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IN THE HIGH COURT OF DELHI

ITRs No.309-311/82

Date of Decision: 7th August, 2001

Commissioner of Income-taxPetitioner

through: Mr.Sanjiv Khanna
with Mr.Ajay Jha,
Advocates

Versus

Sohan SinghRespondent

through: Nemo

CORAM:

THE HON'BLE MR.JUSTICE ARIJIT PASAYAT, CHIEF JUSTICE

THE HON'BLE MR.JUSTICE D.K. JAIN

1. Whether reporters of local papers may be allowed to see the judgment ?
2. To be referred to the Reporter or not ?

ARIJIT PASAYAT,C.J. (Oral)

Pursuant to the direction given by, this Court under Section 256(2) of the Income-tax Act, 1961 (in short 'the Act'), following question has been referred for opinion of this Court, in the three reference applications filed by Revenue before the Income-tax Appellate Tribunal Delhi Bench-C ('Tribunal' for short):

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"Whether on the facts and in the circumstances of the case and having regard to the conclusion arrived at by the Tribunal in the appeals against the assessments, the Tribunal was justified in cancelling the penalties imposed on the assessee for assessment years 1963-64, 1965-66 and 1966-67 ?"

Dispute relates to assessment years 1963-64, 1965-66 and 1966-67.

2. Factual position in a nutshell is as follows:

S.Sohan Singh, the assessee, is an individual. Previous year in respect of each of the assessment years concerned ended on 31st March, 1963, 31st March 1965 and 31st March, 1966 respectively. Assessments were re-opened by the Income-tax Officer (in short 'ITO') under Section 147 of the Act on the ground that income had escaped assessment. After re-opening of the assessment in each of the years, ITO clubbed the income of the firm M/s.Preetpal Singh & Co with the income of the assessee. These additions were made on the ground that the income of the partnership was really that of the assessee. The partnership was constituted as evidenced by a deed of partnership dated 7th December, 1961 with two partners, namely, Smt.Satwant Kaur and Shri Surinder Singh. Three minor partners, namely, Shri Preetpal Singh, Shri Harvinder Pal Singh and Miss Kamal Anand were admitted to the benefits of the partnership. Smt. Satwant Kaur is mother of the assessee. Shri

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Surinder Singh is his sister's son. He was also an ex-employee of the assessee. The three minors were children of the assessee. The firm discontinued its business on the death of Smt. Satwant Kaur on 27th February, 1967. Income of the firm was assessed, but such assessment was made on protective basis as the ITO was of the view that the firm was a benami concern of the assessee. In the assessment proceedings of the firm, ITO examined Shri Surinder Singh and after taking into account various statements, he clubbed the income of the firm with that of the assessee. Various reasons were given by the ITO for coming to the conclusion regarding benami character of the firm. On appeal, Appellate Assistant Commissioner ('AAC' in short) refused to grant relief and on further appeal before the Tribunal, action of the ITO was confirmed. ITO, before the completion of re-assessment, issued show cause notices to the assessee to show cause why penalty should not be levied under Section 271(1)(c) of the Act. In the penalty proceedings the Inspecting Assistant Commissioner ('IAC' in short) informed the assessee about the requirements of Explanation to Section 271(1)(c), indicating that said provision was applicable to the facts of the case. Assessee was required to show cause why penalty should not be imposed on the assessee under that provision. In reply, stand of the assessee

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was that penalty proceedings were independent of the assessment proceedings and simply because assessment orders have been passed in the case of the firm considering it as a benami concern, that would not be sufficient to hold that the assessee concealed income of the firm from his assessment. It was further submitted that none of the reasons for which the ITO held the firm to be benami was factually correct and the inference drawn was not correct. However, penalties were levied under Section 271(1)(c) of the Act. Matter was carried in appeal before the Tribunal which held that there was nothing on record to show that fraud, gross or wilful neglect could be attributed to the assessee in not returning the correct income in his returns. Prayer for reference made by the Revenue was rejected. However, on being moved under Section 256(2) of the Act, this Court directed the Tribunal to refer the question as set out above.

3. We have heard learned counsel for Revenue. There is no appearance on behalf of assessee in spite of notice. Though there cannot be any quarrel with the proposition that evidence recorded in the assessment proceedings are not conclusive for determining the question as to whether penalty is to be levied or not, they are not totally irrelevant. They could be taken note of. What is required is that the assessee must

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offer an explanation to show that there was no fraud, gross or wilful negligence involved in not returning the correct income in his return. The explanation offered has to be examined by the Assessing Officer. It is not sufficient if any fanciful or totally untenable explanation is offered. If no explanation is offered or the explanation offered is found to be untenable or unacceptable, the Assessing Officer may, considering the background facts, impose penalty if it comes to the conclusion that fraud, gross or wilful negligence was involved. That finding would be essentially one of facts and if the finding is factual as recorded by the Tribunal obviously no question of law arises. But when the conclusion is arrived at by ignoring relevant material or where irrelevant material is taken into consideration, question of law arises. From the order of the Tribunal it appears that great emphasis was laid on the fact regarding grant of registration to the firm. We find from the orders passed by the Tribunal relating to assessment that it was clearly noted that the mere fact that registration was granted does not stand on the way of coming to the conclusion that firm is benami concern of the assessee. With reference to the materials brought before it, Tribunal had come to a definite conclusion about the benami character. Tribunal itself proceeded on the basis that no positive

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evidence about the flow of capital invested by the partners was on record and so far as the enjoyment of the profits is concerned there is also no positive evidence to show that the profits were enjoyed by the assessee. These conclusions are at variance with those recorded by the Tribunal in the appeal relating to the assessment. It was, inter alia, observed as follows: "In addition to this it is on record that both Smt. Satwant Kaur and Shri Surinder Singh gave away all the profits earned by them by way of gifts to the children of the assessee". It was also noted by the Tribunal that accountability of the partners to the assessee was not discharged and the same was proved on record by way of gifting of their shares by the two major partners to the minor sons and daughter of the assessee and investment of the profits by all partners in the firms controlled by the assessee. Obviously, the onus lies on the assessee to prove that there was no fraud, gross or wilful negligence which can be attributed to the assessee. This was the initial onus which lay on the assessee. Tribunal, therefore, does not appear to have examined the matter in the background of the Explanation to Section 271(1)(c) of the Act, operative at the relevant point of time, in its proper perspective. In the circumstances, we think it would be appropriate for the Tribunal to re-hear the appeals and decide the matter afresh, keeping in view

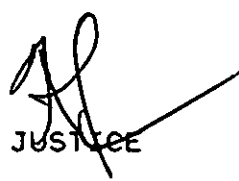
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the relevant provisions. The reference applications are accordingly disposed of.


CHIEF JUSTICE
D.K. JAIN, J.

7th August, 2001

"v"