IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE DR. JUSTICE A.K.JAYASANKARAN NAMBIAR

&

THE HONOURABLE MR. JUSTICE SYAM KUMAR V.M.

MONDAY, THE 20TH DAY OF MAY 2024/ 30TH VAISAKHA, 1946

I.T.A.NO.75 OF 2020

AGAINST THE ORDER DATED 26-08-2019 IN I.T.A.NO.4 OF 2017 OF I.T.A.TRIBUNAL, COCHIN BENCH

APPELLANT/RESPONDENT:

**THE PRINCIPAL COMMISSIONER OF INCOME TAX
KOCHI-1, KOCHI, INCOME TAX OFFICE,
CENTRAL REVENUE BUILDING, I.S. PRESS ROAD,
KOCHI- 682 018.**

**BY JOSE JOSEPH, SC, FOR INCOME TAX
BY ADV.SRI.P.K.RAVINDRANATHA MENON (SR.)**

RESPONDENT/RESPONDENT:

**SHRI. AMBADY KRISHNA MENON
AMBADY PANTHIYIL TOWERS, WARRIAM ROAD,
KOCHI-682 016.**

BY ADV.SRI.P.SATHISAN

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 20.05.2024, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J U D G M E N T

Dr. A.K. Jayasankaran Nambiar, J.

The Revenue is in appeal before us in this case impugning the order dated 26.08.2019 of the Income Tax Appellate Tribunal, Cochin Bench that cancelled the penalty imposed on the respondent/assessee by the Assessing Authority under Section 271(1)(c) of the Income Tax Act [hereinafter referred to as the "I.T. Act"], by raising the following questions of law:

1. Whether on the facts and in the circumstances of the case, the Tribunal was right to hold that 'the penalty proceedings initiated by the Assessing Officer is void abinitio' and is not such a decision perverse? And should not the Tribunal have considered the case on merits?

2. (a) Whether on the facts and in the absence of any prejudice and violation of natural justice being alleged or caused, the Tribunal is right in law in declaring the penalty order?

(b) Whether the Tribunal is justified in entertaining the belated Ground raised for the first time?

3. Whether the assessee having well understood the purport and import of the notice and having acted upon the same, is justified in challenging the same for the reason alleged?

4. Are not the 271(1)(c) penalty proceedings and penalty order legal and with jurisdiction and should not the Tribunal have upheld the same?

5. Whether, on the facts and in the circumstances of the case should not the Tribunal have held that the appellant had concealed long term capital gain on transfer of equity shares by furnishing inaccurate and false particulars and therefore liable to penalty under Section 271(1)(c) of the Act?

2. The brief facts necessary for disposal of this appeal are as follows:

The respondent/assessee had filed a return dated 30.07.2011 for the assessment year 2011-12 declaring a total income of Rs.70,74,466/-. In the said return, he had also computed a capital gain of Rs.37,66,168/-. The said return was processed under Section 143(1) of the I.T. Act on 28.12.2012. Subsequently, it came to the notice of the Revenue that there might have been a suppression of the capital gain declared by the assessee in the return that was filed on 30.07.2011. A summons was therefore issued under Section 131 of the I.T. Act to the respondent/assessee on 19.05.2014 calling for certain details with a view to ascertaining whether there was any suppression of income. While the respondent/assessee sought some time for furnishing the details and the Department granted the assessee the said time by issuing a fresh summons dated 05.06.2014 for furnishing the details, the details were eventually furnished by the assessee on 13.06.2014.

Thereafter through another summons dated 18.06.2014, the Revenue called for further details and those details were also furnished by the assessee on 19.06.2014 itself. Thereafter, by Annexure 'C' letter dated 23.06.2014, the respondent/assessee informed the Commissioner of Income Tax as also his Assessing Authority that on a review of the return that was originally filed by him, he came to understand that he had inadvertently taken into account the cost of bonus shares under capital gains on sale of equity shares of a company in which he was a share holder, and that the mistake occurred while working the capital gain tax based on the indexed value of equity shares. In the letter, he clearly indicated that he was convinced that the mistake in computation of capital gain had been occassioned at his instance, and therefore he was ready to pay differential tax on the differential amount of Rs.15,82,63,937/- that was computed under the head of capital gain.

3. On receipt of the said letter, the Revenue then proceeded to issue a notice under Section 148 of the I.T. Act for the purposes of re-assesssing the tax by including the escaped income. The said notice under Section 148 was issued to the respondent/assessee on 03.07.2014. On receipt of the said notice, the assessee proceeded to file a fresh return including the differential amount of capital

gain computed by him and intimated by him to the Department in Annexure 'C' letter dated 23.06.2014. The total tax liability of Rs.3,42,63,389/- together with the interest liability of Rs.1,39,81,676/- was thereafter paid by the assessee along with the return filed pursuant to the notice under Section 148 of the I.T. Act. In total, the respondent/assessee paid an amount of Rs.5,00,85,159/- towards tax and interest liability for the assessment year 2011-12.

4. The Revenue proceeded to complete the assessment for the assessment year 2011-12 under Section 143(3) read with Section 147 of the I.T. Act by Annexure 'E' order dated 31.01.2015. It is significant to note that in the assessment order so passed, there was no addition to the income of the assessee save to the extent already admitted by him through Annexure 'C' letter dated 23.06.2014.

5. The issue that arises for consideration in this appeal is not with regard to the assessment completed against the respondent/assessee but with regard to the penalty that was imposed on him under Section 271(1)(c) of the I.T. Act immediately thereafter. It would appear that while by Annexure 'F' notice dated 30.01.2015, the Revenue proposed the imposition of a penalty on

the respondent/assessee on the ground that the “assessee had concealed particulars of his income or furnished inaccurate particulars of such income”, the said notice did not clearly mention which of the two grounds i.e., concealment of income or furnishing inaccurate particulars of income formed the basis on which the notice for penalty had been issued. Notwithstanding the aforesaid discrepancy in the notice, the respondent/assessee preferred a detailed reply citing reasons as to why a penalty under Section 271(1)(c) could not be imposed on him. The explanation of the assessee did not however find favour with the Assessing Authority, who, by Annexure 'G' order dated 20.07.2015 confirmed a penalty equal to 100% of the tax allegedly sought to be evaded, namely, Rs.3,26,57,795/- on the respondent/assessee.

6. In the appeal preferred by the assessee before the First Appellate Authority, the Appellate Authority by Annexure 'H' order found that the requirement of “concealment of income”, which was a pre-requisite for invoking the provisions of Section 271(1)(c) of the I.T. Act, was not established on the facts of the instant case and therefore cancelled the penalty imposed on the assessee. The Revenue therefore preferred an appeal before the Appellate Tribunal against Annexure 'H' order of the First Appellate Authority. The Appellate Tribunal dismissed the appeal preferred

by the Revenue on technical ground and without going into the merits of the finding of the First Appellate Authority. The technical issue on which the Appellate Tribunal decided against the Revenue was that in Annexure 'I' notice that proposed the imposition of penalty on the respondent/assessee, the Revenue had not clearly indicated the specific ground on which it was proceeding against the respondent/assessee for imposition of penalty. The Tribunal, in particular, relied on various decisions of the High Courts and the Supreme Court to find that the Assessing Officer had not struck out the irrelevant provision of the notice and had thereby not specified whether he was levying penalty for concealment of particulars of income or furnishing of inaccurate particulars of income. It accordingly held that the notice issued by the Assessing Officer was bad in law, and could not support the imposition of penalty under Section 271(1)(c) of the I.T. Act.

7. We have heard Sri.Jose Joseph, the learned Standing Counsel for the appellant as also Sri.P.Sathisan, the learned counsel for the respondent/assessee.

8. On a consideration of the facts and circumstances of the case and the submissions made across the bar, we find that it is not in dispute that in the original return filed by the

respondent/assessee, only a lesser figure was returned both in respect of the total income as also capital gains earned by the respondent/assessee. It is also not in dispute that but for the investigation initiated by the Revenue, the differential income might have escaped assessment to tax. What is significant however is that it was during the course of the investigation initiated by the Revenue, but well before any conclusion could be arrived at by the Revenue as regards suppression/concealment of income, that the assessee in the instant case came forward and admitted before the Revenue authorities that he was convinced of the mistake occassioned at the time of filing the original return, and that he was ready and willing to pay the differential amount of tax computed by him based on a revised computation of the capital gains earned by him. We further find from the records that the differential tax, together with interest thereon, was subsequently paid by the respondent/assessee when he was afforded an opportunity of doing so by filing the necessary returns pursuant to the notice issued to him under Section 148 of the I.T. Act. In our view, on the peculiar facts of this case, the notice issued under Section 148 of the I.T. Act has to be seen as one that literally enabled the respondent/assessee to pay the differential tax along with interest thereon by filing a fresh return that was recognised under the I.T. Act. We have to remind ourselves that, but for the notice under Section 148 of the

I.T. Act, the assesseee in the instant case could not have paid the differential tax that was admitted by him as payable, because the time limit for filing returns in terms of Section 139 of the I.T. Act had already expired. At any rate, the subsequent payment of tax, based on the disclosure that was made prior to the notice under Section 148 of the I.T. Act, led to the finalisation of the assessment for the assessment year concerned [2011-12], and in the finalised assessment, there was no addition to the income of the respondent/assessee over and in addition to what was already disclosed and admitted by him before the Revenue authorities.

9. As already noticed, in the instant appeal, we are not concerned with the assessment that was completed on the assessee but on the penalty that was imposed on him under Section 271(1)(c) of the I.T. Act. The relevant portion of Section 271(1)(c) of the I.T. Act reads as follows:

> **"271.** (1) If the Assessing Officer or the Joint Commissioner (Appeals) or the Commissioner (Appeals) or the Principal Commissioner or Commissioner in the course of any proceedings under this Act, is satisfied that any person-
>
> (a) xxxxxx xxxxxx
>
> (b) xxxxxx xxxxxx
>
> (c) has concealed the particulars of his income or furnished inaccurate particulars of such income, or
>
> he may direct that such person shall pay by way of penalty,-

(*i*) xxxxxx xxxxxx

(*ii*) xxxxxx xxxxxx

(*iii*) in the cases referred to in clause (*c*) or clause (*d*), in addition to tax, if any, payable by him, a sum which shall not be less than, but which shall not exceed three times, the amount of tax sought to be evaded by reason of the concealment of particulars of his income or fringe benefits or the furnishing of inaccurate particulars of such income or fringe benefits.

[*Explanation 1.* - Where in respect of any facts material to the computation of the total income of any person under this Act,-

(*A*) such person fails to offer an explanation or offers an explanation which is found by the Assessing Officer or the or the Joint Commissioner (Appeals) or the Commissioner (Appeals) or the Principal Commissioner or Commissioner to be false, or

(B) such person offers an explanation which he is not able to substantiate and fails to prove that such explanation is *bona fide* and that all the facts relating to the same and material to the computation of his total income have been disclosed by him,

then, the amount added or disallowed in computing the total income of such person as a result thereof shall, for the purposes of clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed."

It will be seen from a perusal of Section 271 of the I.T. Act that it is a specific provision providing for imposition of penalties, and is a complete code in itself, regulating the procedure for the imposition of penalties prescribed. The proceedings are therefore to be conducted in accordance therewith, subject always to the rules of natural justice. The provisions for the assessment and levy of tax will not apply as such for the imposition of penalty, and when there is a specific provision, it is trite that it alone will govern the imposition of penalties. In terms of Section 271(1)(c) of the I.T. Act,

the penal provision is attracted only when the conditions therein are fulfilled namely, when there is a concealment of the particulars of an assessee's income or when the assessee has furnished inaccurate particulars of such income. The crucial question that arises for consideration before us is whether on the facts of the instant case those pre-conditions existed for initiating proceedings under Section 271 of the I.T. Act. Further, the provisions of Section 271(1) of the I.T. Act mandate that the existence of the conditions precedent for imposition of penalty under Section 271(1)(c) of the I.T. Act must have been noticed by the Assessing Authority in the course of some proceedings under the I.T. Act. In other words, the satisfaction of the Assessing Authority with regard to the existence of either of the conditions warranting the invocation of the provisions of Section 271(1)(c) had to be in the course of proceedings initiated by the Assessing Authority under the I.T. Act. In our view, the reference to proceedings under Section 271 of the I.T. Act, on the facts of the instant case, can only be a reference to the proceedings initiated against the assessee in terms of Section 148 of the I.T. Act. This is because the call for details and information under Section 131 of the I.T. Act cannot be seen as initiation of any proceedings under the I.T. Act but is merely a manifestation of the exercise of a power similar to that conferred to civil courts, by the Officers of the I.T. Department. If that be the

case, then what we have to examine in the instant case is whether at the time of issuance of notice under Section 148, the Assessing Authority can say that he was satisfied that the assessee had concealed the particulars of his income or furnished inaccurate particulars of such income. In our view, in the light of the disclosure made by the assessee, of the income that he had omitted to include in his original return, well before the date on which the notice under Section 148 of the I.T. Act was issued to him by the Assessing Authority, the Assessing Authority was effectively estopped from contending that he was satisfied at that point in time, of the assessee having concealed the particulars of his income or furnished inaccurate particulars of such income. Section 271(1)(c) no doubt authorises the imposition of a penalty irrespective of whether the assessee had any *mens rea* to occasion the default specified therein. The liability in that sense is a strict one as was the case under Section 11AC of the Central Excise Act, the scope of which was considered by the Supreme Court in **Union of India v. Dharmendra Textiles Processors – [(2008) 306 ITR 277].** It is therefore all the more necessary to strictly construe the provisions of Section 271(1)(c) to ensure that only the clear and unambiguous cases of defaults specified therein would attract a penalty. On the facts of this case, we fail to see how an assessee who disclosed his liability to tax, well before the Assessing Authority himself could

determine it, can be seen as having concealed or incorrectly stated the facts leading to his liability. To invoke the penal provisions of the Act against an assessee in such a situation would throw to the winds the elements of fairness in tax administration and discourage asssessees from disclosing defects in their tax returns before their Assessing Authorities. This is more so when, as in the present case, the assessee had also paid the interest on the differential tax to cover the period of delay in payment thereof. The payment of statutory interest having compensated the exchequer adequately, to further penalise the assessee would tantamount to an act of overkill and would be antithetical to the rule of law. We are of the firm view that the honesty of an assessee cannot attract the penal provisions under the I.T. Act and that, in the instant case, the essential pre-conditions for the invocation of the provisions of Section 271(1)(c) of the I.T. Act against the assessee were not established.

10. We might also in this connection notice *Explanation 1* to Section 271 which clarifies that where in respect of any facts material to the computation of the total income of any person under the Act, such person fails to offer an explanation or offers an explanation which is found by the Assessing Officer to be false, or such person offers an explanation which he is not able to substantiate and fails to prove that such explanation is *bona fide*

and that all facts relating to the same and material to the computation of his total income have been disclosed by him, it is only then that the amount added or disallowed in computing the total income of such person as a result thereof will be deemed to represent the income in respect of which particulars have been concealed for the purposes of Section 271(1)(c) of the I.T. Act. In our view, the *Explanation* clearly envisages that where as in the instant case, a satisfactory explanation has been offered by the assessee, well before the issuance of a notice to him under Section 148 of the I.T. Act and the admission of additional income made by the assessee has been accepted by the Revenue which completed the assessment under Section 143 read with Section 147 of the I.T. Act on that basis, the explanation offered by the assesee with regard to the differential income has to be been seen as accepted by the Revenue for the purposes of the *Explanation* under Section 271 of the I.T. Act. Axiomatically, therefore, the said additional income cannot be treated as concealed income for the purposes of Section 271(1)(c) of the I.T. Act.

11. We also find merit in the finding of the Appellate Tribunal in Annexure 'I' order that the notice proposing penalty, that was issued to the respondent/assessee, was inherently defective, in that, it had not specified the particular ground on

which the Revenue was proceeding against the assessee for the imposition of the penalty. Thus, in any view of the matter, we find that the imposition of penalty under Section 271(1)(c) of the I.T. Act on the respondent/assessee for the assessment year 2011-12 cannot be legally sustained.

12. Resultantly, for the reasons stated by the First Appellate Authority in Annexure 'H' order and the Appellate Tribunal in Annexure 'I' order, as supplemented by the reasons given in this judgment, we dismiss the I.T. Appeal by answering the questions of law raised against the Revenue and in favour of the respondent/assessee.

The I.T. Appeal is dismissed.

Sd/-
DR. A.K.JAYASANKARAN NAMBIAR
JUDGE

Sd/-
SYAM KUMAR V.M.
JUDGE

prp/21/5/24

APPENDIX OF I.T.A.NO.75/2020

APPELLANT'S ANNEXURES:

ANNEXURE-A	COPY OF THE ORIGINAL RETURN FILED BY THE ASSESEE.
ANNEXURE-B	COPY OF THE AGREEMENT DATED 04/07/2009.
ANNEXURE-C	COPY OF LETTER DATED 23/06/2014 FILED BY THE ASSESSEE.
ANNEXURE-D	COPY OF RETURN FILED IN PURSUANT TO NOTICE u/s 148.
ANNEXURE-E	COPY OF ASSSESSMENT ORDER u/s 143(3) r.w.s.147 DATED 30/01/2015.
ANNEXURE-F	COPY OF THE SHOW CAUSE NOTICE u/s 274 r.w.s. 271.
ANNEXURE-G	COPY OF THE ORDER u/s 271(1)(C) DATED 20/07/2015.
ANNEXURE-H	COPY OF CIT(A) ORDER DATED 24.10.2016.
ANNEXURE I	CERTIFIED COPY OF ITAT ORDER DT.26/08/2019.
ANNEXURE J	COPY OF THE MADRAS HIGH COURT ORDER IN THE CASE OF M/S SUNDARAM FINANCE LTD.
ANNEXURE K	COPY OF THE SUPREME COURT ORDER DISMISSING THE SLP FILED BY M/A. SUNDARAM FINANCE LTD.

RESPONDENT'S ANNEXURES: NIL.

//TRUE COPY//

P.S. TO JUDGE