

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :: 01-04-2019

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI

AND

THE HON'BLE MR.JUSTICE C.V.KARTHIKEYAN

T.C.A.Nos.1383 TO 1388 OF 2008

Sri K.Devakar ... Appellant in all Appeals

-VS-

The Additional Commissioner of Income Tax,
Business Range VIII, Chennai-6. ... Respondent in all Appeals

T.C.A.No.1383 of 2008 is filed under Section 260A of the Income Tax Act,1961, against the order of the Income Tax Appellate Tribunal, Chennai 'B' Bench, dated 16.05.2008, passed in ITA No.483/Mds/2008.

T.C.A.No.1384 of 2008 is filed under Section 260A of the Income Tax Act,1961, against the order of the Income Tax Appellate Tribunal, Chennai 'B' Bench, dated 16.05.2008, passed in ITA No.20/Mds/2008.

T.C.A.No.1385 of 2008 is filed under Section 260A of the Income Tax Act,1961, against the order of the Income Tax Appellate Tribunal, Chennai 'B' Bench, dated 16.05.2008, passed in ITA No.21/Mds/2008.

T.C.A.No.1386 of 2008 is filed under Section 260A of the Income Tax Act,1961, against the order of the Income Tax Appellate Tribunal, Chennai 'B' Bench, dated 16.05.2008, passed in ITA No.484/Mds/2008.

T.C.A.No.1387 of 2008 is filed under Section 260A of the Income Tax Act,1961, against the order of the Income Tax Appellate Tribunal, Chennai 'B' Bench, dated 16.05.2008, passed in ITA No.485/Mds/2008.

T.C.A.No.1388 of 2008 is filed under Section 260A of the Income Tax Act,1961, against the order of the Income Tax Appellate Tribunal, Chennai 'B' Bench, dated 16.05.2008, passed in ITA No.486/Mds/2008.

For Appellant in all Appeals : Mr.N.V.Balaji

For Respondent in all Appeals : Mr.M.Swaminathan,
Senior Standing Counsel.

JUDGMENT

(Delivered by ***Dr.Vineet Kothari,J.***)

Assessee has filed these Appeals raising the Substantial Questions of Law arising from the order of the learned Income Tax

Appellate Tribunal, Chennai 'B' Bench, dated 16.05.2008, upholding the penalty imposed on the Assessee under Section 271 (1) (c) of the Income Tax Act, 1961, in short, 'Act', for various Assessment Years viz., 2000-2001 to 2005-2006

2. The Substantial Questions of Law, on which these Appeals were admitted by a Co-ordinate Bench of this Court on 13.08.2008, are quoted below for ready reference :

(1) Whether the Tribunal has failed to hold that failure on the part of Assessing Officer to record his satisfaction that the Assessee had wilfully concealed his income or had furnished inaccurate particulars so as to enable him to proceed for penalty proceedings vitiates the penalty proceedings?

(2) Is the initial burden not upon the Department to prove the concealment of income especially where the Assessee had offered sufficient explanation for show cause notice to penalty?

3. The penalty in question was imposed by the Assessing Authority basically for two reasons viz., (i) Unvouched Expenses and (ii) Unexplained Credits. The explanation given by the Assessee before the

Assessing Authority in the present penalty proceedings under Section 143 of the Act was that during the course of survey conducted at the place of business of the Assessee on 30.09.2005, the authority concerned found that certain cash expenses/unvouched expenses were shown in the Books of Accounts, relating to docks and certain expenses in the nature of labour charges. The Assessee claimed that some of the expenses were incurred on behalf of the customers, as they were engaged in the business of clearing and forwarding agents, and such expenses were to be reimbursed by the customers to him and, therefore, the said expenses were not even claimed as deduction by debiting the same in the Profit and Loss Account of the Assessee but still in order to buy peace, he surrendered the amount of Rs.1,03,255/- in his Revised Return filed and offered the same for taxation. However, a Penalty of Rs.4,16,836/- was imposed by the Assessing Authority under Section 271 (1) (c) of the Act and the Appellate Authority also upheld the same.

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4. The other issue on which the Penalty under Section 271 (1) (c) of the Act was imposed by the Assessing Authority is the alleged Unexplained Credits. Again, during the same survey, it was found that there

were certain discrepancies in tallying the account balances of some of the Sundry Creditors viz., (1) M/s.Polisetty Somasundaram, (2) M/s.Amaravathi Agro Exports, (3) M/s.Bommidala Int.P.Ltd., and (4) M/s.Sri Chakra and the Assessee was asked to verify the balances and reconcile the same with those parties. It was found that the balances of these four parties did not tally with the Books of Accounts of the Assessee and that party and, therefore, the same was also offered as income in the Revised Return as 'Cessation of Liability' under Section 41 (1) of the Act and the same was added as income of the Assessee and consequent penalty of 100% of the said unreconciled balances was also imposed by the Assessing Authority.

5. Learned counsel for the Assessee relied upon a number of cases and submitted before us that though both the issues on which penalty in question has been concurrently imposed by the three authorities below was explained before the Assessing Authority and also the Appellate Authority, without rejecting such explanation by cogent findings, the authorities below have just treated the offer of the Assessee himself in the Revised Return surrendering the amounts as income and formed the same to the basis of concealment of income or filing of inaccurate particulars and thus imposed the penalty under Section 271 (1) (c) of the Act.

6. Learned Senior Standing Counsel for the Revenue supported the impugned orders passed by the authorities below.

7. The relevant portion of the order of the learned Tribunal is quoted below for ready reference :

*"7. In our opinion, this case is squarely covered by Hon'ble Apex Court decision in the case of **K.P.Madhusudhanan Vs. CIT (2001) 251 ITR 99**. In the case of **K.P.Madhusudhanan Vs. CIT**, the facts of the case were that for the assessment year 1986-87, the assessee, a partnership firm, filed return of income and assessment was completed determining the total income of the assessee which included income from other sources. However, the assessee did not enter in the cash book some of the transactions on the date when purchase was made. After the assessing authority noticed the aforesaid act, the assessee offered some amount as additional income. The assessment was accordingly made treating the amount as unexplained investment. Consequently, penalty proceedings were initiated against the assessee under section u/s 271 (1) (c) of the Act. The Assessing Officer found the assessee's explanation unacceptable and imposed penalty. The appeal filed by the assessee was refused. The assessee then preferred appeal before the Income Tax Tribunal. The Tribunal allowed the appeal.*

Arising out of the order of the Tribunal, the questions noted therein were placed for consideration of the High Court. The High Court answered the questions in favour of the Revenue. Then the assessee moved the Supreme Court. The Supreme Court considered the ratio decided by the Bombay High court in the case of CIT Vs. P.M.Shah (1993) 203 ITR 792 and in the case of CIT Vs. Dharmchand L.Shah (1993) 204 ITR 462 (Bom) and observed (page 103) :

'We find it difficult to accept as correct the two judgments aforementioned. The Explanation to section u/s 271 (1) (c) is a part of Section 271. When the Income Tax Officer or the Appellate Assistant Commissioner issues to an assessee a notice under Section 271, he makes the assessee aware that the provisions thereof are to be used against him. These provisions include the Explanation. By reason of the Explanation, where the total income returned by the assessee is less than 80 per cent of the total income assessed under section 143 or 144 or 147, reduced to the extent therein provided, the assessee is deemed to have concealed the particulars of his income or furnished inaccurate particulars thereof, unless

he proves that the failure to return the correct income did not arise from any fraud or neglect on his part. The assessee is, therefore, by virtue of the notice under section 271 put to notice that if he does not prove, in the circumstances stated in the Explanation, that his failure to return his correct income was not due to fraud or neglect, he shall be deemed to have concealed the particulars of his income or furnished inaccurate particulars thereof and, consequently, be liable to the penalty provided by that section. No express invocation of the Explanation to section 271 in the notice section 271 is, in our view, necessary before the provisions of the Explanation therein are applied. The High Court at Bombay was, therefore, in error in the view that it took and the Division Bench in the impugned judgment was right.'

Hence, on the touchstone of these decisions and discussions, the assessee's action of paying tax and filing revised return cannot be called to be a voluntary one. The assessee had not at all cogently rebutted that his act of furnishing inaccurate and false particulars of income in

*original return was not meant for defrauding the Revenue.
In the light of the aforesaid discussion and precedent, we
do not find any infirmity in the levy of penalty in this
regard.*

*8. In the result, these appeals by the assessee are
dismissed."*

8. Having heard the learned counsel for the parties, we are satisfied that the authorities below, right from the Assessing Authority, have abused their powers under Section 271 (1) (c) of the Act in the present case. The explanation furnished by the Assessee for both the additions made to the declared income in the Revised Return filed by the Assessee was a plausible explanation which required consideration at the hands of the Assessing Authority. Part of expenses, which were not at all even claimed as deduction from the profits of the Assessee, were said to have been incurred by the Assessee- the forwarding Agent- to be reimbursed by his customers. Without holding any inquiry in the matter from the said customers as to whether they were reimbursed or not, no such finding of guilty animus or concealment of income could have been rendered by the Assessing Authority in such cases. The surrender on the part of the Assessee appears to be under the coercion exercised by the Survey

Authority at the time of survey or the Assessing Authority. The Assessee furnished a plausible explanation, which required an investigation and inquiry. Instead of undertaking such fair exercise, the Assessing Authority and subsequently the Appellate Authorities just imposed and upheld the penalty in question to the extent of 100% of tax on such surrendered income, which was not at all called for.

9. Equally, meritless was the addition in the income by the Assessing Authority on account of surrender of the Assessee to the extent of unreconciled differences of balances in the accounts of four of the Sundry Creditors. The reconciliation of the accounts of the Sundry Creditors is a routine accounting practice in day-to-day business and it was a matter for scrutiny and, therefore, the explanation of the Assessee that there were some unreconciled balances only required further examination and an opportunity was to be given to the Assessee to reconcile such account balances with creditors. Such unreconciled balances could not have been added as 'income' on account of 'Cessation of Liability' to be brought to tax under Section 41 (1) of the Act and invoking of Section 41 (1) of the Act in the present case was wholly erroneous. The said provision applies if a liability has completely ceased for Assessee, *de facto* and *de jure*.

10. As already stated above, Revised Return appears to have been filed by the Assessee under the coercion of the authorities concerned, which does not absolve such authorities to hold a fair investigation during the course of proceedings.

11. Having carefully gone through the order of the Tribunal, we are sorry to observe that it was passed by the final fact finding body comprising of responsible Members. The tenor of the order does not impress us at all and leaves much to be desired. The said order seems to be a **"cut and paste"** order, taking pieces from here and there and as if quoting some of the judgments of Supreme Court and High Courts would be enough for the final fact finding body. Further, we are sorry to notice this quality of order passed by the learned Tribunal in this case. The very premise on which the penalty under Section 271 (1) (c) of the Act was imposed by the Assessing Authority should have invoked the good conscience of the learned Members of the Tribunal, who should have either sent back the matter to the Assessing Authority for investigating into the affairs once again or set aside the penalty in the fair exercise of their discretion in the matter. It seems, the learned Tribunal chose to uphold the order of penalty, which was passed wholly on erroneous premises, just by citing and quoting

some judgments and not giving any of their own findings. The said order of the Tribunal, therefore, cannot be sustained in the eye of law.

12. We are satisfied that the present Appeals filed by the Assessee deserves to be allowed with costs, quantified at Rs.10,000/-, to be borne by the Assessing Authority, who passed the impugned penalty orders in the present case, namely, **Mr.B.B.Rajendra Prasad, Joint Commissioner of Income Tax, Business Range VIII (I/c), Chennai-600 006**, to be paid to the Appellant-Assessee within three months from today and Compliance Report should be sent to this Court.

13. Appeals filed by the Assessee are allowed with costs, as above.

14. Registry is directed to forward a copy of this order along with a copy of the impugned order of the Tribunal to President and Members concerned of Income Tax Appellate Tribunals and also to Law Secretary to the Government of India, Ministry of Law and Justice, New Delhi, for information.

Index : Yes
Internet : Yes
Speaking Order
dixit

(V.K.,J.) (C.V.K.,J.)
01-04-2019

To

1.The Additional Commissioner of Income Tax,
Business Range VIII,
Chennai-6.

2.Income Tax Appellate Tribunal,
Chennai 'B' Bench,
Chennai.

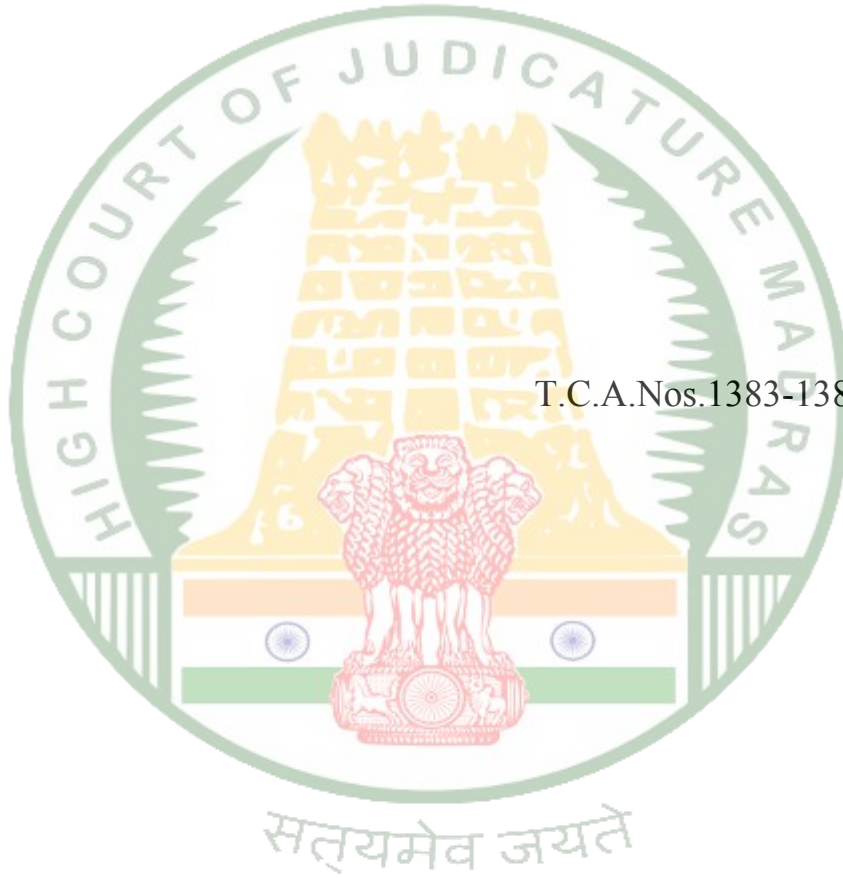


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14/14 Judgment dt.01.04.2019 in TCA Nos.1383-1388/2008
[Sri K.Devakar v. ACIT]

DR.VINEET KOTHARI, J.
and
C.V.KARTHIKEYAN, J.

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T.C.A.Nos.1383-1388 OF 2008

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