IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC
&
THE HONOURABLE MR. JUSTICE SHAJI P.CHALY

WEDNESDAY, THE 12TH DAY OF AUGUST 2015/21ST SRAVANA, 1937

ITA.No. 121 of 2014 ()

AGAINST THE ORDER IN ITA 460/2013 of INCOME TAX APPELLATE TRIBUNAL,COCHIN BENCH, COCHIN DATED 22-11-2013

APPELLANT/RESPONDENT/ASSESSEE:

PARAYIL BALAN NAIR
XI/291, RAMKRIPA, P.O.ALAVIL
KANNUR-670002
REPRESENTED BY ITS POWER OF ATTORNEY HOLDER
SHRI. SUBASH RAJANI BALAN.

BY ADVS.SRI.T.M.SREEDHARAN (SR.)
SRI.M.B.PRAJITH
SRI.V.P.NARAYANAN
SMT.DIVYA RAVINDRAN

RESPONDENT/APPELLANT/REVENUE:

THE COMMISSIONER OF INCOME TAX
AAYAKAR BHAVAN, KANNOTHUMCHAL, CHOVVA
KANNUR-670006.

BY ADV. SRI.P.K.R.MENON,SR.COUNSEL, GOI(TAXES)
BY ADV. SRI.JOSE JOSEPH, SC, FOR INCOME TAX

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 12.08.2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ITA.No. 121 of 2014

APPENDIX

APPELLANT'S ANNEXURES:

ANNEXURE-A : TRUE COPY OF ASSESSMENT ORDER DATED 31.12.2010 PASSED BY THE ASSISTANT COMMISSIONER OF INCOME TAX, CENTRAL CIRCLE – 2, CALICUT.

ANNEXURE -B : TRUE COPY OF THE SHOW CAUSE NOTICE U/S 271D DATED 24.2.2011 ISSUED BY THE ADDITIONAL COMMISSIONER OF INCOME TAX, CENTRAL RANGE, ERNAKULAM.

ANNEXURE -C : TRUE COPY OF ORDER IMPOSING PENALTY U/S.271D DATED 29.6.2011 PASSED BY THE JOINT COMMISSIONER OF INCOME TAX, CENTRAL RANGE, ERNAKULAM.

ANNEXURE – D : TRUE COPY OF THE ORDER DATED 17.1.2013 IN ITA NO.E-29/ABIPN 8694-G/11-12 PASSED BY THE COMMISSIONER OF INCOME TAX (APPEALS) – 1, KOCHI.

ANNEXURE – E : TRUE COPY OF THE ORDER OF THE APPELLATE TRIBUNAL IN ITA NO.460/COCH/2013 DATED 22.11.2013.

ANNEXURE – F : TRUE COPY OF THE LETTER DATED 4.3.2011 SUBMITTED BY THE APPELLANT BEFORE THE ADDITIONAL COMMISSIONER OF INCOME TAX, ERNAKULAM.

ANNEXURE – G : TRUE COPY OF THE LETTER DATED 4.3.2011 OF SRI.K.C.BASHEER SUBMITTED BY THE APPELLANT BEFORE THE ADDITIONAL COMMISSIONER OF INCOME TAX.

ANNEXURE – H : TRUE COPY OF THE NOTICE NO.JCIT-CR-EKM/PENALTY/11-12 DATED 3.06.2011 ISSUED BY THE JOINT COMMISSIONER OF INCOME TAX, ERNAKULAM.

ANNEXURE – I : TRUE COPY OF THE LETTER DATED 8.6.2011 SUBMITTED BY THE CHARTERED ACCOUNTANT TO THE JOINT COMMISSIONER OF INCOME TAX.

RESPONDENT'S ANNEXURES: NIL

//TRUE COPY//

smv P.A. TO JUDGE

ANTONY DOMINIC
&
SHAJI P. CHALY, JJ.

I.T.A. No.121 of 2014

Dated this the 12th day of August, 2015

JUDGMENT

Antony Dominic,J.

This appeal is filed by the assessee under Section 260A of the Income Tax Act, challenging the order passed by the Income Tax Appellate Tribunal, Cochin Bench in ITA No.460/2013 pertaining to the assessment year 2008-2009. In the appeal filed by the Revenue, Tribunal set aside the order passed by the Commissioner of Income Tax (Appeals), by which the order passed by the Joint Commissioner of Income Tax levying penalty on the assessee under Section 271D of the Income Tax Act was set aside and the penalty levied was restored.

2. We heard the learned Senior Counsel for the appellant and the learned Senior Standing Counsel for the Revenue.

3. Brief facts of the case are that the assessee is a non-resident Indian. Based on letter dated 13.12.2010 from one K.C.Basheer to the Assistant Commissioner of Income Tax, Calicut where Sri.Basheer confirmed that he had paid a sum of

Rs.15,00,000/- to the assessee on behalf of his brother Sri. K.C. Usman, a non-resident Indian doing business in Dubai. He also confirmed that the amount was paid in cash on 21.01.2008 after withdrawing the same from his Savings Bank Account maintained at the Indian Overseas Bank, Kadirur. The letter with the subject; "confirmation of loan to Mr.Balan Nair (K.V.R. Tower), Kannur", reads thus:

> "This is to confirm that I have given a sum of Rs.15,00,000/- (Rupees Fifteen Lakhs only) to Mr.Balan Nair (K.V.R. Group), Kannur on behalf of my brother Mr.K.C.Usman who is an Non Resident Indian doing business at Dubai. The said sum of Rs.15 lacs was given in cash on 21-01-08 after withdrawing from my Savings Bank A/c No.6414 maintained with Indian Overseas Bank, Kadirur. A copy of my bank statement for the relevant period is enclosed. The amounts to my account was transferred from by brother's NRE A/c also maintained at IOB, Kadirur. I am assessed to Income Tax at Ward 2, Kannur and my PN is AMXPB4206E."

4. Based on this letter of Sri.K.C. Basheer, notice dated 24.02.2011 was issued by the Additional Commissioner of Income Tax, Ernakulam under Section 274 read with Section 271D of the Income Tax Act, informing the assessee that it has been brought to his notice that the assessee had accepted loans/deposits amounting to Rs.15,00,000/- in contravention of

the provisions of Section 269SS of the Act for the assessment year 2008-2009. He was called upon to appear and explain as to why penalty under Section 271D shall not be levied.

5. On receipt of this notice, the assessee submitted his reply dated 04.03.2011. In this letter, he denied of having taken or accepted any loan or deposit from any person relating to assessment year 2008-2009 and according to him, Rs.15,00,000/- received from Sri.K.C. Basheer was only an advance received in connection with the sale of a property. He also stated that he is not denying that one Mr.Sreedharan Nair had received Rs.15,00,000/- for and on his behalf. According to him, he had intention to sell a part of the land near K.V.R. Tower in Kannur and that his friend K.C.Usman was interested in purchasing the property and as such made the advance of Rs.15,00,000/- through his brother K.C. Basheer from Tellicherry. He also enclosed letter dated 4.3.2011 from Sri.K.C.Bahseer, clarifying his letter dated 13.02.2010 to the effect that it was not actually a loan but was only a property advance given to Sreedharan Nair and that the advance was given in accordance with the direction of his brother K.C.Usman.

6. On the basis of the above, Annexure-C order dated

29.06.2011 was passed by the Joint Commissioner of Income Tax in which it was found that the assessee had contravened the provisions of Section 269SS and on that basis penalty was levied under Section 271D. The assessee challenged this order before the Commissioner of Income Tax (Appeals) who set aside the order and allowed the appeal by Annexure-D order on the ground that the transaction in question is not a loan or deposit and that therefore Section 269SS is not attracted. It was this order which was challenged by the Revenue before the Tribunal. By the impugned order, the Tribunal set aside the order of the Appellate Commissioner and restored the penalty order.

7. Before us, referring to the above documents and also the provisions of Section 269SS and 271D of the Income Tax Act, learned Senior Counsel for the appellant contended that the assessee did not accept any loan or deposit in order to attract the penal provisions of Section 271D. According to the counsel, even the vague statement that it was a loan contained in the letter dated 13.12.2010 given by Sri.K.C. Basheer was clarified by him in his letter dated 04.03.2011 submitted by the assessee along with his reply to the notice dated 24.02.2011. Counsel clarified that this was an advance paid to the assessee by

Sri.K.C.Basheer on behalf of his brother Usman pursuant to an agreement for sale entered into between the parties for the sale of a plot of land owned by the children of the assessee. Therefore, according to the learned counsel, the Commissioner of Income Tax (Appeals) rightly set aside the order of penalty and the Tribunal without any valid reasons interfered with the said order.

8. However, these contentions were contradicted by the learned Senior Standing Counsel for the Revenue and according to him, originally it was conceded that this was a loan and later that was sought to be modified as a case of payment of advance for sale of the property. It was pointed out that the facts of the case show that the theory of payment of advance was not substantiated in any manner and that therefore, the original version that it was a loan stood established. In such a case, counsel contended, Section 269SS and Section 271D are attracted.

9. We have considered the submissions made. The fact that Rs.15,00,000/- was received from Sri.K.C.Basheer on behalf of the assessee is undisputed, although the receipt of the amount or its utilisation are not reflected in the books of accounts of the

assessee. Initially in his letter dated 13.12.2010, Sri.K.C.Basheer himself had confirmed that the payment was by way of a loan. It was on that basis the assessee was issued notice dated 24.02.2011. In his reply to the said notice the assessee had stated that he had not accepted any loan or deposit from anybody and that Rs.15,00,000/- received on his behalf was towards advance for the property that was intended to be sold. It was along with that reply that he enclosed a clarification from Sri.K.C. Basheer to the effect that the amount paid was towards advance as contended by the assessee. The story that payment made was towards the advance was disbelieved by the Tribunal and the reasons thereof have been given by the Tribunal in paragraph 8 of its order which reads thus:

> "8. We have heard the rival contentions and carefully perused the record. In the first place, we notice that the theory of receipt of Rs.15.00 lakhs as property advance does not find to be a convincing one to us for the following reasons.
>
> (a) The property was said to belong to the four children of the assessee. From the recitals made in the agreement, it is seen that two persons are residing in India and other two persons are doing business abroad. However, the said agreement was signed by one Shri. V.V.Sreedharan, on behalf of the four children of the assessee. It is not explained as to how a third person could enter into such an

agreement, that too for sale of a property. The reason why the four children or at least the two persons who are residing in Kathirur Village, Tellicherry Taluk, did not sign the said agreement is also not explained.

(b) The property, that was proposed to be sold is described as under in the agreement:-

> “0.20 cents of land with old building No.IV/308 and well in Old survey 4/3 and resurvey 577W1b11 Korambath South Amsam Paramba with usufructs.”

It is seen that the description of the property is incomplete, i.e., the usual practice of describing the surrounding properties on the four sides of the impugned property is absent here. Further the area of the property was mentioned as 0.20 cents, which converts into just about 86 Sq.Ft. The sale value of Rs.50.00 lakhs mentioned in the agreement for such a small property is highly disproportionate.

(c) The reason for not executing the sale deed within the period of six months from the date of the agreement, viz, 21.1.2008 was not given.

(d) No further materials in the form of confirmation letters from the buyer or the children of the assessee were furnished to substantiate the explanations.

(e) The reason for the delay of about two years in returning the advance amount of Rs.15.00 lakhs was not explained.

(f) The agent of the buyer Shri.K.C.Basheer gave a letter dt.13.12.2010 before the AO, wherein the transaction was mentioned as Loan transaction. However, before the JCIT the said person has changed his stand and has stated the same as Property advance in his letter dated 04.03.2011 filed with JCIT. It is to be noted here that the assessee herein has started repaying the amount from 20.10.2010 onwards, i.e., during the course of assessment proceedings. However, the letters furnished by Shri.K.C.Basheer did not mention about the repayments nor did it state about the reasons for cancellation of the sale agreement. The names of children of the assessee or the details of property also do not find place in the said letters.

(g) If the amount of Rs.15.00 lakhs was received as advance for sale of property belonging to four children of the assessee, then the said amount belong to them only and the assessee shall be deemed to have received the amount from his children only. However, the letters written by Shri.K.C.Basheer do not mention about the children of the assessee. The assessee has also failed to furnish any confirmation letters from his children.

Further the Ld Counsel for the assessee had admitted before JCIT that the assessee did not maintain any accounts for land transactions and he could not furnish the details of utilisation of Rs.15.00 lakhs. Hence, we are of the view that the claim of the assessee that it represents the advance received for sale of property belonging to his four children does not stand substantiated and hence the said explanation is liable to be rejected. Hence, in our view, the AO was justified in rejecting this claim and accordingly, in our view, the Ld(CIT(A)) was not justified in accepting the contentions of the assessee without conducting further enquiries to ascertain about the veracity of the said claim."

10. These facts found by the Tribunal are absolutely unassailable. Such being the case, we are clearly of the view that the transaction was correctly taken as a loan and if so the provisions of Section 269SS and Section 271D are attracted to the case.

11. We, therefore, do not find any illegality in the view taken by the Tribunal.

Appeal fails and it is accordingly dismissed.

Sd/-
ANTONY DOMINIC
JUDGE

Sd/-
SHAJI P. CHALY
JUDGE

smv