emphasis, here italicised in print, supplied)

8. The main grievance of the revenue, as stated earlier, is that the Tribunal failed to consider the impact of the Explanation to section 271(1)(c).

9. According to the revenue, the assessment order will reveal the following facts. Originally, the gross profit shown by the assessee in his return was only 5% whereas other jewellers admit that the gross profit will come to 10% to 15%. The assessee was purchasing old gold ornaments on outright cash payment basis or in exchange for new gold ornaments. The purchase bills of the assessee for old gold ornaments did not show the actual weight, but the net weight after deducting the wastage alone was shown. It was also found that many of the purchase bills were bogus. They were prepared in the names of persons who actually did not sell any ornaments or in the name of his employees. It was also found that the purchase value of all the ornaments was inflated. When called upon to explain this aspect, the assessee could not give any proper explanation. It was also found that the assessee was issuing sale bills for new ornaments only to a nominal extent. Large extent of sale was conducted using estimate slips. This fact was verified from several customers. During the course of the assessment proceedings, as stated earlier, the assessee filed, a petition under section 273A and offered an amount of Rs.15 lakhs as net assessable business income and also Rs. 1 lakh to cover the probable disallowance. The assessing officer also found that the claim of receipt of loans totalling to Rs. 4,86,516 from M/s Dharmapalan, Raman and Premkumar, was not proved to be genuine. It was also found that the, claim of loan for Rs. 2,90,000 from one Smt. Leela Menon was not genuine. Since the amount offered covered the said two amounts also, no separate additions were made in the income on the basis of those loans. On the basis of the above view of the facts, the assessing officer decided to initiate penalty proceedings which were finalised as per Annexure A. But, the Commissioner (Appeals) set aside the said order. The main ground for reversal of the penalty order is that the assessing officer did not establish concealment from the part of the assessee. Reliance is placed on the words of the assessing officer that 'the assessing officer has almost established

concealment on account of net valuation of closing stock, inflation of purchases, suppression of sales, inexplainable cash credits in the form of fresh loans, etc...' The appellate authority also relied on the report of the Assistant Commissioner Thrissur, sent to the Commissioner Cochin, on 24-12-1991, in connection with the Settlement Commission's proceedings. In the said report, it is stated that no foolproof case of concealment is made out. On the basis of the above finding, the penalty order was set aside by the first appellate authority. More or less relying on the very same reason, the Tribunal affirmed it. The assessee mainly relied on the decision in CIT v. Suresh Chandra Mittal (supra). That was a decision rendered relying on Shadilal Sugar & General Mills Ltd. v. CIT : [1987]168ITR705(SC) . But Shadilal has since been held to be not laying down the correct law in K.P. Madhusudhanan v. CIT (supra). In this decision, the Apex Court held that even if there is no mention about the Explanation to section 271(1)(c), in the notice issued to the assessee, the authorities are bound to consider the effect of the Explanation also. The other decisions cited at the Bar, as stated earlier, are mainly decisions rendered on the facts of the relevant cases. In this case, the assessing officer in the assessment. Order dated 24-3-1992, for the year 1989-90, had made certain observations/findings regarding concealment of the particulars of income disclosed. The assessing authority had also noted that the explanation offered by the assessee in reply to the letter dated 6-3-1991, wherein he was asked to explain why 10% of the old gold purchases should not be taken as the purchase inflation as was done for the earlier assessment year, is not convincing. As already noted, the appellant had filed petition under section 273A before the Commissioner offering a sum of Rs. 16 lakhs as income and gave his own reasons for such offer. The assessing officer had accepted the said figure, as according to him, it reasonably covers the purchase inflation and profit on sale of ornaments outside the accounts and other inadmissible claims in the accounts. It is relevant to note here that since the assessing officer had accepted the income offered in the petition under section 273A and completed the assessment, the appellant could not and did not have any occasion to file any appeal against the said assessment order. In such circumstances, it was open to the appellant, when proceedings were initiated for imposition of penalty under section 271(1)(c), to offer his explanation on all the matters dealt with by the assessing authority in the

assessment order. When the appellant had filed such explanation in reply to the notice, the assessing officer as well as the appellate authorities are bound to consider the explanation in the light of clause (B) to Explanation 1 to section 271(1)(c) of the Act. In this case, the Tribunal had erroneously cast the burden on the department. In these circumstances, we are of the view that the Tribunal should have considered the effect of the Explanation to section 271(1)(c) while judging the validity of the penalty order. The omission to consider this aspect gives rise to a question of law from the order of the Tribunal justifying interference by this court.

10. Therefore, we feel that this is a matter requiring re-examination by the Tribunal. Since the Tribunal has to consider the entire matter afresh both in respect of facts and in respect of law with particular reference to Explanation 1 (B) of section 271(1)(c) of the Act, in the light of the principles laid down by the decisions of the Supreme Court and of this court referred to earlier, we do not think it necessary to answer any of the questions formulated by the revenue on which notice is ordered at the time of admission. Hence, we decline to answer those questions.

11. We accordingly set aside the order of the Tribunal impugned in this appeal and remit the matter to the Tribunal for fresh disposal in accordance with law and in the light of the observations made hereinabove after affording opportunity to the parties. It is open to the parties to rely on all the decisions which they consider relevant for the purpose of this case.

The appeal is disposed of as above.

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