

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.02.2019

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI
AND
THE HON'BLE MR.JUSTICE C.V.KARTHIKEYAN

Tax Case Appeal No.120 of 2009

B.Loganathan .. Appellant/ Respondent

Vs.

The Income Tax Officer
Ward VIII(3)
Chennai. Respondent / Appellant

Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras "A" Bench, in ITA No.2762/MDS/2004 dated 13.6.2008 for the assessment year 2000-01 against the order of Commissioner of Income Tax(Appeals)IX, Chennai. 34. in ITA NO.155/2003-2004 dated 18.08.2004 against the Assessment Order of Income Tax officer ,Business Ward -VIII (3), Chennai. Dated 22.09.2003 for PAN NO.AAAPL 5729 K for the Assessment Year 200-2001.

For Appellant : Mr.Kaushik
For Mr.S.Sridhar

For Respondent : Ms.Premalatha
Junior Standing Counsel

सत्यमेव जयते

J U D G M E N T

(Delivered by Dr.Vineet Kothari,J)

The assessee has filed this appeal under Section 260A of the Act, aggrieved by the order of the Tribunal dated 13.6.2008 for the assessment year 2000-01, wherein the Revenue's appeal was allowed and the penalty under Section 271(1)(c) of the Act was restored by the Tribunal setting aside the order passed by the Commissioner of Income Tax (Appeals) on 18.8.2004, by which the first Appellate Authority Commissioner of Income Tax (Appeals) had set aside the penalty in question, in favour of assessee.

2. The facts leading to the said order of the Tribunal, in brief, are as under:

The assessee purchased three Pay Loaders from Hindustan Motors Limited on the last day of previous year, that is on 31.3.2000 at Pondicherry and brought the same to Port Trust, Chennai, on the same day, where he was undertaking certain works for the Port Trust and the question in the assessment proceedings arose as to whether the assessee could claim depreciation in respect of these three Pay Loaders for the assessment year 2000-01. The Assessing Authority held that since the assessee had not actually put to use these three Pay Loaders during the previous year, as the same were admittedly purchased on the last date, namely 31.3.2000 and the place delivery of the Pay Loaders, was either at Tiruvallur or Pondicherry, was not established and the three Pay Loaders could not have reached the work place at Chennai Port before the end of that date and therefore, the assessee was not entitled to depreciation. The penalty proceedings under Section 271(1)(c) of the Act for concealment of income and for filing of inaccurate particulars were also initiated by the Assessing Authority.

3. The Assessee, during the course of assessment proceedings, claimed initially that the delivery of these three Pay Loaders was taken at Pondicherry at about 2.30 and they were brought to Chennai Port by 9.30 PM and therefore, the said three Pay Loaders were put to use before the end of the previous year on 31.3.2000 and thus, he was entitled to depreciation claim of Rs.14,79,000/-, but the assessee somehow gave up the claim of depreciation in respect of these three Pay Loaders and paid the tax due to that extent forgoing his claim of depreciation, for the assessment year 2000-01.

4. The Assessing Authority, thereafter, by the impugned order dated 22.9.2003, imposed penalty under Section 271(1)(c) on the assessee to the extent of Rs.4,88,070/-, being 100% of the tax leviable on the amount of depreciation in question. In the said penalty order, the Assessing Authority observed in paragraph 12 of the order that there was a conscious concealment on the part of the assessee and the assessee had intention to defraud the revenue by making false depreciation claim and therefore, the penalty in question was leviable.

5. The first Appellate Authority, Commissioner of Income Tax (Appeals), however, set aside the said penalty by his order dated 18.8.2004 with the following observations:

"The appellant is having a proprietary concern. He was present at the time of hearing. He stated that he is not looking into each and every transaction of the business as he had his own employees for that. Concerning the delivery, he stated that the vehicle was taken delivery at Tiruvellore because it appears that when this survey operation took place, the vehicles were being delivered at Tiruvellore and immediately he could not recollect the place of delivery. Whenever questions are asked, he had taken the help of his auditors or employees to answer the questions. That suggests that each and every particular fact was not in his immediate knowledge. The appellant further stated that he had submitted positive evidences of these vehicles being put into use in the Port Trust. According to the appellant, some of the positive evidences submitted by him in support of his stand which are on record, were not considered and only some small errors in statement have been magnified not only to make addition but also to levy the penalty. The appellant along with his authorised representative personally stated that they were not only forced to agree for the addition but also forced to pay tax even before the assessment order was passed. The appellant had stated that they have paid Rs.4 lakhs tax even before the assessment order was passed. To their shock even when they followed whatever the department had wanted, prosecution proceedings were also initiated against the appellant.

I had gone through the assessment records. There was a prima facie evidence established by the assessing officer regarding the wrong claim of depreciation of the appellant. Since the appellant had accepted under whatever circumstances, the same has been upheld by me vide my order in ITA No.156/2003-04 dated 16.9.2004. That appeal was only filed when once the 271(1)

(c) was initiated.

In order to strengthen the case of penalty, it is merely not sufficient to take advantage of surrendering of the claim with few inquiries. They are incomplete inquiries and evidences. They cannot establish that the appellant had concealed true particulars of the claim of depreciation. The assessing officer has to prove the concealment. Mere repetition of assessment order in penalty proceedings is not adequate to sustain the levy of penalty under section 271(1)(c). To achieve this purpose, he has to make additional effort in establishing the concealment of income. Concealment of income cannot be inferred merely from assessment order. The burden is on the assessing officer in penalty proceedings to establish deliberate concealment which is not completely discharged. Mere agreeing for disallowance of depreciation without conclusive evidence gathered by assessing officer does not warrant the inference that the appellant had deliberately concealed income. Therefore on facts of this case and circumstances in which the depreciation claim is withdrawn, it is not possible to state with certainty that withdrawal of claim would be "concealed income" of the appellant. Therefore the ingredients of offence as contemplated under section 271(1)(c) and propounded by various High Courts had not been satisfied to impose penalty in this case under section 271(1)(c). The penalty of Rs.4,88,070/- levied by the assessing officer is therefore cancelled.

In the result, the appeal is allowed."

6. The Revenue took up the matter further before the Tribunal, which allowed the appeal of Revenue and restored the said penalty with the following observations:

"We also find that under similar circumstances, when the Assessee has claimed depreciation on the basis of factory manager's certificate that machinery had been received before the close of the year and later on the claim for depreciation was withdrawn, still penalty was held to be

leviable by the decision of the Hon'ble Karnataka High Court in the case of CIT v. Sree Valliappa Textiles (supra). In that case, the High Court has held that:

"The Tribunal failed to notice that when the claim was made on the basis of installation, the machinery had not even left the premises of the seller. The defence of the factory manager could not have been considered. The Assessee was bound by the act of its servants. Tax exemption, tax concession and tax deduction have to be for bona fide reason and not for those who made false declaration for the purpose of benefit in terms of the statute. Section 271(1)(c) had to be strictly applied in the larger interest of discipline in filing correct returns by the Assessee."

We further observe that the CIT (Appeals) has, without appreciating the facts properly, has given a finding that the Assessing officer has not made sufficient enquiries, with which we do not agree. In these circumstances, and following the judgment of the Hon'ble Karnataka High Court (supra), we set aside the order of the CIT (Appeals) on this issue and restore that of the Assessing Officer. The penalty levied by the Assessing Officer is confirmed."

7. The Assessee has, thus, approached this Court by way of the present appeal under Section 260A of the Act. The appeal was admitted by a Coordinate Bench of this Court on 31.3.2009, on the following substantial question of law.

"Whether the Appellate Tribunal is correct in law in sustaining the levy of penalty u/s 271(1)(c) of the Act on the rejection of claim of depreciation which was surrendered in the course of the assessment proceedings and further on the claim of certain expenses which claim was reversed in the same proceedings by the Appellant even though there was total violation of the principles of natural justice as well as the Doctrine of Fair Procedure?"

8. The learned counsel for the assessee, Mr. Kaushik, urged before us that the assessee was entitled to claim depreciation in respect of the said three Pay Loaders even though they were purchased on the last date of the previous year, namely on 31.3.2000. He relied upon several case laws to support his contention, namely

(i) CIT v. Geo Tech Construction Corporation [(2000) 112 Taxman 373 (Kerala)],

(ii) CIT v. Premier Industries (India) Ltd. [(2008) 170 Taxmann 407 (MP)],

(iii) Principal Commissioner of Income-tax v. Larsen and Toubro Ltd. [(2018) 98 taxmann.com 368 (SC)],

(iv) Principal Commissioner of Income-tax v. Larsen and Toubro Ltd. [(2018) 89 taxmann.com 186 (Bom)],

(v) Commissioner of Income Tax v. Refrigeration & Allied Industries Ltd. [(2000) 113 Taxman 103 (Delhi)], and

(vi) National Thermal Power Corporation Ltd. v. Commissioner of Income-tax [(2012) 28 taxmann.com 89 (Delhi)].

9. The learned counsel urged that though the depreciation could have been allowed even if the plant and machinery, namely three Pay Loaders in question were not actually used and even if they were ready to use or kept ready for use, as per the judgments supra, the assessee was entitled to claim deduction under Section 32 of the Act and merely because the assessee gave up his claim to buy peace, it could not automatically entail the imposition of penalty under Section 271(1)(c) of the Act.

10. The learned counsel also submitted that there was no concealment on the part of the assessee or filing of inaccurate particulars, which is a ground for the imposition of penalty under Section 271(1)(c) of the Act. He also relied upon the Division Bench judgment of this Court in Commissioner of Income Tax v. Gem Granites (Karnataka) [(2014) 42 taxmann.com 493 (Mad.)], wherein, while dealing with the decision of the Supreme Court in the case of Mak Data (P) Ltd. v. Commissioner of Income Tax [(2013) 38 taxmann.com 448 (SC)], which was relied upon by the learned counsel for the Revenue also, it was held that the question would be whether the assessee had offered an explanation for concealment of particulars of income or furnishing of inaccurate particulars of income and the

Explanation to Section 271(1) raises a presumption of concealment, when a difference is noticed by the Assessing Officer between the reported and the assessed income. The burden is then on the Revenue to show otherwise by cogent and reliable evidence once the initial onus placed by such explanation to Section 271(1)(c) has been discharged by the assessee, the onus shifts on the Revenue to show that the amount in question constituted their concealed income.

11. Similarly, in Commissioner of Income Tax v. Mahabaleshwar Gas & Chemical (P) Ltd. [(2008) 170 Taxman 38 (Delhi)], a Division Bench of Delhi High Court held that where the assessee's claim for depreciation was based on the bona fide belief and disallowance of the said claim on a difference of opinion was made, the same could not be treated as concealment of income by the assessee, particularly when all particulars in respect of the said claim were fully furnished in his return of income.

12. The Supreme Court, in the case of Commissioner of Income Tax v. Reliance Petroproducts (P) Ltd. [(2010) 189 Taxman 322 (SC)] held that the penalty under Section 271(1)(c) of the Act cannot be imposed merely because the assessee had claimed an expenditure which claim was not accepted or was not acceptable to the Revenue, that by itself would not attract penalty under Section 271(1)(c) of the Act.

13. The learned counsel for the Revenue, however, relied upon the following the judgments in Commissioner of Income Tax v. Zoom Communication Pvt. Ltd. [ITA No.07/2010 dated 24.5.2010 - Delhi High Court] and Mak Data P. Ltd. v. Commissioner of Income Tax-II [SLP (C) No.18389 of 2013 dated 30.10.2013], in support of her contention that the penalty was rightly levied by the Assessing Authority and upheld by the Tribunal.

14. Relying upon Mak Data P. Ltd. supra, the learned counsel for the Revenue urged that the mere fact that the assessee had himself given up the claim of depreciation during the assessment proceedings was enough to sustain the penalty, as he could not establish that the delivery of the three Pay Loaders in question was taken at Pondicherry and that they were in fact brought to Chennai Port and were put to actual user and thus, in these circumstances, giving up of the claim amounted to furnishing of the inaccurate

particulars attracting the penalty.

15. Referring to paragraph 8 of the decision in Mak Data P. Ltd, the learned counsel urged that where the assessee in that case had surrendered the additional sum as undisclosed income with a view to avoid litigation and buy peace, the Supreme Court had upheld the penalty under Section 271(1)(c) of the Act.

16. Similarly, relying upon the decision of the Delhi High Court in Zoom Communication Pvt. Ltd. supra, she urged that the Explanation to Sub-section (1) of Section 271 of the Act would be attracted where the assessee fails to offer an explanation or offers an explanation which is found to be false or offers an explanation which he is not able to substantiate and thus, in the instant case, the provisions of Section 271(1)(c) clearly stood attracted.

17. Having given our thoughtful consideration to the rival submissions made at the Bar, facts on record and the case laws produced, we are of the considered opinion that the present appeal of the assessee deserves to be allowed and the substantial question of law deserves to be answered in favour of the assessee and against the Revenue. The reasons are as follows:

18. The penal provision under Section 271(1)(c) providing a harsh penalty of 100% of the tax held to be evaded is upon two tenets, namely (i) concealment on the part of the assessee, and (ii) furnishing of inaccurate particulars. Such a penalty, therefore, has to be based upon the guilty animus or mens rea on the part of the assessee. A conscious concealment or a deliberate filing of inaccurate particulars is sine qua non to invoke the penal provisions of Section 271(1)(c) of the Act. The Explanation 1 of the said provision also can be invoked only if the assessee fails to offer an explanation or offers an explanation which is found to be false or the assessee is not able to substantiate the explanation furnished by the assessee.

19. In the present case, we do not find any concealment on the part of the assessee at all. On the contrary, the facts relating to purchase of three Pay Loaders in question on the last date of the previous year

was categorically stated and supported by the production of purchase invoices before the Assessing Authority. The statement of the assessee regarding the place of delivery was recorded much after the said date of delivery, namely, during the course of assessment proceedings, which was after about three years. Even from the extract of the statement produced in the assessment order, if it could be inferred that the assessee was confused about the place of delivery at Tiruvallur or Pondicherry, it could not be said that the statement of the assessee was false because there is no rebuttal of the fact that the Pay Loaders were available at Chennai Port before the last day was over on 31.3.2000 and was kept ready for use. The assessee was able to produce the relevant evidence before the Assessing Authority as well as Commissioner of Income Tax (Appeals), who set aside the said penalty holding that the three Pay Loaders in question were ready to be used on the last date of previous year. The case laws cited by the learned counsel for the assessee clearly supports the contention that the depreciation in such cases could have been claimed as deduction under Section 32 of the Act and deserves to be allowed.

20. The words 'use' in Section 32 is not restricted to actual, full or continuous user of Plant and Machinery. It includes within its ambit the status of 'kept ready for use' or 'ready for use' as well. A partial user is also sufficient to apply Section 32 of the Act. For the reasons best known to the assessee, may be to buy peace and to avoid litigation or under pressure not knowing the correct legal position, he gave up the said claim of depreciation under Section 32 of the Act, but, that does not mean that the assessee admitted the guilt of giving a wrong explanation or a false explanation or having concealed his income or filing inaccurate particulars. There was a total absence of mens rea or guilty animus on the part of assessee in present case. Giving up of the claim of depreciation could not automatically entail the penalty under Section 271(1)(c) of the Act. The imposition of penalty is neither automatic nor is expected to be imposed even if the bona fide explanation of the assessee is not finally accepted by the statutory authorities of the Act. The burden of proving the guilty animus on the part of the assessee is on the Revenue, like on Prosecution in criminal cases and no such negative burden could be cast upon by the assessee himself.

21. We do not find any such material on record brought by the Assessing Authority which would indicate, much less, prove the guilty animus on the part of the assessee in the present case. The Assessing Authority appears to be trigger happy in imposing the penalty merely because the assessee gave up the claim of depreciation to buy peace. Instead of giving peace, a long chain of litigation was thrown upon the assessee, invoking the penal provisions under Section 271(1)(c) of the Act. Such casually and lightly invoked penal provisions and impositions thereof in the tax jurisprudence was never the intention of the Parliament and lowers the morale of honest tax payers. Therefore, the restoration of penalty in the present case by the Second Appellate Authority, Tribunal, should fall to the ground.

22. Accordingly, the appeal of Assessee is allowed and substantial question of law is answered question in favour of the Assessee and against the Revenue. The penalty under Section 271(1)(c) of the Act is set aside. The Assessee will be entitled to refund, if the penalty has already been recovered, with interest, in accordance with law. No order as to costs.

Sd/-/-

Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

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To

1. The Income Tax Officer
Ward VIII(3), Chennai.
2. The Commissioner of Income Tax (Appeals)
Chennai.
3. The Income Tax Appellate Tribunal
"A" Bench, Chennai.

+1cc to Mr. S.Sridhar, Advocate SR.No. 11015
+1cc to Ms.Premalatha , Advocate SR.No. 11633

TCA No.120 of 2009.

A.SK(20/03/2019)