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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ITA 1251/2018

PRINCIPAL COMMISSIONER OF INCOME TAX-9

.....Appellant

Through: Mr. Abhishek Maratha, Sr. SC
alongwith Mr. Parth Semiwal,
Mr. Apoorv Agarwal, Jr. SCs.
with Ms. Nupur Sharma, Mr.
Manav Goyal, Mr. Gaurav
Singh, Ms. Divya Verma and
Mr. Bhanukaran Singh Jodha,
Advs.

versus

AMUL GABRANI

.....Respondent

Through: Mr. Sandeep Chilana, Ms.
Anjali Jain, and Ms.
Kannopriya Gupta, Advs.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE RAVINDER DUDEJA

ORDER

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24.07.2024

1. This appeal calls in question the order of the Income Tax Appellate Tribunal ["**Tribunal**"] dated 03 April 2018. By our order dated 22 March 2024, we had succinctly captured the issues which arose, as would be evident from the extracts of that order which are reproduced hereinbelow: -

"1. Having heard Mr. Maratha, learned counsel appearing for the appellant, we note that the impugned judgment rendered by the Income Tax Appellate Tribunal ["**ITAT**"] would give rise to the following question:-

(a) Whether the ITAT in facts and circumstances of the case was correct in law in deleting the penalty of INR 1,97,70,670/- imposed by Assessing Officer under Section 271AAA of the Income Tax Act, 1961["**Act**"]?



2. While dealing with the issue of penalty under Section 271AAA of the Act, the ITAT has observed as follows: -

"2.4 If the aforesaid judicial pronouncements are analyzed with the facts of the present appeal there is uncontroverted finding in the impugned order and also in the assessment order that in computation of income, attached with the return, the assessee declared the surrendered amount of Rs. 19,77,06,696/- under the head "additional income" which was accepted by the Revenue. It is further noted that while initiating the penalty proceedings the Ld. AO nowhere stated as to why the penalty proceedings were initiated and whether the conditions laid down in the section were satisfied or not. The Ld. AO without assigning any reason and merely on the basis of surrender made by the assessee initiated penalty proceedings. The amount of surrender was made by the assessee on the basis of certain loose papers found and seized during search operation upon tecpro group at Gurgaon. There is a further observation that these papers were, dictated by the search team and further from the statement tendered by the assessee there is a condition that the surrender made by the assessee shall be without penal action by the Department whatsoever and the surrender was made to buy peace and to avoid litigation with the Department in the spirit of cooperation. Considering the totality of facts and the decision in CIT vs. Suresh Chander Mittal (251 ITR 9) (MP), we find merit in the conclusion drawn by the Ld CIT (A) and confirm the same, resultantly the appeal of the Revenue is dismissed."

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4. It is in the aforesaid backdrop that we prima facie find merit in the submission of Mr. Maratha, that a mere surrender of income would not absolve the assessee from the levy of penalty.

5. We are thus of the considered opinion that the appeal merits further consideration and it shall consequently stand admitted on the aforesaid question of law."

2. The principal question which is sought to be canvassed is whether the Commissioner of Income Tax (Appeals) ["CIT(A)"] and the Tribunal were justified in deleting the penalty which came to be imposed in terms of Section 271-AAA of the Income Tax Act, 1961 ["Act"], notwithstanding a purported failure on the part of the assessee to substantiate the manner in which the undisclosed income was derived.



3. We note that the Assessing Officer [“AO”] while passing the penalty order had in this regard observed as follows:-

“I. There is no doubt that the assessee had admitted the undisclosed income of Rs. 19,77,06,696/- in its hands but the assessee fails to specify the manner in which such income has been derived.

II. The return of income filed u/s 139(1) cannot be considered as voluntary return as the same has been filed after the assessee was subjected to search u/s 132 and it was this search and the fact of seizure of incriminating documents / assets which resulted into filing of enhanced income u/s. 139(1) of the I. T. Act.

III. Disclosure of undisclosed income in the return filed U/S 139(1) shall not absolve the assessee from penalty U/S 271AAA. The immunity from penalty provided in section 158BFA has not been provided in the new assessment scheme w.e.f. 1.6 2003.”

4. When the matter reached the CIT(A), the said authority took the view that the absence of any specific query having been put to the assessee to disclose the manner in which the undisclosed income had been derived would be fatal, and consequently it could not be said that the provisions of sub-section (2) of Section 271-AAA of the Act had not been adhered to. It is this view which has come to be affirmed by the Tribunal.

5. Section 271-AAA of the Act reads as follows: -

“271-AAA. Penalty where search has been initiated.—

(1) The Assessing Officer may, notwithstanding anything contained in any other provisions of this Act, direct that, in a case where search has been initiated under Section 132 on or after the 1st day of June, 2007 [but before the 1st day of July, 2012], the assessee shall pay by way of penalty, in addition to tax, if any, payable by him, a sum computed at the rate of ten per cent of the undisclosed income of the specified previous year.

(2) Nothing contained in sub-section (1) shall apply if the assessee,—

(i) in the course of the search, in a statement under sub-section (4) of Section 132, admits the undisclosed income and specifies the manner in which such income has been derived;



(ii) substantiates the manner in which the undisclosed income was derived; and

(iii) pays the tax, together with interest, if any, in respect of the undisclosed income.

(3) No penalty under the provisions of clause (c) of sub-section (1) of Section 271 shall be imposed upon the assessee in respect of the undisclosed income referred to in sub-section (1).

(4) The provisions of Sections 274 and 275 shall, so far as may be, apply in relation to the penalty referred to in this section.

Explanation.—For the purposes of this section,—

(a) “undisclosed income” means—

(i) any income of the specified previous year represented, either wholly or partly, by any money, bullion, jewellery or other valuable article or thing or any entry in the books of account or other documents or transactions found in the course of a search under Section 132, which has—

(A) not been recorded on or before the date of search in the books of account or other documents maintained in the normal course relating to such previous year; or

(B) otherwise not been disclosed to the [Principal Chief Commissioner or Chief Commissioner] or [Principal Commissioner or Commissioner] before the date of search; or

(ii) any income of the specified previous year represented, either wholly or partly, by any entry in respect of an expense recorded in the books of account or other documents maintained in the normal course relating to the specified previous year which is found to be false and would not have been found to be so had the search not been conducted;

(b) “specified previous year” means the previous year—

(i) which has ended before the date of search, but the date of filing the return of income under sub-section (1) of Section 139 for such year has not expired before the date of search and the assessee has not furnished the return of income for the previous year before the said date; or

(ii) in which search was conducted.”

6. As is manifest from a reading of the aforesaid provision, an assessee would, pursuant to a search which may have been initiated



and where undisclosed income is unearthed, become liable to pay a penalty in addition to tax at a rate computed at 10% of the undisclosed income in the specified previous year. In terms of sub-section (2), however, the assessee would stand absolved of the additional tax burden if it were able to satisfy the preconditions which are prescribed therein. In terms of Section 271-AAA(2), the statute clearly provides that sub-section (1) would not apply provided the assessee admits to the undisclosed income and specifies the manner in which such income had been derived in a statement made and recorded under Section 132(4). That provision then places the additional burden of substantiating the manner in which the undisclosed income was derived upon the searched assessee. It is only thereafter that in terms of clause (iii) of sub-section (2), a payment of tax together with interest in respect of undisclosed income is contemplated.

7. As we read clauses (i) and (ii) of sub-section (2), it becomes evident that there is a statutory obligation placed upon the assessee to not only “specify” the manner in which the undisclosed income had been derived but also to “substantiate” the statement that may be made under Section 132(4). We also bear in mind the indubitable position that for the purposes of being absolved from the additional tax burden which stands constructed in terms of Section 271-AAA(1), the burden is placed upon the assessee to establish that its case falls squarely within the scope and ambit of sub-section (2) thereof.

8. The imperatives underlying the statutory provision, when it speaks of specification and substantiation of the manner in which undisclosed income was derived, stands enunciated in a decision of the Delhi High Court in **Principal Commissioner of Income Tax vs.**



Ritu Singal¹ and relevant extracts whereof are reproduced hereinbelow: -

“11. Explanation 5(2) of section 271(1)(c) was considered by the Supreme Court in Asst. CIT v. Gebilal Kanhaialal (2012) 348 ITR 561 (SC). It was held that Explanation 5(2) to section 271(1)(c) provides, where, in the course of search under section 132, the assessee, found to be owner of unaccounted assets, claims that such assets have been acquired by him by utilizing, wholly or partly, his income for any previous year which has ended before the date of search or which is to end on or after the date of search, then, notwithstanding that such income is declared by him in any return of income furnished on or after the date of search, he shall be deemed to have concealed particulars of his income for the purpose of imposition of penalty, but there are exceptions to such deeming provision or to such a presumption of concealment. The court then said (page 565):

"It provides that where, in the course of search under section 132, the assessee is found to be the owner of unaccounted assets and the assessee claims that such assets have been acquired by him by utilizing, wholly or partly, his income for any previous year which has ended before the date of search or which is to end on or after the date of search, then, in such a situation, notwithstanding that such income is declared by him in any return of income furnished on or after the date of search, he shall be deemed to have concealed the particulars of his income for the purposes of imposition of penalty under section 271(1)(c). The only exception to such a deeming provision or to such a presumption of concealment are given in sub-clauses (1) and (2) of Explanation 5. In this case, we are concerned with interpretation of clause (2) of Explanation 5, which has been quoted above. Three conditions have got to be satisfied by the assessee for claiming immunity from payment of penalty under clause (2) of Explanation 5 to section 271(1)(c). The first condition was that the assessee must make a statement under section 132(4) in the course of search stating that the unaccounted assets and incriminating documents found from his possession during the search have been acquired out of his income, which has not been disclosed in the return of income to be furnished before expiry of time specified in section 139(1). Such statement was made by the karta during the search which concluded on August 1, 1987. It is not in dispute that condition No. 1 was fulfilled. The second condition for availing of the immunity from penalty under section 271(1)(c) was that the assessee

¹ 2018 SCC OnLine Del7692



should specify, in his statement under section 132(4), the manner in which such income stood derived.

Admittedly, the second condition, in the present case also stood satisfied. According to the Department, the assessee was not entitled to immunity under clause (2) as he did not satisfy the third condition for availing of the benefit of waiver of penalty under section 271(1)(c) as the assessee failed to file his return of income on July 31, 1987, and pay tax thereon particularly when the assessee conceded on August 1, 1987 that there was concealment of income. The third condition under clause (2) was that the assessee had to pay the tax together with interest, if any, in respect of such undisclosed income. However, no time limit for payment of such tax stood prescribed under clause (2). The only requirement stipulated in the third condition was for the assessee to 'pay tax together with interest'. In the present case, the third condition also stood fulfilled. The assessee has paid tax with interest up to the date of payment. The only condition which was required to be fulfilled for getting the immunity, after the search proceedings got over, was that the assessee had to pay the tax together with interest in respect of such undisclosed income up to the date of payment. Clause (2) did not prescribe the time limit within which the assessee should pay tax on income disclosed in the statement under section 132(4).

For the above reasons, we hold that the assessee was entitled to immunity under clause (2) of Explanation 5 to section 271(1)(c)."

12. Like in that case, the first condition under section 271AAA is that the assessee must make a statement under section 132(4) in the course of search stating that the unaccounted assets and incriminating documents found from his possession during the search have been acquired out of his income, which has not been disclosed in the return of income to be furnished before expiry of time specified in section 139(1). The second condition for availing of the immunity from penalty under section 271(1)(c) is that the assessee should specify, in his statement under section 132(4), the manner in which such income stood derived. The Revenue contended Gebilal Kanhaialal that though the second condition stood satisfied, the third condition was not sought. It urged that the assessee was not entitled to immunity under clause (2) as he did not satisfy the third condition for availing of the benefit of waiver of penalty under section 271(1)(c) as he failed to file his return of income on July 31, 1987 and pay tax thereon particularly when the assessee conceded on August 1, 1987 that there was concealment of income. The third condition under clause (2) was that the



assessee had to pay the tax together with interest, if any, in respect of such undisclosed income. The court held that no time-limit for payment of such tax stood prescribed under clause (2) and that the only requirement stipulated in the third condition was for the assessee to "pay tax together with interest". It was held in *Gebilal Kanhaialal* (supra) that the third condition was also fulfilled as the assessee paid tax with interest up to the date of payment. The only condition which was required to be fulfilled for securing the immunity, after the search proceedings got over, was that the assessee had to pay the tax together with interest in respect of such undisclosed income up to the date of payment. Explanation 5(2) did not prescribe the time-limit within which the assessee should pay tax on income disclosed in the statement under section 132(4).

13. In the present case, during the course of the statement made by the assessee, during the course of the search on March 4, 2010, that she had lent Rs. 16 crores in aggregate to three individuals during the financial year 2009-10. This was in response to a query by the Revenue officials during the course of search when the basis of page 81 of Exhibit A-3 was sought to be questioned. To the next question, the assessee replied that the said amount of "Rs. 16 crores is my unaccounted income for the financial year 2009-10 relevant for the assessment year 2010-11." However, the requirement of the assessee having to "(ii) substantiates the manner in which the undisclosed income was derived" was satisfied. Although a general statement that the undisclosed income was the source of Rs. 16 crores was disclosed, no "substantiation" of the "manner" of deriving such undisclosed income was revealed.

14. In construing section 271AAA one must not lose sight of its essential purpose which resulted in its enactment. There is a penalty at the rate of 10 per cent. of the undisclosed amount declared, if the conditions in section 271AAA(2) are not met with. This is quite different from the penal provision under section 271(1)(c) of the Act, which directs that if income is concealed or inaccurate returns are filed, which are disallowed by the Assessing Officer, the penalty shall be "three times the amount of tax sought to be evaded." In the case of amounts disclosed during the course of search, the penalty amount is only ten per cent. of the undisclosed income. Parliament has, therefore, given a different treatment to the latter category. At the same time, if an assessee were to successfully urge the "escape route" so to say, of section 271AAA(2), all three conditions mentioned in the provision, (as held in *Gebilal Kanhaialal* in respect of *pari materia* provisions) have to necessarily be fulfilled. In the present case, the assessee, while declaring the "undisclosed income" also stated, that "the surrender is being made subject to no penal action of section 271(1)(c)".



15. While dealing with a case of similar surrender—but made in the course of survey proceedings, by an assessee (which led to imposition of penalty), the Supreme Court, in *MAK Data (P) Ltd. v. CIT* (2013) 358 ITR 593 (SC) held as follows (page 597):

"The Assessing Officer, in our view, shall not be carried away by the plea of the assessee like 'voluntary disclosure', 'buy peace' 'avoid litigation', 'amicable settlement', etc. to explain away its conduct. The question is whether the assessee has offered any Explanation for concealment of particulars of income or furnishing inaccurate particulars of income. Explanation to section 271(1) raises a presumption of concealment, when a difference is noticed by the Assessing Officer, between reported and assessed income. The burden is then on the assessee to show otherwise, by cogent and reliable evidence. When the initial onus placed by the Explanation, has been discharged by him, the onus shifts on the Revenue to show that the amount in question constituted the income and not otherwise.

The assessee has only stated that he had surrendered the additional sum of Rs. 40,74,000 with a view to avoid litigation, buy peace and to channelize the energy and resources towards productive work and to make amicable settlement with the Income-tax Department. The statute does not recognize those types of defences under Explanation 1 to section 271(1)(c) of the Act. It is trite law that the voluntary disclosure does not release the appellant-assessee from the mischief of penal proceedings. The law does not provide that when an assessee makes a voluntary disclosure of his concealed income, he had to be absolved from penalty.

We are of the view that the surrender of income in this case is not voluntary in the sense that the offer of surrender was made in view of detection made by the Assessing Officer in the search conducted in the sister concern of the assessee. In that situation, it cannot be said that the surrender of income was voluntary. The Assessing Officer during the course of assessment proceedings has noticed that certain documents comprising share application forms, bank statements, memorandum of association of companies, affidavits, copies of Income-tax returns and assessment orders and blank share transfer deeds duly signed, have been impounded in the course of survey proceedings under section 133A conducted on December 16, 2003, in the case of a sister concern of the assessee."

16. That the income which was ultimately brought to tax pursuant to the disclosure made, which was voluntary on the part of the



assessee is stating the obvious. The assessee merely stated that the sums advanced were undisclosed income. However, she did not specify how she derived that income and what head it fell in (rent, capital gain, professional or business income out of money lending, source of the money, etc.). Unless such facts are mentioned with some specificity, it cannot be said that the assessee has fulfilled the requirement that she, in her statement (under section 132(4)) "substantiates the manner in which the undisclosed income was derived". Such being the case, this court is of the opinion that the lower appellate authorities misdirected themselves in holding that the conditions in section 271AAA(2) were satisfied by the assessee."

9. Although learned counsel for the respondents sought to draw support from an earlier judgment rendered in **Principal Commissioner of Income Tax vs. Emirates Technologies Pvt. Ltd.**², we find that the same rests solely on the Court ultimately coming to conclude that the same did not give rise to a substantial question of law. In any case, we find ourselves bound by the more elaborate discussion which appears in the judgment rendered in *Ritu Singal*.

10. Accordingly, the appeal is allowed and the questions raised are answered in favour of the appellant. The order of the Tribunal and CIT(A) shall stand set aside.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

JULY 24, 2024/neha

² (2017) 399 ITR 189 (Del.)