

**IN THE HIGH COURT OF KARNATAKA
AT BANGALORE**

Dated this the 2nd day of April, 2012

PRESENT

THE HON'BLE MR JUSTICE D V SHYLENDRA KUMAR

AND

THE HON'BLE MR JUSTICE K GOVINDARAJULU

Income Tax Appeal No. 522 of 2006

BETWEEN:

1. THE COMMISSIONER OF INCOME TAX
CENTRAL CIRCLE,
C.R. BUILDING, QUEENS ROAD
BANGALORE.
 2. THE INCOME TAX OFFICER
WARD-6(2),
C.R. BUILDING, QUEENS ROAD
BANGALORE.
- ... APPELLANTS

[By Sri F R Indrakumar, Sr. Counsel
with Sri E I Sanmathi, Adv.]

AND:

M/S SANGMESHWARA ASSOCIATES
191, SANKEY ROAD
SADASHIVANAGAR
BANGALORE.

... RESPONDENT

[By Sri Ashok A Kulkarni, Adv. for
M/s K R Prasad, Adv.]

THIS APPEAL IS FILED UNDER SECTION 260A OF THE
INCOME TAX ACT, 1961 ARISING OUT OF ORDER DATED
29.09.2005 PASSED IN ITA NO. 256/BANG/2002, FOR THE
ASSESSMENT YEAR 1996-97, PRAYING TO SET ASIDE THE SAID
ORDER OF THE TRIBUNAL AND ETC.,

THIS APPEAL COMING ON FOR HEARING, THIS DAY, **SHYLENDRA KUMAR J.**, DELIVERED THE FOLLOWING:

J U D G M E N T

Appeal by the revenue under Section 260A of the Income Tax Act, 1960 [for short, the Act] directed against the affirmation order dated 29-9-2005, passed by the Income Tax Appellate Tribunal, Bangalore Bench 'B', in ITA No 256/Bang/2002, dismissing the appeal of the revenue before the tribunal.

2. The assessee is a partnership firm and the assessment year is 1996-97. The assessee had filed its return disclosing an income of ₹ 4,68,340/-. This income had been disclosed in the original return and the assessment was completed under Section 143(3) of the Act.

3. The assessing officer reopened the assessment, particularly as it was found that there was a cash credit entry for a sum of ₹ 4,50,000/-, as disclosed in the books of accounts of the assessee and not merely for the



assessment year in question but for the subsequent year also; that the person in whose name the credit stood namely Sri Thimme Gowda had pleaded ignorance of any such credit given to the assessee during the course of assessment proceedings of the said Thimme Gowda. It is because of this, the assessing officer issued notice for reopening the concluded assessment and called upon the assessee to file a fresh return. In response to said notice issued under Section 148 of the Act, the assessee filed a fresh return for the very assessment year, but indicated the cash credit of ₹ 4,50,000/- as income of the assessee in this return.


4. The assessing officer concluded the assessment based on the return filed by the assessee in response to the notice under Section 148 of the Act. The assessing officer while brought to tax the original income as returned by the assessee and the addition in the return filed pursuant to Section 148 notice and therefore the total taxable income was assessed at ₹ 9,18,340/-



against the original income as returned by the assessee viz., ₹ 4,68,340/- and called upon the assessee to pay the difference in the tax, also directed to issue penalty notice for levying penalty under Section 271(1)(c) of the Act.

5. The assessee offered his explanation in response to said notice claiming that the assessee-firm was in the business of bidding for toddy contracts; that the said Thimme Gowda was also in the same line of business; that there was some understanding between the two; that they had exchanged a demand draft showing the amount as credit due to said Thimme Gowda in the books of accounts of the assessee, but nevertheless for buying peace with the department, the assessee offered the additional income in response to the notice under Section 148 of the Act and therefore prayed for dropping penalty proceedings.

6. Assessee also contended that for the reasons best known to the assessee, if the said Thimme Gowda has



refused to confirm credit as indicated in the books of account of the assessee the assessee could not be held responsible for the same, as the amount had been received by way of demand draft etc.

7. The assessing officer examined the question of levy penalty under Section 271(1)(c) of the Act in the background of decided case of Supreme Court indicating that the assessee had persisted the cash credit for the subsequent assessment year also, but it was by sheer chance that this was found to be not a true cash credit in the course of the assessment proceedings of the said Thimme Gowda, particularly after the statement of said person to the authority that he had never lent such an amount to the assessee, it became necessary for the authorities to reopen the concluded assessment of the assessee and the assessee having offered to pay tax on the cash credit as income for the period, only after receipt of the notice under Section 148 of the Act, thought it proper to levy penalty being a situation of furnishing

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inaccurate particulars of income, coming within Section 279(1)(c) of the Act.

8. The assessing officer also felt that in the circumstance under which the assessee came forward to offer the amount as income is only in a situation when the concluded assessment was reopened and notice was issued to the assessee and therefore it can be presumed to be a situation of not a voluntary disclosure by the assessee, but because that in the circumstance the assessee was left with no choice but to offer the amount as income and therefore recorded a finding that there was no mitigating circumstance to justify non-levy of penalty etc. The penalty was in sum of ₹1,80,000/- being 100% of the tax amount which was sought to be paid.

9. The assessee appealed to the commissioner of income tax [appeals] and met with success. The commissioner was of the view that when the order of assessment is under Section 143(3) read with Section 147



of the Act, not much reason was forthcoming for the issue of notice under Section 148 of the Act; that no details of the nature of credit of ₹ 4,50,000/- has been discussed; that the explanation offered by the assessee was not independently examined; that it was a credit entry in favour of one Thimme Gowda; that the ratio of the decision of the Supreme Court in the case of **SIR SHADILAL SUGAR & GENERAL MILLS LTD vs COMMISSIONER OF INCOME TAX [(1937) 168 ITR 705]** was attracted and in favour of the assessee and therefore allowed the appeal, set aside the order of penalty.

10. It was now the turn of the revenue to go in appeal before the tribunal. The tribunal held that the revenue which has gathered information against the assessee that too in the form of sworn statement by said Thimme Gowda, having not given opportunity to the assessee to cross-examine the said person, that was a lacunae in the penalty proceedings and also was of the opinion that the assessing authority having not recorded his satisfaction



before initiating penalty proceedings was yet another drawback in the order of levying penalty and therefore dismissed the appeal, affirming the order passed by the appellate commissioner. For a good measure, the tribunal added that the explanation offered by the assessee during the course of penalty proceedings cannot be said to be either untrue or false and therefore also held that levy of penalty was not warranted. It is against this order of the tribunal, the present appeal by the revenue.

11. Appeal had been admitted to examine the following substantial question of law:

“Whether the appellate authorities were right in holding that the imposition of penalty by the assessing authority in exercise of power under Sec. 271(1)(c) of the IT Act, 1961 is after satisfying himself that the non-disclosure of income warrants imposition of penalty?”

12. We have heard Sri E R Indrakumar, learned senior counsel appearing for the appellant-revenue and Sri Ashok A Kulkarni, learned counsel for the respondent-assessee at some length.



13. Sri Kulkarni has raised a preliminary objection regarding maintainability of the appeal by pointing out that in terms of the Board's circular which has come to be revised from time to time and instruction No 2 of 2005 dated 24-10-2005 governs the present appeal; that for an appeal before a high court filed under Section 260A of the Act, unless the subject matter is above ₹ 4,00,000/- monetary value, the department should not go in appeal and therefore the present appeal in respect the subject matter of ₹ 1,80,000/- is not maintainable.

14. Sri Kulkarni has also placed reliance on the decision of a Division Bench of this court rendered on 20-9-2011 in ITA No 907 of 2006, referring to this circular and holding that the appeal was not tenable, as the subject matter of the appeal was less than the monetary limit as per the circular.

15. Sri E R Indrakumar, learned senior counsel appearing for the appellant-revenue, on the other hand,



by drawing out attention to para-3 of the very circular, reading as under:

3. The Board has also decided that in cases involving substantial question of law of importance as well as in cases where the same question of law will repeatedly arise, either in the case concerned or in similar cases, should be separately considered on merits without being hindered by the monetary limits.

submits that the very circular indicates the decision of the Board to the effect that in cases involving substantial questions of law of importance as well as in cases where a question of law will be recurring from year to year or from assessee to assessee, such appeals can be pursued by the department without being hindered by the monetary limit. Learned senior counsel submits that the present appeal is one such case and the appellant-revenue was conscious of the circular and it is only after it was examined, it was found that the question was one of importance, a decision was taken to pursue the appeal and therefore neither the circular nor the judgment relied upon by the learned



counsel for the respondent-assessee can come in the way of the present appeal.

16. This court on being satisfied that the appeal involves one such question admitted the appeal on 18-7-2007. The circular, assuming it is so, cannot be a hindrance for the appeal having been presented before this court and more so when the appeal is admitted by this court. But even as per the circular, clause-3 does carve out an exception with regard to the embargo placed on the monetary limit of the subject matter of the appeal. Therefore, the preliminary objection may not hold water.

17. However, before we proceed to take up the appeal on merits, we would like to observe that there appears to be an incongruity in retaining clause-2 of the circular relating to an appeal under Section 260A of the Act and indicating its limit to be up to ₹ 4,00,000/-, as an appeal under Section 260A can be examined only if it involves a substantial question of law and not otherwise. Of



course, it can, at the best, be a guiding factor to the revenue to be satisfied itself before preferring such appeals under Section 260A of the Act which do not involve substantial questions of law and keep seeking opinion of the high court whether a substantial question of law is involved or otherwise.

18. Be that as it may, this controversy does not in any way alter the position in this appeal, as the appeal has, in fact, been admitted on the premise of involving a substantial question of law.

19. In so far as the merits of the matter is concerned, submission of Sri E R Indrakumar, learned senior counsel appearing for the appellant-revenue is that levy of penalty under 271(1)(c) of the Act has been subject matter of a good number of decisions; that there has been a good number of legislative changes made to the section and the legislative changes have the effect of sustaining a levy of penalty even when there is no element of *mens rea*



involved; that the explanation-1 added to Section 271(1)(c) of the Act, particularly explanation-1B, reading as under:

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

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(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.

has in fact gone to the extent of an income in respect of which the assessee is unable to come up with a proper explanation and which explanation is found to be incorrect at a later stage, and which is also found to be not *bona fide*, is presumed to be a situation of concealment; that in the present case, the assessee in



fact had admitted the concealment of true particulars of income as returned in the original return by filing a return in response to Section 148 Notice and had itself offered the amount of ₹ 4,50,000/- which had earlier been shown as cash credit, as income and therefore all such questions may not be much relevance, particularly as discussed by the appellate commissioner and the tribunal.

20. However, Sri Indrakumar has placed reliance on the decision of the Supreme Court in the case of **K P MADHUSUDHANAN vs COMMISSIONER OF INCOME TAX [(2001) 251 ITR 99]** and submits that the Supreme Court had occasion to examine the ratio of its earlier decision in **SIR SHADILAL SUGAR AND GENERAL MILLS LTD** [supra] and has clearly held that the ratio in **SIR SHADILAL SUGAR AND GENERAL MILLS LTD** [supra] does not hold the field any more in view of the amendment to explanation-B as under:



No express invocation of the Explanation to section 271 in the notice under section 271 is, in our view, necessary before the provisions of the Explanation therein are applied. The High Court at Bombay was, therefore, in error in the view that it took and the Division Bench in the impugned judgment was right.

Learned counsel for the assessee then drew our attention to the judgment of this court in *Sir Shadilal Sugar and General Mills Ltd. v. CIT* [1987] 168 ITR 705. He submitted that the assessee had agreed to the additions to his income referred to hereinabove to buy peace and it did not follow therefrom that the amount that was agreed to be added was concealed income. That it did not follow that the amount agreed to be added was concealed income is undoubtedly what was laid down by this court in the case of *Sir Shadilal Sugar and General Mills Ltd.* [1987] 168 ITR 705 and that, therefore, the Revenue was required to prove the mens rea of a quasi-criminal offence. But it was because of the view taken in this and other judgments that the Explanation to section 271 was added. By reason of the addition of that Explanation, the view taken in this case can no longer be said to be applicable.

The appeal is, therefore, dismissed with costs.

21. Sri Indrakumar has also placed reliance on the decision of the Supreme Court in the case of **COMMISSIONER OF INCOME TAX vs ONKAR SARAN**



AND SONS [(1992) 195 ITR 1(SC)] to submit that while the law to be made applicable for the levy of penalty is only with reference original return filed and submitted that mere fact that the assessee filed a return in response to the notice issued under Section 148 of the Act and on this occasion chose to disclose the true particulars of the income and assuming that the assessment has been concluded based on such return without any additions or deletions, that will not in any way absolve the assessee from the attraction of Section 271(1)(c) of the Act and therefore has submitted that the appellate commissioner and the tribunal have committed an error in law in opining that no penalty was leviable, as the assessee has *bona fide* filed return and had not suppressed any income in the return pursuant to notice under Section 148.

22. Reliance is also placed on a Division Bench decision of Madras High court in the case of **HENRY ISIDORE vs COMMISSIONER OF INCOME TAX [(1996) 222 ITR 496]**. Specific attention was drawn to contend that even



in a situation where the assessee files a revised return and the court found it was not as though there was no concealment, penalty can be levied and submits that it is *a fortiori* so in a case where a second return is filed in response to notice issued under Section 148 of the Act. However, the observation in the decision to the effect that furnishing of incorrect particulars or concealment in the subsequent return cannot give cause to multiple levy of penalty, but penalty can be only on the original return, as had been filed by the assessee and if it had resulted in some concealment and is what is sought to be highlighted.

23. Sri Indrakumar has also submitted that satisfaction of the assessing officer is clear from the fact that he has directed initiation of penalty proceedings while passing orders pursuant to the notice under Section 148 of the Act and submits that this is sufficient awareness on the part of the assessing officer about his satisfaction, as a



conscious decision is taken for initiation of penalty proceedings.

24. Sri Ashok A Kulkarni, learned counsel for the respondent-assessee, on the other hand, has raised three contentions. It is firstly contended that the assessment order with reference to which penalty has been levied viz., assessment order passed pursuant to the notice issued under Section 148 of the Act does not in any way show any addition or deletion of any income to the return or deletion of deductions claimed and therefore with reference to the language of the statutory provisions, submits that there was neither any concealment nor any inaccurate particulars furnished in the return, which the assessee had filed, though may be pursuant to notice issued under Section 148 of the Act and which was finalized by the assessing officer. Submission is that penalty is justified only if there is concealment and that concealment is due to either suppression of real income or in a case of furnishing of inaccurate particulars.



25. Sri Kulkarni has also strongly contended that in the absence of a clear satisfaction recorded by the assessing officer, levy of penalty is not justified and in support of his submissions, reliance is placed on the judgment of the Delhi High Court in the case of **COMMISSIONER OF INCOME TAX vs RAM COMMERCIAL ENTERPRISES LTD. [(2000) 246 ITR 568]** and a judgment of Madhya Pradesh High Court in the case of **COMMISSIONER OF INCOME TAX vs SURESH CHANDRA MITTAL [(2000) 241 ITR 124]** and this judgment having been upheld by the Supreme Court in the case of **COMMISSIONER OF INCOME TAX vs SURESH CHANDRA MITTAL [(2001) 251 ITR 9]** to submit that penalty is not justified in a situation where the assessee offers an explanation and unless that explanation is proved to be false by the revenue and submits that in the present case, there being no specific recording of finding as to how the explanation offered by the assessee is false and on the other hand, the assessee having indicated that though there was no



concealment on its part more so when the assessee offered the income to buy peace than to keep litigating over the matter and that being a *bona fide* explanation, there was no justification for the levy of penalty.

26. Sri Kulkarni has also drawn our attention to the fiction created under Section 271(1B) of the Act to submit that as there was no addition of income to the return filed nor any deletion of particulars of deductions claimed and on the other hand, the return having been processed on and on the basis of the return filed by the assessee, penalty is not attracted etc.

27. On a perusal of section 271(1)(c) of the Act we find that penalty under Section 271(1)(c) of the Act on the language of the very Section is justified only when the assessee has concealed particulars of his income or is furnishing inaccurate particulars of such income etc. Non-disclosure or concealment may be total, non-disclosure or even while disclosing, a lesser amount being



disclosed can constitute furnishing of inaccurate particulars.

28. In the instant case, the assessee had filed a return and had disclosed the income. However, later the assessee did file another return in response to the notice issued under Section 148 of the Act and in this return what had not been shown as income earlier but claimed as a cash credit was offered as income. The assessment was concluded on such premises.

29. Judicial pronouncements indicate that disclosure of income pursuant to a search conducted at the premises of the assessee or any other place as a sequel to some development and even if no notice had been issued and the assessee had not been called upon to file a proper return, nevertheless, amounts to concealment of income even in a situation where the assessee had filed such a return before receipt of any notice.



30. We can only say that a return filed pursuant to a notice under Section 148 of the Act for reopening of a concluded assessment stands on a much higher pedestal and the fact that an assessment pursuant to notice issued under Section 148 results in a higher tax liability is obviously a situation where it can be readily inferred that the assessee had not furnished full particulars of his correct or true income and therefore reopening became necessary.

31. It is not as though in the present case, subsequent return was filed voluntarily, but only upon issue of notice under Section 148 of the Act. We are of the clear view that a situation of this nature clearly attracts the provisions of Section 271(1)(c) of the Act. Even judicial decisions are also to the same effect, particularly as opined by the Supreme Court in the cases of **K P MADHUSUDHANAN** [supra] and **ONKAR SARAN AND SONS** [supra] and in the decision rendered by the Madras High Court in the case of **HENRY ISIDORE** [supra].



32. The decisions referred and relied upon by Sri Kulkarni, learned counsel for the respondent-assessee do not advance the case of the assessee in the present case, as the mere fact that the assessee comes up with an explanation that the income he has offered is only to buy peace and not a suppression nor concealment, but on the other hand a clear case of admission of not furnishing true or correct income earlier.

33. We are also of the view that the principles relating to offering the person whose statement the revenue or the assessing officer had recorded for cross examination will arise only where the matter is contested etc. With the assessee itself having admitted that cash credit entry is an income, going back from that saying that it was only to buy peace is not, in our considered opinion, an acceptable explanation to say that it is not an income. There is distinction between an amount being brought to tax as income and an assessee offering that as an income to buy peace etc. It may be an explanation for the earlier



default, but it cannot detract from the fact that amount has been assessed as income and but for the reopening of the assessment proceedings, the amount would have escaped assessment and tax.

34. We cannot also avoid to observing that the proceedings for reopening the assessment is hedged by time limits and the revenue cannot invoke it at any point of time and under any circumstance. If it is so invoked within the limits of law, the consequences follow and we are of the opinion that no premium can be placed on the conduct of the assessee in a situation where the assessee had not furnished true and correct particulars of income earlier and therefore a situation arose for levy of penalty and also justifies the levy of penalty.

35. In so far as the argument relates to non-recording of satisfaction for levy of penalty by the assessing officer and the decision relied upon by Sri Kulkarni in this regard is concerned, we are of the view that the assessing officer showing his awareness about the need and necessity to



initiate penalty proceedings is sufficient satisfaction as indicated in the order of assessment leading to penalty proceedings. Penalty proceedings are independent proceedings and the order should justify itself and not merely on an earlier satisfaction. Therefore, we opine that the awareness shown by the assessing officer about the need to initiate penalty proceedings is a good enough satisfaction on the part of the assessing officer.

36. In a situation where the assessee admits that a return which had been filed earlier did not disclose a true or full income, which is the case in the present situation, does not warrant proof or burden on the revenue to prove things, as it is well settled legal principle that any proof and manner of proof are all not required when there is an admission. Proof is required where it becomes a contentious issue and person asserting is required to make good his version. But in a situation where it is not contested, but admitted, production of proof is not necessary nor warranted in law.



37. In this view of the matter, we are of the opinion that both the appellate commissioner and the tribunal erred in setting aside the order of the assessing officer levying penalty, by adverting to irrelevant grounds and on untenable reasoning.

38. The decisions relied upon also did not further the case of the assessee and therefore we allow this appeal and set aside the order of the tribunal by answering the question in favour of the revenue and against the assessee.

39. Appeal allowed and the order of the assessing officer restored.

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JUDGE

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