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Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Aug-31-2007

Judge : R Easwar, Vice, K Bansal

Appellant : Vijay Power Generators Ltd.

Respondent : ito

Judgement :

1. This appeal by the assessee relates to the assessment year 1997-98 and is directed against the levy of penalty of Rs. 11,10,500/- imposed on it under Section 271(1)(c) of the Income-tax Act.

2. The assessee is a company. During the year ended 31.3.1997, it received Rs. 25,23,500/- from 15 persons as share application money. In the assessment made under Section 144 on 28.3.2003, the amount was added as unexplained cash credit under Section 68 of the Act on the ground that the genuineness of the transactions was not proved and the assessee did not render any evidence in support of the receipt of the share application money. The assessee carried the matter in appeal before the CIT (Appeals) but without any success and the further appeal to the Tribunal was also dismissed by order dated 23rd February 2005 in ITA No. 1670/Del/2004 3. After the order of the Tribunal, the Assessing Officer issued notice under Section 274 read with Section 271(1)(c) calling upon the assessee to explain why penalty could not be levied for concealment of income in respect of the cash credit added under Section 68. The assessee objected on the ground that the Assessing Officer did not record any satisfaction in the

assessment order to the effect that the assessee concealed its income or furnished inaccurate particulars thereof and that a further opportunity should be given to enable the assessee to submit its explanation. In the further opportunity given to the assessee, it was pleaded that the penalty proceedings be kept in abeyance since the assessee had filed an appeal to the Hon'ble Delhi High Court under Section 260A against the order of the Tribunal. The Assessing Officer overruled the assessee's objection and held that the cash credits were non-genuine and by making a claim that they were genuine the assessee had concealed its income as also furnished inaccurate particulars thereof. He accordingly imposed the minimum penalty under Section 271(l)(c) which was confirmed by the CIT (Appeals). Hence the present appeal.

4. The first contention raised before us on behalf of the assessee was that the Assessing Officer has not recorded any satisfaction in the assessment order to the effect that the assessee concealed its income or furnished inaccurate particulars thereof and the penalty is, therefore invalid on this ground alone. On merits, it has been contended that at best it could be a case of the assessee's inability to prove the share application monies in the manner required by the department and that the departmental authorities have ignored vital evidence which the assessee adduced before the GIT (Appeals) in appeal against the assessment order. It was submitted that the findings in the assessment proceedings are not conclusive for the purpose of levying penalty for concealment and in the penalty proceedings, there has to be a reappraisal of the entire evidence afresh in order to determine the guilt of the assessee. It was contended that the evidence adduced before the CIT (Appeals) which had also been sent to the Assessing Officer was completely not taken into account by the Assessing Officer while levying penalty which is contrary to well established principles.

Our attention in this connection is drawn to the entire evidence compiled in the paper book. It was contended finally that the impugned orders suffer from the infirmity of non-application of mind. It was, therefore, pleaded that the penalty should be cancelled.

5. Mr. Pandey, the learned CIT DR contended that the reaching of the satisfaction under Section 271 was an administrative action in which the, form is not important and only the substance matters and if the assessment order is read as a whole without giving undue importance only to the operative part thereof it would be clear that the Assessing Officer can be said to have reached the requisite satisfaction. On merits, he submitted that the assessee never produced the details in support of the share application monies before the income-tax authorities and its conduct was thus contumacious for which penalty was imposable. He pointed out that the addition has been confirmed by the Tribunal which is a strong point in support of the levy of penalty. He further pointed out that the evidence adduced by the assessee in support of the receipt of share application monies does not stand the test of the normal course of human conduct and probabilities and the assessee was trying to pass off its own monies in the guise of share application monies from agriculturists who did not have the wherewithal to find such resources. He, therefore, pleaded that the penalty was rightly imposed and should be sustained.

6. On a careful consideration of the facts and the rival contentions, we are of the view that the penalty is not justified. On the question of satisfaction, we are inclined to accept the submissions of the learned Counsel for the assessee. Though the Assessing Officer would appear to have reached the satisfaction that the "alleged share holders are fictitious identities or men of straw as held by the Kerala High Court who had been created by the company in order to substantiate the investment made in the share application money" in his letter dated 7.3.2003 addressed to the assessee and referred to in paragraph 5.6 of the assessment order, in the operative portion of the assessment order, the Assessing Officer appears to have climbed down from that position and was less sure of his satisfaction, which is clear from his observation in paragraph 5,8 (b) of the assessment order that "Under the above circumstances, genuineness of the transactions are doubtful".

He has further added that the "genuineness of the transactions were not proved". These observations are ambiguous and it seems to us that though the Assessing Officer started with the premise that the share application monies were fictitious, ultimately he merely stated that the genuineness of the transactions was doubtful

or was not proved.

There is a difference between the two sets of expressions, namely, "fictitious" on the one hand and "doutful" and "not proved" on the other hand. Thus, while concluding his reasoning and making the addition the Assessing Officer would appear to have abandoned his earlier view that the monies were received from fictitious persons and seems to have settled for less-strong expressions. It is, therefore, some what difficult to assert that the Assessing. Officer did reach the sat is faction in the course of the assessment proceedings that the assessee concealed its income or furnished inaccurate particulars thereof. The last line in the assessment order to the effect that the penalty proceedings under Section 271(l) (c) have been initiated separately does not also amount to recording of the requisite satisfaction. In our opinion, the case falls within the ratio of the judgments of the Hon'ble Delhi High Court in Ram Commercial Enterprises 246 ITR 568 and Diwan Enterprises 246 ITR 571. We accordingly cancel the penalty on this ground.

7. Even on merits, we are satisfied that it cannot be said mat the assessee concealed its income or furnished inaccurate particulars thereof. Though the assessee did not comply with all the directions of the Assessing Officer in the course of the assessment proceedings and could produce only five or six share applicants before the Assessing Officer, all the confirmations, addresses, evidence to prove the identity, certificates from chartered accountants, evidence of allotment of shares, etc. in respect of all the applicants were adduced before the CIT (Appeals) who admitted the same and sent them to the Assessing Officer for remand report. In his remand report dated 23.12.2003, the Assessing Officer stated that no comments can be offered at this stage without necessary verification. The CIT (Appeals) and the Tribunal had confirmed the additions but a perusai of para 15 of the order of the Tribunal shows that this aspect of the matter, namely, that the assessee adduced all the evidence in support of the share application monies before the CIT (Appeals) and he had admitted them and sent to the Assessing Officer for a remand report does not appear to have been highlighted. It is well settled that the findings rendered in the assessment proceedings though they constitute good evidence do not constitute conclusive evidence in penalty proceedings.

During penalty proceedings, there has to be reappraisal of the very same material on the basis of which the addition was made and if further material is adduced by the assessee in the course of the penalty proceedings, it is all the more necessary that such further material should also be examined in an attempt to ascertain whether the assessee concealed his income or furnished inaccurate particulars thereof. In the present case, the evidence adduced before the CIT (Appeals) in appeal against the assessment order has not been examined by the Assessing Officer or the CIT (Appeals) while dealing with the penalty proceedings against the assessee for concealment of income. If this evidence is taken into account it would, appear that it cannot be asserted that the receipt of share application monies is totally unsupported. We find that the assessee had filed the confirmation from all the share applicants, proof of share allotment to them, evidence for proving their identity, certificates from chartered accountants showing the distinctive numbers of the shares allotted to the applicants, etc. These ought to have been considered by the departmental authorities while dealing with the penalty proceedings for concealment of income. They have, however, omitted to do so. They have merely relied on the findings in the assessment proceedings without independently examining the evidence adduced by the assessee in the course of the assessment proceedings both before the Assessing Officer as well as the CIT (Appeals). Their orders thus suffer from basic infirmity. Explanation 1 to Section 271 (l) (c) is also not attracted since the assessee has adduced whatever evidence was in its possession which has not been found to be false or unsubstantiated. All that can be said is that the income-tax authorities were not satisfied with such evidence. That does not amount to proof that the assessee concealed its income or furnished inaccurate particulars thereof. We accordingly accept the submissions made on behalf of the assessee and cancel the penalty imposed on it. The appeal is allowed with no order as to costs.