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% 31.05.2011

Present: Mr. Harish Malhotra, Sr. Advocate with Mr. R.K. Modi, Advocate for the appellant.
Mr. Abhishek Maratha, Sr. Standing Counsel for the respondent.

+ ITA No. 789/2011

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1. While making addition, the Assessing Officer also initiated penalty proceedings against the assessee under Section 271(1)(c) of the Income Tax Act. A show cause notice was issued to the assessee and thereafter, the Assessing Officer passed orders dated 21st March, 2005 imposing penalty of Rs.1,85,000/-. The assessee preferred appeal there against before the CIT(A) which was dismissed. Second appeal before the ITAT met the similar fate. This appeal is directed against the order of the ITAT confirming the said penalty.
2. Learned senior counsel for the appellant argues that while initiating the penalty proceedings, no satisfaction was recorded by the Assessing Officer and therefore the order of penalty needs to be set aside on this ground. The provisions of Section 271 were amended retrospectively doing away with the recording and satisfaction specifically. The vires of this provision have



been upheld by the Division Bench of this Court in 307 ITR in the following words:

"In the result, our conclusion are as follows:

(i) Section 271(1B) of the Act is not violative of article 14 of the constitution.

(ii) the position of law both pre and post-amendment is similar, inasmuch as, the Assessing Officer will have to arrive at a prima facie satisfaction during the course of proceedings with regard to the assessee having concealed particulars of income or furnished inaccurate particulars, before he initiates penalty proceedings.

(iii) "Prima facie" satisfaction of the Assessing Officer that the case may deserve the imposition of penalty should be discernible from the order passed during the course of the proceedings. Obviously, the Assessing Officer would arrive at a decision, i.e., a final conclusion only after hearing the assessee.

(iv) At the stage of initiation of penalty proceedings the order passed by the Assessing Officer need not reflect satisfaction vis-à-vis each and every item of addition or disallowance if overall sense gathered from the order is that a further prognosis is called for.

(v) However, this would not debar an assessee from furnishing evidence to rebut the "prima facie" satisfaction of the Assessing Officer; since penalty proceedings are not a continuation of assessment proceedings, [See Jain Brothers V. Union of India [1970] 77 ITR 107(SC)]



(vi) due compliance would be required to be made in respect of the provisions of Sections 274 and 275 of the Act.

(vii) the proceedings for initiation of penalty proceeding cannot be set aside only on the ground that the assessment order states "penalty proceedings are initiated separately" if otherwise, it conforms to the parameters set out hereinabove are met."

It is clear from the above that while upholding the provision, the Division Bench has maintained that the satisfaction of the Assessing Officer is necessary though it would suffice if it is discernible from records.

3. In the present case, after going through the order of the Assessing Officer we are of the opinion that the satisfaction is writ large in the order passed by the AO. We may produce paras 11, 12 and 13 of the assessment order passed by the Assessing Officer, to demonstrate the same:-

11. From the above facts of the case, it is very much clear that it is only a passing of money and the persons who are engaged in a very small business of stitching, embroidery, cooking and papad making cannot be so rich that they can make such gift to Shri Vikal Aggarwal. They all are living in rented premises and are living hand to mouth. They don't have any day to day dealings with the donee. All of



them have stated that the donee's grandfather helped their husbands or Shri Ram Chandra Aggarwal in their business. But none of them was able to explain the nature or type of help, which Assessee's grandfather made. No evidence has been produced in this regard. Even for an argument sake if it is admitted that he helped them but looking to the financial status of the donors it cannot be believed that they are having that much capacity to gift this big amount to the Assessee. These things are all an after thought to make the rotation of the money to name it as gift. It is true that the moneys have been passed on through the bank accounts and all the persons are Income tax Assesseees but this channel has been misused to give this the colour of gifts.

12. On one side there is Sh. Vikal Aggarwal and his father Anil Aggarwal whose turnover runs into crores. Vikal himself has admitted that they have two full time servants, four air conditioners, 3 floor house and a few cars. On the other side we have donor Sh. Ram Chander Aggarwal, Smt. Meera Devi Sharma, Radha Sharma and Smt. Chanda Devi Dokania who live hand to mouth, do not have even total worth of 15 lakhs (Total of Balance Sheet for all put together). Thus the gifting of money is only a created story, which is having weak threads due to contradictory statements. The onus was on Assessee to discharge his burden to prove the credit worthiness of donors. He refused to produce them and subsequently when he said that he wanted to cross examine, vide order sheet entry dated 5.1.04, it was told "since the Assessee has taken the gifts, he may produce the donors as his witnesses and offer the Deptt for cross examination. To make it convenient to them this can be done at either of the places i.e., Kolkatta or Delhi. In that case the statements recorded by us will not be used. He was asked to reply this in writing by 8.1.2004 alongwith the date on which they will offer them for examination and re-examination."

13. Again he was told on 8.1.04 that since the statements were recorded neither in my presence nor before Assessee, he could produce those donors. On 5th Jan, itself I had made offer that donors could be produced in Kolkatta or Delhi. From 5th Jan 2004



to 25.2.2004, the counsel played dily-dallying tactics and again wrote on 25.2.04 that statement of Sh. R.C. Aggarwal was recorded under pressure and wanted the statement to be recorded again.

Strangely he did not raise this issue for other three persons. The onus is on Assessee, as it is he who is the beneficiary of such gifts and circumstantial evidence suggest that such a "gift" is only a colourable device. He himself is not ready to produce Sh. R.C. Aggarwal and trying to delay the proceedings using such tactics. I thus treat the receipt of Rs.5,24,000 as unexplained cash credit u/s 68. The same is therefore, taxed as income from other sources.

4. We do not find any merit in this appeal. Same is hereby dismissed.


A.K. SIKRI, J.


M.L. MEHTA, J.

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