

ito Vs. Kiran Dev

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Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Oct-05-2007

Judge : N Karhail, R Sharma

Appellant : ito

Respondent : Kiran Dev

Judgement :

1. These are the appeals filed by the revenue against the separate orders of Commissioner (Appeals) for the assessment year 1988-89, in the matter of imposition of penalty under Section 271 (1)(c) of the Income Tax Act, 1961.

2. We have heard the learned Departmental Representative and gone through the orders of the authorities below and found from the record that assessee was in receipt of enhanced compensation amounting to Rs. 96,276 from Haryana Urban Development Authority as a result of award of Additional District & Session Judge, Faridabad, the assessing officer stated that the assessee filed his return of income on 20-4-2001, wherein he has offered enhanced compensation and claimed deductions under Section 48(2), and the net capital gain has been declared at Rs. 40,639. The gross capital gain declared in the return was accepted by the assessing officer. With regard to the interest on enhanced compensation, the assessing officer observed that the assessee received interest on enhanced compensation from HUDA at Rs. 1,37,027 during the previous year relevant to assessment year 1988-89 but has not offered the same for tax on the ground that the interest related to period 10-11-1976 to 9-12-1986 and no interest for the

accounting year was received during the year. The assessee has further contended that in view of Hon'ble Supreme Court decision in the case of Smt. Rama Bai v.CIT and K.S. Krishna Rao v. CIT , The assessing officer did not accept the assessee's contention and held that the interest received by the assessee at Rs. 1,37,027 during the accounting year relevant to assessment year 1988-89 was taxable on receipt basis in assessment year 1988-89. The assessing officer also levied penalty under Section 271 (1)(c) in respect of the interest income alleged to be concealed. The assessing officer also levied penalty under Section 271(1)(a) for delay in filing of the return.

Penalty was also levied under Section 273 amounting to Rs. 5,447.

3. By the impugned order, the Commissioner (Appeals) deleted all the three penalties by observing that the reassessment proceedings initiated in respect of enhanced compensation was held to be void ab initio in view of the decision of Hon'ble Gujarat High Court in case of Nitin R. Patel-Taxation LR 559, Ranchhodbhai Haribhai Jadav v. Asstt.

CIT as well as by the decision of Hon'ble High Court in case of C.A. Abraham v. ITO . Accordingly, all the three penalties were deleted.

4. We have carefully gone through the orders of the lower authorities, the issue regarding taxation of enhanced compensation and interest thereon has now been settled by the decision of ITAT, Special Bench in case of Dy. CIT v. Padam Prakash HUF (2006) 10 SOT 1 (Delhi), wherein it was held that interest received on enhanced compensation is liable to be tax on accrual basis, therefore, to be spread over in the years falling between the year of possession of land being taken over by the Government and the year in which the enhanced compensation is being paid. However, the interest is not liable to be taxed in the year of receipt. In case any further appeal has been filed against such enhanced compensation and interest thereon to the higher court, interest cannot be brought to tax till the final verdict of the higher court and till the matter reached to the finality, no interest can be brought to tax. Following was the observation of Special Bench: In order to overcome difficulties and to improve the situation, the Legislature amended Section 45 by introducing Sub-section (5) to Section 45 with effect from 1-4-1983.

Now compensation payable is brought to tax at two stages : one under Sub-section (1) i.e., in the year in which transfer takes place. This gain is computed with reference to the compensation awarded by the Acquisition Officer. If any capital gain arises or accrues with reference to compensation awarded it is liable to tax under Sub-section (1) of Section 45.

(ii) Secondly enhanced compensation is separately and independently assessed. Sub-section (5) of Section 45 deals with a situation where compensation on compulsory acquisition is enhanced (including further enhanced) by any Court, Tribunal or other authority. Such enhancement of compensation is brought to charge in the year in which such enhanced compensation is received. Sub-section (5) is a complete code as it provides not only for charging enhanced compensation but also contains a machinery for computation of income by providing that cost of acquisition and cost of improvement in such a case would be nil. It further provides that in case of a death, enhanced compensation shall be deemed to be the income of the person receiving it. The amount is to be taxed in the year of the receipt. Sub-section (5) is an overriding provision and quite different from Sub-section (1) of Section 45 in content and texture.

It is not possible to disregard change introduced by the Legislature by applying old scheme to cases of enhanced compensation. There is no good reason why scheme of Sub-section (5) should not be applied to receipt of enhanced or further enhanced compensation as envisaged by the Sub-section. Why the amount received should not be brought to tax in the year of the receipt when language and intention of the Legislature is absolutely clear. Why court should not give effect to the legislative intent and follow its mandate. There is no scope to whittle down applicability of the provision by introducing philosophy that gain has not accrued or arisen. The right to receive compensation has not attained finality. "Idea" of accrual of income not being supported by the Legislature's intent as is available from the plain language cannot be accepted. Even otherwise statutory provision is quite equitable. Obligation to pay tax is cast on the assessee only after enhanced compensation is pocketed by the assessee. It is taxed when it is actually received. The argument that unless final word on compensation or enhanced compensation is heard, there can be no gains is not sustainable. As discussed above, a new

scheme to tax enhanced or further enhanced compensation on receipt basis in the year of receipt has been introduced by adopting plain and unambiguous language. Tribunals and Courts are required to give effect to the mandate of the Legislature. Therefore, decision of Hindustan Housing Development Corpn. and all other decisions which have not taken note of intention and scheme of the Legislature and its purpose, are not applicable to cases where enhanced compensation is received.

It is no doubt true that Legislature while inserting Sub-section (5) in Section 45 through the Finance Act, 1987 with effect from 1-4-1988, did not provide for cases where enhanced or further enhanced compensation was subsequently reduced by any Court, Tribunal or other authority. Such situation has been taken care of by insertion of Clause (c) to Sub-section (5). The said clause no doubt was inserted by Finance Act, 2003 with effect from 1-4-2004, but it has to be taken to be declaratory in character. In a given case where enhanced compensation is assessed on receipt basis, and amount of compensation is subsequently reduced, then revenue will have to rectify and take reduced amount in place of the amount originally taken in the assessment. Thus the Legislature has deal twith a situation of compensation getting reduced in appeal or other proceedings. Above provision and the purpose for which such provision was made by the Legislature cannot be ignored. Mischief rule of interpretation is clearly applicable here. Even specific provision like Sub-section (7A) of Section 155 supported above inference. The picture without insertion of above Clause (c) was incomplete as the section did Bnot deal with a situation where enhanced compensation is reduced in further appeal by Courts or Tribunal. The provision was made to obviate the hardship and unintended consequences of Sub-section (5) of Section 45. The clause was inserted to make entire scheme workable and to supply an obvious omission in the provision. The situation envisaged as per Clause (c) above was required to be given reasonable construction to accomplish purpose and object of the enactment. Accordingly, it is retrospective in operation.

As far as question of interest income on enhanced compensation is concerned, the Legislature had made no change in the statutory provision. The interest is to be assessed on accrual basis from year to year. However, question of assessment

of such interest on accrual basis would not arise unless it is finally determined. In case a dispute relating to interest payable on enhanced compensation is pending before a court of Law and not attained finality, the same will not accrue and not liable to tax. Only after it is finally determined, the same can be subjected to tax.

In the instant case, the interest related to the period 10-11-1976 to 9-12-1986 and the assessee was not in receipt of any interest for the relevant assessment year under consideration. Furthermore, the Hon'ble Supreme Court in case of Smt. Rama Bai (supra) had held that interest cannot be brought to tax in the year of receipt and the same is liable to be spread over among the years to which it pertained. With regard to imposition of penalty under Section 271(1)(c) is concerned, Hon'ble Supreme Court in case of Dilip N. Shroff v. Jt. CIT observed as under: Clause (c) of Sub-section (1) of Section 271 categorically states that the penalty would be leviable if the assessee conceals the particulars of his income or furnishes inaccurate particulars thereof. By reason of such concealment or furnishing of inaccurate particulars alone, the assessee does not ipso facto become liable for penalty. Imposition of penalty is not automatic. Levy of penalty not only is discretionary in nature but such discretion is required to be exercised on the part of the assessing officer keeping the relevant factors in mind. Some of those factors apart from being inherent in the nature of penalty proceedings, inheres on the face of the statutory provisions. Penalty proceedings are not to be initiated, as has been noticed by the Wanchoo Committee, only to harass the assessee. The approach of the assessing officer in this behalf must be fair and objective. Clause (iii) of Sub-section (1) of Section 271 again provides for a discretionary jurisdiction upon the assessing authority inasmuch as the amount of penalty may not be less than the amount of tax sought to be evaded by reason of such concealment of particulars of his income, but it may not exceed three times thereof. The factors which are material for the purpose of computation of total income as is sought to be emphasized in Explanation 1, refer to computation of income on the part of the assessee which is directly relatable to: (a) failure to offer an explanation and/or offering an explanation which is false; and (b) which he is not able to substantiate and fails to prove that such explanation is bona fide. Only in the event the factors enumerated in Clauses (A) and (B) of Explanation 1 are satisfied and a finding in this behalf is arrived at by the assessing officer, the legal

fiction created thereunder would be attracted. The expression "conceal" is of great importance. It signifies a deliberate act or omission on the part of the assessee. Such deliberate act must be either for the purpose of concealment of income or furnishing of inaccurate particulars. The term 'inaccurate particulars' is not defined. Furnishing of an assessment of value of the property may not by itself be furnishing of inaccurate particulars. Even if the Explanations are taken recourse to, a finding has to be arrived at having regard to Clause (a) of Explanation 1 that the assessing officer is required to arrive at a finding that the explanation offered by an assessee, in the event he offers one, was false. He must be found to have failed to prove that such explanation is not only not bona fide but all the facts relating to the same and material to the income were not disclosed by him. Thus, apart from his explanation being not bona fide, it should have been found as of fact that he has not disclosed all the facts which was material to the computation of his income. The explanation must be preceded by a finding as to how and in what manner he furnished the particulars of his income. It is beyond any doubt or dispute that for the said purpose the Income Tax Officer must arrive at a satisfaction in this behalf.

Primary burden of proof, therefore, is on the revenue. The statute requires satisfaction on the part of the assessing officer. He is required to arrive at a satisfaction so as to show that there is primary evidence to establish that the assessee had concealed the amount or furnished inaccurate particulars and this onus is to be discharged by the department. While considering as to whether the assessee has been able to discharge his burden, the assessing officer should not begin with the presumption that he is guilty.

Once the primary burden of proof is discharged, the secondary burden of proof would shift on the assessee because the proceeding under Section 271(1)(c) is of penal nature in the sense that its consequences are intended to be an effective deterrent which will put a stop to practices which the Parliament considers to be against the public interest and, therefore, it was for the department to establish that the assessee shall be guilty of the particulars of income. The order imposing penalty is quasi-criminal in nature and, thus, burden lies on the department to establish that the assessee had concealed his income. Since burden of proof in penalty proceedings varies from that in the assessment proceeding, a finding in an

assessment proceeding that a particular receipt is income cannot automatically be adopted, though a finding in the assessment proceeding constitutes good evidence in the penalty proceeding. In the penalty proceedings, thus, the authorities must consider the matter afresh as the question has to be considered from a different angle. 'Concealment of income' and 'furnishing of inaccurate particulars' are different. Both concealment and furnishing inaccurate particulars refer to deliberate act on the part of the assessee. A mere omission or negligence would not constitute a deliberate act of suppressio veri or suggestio falsi. Although it may not be very accurate or apt but suppressio veri would amount to concealment, suggestio falsi would amount to furnishing of inaccurate particulars.

5. A In view of the above discussion, we do not find any merit in the action of the lower authorities for imposition of penalty under Sections 271(1)(c)/271(1)(a) and 273 of the Income Tax Act, 1961.

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