IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 17.04.2021

PRONOUNCED ON : 26.04.2021

CORAM:

THE HONOURABLE MR. JUSTICE M.DURAISWAMY
AND
THE HONOURABLE MRS. JUSTICE R. HEMALATHA

Tax Case (Appeal) Nos.1120, 1121 & 1122 of 2009

Dharampal R.Pandia ... Appellant in all Appeals

.Vs.

The Deputy Commissioner of Income - Tax,
Business Circle X,
Kannammal Building, 3rd Floor,
No.611, Anna Salai,
Chennai - 600 006. ... Respondent in all Appeals

COMMON PRAYER: Tax case (Appeals) filed under Section 260 of the Income Tax Act 1961, against the order of the Income Tax Appellate Tribunal, Bench A, Chennai in ITA Nos.1538 to 1540/mds/2007 dated 25.05.2009 against the common order of the dated 23.03.2007 and made in the Commissioner of Income Tax (Appeals)-IV, Chennai Appeal Nos.CIT(A)-IV/CHE/692/06-07, CITC)A)-IV/CHE/665/06-07,CIT(A)-IV/CHE/664/06-07 in Assessment Year 1999-2000, 2000-2001, 2001-2002.

For Appellant : Mr.Pramod Kumar Chopda

For Respondent : Mrs.R.Hemalatha, SSC

COMMON JUDGMENT
(Judgment delivered by Justice R.HEMALATHA)

These appeals are directed against the common order of the Income Tax Appellate Tribunal, Bench A, Chennai in ITA No.1538 to 1540/mds/2007 dated 25.05.2009.

2.The appellant/assessee is an individual engaged in the business of antibiotics, chemicals, prawn feeds etc. under the name and style of M/s.Hermes India (Madras). According to the appellant, the Assessing Officer of the Income Tax Department accepted the Income Tax Returns filed by him for the assessment years 1999-2000, 2000-2001 and 2001-2002. However, a notice under section 274 was issued to him vide his order dated 27.09.2006 levying a penalty by invoking

Explanation 3 to Section 271 (1)(C) of Income Tax Act, 1961 (Hereafter referred to as the Act). Aggrieved over the orders of the Assessing Officer, the appellant / assessee appealed to the Commissioner of Income Tax (Appeals) who allowed the appeals and set aside the order of the Assessing Officer vide his orders dated 23.03.2007. The Income Tax Department which was aggrieved by the orders of the CIT (A) appealed to the Income Tax Appellate Tribunal which in turn reversed the orders of the CIT (A) and upheld the orders of the Assessing Officer. The present appeal is against this order on the following substantial questions of law:

"1.Whether on the facts and in the circumstances of the case the Tribunal is right in confirming the levy of penalty u/s 271 (1) (c) for the Assessment Years 1999-2000, 2000-2001 and 2001-2002.

2.Whether on the facts and in the circumstances of the case the Tribunal is right in holding that the Appellant has not established reasonable cause for the non submission of the returns within the time prescribed u/s 153(1).

Additional Substantial Question of Law :

1.Whether on the facts and in the circumstances of the case the Tribunal is right in confirming the penalty based on amended Explanation 3 to Section 271(1)(c) of the Act although the said amendment is not applicable to the impugned Assessment Years 1999-2000, 2000-2001 and 2001-2002 but applicable prospectively w.e.f. 01.04.2003 i.e., from AT 2003-2004 onwards only?"

3.Mr.Promod Kumar Chopda, learned counsel for the assessee mainly harped on the additional question of law, challenging as to how the amended Explanation 3 to Section 271(1)(C) would be applicable to the assessment years prior to the date of amendment i.e. 01.04.2003. He also further contended that the amendment was also applicable to those who have not been previously assessed under the Act and that he was earlier assessed. He relied on the decision of Bombay High Court in CIT Vs Smt.Lata Shantilal Shah reported in (2009) 221 CTR 778 (Bombay) where it was held that the amended Explanation 3 would not apply to assessment years prior to 01.04.2003, if the assessee had filed returns earlier. He also relied on the decision of Gujarat High Court in Chagganlan Suteriya Vs Income Tax Officer reported in (2011) 337 ITR 350 (Gujarat) in which it was held that the 3rd condition of Explanation 3 of Section 271(1)(c) of the Act that notice under Section 142(1) or 148 of the Act should have been issued within the period specified under sub-section (1) of section 153 and therefore could not be deemed to be concealment within the meaning of Explanation 3 to Section 271(1)(c).

4.Per contra Mrs.R.Hemalatha, learned Senior Standing Counsel for the respondent pointed out that this plea was never raised in any of the earlier proceedings by the assessee. It was also contended that the appellant had defaulted in filing the Income Tax Returns for three consecutive assessment years and a survey under Section 133-A was conducted and subsequently notices under Section 148 dated 23.12.2004 were served upon the assessee which resulted in his filing the belated returns. It was also pointed out that in fact only after the survey under Section 133-A the assessee got his accounts audited and the returns submitted.

5.The amended Explanation 3 to Section 271(1)(c) is extracted hereunder:

> "where any person who has not previously been assessed under this Act, fails, without reasonable cause, to furnish within the period specified in sub-section(1) of section 153, a return of his income which he is required to furnish under section 139 in respect of any assessment year commencing on or after the 1st day of April 1989, and until the expiry of the period aforesaid, no notice has been issued to him under clause (i) of sub-section (1) of section 142 or section 148 and the Assessing Officer or the Deputy Commissioner (Appeals) or the Commissioner (Appeals) is satisfied that in respect of such assessment year such person has taxable income, then such person shall, for the purposes of clause (c) of this sub-section , be deemed to have concealed that particulars of his income in respect of such assessment year, notwithstanding that such person furnishes a return of his income at any time after the expiry of the period aforesaid in pursuance of a notice under section 148".

The amendment omitted the clause "who has not previously been assessed under the Act" with effect from 01.04.2003. The Explanation 3 to Section 271(1)(c) specifies that the assessee's non-filing of returns within the period specified in sub section (1) of Section 153 of the Act, non issue of any notice to him under clause(i) of sub section (1) of Section 142 or Section 148 until the period aforesaid and the Assessing Officer being satisfied that such person has taxable income are the three conditions to be fulfilled to conclude that there has been a deemed concealment of income.

6.The bone of contention now is whether the Income Tax Appellate Tribunal was correct in upholding the orders of the Assessing Officer who in fact had 'allegedly' given retrospective effect to Explanation 3 to Section 271(1)(c). It is not the case of the appellant that he had filed the Income Tax Returns for all the three years namely 1999-2000, 2000-2001 and 2001-2002 within the specified period as mentioned in sub section 1 of Section 153 of Income Tax Act. As such the due dates for filing these returns were 31.10.1999, 31.10.2000 and 31.10.2001 respectively. While this being so, these returns were filed on 07.04.2005, 15.06.2005 and 19.12.2005 respectively for the assessment years. These filing of returns were also subsequent to the issue of notice dated 23.12.2004 under Section 148 of the Act after the survey under Section 133-A of the Act. It is also pertinent to mention that the survey under Section 133 A of the Act was conducted subsequent to which the audit of accounts was completed and the consequent Income Tax Returns were filed. Explanation 3 to Section 271(1)(C) is categorical as to where concealment of income can be deemed. Moreover, in the instant case the Income Tax Appellate Tribunal observation is significant.

> "6.The learned counsel for the assessee submitted that there was reasonable cause for not furnishing the returns even though there was sufficient taxable income and when she was pointed out as to how and asked to state or to elaborate such reasonable cause she was unable to do so. She did not give any bonafide reason nor did she filed any documentary evidence in this regard before the authorities below for not furnishing the returns of income on due dates or even within the time allowed for finalization of the assessment as per section 153(1), she just insisted upon confirmation of the impugned orders".

It is not also the case of the appellant that the Income Tax Returns were filed before the amendment to Explanation 3 to Section 271(1)(c) was brought in. Therefore, there is no substance in the contention of the learned counsel for the appellant in claiming that the said amendment has been applied retrospectively. Interestingly, the learned counsel for the appellant has tried to take shelter that the words "Who has not previously been assessed under this Act" which was a part of the Explanation 3 to Section 271(1)(C) prior to 01.04.2003 and omitted thereafter stating that he was an existing assessee even prior to the amendment and therefore the amended explanation was not applicable to him. However, this point has already been dealt with and clarified and needs no further elaboration.

7.The decision of the Bombay High Court in CIT Vs Smt.Lata Shantilal Shah (cited supra) and the decision of Gujarat High Court in Chagganlal Suteriya Vs ITO (cited supra) may not apply to the present case for the following reasons:

i. In the first decision in CIT Vs Smt.Lata Shantilal Shah (cited supra) there are no details regarding the date of filing of returns and whether such return was filed after the survey under Section 133 A and consequent notice under Section 148 of the Income Tax Act 1967.

ii. In the second decision Chagganlal Suteriya Vs ITO (cited supra) there is non-fulfilment one of the three conditions stipulated in Explanation 3 to Section 271(1)(C) whereas in the present case all the three conditions have been fulfilled.

8.In the result, the appeals fail and are dismissed. No costs.

Sd/-
Assistant Registrar(CS-III)

//True copy//

Sub Assistant Registrar

mtl

To

1.The Deputy Commissioner of Income - Tax,
Business Circle X,
Kannammal Building, 3rd Floor,
No.611, Anna Salai,
Chennai - 600 006.

2. The Commissioner of Income Tax (Appeals)-IV
Chennai.

+3cc to Mr.Pramod Kumar Chopda, Advocate SR.No.25560, 25561, 25562

+1cc to Mr.T.Ravikumar, Advocate SR.No.25235

Tax Case (Appeal) Nos.1120, 1121 & 1122 of 2009

KV(CO)
GMY(01/07/2021)