IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL NO. 1181 of 2010
With
TAX APPEAL NO. 1182 of 2010
TO
TAX APPEAL NO. 1185 of 2010

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE KS JHAVERI

and
HONOURABLE MR.JUSTICE K.J.THAKER

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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KIRIT DAHYABHAI PATEL....Appellant(s)

Versus

ASSISTANT COMMISSIONER OF INCOME TAX....Opponent(s)

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Appearance:

MR. SAURABH M SOPARKAR, SENIOR COUNSEL WITH MRS SWATI SOPARKAR, ADVOCATE for the Appellant(s) No. 1

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MR. P.G. DESAI, ADVOCATE WITH MR SUDHIR M MEHTA, ADVOCATE for the Opponent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE KS JHAVERI**
and
HONOURABLE MR.JUSTICE K.J.THAKER

Date : 03/12/2014

COMMON ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE KS JHAVERI)

1. As all these arise out of the common order of the Income Tax Appellate Tribunal, they are being disposed of by this common judgment.

2. By way of these appeals, the appellants-assessees have challenged the common order dated 17. 07.2009, passed by the Income Tax Appellate Tribunal [for short "*the Tribunal*"] in ITA Nos. 2344, 2345, 2346, 2348 and 2389/Ahd/2007, whereby the appeal preferred by the revenue were partly allowed by the Tribunal.

3. In all these appeals, the facts and question of law are identical, therefore, we discuss only the facts of Tax Appeal No.1181 of 2010 for convenience.

4. The appellant-assessee had filed its return of income for the Assessment Year 2002-03 on 07.06.2002, declaring total income at Rs.1,30,900/-. A search under Section 132 of the Income Tax Act, 1961 [for short"the act"] was conducted in the assessee's residential and office premises on 04.09.2003. In

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response to the notice under Section 153(1)(a) of the Act, the assessee-appellant disclosed additional income over and above the income which was declared in the original return. Thereafter, the assessment proceedings under Section 153(1)(b) of the Act were completed on 20.03.2006 and the return of income in pursuance to the search was accepted. Simultaneously, penalty proceedings were also initiated under Section 271(1)(C) of the Act as the appellant disclosed additional income in pursuance of the search. However, the Assessing Officer rejected the contention of the appellant and levied penalty @ 100% of the tax sought to be evaded.

4.1. Against the order of the Assessing Officer, the appellant preferred an appeal before the Commissioner of Income Tax (Appeals). The CIT(A) allowed the said appeal and deleted the penalty imposed by the Assessing Officer. Against the order of the CIT(A), the respondent-revenue preferred an appeal before the Income Tax Appellate Tribunal. However, there was a difference of opinion between the Accountant Member and the Judicial Member and both rendered their separate orders on 24.02.2009. Therefore, the matter was referred to a Third Member, who, after giving his opinion referred the matter to the Division Bench of the Tribunal for passing the final order. Thereafter, the Division Bench of the Tribunal passed the final order and allowed the revenue’s appeal by its order dated 17.07.2009. Hence, these appeals are filed at the instance of the

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assessees.

5. While admitting these appeals on 29.08.2011, the Court has formulated the following substantial question of law:-

> *"Whether in the facts and circumstances of the case, the Income Tax Appellate Tribunal was right in law in restoring the penalty imposed under Section 271(1)(c) of the Act holding that benefit under explanation 5 to Section 271(1)(c) of the Act would be available only for period where due date for filing the return under Section 139(1) of the Act had not expired ?"*

6. Mr. Soparkar, learned senior counsel for the appellants has submitted that the Tribunal has committed error in restoring the penalty imposed by the Assessing Officer and in setting aside the order of the CIT(A). He further submitted that the Tribunal has failed to appreciate the fact that the penalty under Section 271(1)(c) of the Act could be levied only if there is no variation between the income assessed and the income filed in the return under Section 153A of the Act.

6.1. Learned counsel for the appellants contended that the Tribunal has failed to appreciate the fact that the Assessing Officer had dropped the penalty proceedings in the case of another member of the same

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group for the Assessment Years 2003-04 and 2004-05.

6.2. Learned senior counsel for the appellants has taken us to the order of CIT (Appeals) as well as the judgment of the Tribunal and contended that the Tribunal has relied upon the decision of other Tribunals and the decision of the Bombay High Court for passing the impugned judgment, however, it has ignored the judgments of the Madras High Court and Rajashtan High Court, which squarely govern the issue involved in these appeals. Therefore, learned counsel for the appellant submitted that the decision of the Tribunal is required to be quashed and set aside.

6.3. In support of his contentions, he relied the following judgments:-

(i) *Commissioner of Income Tax Vs. Chhabra Emporium [264, ITR 249(Delhi)]*

(ii) *Commissioner of Income Tax Vs. S.D.V. Chandru [266 ITR 175 (madras)]*

(iii) *Gebilal Kanbhaialal (HUF) Vs. Assistant Commissioner of Income Tax [270 ITR 523 (Rajashtan)]*

(iv) *Assistant Commissioner of Income Tax Vs. Gebilal Kanhailal HUF [348ITR 561 (SC)]*

(v) *Commissioner of Income Tax Vs. Kanhaiyalal*

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[299 ITR 19 (Rajashtan)]

(vi) Commissioner of Income Tax Vs. Radha Kishan Goel [278 ITR 454 (Allahabad)]

(vii) Commissioner of Income Tax Vs. Abdul Rashid [40 taxman.com 244 (Chattisgarh)]

(viii) S.M.J. Housing Vs. Commissioner of Income Tax, Central-II [2013] 38 taxman.com 203 (Madras).

(ix) Commissioner of Income Tax, West Bangal Vs. Vegetable Products Ltd.[88 ITR page 192].

6.4. Learned senior counsel for the appellants contended that in view of above submissions and in view of the above decisions, the present appeals deserve to be allowed.

7. On the other hand, learned advocate for the respondent-revenue has supported the order of the Tribunal and submitted that the order of the Tribunal is just and proper and no interference is required to be called for. He has relied upon the decision of the Delhi High Court in the case of ***Shourya Towers (P.) Ltd. Vs. Deputy Commissioner of Income Tax,*** reported in ***[2013] 30 taxmann.com 10,*** *more particularly paragraph Nos. 13 and 14, which reads as under:-*

"13. From the record, this Court notices

that after the search, and the statement recorded under Section 132 (4), the assessee, on being issued with notice under Section 153A did not file any return. The notice under Section 153A was issued on 20-7-2006. It was only when assessment proceedings were taken up for consideration, did the assessee, by letter dated 14-8-2007, request, that its return, filed on 31-10-2005, be treated as its return filed in response to the notice under Section 153A. Much later, it sought to revise its computation, on 14-12-2007. Therefore, this Court is of the opinion that the "escape route", provided by Clause (2) to Explanation 5 in this case, was not available to the assessee. It has to be reiterated that the said provision is available, not merely when the assessee, in his statement offers or surrenders, to tax the amount in question which is later assessed, but also complies with the other conditions, of having filed the return. The allusion to Section 139 (1) is significant in this regard, because a notice and consequent search assessment pursuant to Section 153A stands excluded, altogether, by virtue of the non-obstante clause to the latter (Section 153A) provision. Even if the other view, more favourable to the assessee were to be taken, and for a moment, a return

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under Section 153A were to, arguendeo be assumed to be covered as one under Section 139 (1), the fact remains, that in this case, the assessee did not include it, pursuant to the notice issued, and instead chose to merely reiterate its return originally filed on 31-10-2005.

14. This Court is also of the opinion that a plain reading of Clause (2) to Explanation 5 (to Section 271 (1) (c)) altogether excludes its application to cases where returns are filed under Section 139 (1). This clause, in the opinion of the Court, extends to those cases, falling in clause (b) of the excepted part, i.e. where the return of year is yet to be filed, in respect of a previous year, during which the search took place. This is because of the expression "in his return of income to be furnished before the expiry of time specified in sub-section (1) of section 139..". If Parliament had intended clause (2) (to Explanation 5) to cover all other categories, then, having regard to the structure and placement of the main provision, which is specially intended to cover search assessments, such intention would have been manifest if there were no reference to Section 139 (1) and instead, Section 153 A were to be used. That this is

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the correct position is also evident from the non obstante clause under Section 153A, which was resorted to by the AO in this case."

8. We have heard learned advocates for the parties and perused the material on record. Before dealing with the contentions, it would be relevant to reproduce Explanation 5 to Section 271 (1) (c) of the Income Tax Act, which reads as under:-

"Explanation 5. Wherein in the course of a [search initiated under section 132 before the 1st day of June, 2007], the assessee is found to be the owner of any money bullion, jewellery or other valuable article or thing (hereafter in this Explanation referred to as assets) and the assessee claims that such assets have been acquired by him by utilising (wholly or in part) his income-

(a) for any previous year which has ended before the date of the search, but the return of income for such year has not been furnished before the said date or, wherein such return has been furnished before the said date, such income has not been declared therein; or

(b) for any previous year which is to end

on or after the date of the search,

then, notwithstanding that such income is declared by him in any return of income furnished on or after the date of the search, he shall, for the purposes of imposition of a penalty under clause(c) of sub-section (1) of this section, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income, unless, -

(1) Such income is, or the transactions resulting in such income are recorded,-

(i) in a case falling under clause(a), before date of the search; and

(ii) in a case falling under clause(b), on or before such date;
in the books of account, if any, maintained by him for any source of income of such income is otherwise disclosed to the [principal Chief Commissioner or Commissioner or] Chief Commissioner or [Principal Commissioner or] Commissioner] before the said date; or

(2) he in the course of the search, makes a statement under sub-section (4) of

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section 132 that any money, bullion, jewelery or other valuable article of thing found in his possession or under his control, has been acquired out of his income which has not been disclosed so far in his return of income to be furnished before the expiry of time specified in sub section (1) of Section 139 and also specifies in the statement the manner in which such income has been derived and pays the tax, together with interest, if any, in respect of such income."

9. The High Court of Madras in the case of *S.D.V.Chandru (supra)* held that in a case where the asseessee had not disclosed his income in the returns filed for the previous year which have ended prior to the date of the search and, in the statement given under Section 132(4) the assessee admitted the receipt of undisclosed income for those years and also specified the manner in which such income had been derived and thereafter pays the tax on that undisclosed income with interest, then such undisclosed income would get immunised from the levy of penalty.

10. Looking to the facts and circumstances of the case, it would be relevant to refer the decision relied upon by learned senior advocate for the appellant in the case of ***Gebilal Kanbhaialal (HUF)***

(supra), wherein the Apex Court in paragraph No.6 has observed as under:-

> *"6. Explanation 5 is a deeming provision. 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 purpose of imposition of penalty under Section 271(1)(C). The only exceptions 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 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*

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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 should specify, in his statement under Section 132(4), the manner in which 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 the condition for availing the benefit of waiver of penalty under Section 271(1)(c) as the assessee failed to file his return of income on 31st July, 1987 and pay tax thereon particularly when the assessee concealed 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 upto 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 upto 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)."

11. Even, the High Court of Chattisgarh in the case of ***Abdul Rashid(supra)*** has held that in order to get the benefit of immunity under clause(2) of explanation-5 to Section 271(1)(c) of the Income Tax Act, it is not necessary to file the return before the due date provided that the assessee had made a statement, during the search and explained the manner in which the surrendered amount was derived, and paid tax as well as interest on the surrendered amount.

12. At this stage, it is required to be noted that the Apex Court in the case of ***Commissioner of Income Tax, West Banagal-I Vs. Vegetable Products***

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Ltd. (supra), has held that if the Court finds that the language of a taxing provision is ambiguous or capable of more meaning than one, then the Court has to adopt the interpretation which favours the assesee, more particularly so where the provision relates to the imposition of a penalty.

13. Considering the facts and circumstances of the case and also considering the decisions relied upon by learned senior advocate for the appellant, we are of the considered opinion that the view taken by the Tribunal is erroneous. The CIT(A) rightly held that it is not relevant whether any return of income was filed by the assessee prior to the date of search and whether any income was undisclosed in that return of income. In view of specific provision of Section 153A of the I.T. Act, the return of income filed in response to notice under Section 153(a) of the I.T. Act is to be considered as return filed under Section 139 of the Act, as the Assessing Officer has made assessment on the said return and therefore, the return is to be considered for the purpose of penalty under Section 271(1)(c) of the I.T. Act and the penalty is to be levied on the income assessed over and above the income returned under Section 153A, if any.

14. Further, in the present case, it appears from the record that the assessees had satisfied all the conditions which are required for claiming immunity from payment of penalty under Section 271(1)

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of the Act. The provision does not specify any time limit during which the aforesaid amount i.e. the amount of penalty with interest has to be paid. Admittedly when the assessees herein have paid the entire amount with interest, the Assessing Officer ought to have granted them immunity available under Section 271(1)(C) of the Income Tax Act.

15. The decision relied upon by learned advocate for the respondent will not apply to the facts of the present case.

16. In view of the aforesaid facts of the case and also the principle laid down in the decisions relied upon by the learned senior counsel for the appellant more particularly the principle laid down in the case of Assistant Commissioner of Income Tax Vs. Gebilal Kanhailal (supra) and Commissioner of Income Tax Vs. Abdul Rashid (supra), we are of the considered opinion that the penalty under Section 271(1)(C) of the Income Tax Act cannot be levied on the income shown in the return filed under Section 153 of the I.T. Act.

17. Considering the facts and circumstances of the case and also considering the decision of the Madras High Court in the case of S.D.V. Chandu (supra), we are of the opinion that the appellant is entitled to the benefit of the provisions of Explanation 5(2) to Section 271(1)(c) of the Income Tax Act.

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18. For the foregoing reasons, the present appeals stand allowed. The order of the Tribunal is quashed and set aside. Consequently, the order of the CIT(A) is restored. The question of law involved in this appeals is answered in favour of the assessee and against the revenue.

(K.S.JHAVERI, J.)

(K.J.THAKER, J)

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