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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 12th August, 2014

+ **ITA 34/2002**

M/S BHARAT FURNISHING CO. Appellant
Through Mr. Sanjeev Ralli and Mr. Aayush
Juneja, Advocates.

versus

COMMISSIONER OF INCOME TAX AND ANR..... Respondent
Through Mr. Sanjay Kumar, Jr. Standing
Counsel.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE V. KAMESWAR RAO

SANJIV KHANNA, J. (ORAL)

This appeal, by the assessee, impugns imposition of penalty, under section 271(1)(a) of the Income Tax Act, 1961 (Act, for short), for late filing of return in relation to assessment year 1984-85. By order dated 17th September, 2002, the following substantial question of law was framed:-

“Whether the Income-tax Appellate Tribunal was justified in law in holding that there was no reasonable cause for delay in filing the return by the assessee for the assessment year 1984-85 and, therefore, penalty under Section 271(1)(a) of the



Income-tax Act, 1961 was leviable for the entire period of delay?”

2. The appellant-assessee, a partnership firm, was a government contractor during the relevant period. Return for the assessment year 1984-85 was due and should have been filed on or before 31st July, 1984. It was belatedly filed after 23 months on 2nd July, 1986, declaring taxable income of Rs. 3,91,440/-. Self assessment tax of Rs.89,940/- due was paid at the time of filing the return, after taking credit of tax deducted at source of Rs.42,095/-. The computation sheet shows that there were three partners of the appellant firm and the taxable income of Rs. 3,01,500/-was divided amongst the three partners in the ratio of 30% (Rs.90,450/-), 35% (Rs.1,05,525/-) and 35% (Rs.1,05,525/-).

3. The Assessing Officer by order dated 26th March, 1990, imposed penalty of Rs.1,34,228/- for this delay of 23 months, computed @ 2% per month for the period of delay. Commissioner of Income Tax (Appeals) affirmed, observing that the assessee had not been able to justify the delay in filing of the return. He observed that the return for the last year i.e. assessment year 1983-84 was also filed belatedly in November, 1985. Being a “class A” government contractor, the appellant-assessee was required by law to maintain books of accounts



on day-to-day basis and the prolonged delay of nearly 2 years could not be explained in a casual manner.

4. The appellant-assessee filed an appeal before the Income Tax Appellate Tribunal (Tribunal, for short), which has been dismissed by the impugned order dated 8th June, 2001. Before the Tribunal, the assessee had placed reliance on judgment of the Supreme Court in ***Hindustan Steel Limited Vs. State of Orissa***, (1972) 83 ITR 26 (SC). Tribunal rejected the contention that the return for the earlier assessment year 1983-84 was revised and as a result of the revision, the income of the assessment year 1984-85 underwent a change. It was held that this could not be established. Further, the appellant-assessee's submission that they were in a dilemma and that there were sufficient reasons to explain the delay in filing the return after a period of 23 months, cannot be accepted. The assessee had not filed Form No.6 seeking extension of time nor had they justified and satisfactorily explained the cause for the delay.

5. Learned counsel appearing for the appellant-assessee submits that the facts have not been properly understood and appreciated by the Tribunal. He states that the appellant-assessee was in fact in a dilemma and did not know how to treat and claim the amount received from the DDA. He accepts that Rs.2,93,004.13 was received from the DDA on account of the Asian Games Project in the present assessment



year i.e. 1984-85 and not in the assessment year 1983-84, but stat that the revised return for assessment year 1983-84 was filed on 1st November, 1985 taking into account the losses suffered in the Asian Games Project and net loss of Rs.9,35,200/- was declared in the said return. The original return for assessment year 1983-84 was filed on 29th October, 1984, declaring positive income of Rs.72,995/-. He has drawn our attention to a chart enclosed as Annexure A-4 and states that in case income/receipt of Rs.2,93,004/- stands excluded from the returned income of Rs.3,91,440/-, the net taxable income would be Rs.98,436/-, on which tax of Rs.11,155/- was payable by the partnership firm, whereas the tax deducted at source was more i.e. Rs.42,095/-. If income of Rs.98,436/- had been declared, Rs.30,940/- would be refundable. The appellant-assessee, therefore, had established and proved a just and sufficient cause and reason for the delay in filing the return, if not for the whole period, but upto 1st November, 1985.

6. We have considered the said contention and also examined the reasons given by the Assessing Officer, reply given by the appellant-assessee to the notice under Section 271(1)(a) (Annexure A-5) and the findings recorded by the Tribunal. It is noticeable that the original return for the assessment year 1983-84 was filed on 29th October, 1984, declaring positive income of Rs.72,995/-. This return was slightly belated, but was in fact filed. Thus, the submission that the appellant-



assessee was debating or in dilemma cannot be accepted with reference to other circumstances. Subsequently, revised return for the assessment year 1983-84 dated 1st November, 1985 declaring loss of Rs.9,35,200/- was filed. However, the return for the assessment year 1984-85, which was due and should have been filed by 31st July, 1984, was filed only on 2nd July, 1986. This is about 9 months after the revised return for the assessment year 1983-84 was filed. This creates doubt on whether or not the revision of return for the assessment year 1983-84 had any connection and bearing with the belated return for the assessment year 1984-85. In reply to the notice under Section 274 read with Section 271(1)(a), the appellant-assessee firm had stated that they had completed the Asian Game Project in the assessment year 1983-84 and had incurred all expenses, but the full amount was not paid by the DDA. It was also stated that right from the inception, the appellant-assessee had adopted and followed receipt or cash system of accounting. As the appellant did not receive payment from the DDA, they had revised the return for the assessment year 1983-84, declaring loss of Rs.9,35,200/-. This would certainly be the reason and cause for revising the return for the assessment year 1983-84, but cannot justify the delay in filling return for the assessment year 1984-85 i.e period ending 31st March, 1984. As per the said reply, the appellant-assessee accept and admit that they had received payment of Rs.2,93,004.13/-



from the DDA in the assessment year in question. Thus, as per the system and method of accounting followed by the appellant-assessee, this amount had to be included as income for the assessment year 1984-85. Therefore, the submission that dilemma or lack of clarity was the reason, for not filling in time the return for assessment year 1984-85, has not been substantiated and established. Assuming that the appellant-assessee was in doubt, still return of income for the assessment year 1984-85 could have been filed on time and then if required, revised. This was done in the assessment year 1983-84. Argument of the appellant-assessee that they were in dilemma on how to compute the income of the assessment year 1984-85, does not explain the return filed for the assessment year 1983-84 on 29th October, 1984. If the return for the assessment year 1983-84 could have been filed, though the assessee claims that they were not sure how to treat the loss as they had not received payment from the DDA, the return for the assessment year 1984-85 could have been surely and certainly filed. This reason/cause had not prevented the appellant-assessee from filing the return for the assessment year 1983-84. We, therefore, are not inclined to accept the aforesaid reasons as a valid cause and acceptable justification for filling return for assessment year 1984-85, after a delay of 23 months.

7. Contention of the appellant-assessee that if the receipt of



Rs.2,93,004.13 stands excluded, refund was due, is again an argument based on assumption. It is accepted that payment of Rs 2,93,004.13 was received during the assessment year in question. Clearly, therefore, it was an amount which had to be included in the return of income as a receipt, as the appellant-assessee was following receipt/cash basis for computing their income. If we include this amount of Rs 2,93,004.13, the appellant was liable to pay self-assessment tax of Rs.89,940/-, being the short-fall or deficient payment after taking into consideration TDS of Rs.42,095/-. We also do not know whether the TDS amount of Rs.42,095/- includes the TDS, which was deducted on Rs. 2,93,004.13 received from the DDA.

8. Learned counsel for the appellant-assessee has relied upon decision of this Court in ***Shyam Gopal Charitable Trust Vs. Director of Income Tax (Exemption)***, [2007] 290 ITR 99 (Delhi). This was a case relating to Section 272A. It was held that there was violation of principles of natural justice as the notice for penalty under Section 272A(2)(e) of the Act was required to be issued and served on the assessee to enable him to defend the proceeding as imposition of penalty had adverse civil consequences. The assessee had to be given an opportunity and chance to explain why the penalty should be either waived or should not be imposed. Thereafter, the Division Bench observed that the assessee had given an explanation, which was a



plausible one. Reference was made to the decision of the Kerala High Court in *State of Kerala Vs. Krishan Kurup Madhava Kurup*, 1971 AIR Ker 211, which was approved and extracted by the Supreme Court in *Concord of India Insurance Co. Ltd. Vs. Smt. Nirmala Devi*, [1979] 118 ITR 507 to observe that legal advice sometimes might be wrong and on pronouncements on questions of law, human errors can take place and the courts must be careful when they examine the question of competence or merits of the legal advice to rule out and segregate cases which do not have any taint of mala fides or element of recklessness or ruse. In the said case, the penalty imposed was set aside.

9. In the facts of the present case, we do not find that the appellant-assessee in the course of the reply had stated that they had taken legal advice, and could not ascertain and compute their income and therefore could not file their return for assessment year 1984-85. No details regarding said legal advice including the name of person, who had rendered the same, was stated and brought on record. The appellant-assessee in their reply to the notice for penalty had referred to the return for the assessment year 1983-84 and the fact that the original return was filed taking into account payment received from DDA. However, this cannot be a ground for not filing the return for the assessment year 1984-85, specially, when we notice that the return for



the assessment year 1983-84 was originally filed on 29th October, 1984 and the revised return was filed on 1st November, 1985. However, the return for the assessment year 1984-85 was filed on 2nd July, 1986. The appellant-assessee had the opportunity to file Form No.6, which was applicable and could have given reasons for delay and belated filing of the return. The return could have been initially filed and then revised. For claiming loss, it was necessary for an assessee to file original return within the stipulated time. It is apparent that the assessee by not filing the return did not want benefit of carry forward of loss.

10. Supreme Court in the case of ***Gujarat Travancore Agency Vs. C.I.T (1989) 177 ITR 455*** has held that question of *mens rea* does not arise or require consideration when we examine the question of penalty under Section 271 (1)(a) of the Act. Penalty is a civil liability and is imposed upon infraction of law when conditions stipulated in the provision are satisfied. *Mens rea* is not an requirement to impose penalty under Section 271(1)(a) of the Act. As far as the factum that the return was delayed, the same is accepted and is not in dispute. Justification and cause for the delay is the issue in dispute.

11. Decisions in the case of ***Commissioner of Income Tax Vs. Kanubhai Muljibhai Patel***, [2008] 306 ITR 179 (Guj) and ***Viswam and Company Vs. Commissioner of Income Tax***, [1993] 201 ITR 291



are distinguishable. In *Viswam and Company (supra)*, the assessee had sought reference before the High Court and penalty was imposed for a period of one month only. The Tribunal had deleted the penalty for the other period. High Court did not interfere and the reference filed by the assessee was answered against him. In ***Kanubhai Muljibhai Patel (supra)***, penalty for part period was deleted observing that there was a decision of the Bombay High Court in favour of the assessee and thereupon the assessee had entertained a bonafide belief that the return need not be filed. The said case proceeds on its own facts. Facts of the present case and excuse given by the appellant has been noticed above and rejected.

12. In view of the aforesaid, the question of law is answered against the appellant-assessee and in favour of the respondent-Revenue. We do not find any ground to interfere with the decision of the Tribunal for the reasons stated above. The appeal is dismissed. No costs.

SANJIV KHANNA, J.

V. KAMESWAR RAO, J.

AUGUST 12, 2014
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