IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.10.2020

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

T.C.A.No.630 of 2018

N.Venkatachalam .. Appellant

Versus

The Income Tax Officer,
Ward – I(1),
Namakkal. .. Respondent

Prayer:- Tax Case Appeal filed under Section 260-A of the Income Tax Act, 1961, against the order of the Income Tax Appellate Tribunal, Madras 'D' Bench, Chennai dated 16.08.2016 made in I.T.A.No.566/Mds/2015 relating to the Asst Year 2004-05 against the order of the Commissioner of Income Tax (Appeals) Salem dated 30/12/2014 in ITA No.40/2009-10 against the order dated 25/06/2009 by the Income Tax Officer, ward I(I), Namakkal.

For Appellant :M/s.Niranjan Rajagopal
For M/s.G.R.Associates

For Respondent : M/s.V.Pushpa
Junior Standing counsel

JUDGMENT

[Order of the Court was made by T.S.SIVAGNANAM, J.]

This appeal by the Revenue filed under Section 260 A of the Income Tax Act, 1961 ('the Act' for brevity) is directed against the order dated 16.08.2016 passed by the Income Tax Appellate Tribunal, ('the Tribunal' for brevity) Madras 'D' Bench, Chennai in I.T.A.No.566/Mds/2015 for the Assessment Year 2004-05. The appeal was admitted on 05.12.2018 on the following Substantial Questions of Law:

"(i) Whether the Appellate Tribunal is correct in law in confirming the levy of penalty u/s 271(1)(c) of the Act even after noticing the explanation offered for the current account balance in the partnership firm which was wrongly rejected based on the invalid survey statement?

(ii) Whether the Appellate Tribunal is correct in law in confirming the levy of penalty u/s 271(1)(c) of the Act despite the rejection of explanation offered effectively on the issue relating to the presumption of monies received based on two entries in the impounded note book which according to the appellant on the contrary would prove the source for such credits?

(iii) Whether the Appellate Tribunal is correct in law in confirming the levy of penalty u/ 271(1)(c) of the Act without making the distinction between the facts disproved and the facts not proved with regard to the additions made in the re-assessment order?

(iv) Whether the levy of penalty u/s 274 read with section 271(1)(c) of the Act imposed for the assessment year 2004-05 in the order dated 25.06.2009 could be considered as bad in law in view of lack of precise charge in the show cause notice dated 16.12.2008 issued while completing the assessment?”

2. The assessee is an individual, was working as a Manager in the firm viz., M/s.Andavar & Co (Tyres) till 31.10.2003. The Firm was dissolved and a fresh partnership was drawn on 01.11.2003 and the assessee became the Managing Partner of the said Firm along with four Partners. On 02.11.2003, there was a change of Constitution of the Partnership and three partners retired and two including the assessee continued as partners. The return of income for the Assessment Year under consideration namely AY 2004-05 was filed, in which, the assessee firm had enclosed separate accounts for two periods from 01.04.2003 to 31.10.2003 and 01.11.2003 to 31.03.2004. A Survey was conducted under Section 133 A of the Act in the business premises of the firm on 04.08.2005, during which, books of accounts and documents were seized and sworn statement was recorded from the assessee, the Managing Partner. Certain queries were put to the assessee and statement was recorded and relying upon one of the answers given by the assessee that he could not explain the sources of the partners Current Account, the assessment which was completed under Section 143(3) of the Act was reopened by issuance of notice under Section 148 of the Act. The reason for reopening was that the assessee was not able to explain the partners Current Account balance, no explanation for the unexplained credit. The assessee submitted his objections to the reopening. However, the Assessing Officer was not convinced and the assessment was completed under Section 143 (3) read with Section 147 of the Act by order dated 16.12.2008. As mentioned in the Re-Assessment order, penalty proceedings were initiated against the assessee by issuance of notice under

Section 271(1)(c) of the Act. In the said notice, the Assessing Officer placed much reliance upon the answer given by the assessee to question No.16 posed during the survey operations and therefore, came to the prima facie opinion that it is a fit case for levying penalty. The explanation, which is offered by the assessee before the Assessing Officer, did not convince the Assessing Officer and accordingly, the penalty order was passed on 25.06.2009, levying the minimum penalty of Rs.9,56,067/-.

3. The assessee preferred appeal to the Commissioner of Income Tax (Appeals) ['CIT(A)' for brevity], Salem. The said appeal was dismissed by order dated 30.12.2014, once again on the ground that during the survey operations, in a statement given by the assessee, he had admitted that he was not aware of the unexplained credits and he had not explained the source of their Partnership Current Account as pointed out by the Department. The assessee being aggrieved by the order passed by the CIT(A) dated 30.12.2014 filed appeal before the Tribunal, which has been rejected by the impugned order.

4. We have elaborately heard Mr.Niranjan Rajagopal, learned counsel for the appellant-assessee and M/s.V.Pushpa, learned Junior Standing Counsel for the respondent Revenue.

5. The short issue, which falls for consideration is on account of certain observations made by the Assessing Officer during the quantum assessment and based upon the statement given by the assessee to the Survey party can solely be a basis for levy of penalty under Section 27(1) (c) of the Act. The said provision would stand attracted, if the Assessing Officer is satisfied that any person has concealed the particulars of the income or furnished inaccurate particulars of such income. Since the re-assessment was concluded, after taking note of the statement given by the assessee, the Assessing Officer may have been partially right in issuing show cause notice to initiate penalty proceedings. Nevertheless, penalty proceedings are independent and have to be separately adjudicated by the Assessing Officer and any stand taken by the assessee in the quantum assessment cannot be the sole basis for levying of penalty.

6. We find from the material papers placed before this Court that the assessee had an explanation in respect of the unexplained credits. However, this explanation was not very elaborate and consequently, the Assessing Officer was not convinced. However, before the CIT(A), the assessee specifically stated that the figures shown in the books of account and the Balance Sheet of the firm was duly explained by the firm and the

Assessing Officer did not consider the said explanation. The CIT (A) has referred and noted this ground, which was not raised by the assessee before Assessing Officer. Nevertheless, the CIT(A) also was guided by the observations in the quantum assessment, the answers to the questions which, the assessee had given during the survey under Section 133A of the Act. When the assessee carried the material on appeal to the Tribunal, once again reiterated the explanation, which was offered and as to how the same has to be accounted for in the firms account and not to the account of the appellant-assessee, the individual. However, the Tribunal also was of the view that the assessee was not able to give any plausible explanation and establish genuineness of the credits.

7. In our considered view, the CIT(A) and the Tribunal had to consider the important issue as to the correctness of the explanation offered by the assessee. In fact, such a ground has been raised before us and it is also pointed out that during the re-assessment proceedings to a specific query raised to the assessee, the assessee had given a letter dated 16.08.2007. Reading of the said letter, it is seen that the assessee had stated that the firm was reconstituted on 01.11.2003 and at the time of reconstitution, the credit and debit balance of various parties were transferred to the said file and such transferred balances comprising of Rs.26,82,627/- shown in the Balance Sheet as Current Account on 31.03.2004. If the said letter is taken into consideration, then it goes to show that there was no admission made by the assessee before the Survey party.

8. We find that though such a stand was taken by the assessee, vide letter dated 16.08.2007, the Assessing Officer placing reliance on the answer to question No.8 as recorded in the sworn statement on 17.08.2005. After the survey operations and reconciliation, Rs.20,78,873/-, was added to assessee Account in Paragraph 2 of the re-assessment order. The assessee also had an explanation for the unexplained credit on Rs.5,29,000/- stating that the same was withdrawn from the Partnership Firm on 17.02.2004 and repaid on the same day itself. However, the Assessing Officer has rejected the same and we find that there is no convincing finding rendered by the Assessing Officer to reject the said contention. Thus, considering the totality of the facts and circumstances, we find that this is not a fit case where the Assessing Officer should have impose penalty on the assessee.

9. The learned counsel appearing for the assessee would submit that there is also a defect in the Show cause Notice

dated 16.12.2008, while proposing to initiate penalty proceedings under Section 271(1) (c)of the Act. It is submitted that the Assessing Officer did not specifically state under which limb of the penalty provision, the assessee would fall and therefore, the assessee was put to prejudice as regards the allegation which he has to meet. Apart from that, the learned counsel for the appellant would submit that the re-assessment proceedings in the name of the appellant/assessee is erroneous as if at all there was any material, it is only the firm which is to be assessed and not the appellant/assessee. It would be too late for the assessee to raise such a contention as the re-assessment proceedings stood concluded as of the year 2008. Nevertheless, if it had been raised at the appropriate time, probably it might have been taken note of by the Assessing Officer. In any event, we are convinced that this is not a case, where the assessee had no explanation to offer and the explanation offered was not tested for its correctness in the proper manner to pave way for levy of penalty. For the above reasons, the Tax Case Appeal is allowed and the Substantial Questions of Law are answered in favour of the appellant/assessee. No costs.

Sd/-
Assistant Registrar(CJ Conf)

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Sub Assistant Registrar

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To

1.The Income Tax Appellate Tribunal,
'D' Bench, Chennai.

2. The Commissioner of Income Tax (Appeals),
Salem-7.

3. The Income Tax Officer,
Ward -I(I), Namakkal.

+1cc to Mr.M.Swaminathan, Advocate SR.No.33400

T.C.A.No.630 of 2018

SS(CO)
GMY(18/11/2020)