



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

**Reserved on : 22.11.2012**

**Decided on : 12.12.2012**

+ ITA 170/2012

SHOURYA TOWERS PVT LTD ..... Appellant

Through : Sh. Anoop Sharma, Advocate.

versus

DCIT ..... Respondent

Through : Sh. Sanjeev Sabharwal, Sr. Standing Counsel with  
Sh. Puneet Gupta, Jr. Standing Counsel.

**CORAM:**

**HON'BLE MR. JUSTICE S. RAVINDRA BHAT**

**HON'BLE MR. JUSTICE R.V.EASWAR**

**MR. JUSTICE S.RAVINDRA BHAT**

% Facts:

1. This is an assessee's appeal under Section 260-A of the Income Tax Act 1961 ("the Act") assailing the order of the Income Tax Appellate Tribunal, Delhi Bench (ITAT) dated 25-3-2011 in ITA No. 701/D/09. The assessee urges that the substantial question which arises in this case, is that the ITAT erred in not applying clause (2) to Explanation 5 to Section 271 (1) (c) of the Act, in the facts and circumstances of the present case.



2. The facts of the case are that the assessee filed a return of income on 31.10.2005 declaring total loss of ₹.19,08,840/-. Thereafter, search and seizure operations were conducted in the Nitishree Group, and survey was also conducted at the business premises of the assessee. In the course of search, the statement of Mr. Anil Jain was recorded on oath under Section 132(4) of the Act on 17.02.2006. It was *interalia* deposed that unaccounted income of various years was invested, *benami* in the share capital of some companies. Shri Kahshinath Shukla, Director of the assessee company, also introduced unaccounted money *benami* name as share capital. The details of these were not known to him on the date of search. However, the total amount was quantified at ₹.15 crores. These details were furnished on 31.07.2006.

3. According to the statement, the assessee's *benami* share investment for the two years, i.e., assessment years 2005-06 and 2006-07, were shown at ₹.121 lakhs and ₹.521.95 lakhs respectively. The total unaccounted income for seven assesses of the group was shown as ₹.1522.98 lakh. Subsequent to the searches, a notice under Section 153A of the Act was issued to the assessee. In response, it was stated that the return filed under Section 139(1) may be treated as return under Section 153A. Assessment under Section 153A read with section 143(3) was completed on 31.12.2007, in which the surrendered amount of ₹.121 lakh was deducted from the loss of ₹.19,08,840/- shown in the return. Thus, the total income was computed at



₹.1,01,91,160/-. Penalty proceedings were initiated under Section 271(1)(c) of the Act. These proceedings were completed on 30.06.2008 by levying minimum penalty of ₹.44,27,692/-. The Assessing officer, in his order, stated that neither in the original return nor in the letter in response to notice under Section 153A, was the income has declared. Such a conduct was with the aim of concealing income that was surrendered under Section 132(4) from the purview of taxation. It is only in the course of proceedings u/s 153A that the assessee has filed a revised computation of income in which the surrendered income has been taken to be revised return. Thus, if no specific query had been made, even the surrendered income would have escaped assessment. The CIT (A) and the ITAT successively rejected the assessee's appeals.

4. The primary contention of the assessee is that the case falls under Explanation 5(a)(1) to Section 271(1)(c) of the Act as the income mentioned therein or transactions were recorded in the books in the form of share capital of other concerns of the groups. The counsel for the assessee has relied on the case of *Commissioner Of Income-Tax v. Chhabra Emporium*, reported in 2003 (264) ITR 249 (Del). In that case, it was held that when surrender of the asset has been made on the date of search and when such surrender falls within the explanation 5 to section 271(1)(c) of the Act, the penalty was bound to be cancelled.



5. The assessee argued that since the undisclosed income was admitted in the statement given on 17.02.2006, i.e., the date of search, the same could not be included in the return which was filed on 12.01.2005 which was prior to the search. Moreover, no return was filed pursuant to the notice u/s 153A. Therefore, there is no question of retracting from the statement made on oath under section 132(4) and thus, no concealment of income is there. Thus, no penalty should be imposed on the assessee. Further, reliance has been placed on the judgment of *Sir Shadilal Sugar and General Mills Ltd. v. Commissioner of Income-tax* reported in [1987] 168 ITR 705 (SC) wherein the Supreme Court has held that it is the duty of the Tribunal to consider the facts and evidence with due care and caution. However, the counsel for the assessee has contended that the assessee disclosed the income during search. However, the department has erroneously levied penalty on the assessee, when assessee made all efforts to buy peace by surrendering the amount of income while search.

6. The assessee also contended that since penalty is in quasi-criminal form, it is the duty of the department to establish that the assessee has concealed income. Reliance has been placed on the judgment of *T. Ashok Pai v. CIT* reported in (292 ITR 11)(SC) 3. Thus, the revenue has not established that the assessee has deliberately concealed income. On the other hand, the assessee has surrendered the income. Thus, imposition of penalty on the assessee is bad in law. The assessee placed reliance on the judgment of *CCE Vs. Pepsi Foods Limited* reported in 2010 (260) ELT 481 (SC)



where the Court held that it is essential to establish *mens rea* for purposes of levying penalty. In the instant case, the assessee has no motive to conceal income, nor has any intention to escape income from assessment. The same can be stated based on the fact that the assessee has disclosed and surrendered income on oath u/s 132(4) of the Act. Thus, there is no way that the assessee intended to conceal income which should attract penalty u/s 271(1)(c) of the Act.

7. The revenue contended that it is clear that, the assessee has, neither in the original return nor in the letter in response to the notice u/s 153A, has declared the income. Such a conduct amounted to conceal even the income surrendered under Section 132(4) from the purview of taxation. It is only in the course of proceedings under 153A on 14.02.2007 that the assessee filed a revised computation of income in which the surrendered income has been taken into account. Such computation cannot be taken to be revised return. Therefore, the assessee was taken chance prior to filing the statement and if specific query had not been made, even the surrendered income would have escaped income.

8. The Respondent relied on *CIT v. S. Kumar & Ors*, (2009) 120 TTJ (Bangalore) 361 where it was held that if the assessee surrenders undisclosed income and the assessee files return and pays taxes on it, then the penalty is not leviable. However, in the instant case, the assessee has not filed returns declaring the undisclosed income. The return filed under Section 139(1) did



not include any such income, neither did the assessee file the returns after notice u/s 153A. Thus, it is not incorrect on the part of the Revenue to levy penalty on the assessee. It was also contended that immunity under Explanation 5 of Section 271(1) (c) cannot be availed by the assessee. Relying on the decision of *CIT vs. S.D.V. Chandru* 266 ITR 175 (Mad.), the Respondent argues that it is necessary for the assessee to declare the mode in which the income was acquired. In the instant case, leaving aside the mode of acquisition of income, even the return was not filed of the entire income before the search was made. Thus, immunity under this explanation cannot be granted to the assessee.

9. The Respondent also relied on the judgment in *S. Kumar & Ors.* (Supra) on the issue of *benami* transaction. It is clear that the facts are distinguishable as the *benami* investments, do not stand recorded in the books of the assessee, and the surrender was withdrawn on deemed filing of the return. Further, the income from which *benami* investments were made, had not been surrendered. What was surrendered are the assets found in the possession of the assessee. Thus, the respondent is of the view that no immunity is available under Explanation 5 for the assessee.

10. The Respondent has argued, moreover, that the surrender made by the assessee was retracted, and the mode and manner of earning the income has not been disclosed at any stage. Although, income was offered to tax on 14.12.2007, yet, that cannot obliterate the act of concealment, committed



twice in filing return under Sections 139(1) and return u/s 153A for the reason that the assessee has used dilatory tactics in payment of tax and interest. Thus, no immunity accrues on the assessee from the liability. It is highlighted that the assessee in fact did not file any return, and only chose to revise the return originally filed, only on 14-12-2007, after declaring that its original return (of 31-10-2005) be treated as its response to the notice under Section 153A. In the facts of this case, the provision of clause (2) of Explanation 5 to Section 271 (1) (c) did not apply.

11. Before a further discussion, it would necessary to extract the relevant provision, i.e. Explanation 5 to Section 271 (1) (c); it is as follows:

***“Section 271. FAILURE TO FURNISH RETURNS, COMPLY WITH NOTICES, CONCEALMENT OF INCOME, ETC.***

*(1) If the Assessing Officer or the Commissioner (Appeals) in the course of any proceedings under this Act, is satisfied that any person -*

*(a) Omitted*

*(b) Has failed to comply with a notice under sub-section (1) of section 142 or sub-section (2) of section 143 or fails to comply with a direction issued under sub-section (2A) of section 142; or*

*(c) Has concealed the particulars of his income or furnished inaccurate particulars of such income, he may direct that such person shall pay by way of penalty, -*

.....

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



*(A) Such person fails to offer an explanation or offers an explanation which is found by the Assessing Officer or the Commissioner (Appeals) to be false, or*

*(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.*

.....  
*Explanation 5 : Where in the course of a search under section 132, 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, where 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 the 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 or such income is otherwise disclosed to the Chief Commissioner or Commissioner before the said date; or*
- (2) *He, in the course of the search, makes a statement under sub-section (4) of section 132 that any money, bullion, jewellery or other valuable article or 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.”*

12. Explanation 5- to Section 271 (1) (c) is a deeming provision. It enacts 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 purposes of imposition of penalty under Section 271(1)(c). The only exceptions to such a deeming provision or to such presumption of concealment are given in sub-clauses (1)



and (2) of Explanation 5. The assessee here argues that it is covered by clause (2) of Explanation 5. Three conditions have to be satisfied by the assessee for claiming immunity from payment of penalty under clause (2) of Explanation 5 to Section 271(1)(c):

(i) the assessee must make a statement under Section 132(4) in the course 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 have not

been disclosed in the return of income to be furnished before expiry of time specified in Section 139(1).

(ii) the assessee should specify, in his statement under Section 132(4), the manner in which such income was earned.

(iii) the should pay the tax together with interest, if any, in respect of such undisclosed income.

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

15. In view of the above discussion, it is held that the Tribunal did not commit any error of law; no substantial question of law arises for consideration. The appeal, being devoid of merits, is consequently dismissed.

**S. RAVINDRA BHAT, J**

**December 12, 2012**

**R.V.EASWAR, J**