IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEAL NO. 53 OF 2014

COMMISSIONER OF INCOME TAX ... Appellant
Versus
SHRI. WILSON WILFRED VALADARES ... Respondent

Ms. Asha A. Desai, Advocate for the Appellant.
Ms. Priyanka Kamat, Advocate for the Respondent.

Coram:- F. M. REIS &
M. S. SANKLECHA, JJ.

Date:- 26th March, 2015

ORDER :

This appeal under Section 260-A of the Income Tax Act, 1961 (the Act) by the Revenue challenges the order dated 27/01/2014 passed by the Income Tax Appellate Tribunal (Tribunal). The assessment year involved is AY 2007-08.

2. The appellant-Revenue has formulated the following questions of law for our consideration:

> A. Whether the Tribunal was right in confirming the order of Commissioner of Income Tax (A) and deleting penalty levied when the CIT(A) erred in not considering the fact that the balance sheet of the assesee has shown borrowing/advances towards ancestral share in the property at Rs.58,87,435/- and during the course of assessment proceedings, the assessee could produce the details only to the extent to Rs.9,07,738/- and balance borrowing/advances

> amounting to Rs.49,79,696/- could not be proved?
>
> B. Whether the Tribunal was right in endorsing the order of the Ld. Commissioner of Income Tax(A) when the assessee disclosed before the Ld. CIT(A) that the income of Rs.49,79,696/- was commission received is to be shared with the partners of real estate, but failed to disclose the same in the return of income?

3. The respondent-Assessee filed a return of income for the subject assessment year declaring a total income of Rs.1.75 lakhs. The Assessing Officer by an order dated 29/12/2009 passed under Section 143(3) of the Act determining the respondent's income at Rs.26.65 lakhs. This enhancement was on account of the fact that from the balance sheet of the respondent-Assessee it appeared that the respondent-Assessee had shown borrowings/advances towards ancestral share in property at Rs.58.87 lakhs. The Assessee was able to prove the genuineness of this borrowing/advances to the extent of Rs.9.7 lakhs. Thus the remaining amount of Rs.49.79 lakhs was treated as unexplained cash credit under Section 68 of the Act. However, in view of Section 5A of the Act an amount of Rs.24.89 lakhs was added to the respondent's declared income arriving to the aggregate income of Rs.26.65 lakhs.

4. Being aggrieved, the respondent-Assessee filed appeals from

the assessment order dated 29/12/2009. The appeal was dismissed by the Commissioner of Income Tax (Appeals) by order dated 30/04/2012. The respondent-Assessee has accepted the order dated 30/04/2012 of the Commissioner of Income Tax (Appeals) in quantum proceedings.

5. Thereafter the Assessing Officer initiated penalty proceedings under Section 271(1)(c) of the Act against the respondent-Assessee. By an order dated 27/11/2012 the Assessing Officer held that the Assessee had not disclosed the true and correct income in its return of income, thus became liable for penalty. Consequently as the tax sought to be evaded was Rs.16.73 lakhs, minimum penalty at 100% of the tax evaded i.e. Rs.16.73 lakhs was imposed upon the respondent-Assessee under Section 271(1)(c) of the Act.

6. Being aggrieved, the respondent-Assessee filed an appeal to the Commissioner of Income Tax (Appeals). In appeal, the respondent-Assessee explained that the amount of Rs.49.79 lakhs was in fact attributable to the sale of the property for a sum of Rs.1.50 crores resulting in getting Rs.92.00 lakhs out of which Rs.49.79 lakhs were

to be shared with other people who had assisted in the sale of the property. This explanation offered by the respondent-Assessee was accepted by the Commissioner of Income Tax (Appeals). Consequently, no occasion to apply Section 68 of the Act would arise, as there was no cash credited to the account of the appellant and penalty under Section 271(1)(c) of the Act was set aside by order dated 24/09/2013.

7. On further appeal by the respondent-Assessee the Tribunal by the impugned order dated 27/01/2014 upheld the order of the Commissioner of Income Tax (Appeals). The impugned order also accepts the explanation offered by the respondent-Assessee and thus held no penalty is imposable under Section 271(1)(c) of the Act. Besides upholding the finding of the Commissioner of Income Tax (Appeals) that no occasion to invoke Section 68 of the Act can arise as there was no cash credited to the account of the respondent-Assessee and not being able to prove the liability does not mean furnishing of inaccurate particulars or concealing particulars of income.

8. It is very pertinent to note that even before the order dated

27/11/2012 was passed by the Assessing Officer imposing penalty, the Assessing Officer had issued a reopening notice dated 22/03/2012 seeking to reopen the Assessment for AY 2007-08. This on the ground that the respondent-Assessee had in fact received an amount of Rs.92 lakhs on account of sale of property for Rs.1.50 crores. The amount of Rs.58 lakhs was not shown as its profits. This reopening notice resulted in Assessment Order dated 1/03/2013 bringing the same to tax and also imposition of penalty under Section 271(1)(c) of the Act by order dated 26/09/2013.

9. Being aggrieved, the Revenue has formulated the proposed questions of law. However, we find that the Commissioner of Income Tax (Appeals) and the Tribunal by the impugned order have accepted the explanation offered by the respondent-Assessee. Consequently holding that inability to prove a liability would not amount to furnishing of inaccurate particulars for the purpose of imposing penalty under Section 271(1)(c) of the Act. Moreover, it is pertinent to note that the appellant-Revenue has proceeded on the basis that there was in fact a sale of property as is evident from the fact that the reopening notice under Section 148 of the Act was issued on 22/03/2012 seeking to reopen the assessment for AY 2007-08. This

notice for reopening dated 22/03/2012 is identical to the basis of the explanation offered by the respondent-Assessee viz. that there was a sale of property which resulted in the Assessee being paid Rs.92.00 lakhs. Thus, there is no reason shown to us to disturb the concurrent findings of fact arrived at by the Commissioner of Income Tax (Appeals) and Tribunal .

10. Accordingly, the questions as framed do not give rise to any substantial question of law.

11. Appeal dismissed. No order as to costs.

M. S. SANKLECHA, J. **F. M. REIS, J.**

NH/-