

Deputy Commissioner Of Income Tax vs Good Food Hotels Va. Pvt. Ltd. on 1 January, 1800

ORDER

S.C. Tiwari, Accountant Member

1. In this appeal filed by revenue the impugned order of the learned CIT(A) deleting penalty under section 27(1)(c) imposed by the Assessing Officer has been challenged. Facts of the case leading to this appeal, briefly, are that the assessee filed the return of income declaring loss at Rs. 60,61,650/-. The Assessing Officer found that the assessee had claimed pre-operative expense amounting to Rs. 11,74,168/-. He therefore reduced the same from the loss declared by the assessee. Besides, the learned Assessing Officer also reduced preliminary expenses amounting to Rs. 7,355/- and can nature incurred for increase in authorised share capital amounting to Rs. 8,000/-. Assessment was completed by determining total loss at Rs. 48,72,130/-. Penalty proceedings u/s 27(1)(c) were also initiated. During the course of penalty proceedings the learned authorised representative of the assessee argued that where the assessee filed return declaring loss and even after making auditions. The net income also resulted into loss, the provisions of section 27(1)(c) were not attracted. Reliance in this behalf was placed on the judgement of Hon'ble Punjab and Haryana High Court in the case of CIT V. Prithipal Singh & Co. (183 ITR 69) (P&H). The learned Assessing officer did not accept this contention of the assessee. Relying upon the provisions of Explanation 4 to section 27(1)(c). He therefore levied a penalty of Rs. 7,06,574/- u/s 27(1)(c) of the Act.

2. Aggrieved by penalty order the assessee preferred appeal before the learned CIT(A). The learned CIT(A) found that the judgement in the case of Prithipal Singh & Co. (supra) was clearly applicable to the facts and circumstances of the case. The learned CIT(A) also placed reliance on the decision of ITAT, Bombay "C" bench. In the case of Star Galv aizers (88 TTJ 12) (Bom). in ITA No. 5919. assessment year 1983-84. He also referred to the decision of ITAT, Ahmedabad Bench "A" in the case of Pancharatna Hotels Pvt. Ltd. Accordingly, he cancelled the penalty as levied by the Assessing officer. Aggrieved by this order revenue is in appeal before us.

3. During the course of hearing before us, the learned Departmental Representative argued that the judgement of Hon'ble Punjab and Haryana High Court in the case of Prithipal Singh and Co. (supra) had been delivered in respect of assessment year 1970-71. Provisions of Explanation 4 to section 27(1)(c) came into effect from 1.4.76. The ratio of the judgement of Hon'ble Punjab and Haryana High Court in the case of Prithipal Singh and Co. (supra) could not be applied after insertion of Explanation 4. In support of this contention the learned DR placed reliance on decisions reported in 22 ITD 246 (Del); 35 ITD 42 (All), 48 ITD 322 (Bom) and 64 ITD 129 (Pat) (TM).

4. The learned counsel for the assessee took us closely through the judgement of Hon'ble Punjab and Haryana High Court in the case of Prithipal Singh and Co. (supra). He pointed out that provisions of Explanations 3 and 4 were considered in the said judgement of Hon'ble Punjab and Haryana High Court. Thereafter Hon'ble High Court clearly held that the main provisions of section 27(1)(c) had

provided that penalty was leviable "in addition to the tax available" by assessee. If there was no taxable income or tax assessed for payment during a particular year. the question of evasion and consequently penalty did not arise. the learned counsel argued that Explanation could not alter the law laid down by the main provision. Penalty u/s 271(1)(c) has been envisaged in addition to tax payable by the assessee and therefore if there was no tax payable by the assessee, the question of levy of penalty u/s. 271 (1)(c) did not arise.

5. In furtherance of his arguments, the learned counsel for the assessee argued that the judgement of Hon'ble Punjab and Haryana High Court in the case of Prithipal Singh and Co. (supra) has since been upheld by Hon'ble Supreme Court in the case of CIT V. Prithipal Singh & Co. (249 ITR 670) (SC). That judgement having received that stamp of the apex court, there was no room for any further debate. At this stage, we pointed out to the learned counsel of the assessee that Hon'ble Supreme Court have clearly stated that on the facts of the case no interference was called for. The learned counsel argued that none the loss the judgement of Hon'ble Supreme Court affirmed the view taken by the High Court in the case of Prithipal Singh and Co. Had the Supreme Court found the law to be not correct, they would have said so.

6. Secondly, the learned counsel for the assessee referred to amendment brought to the provisions of section 271(1)(c) and Explanation 4 by the Finance Act, 2002, with effect from 1.4.2003, whereby for the works, "in addition to any tax payable" the words "in addition to tax, if any payable have been substituted. The learned counsel argued that this amendment clearly admitted that the provisions of law as they stood prior to amendment did not contemplated levy of penalty u/s 271(1)(c) in cases of the assessee where no tax was payable in relation to the assessment year in question. The learned counsel and that this amendment could not be said to be clarificatory because had the law been clear there was no need to make the amendment.

7. We have carefully considered the rival submissions. As far as the judgement of Hon'ble Supreme Court in the case of CIT v Prithipal Singh And Co. (249 ITR 670(SC) is concern to, we may as well reproduce the brief judgement delivered by Hon'ble apex court :-

"We have heard learned counsel and find that, on the facts of this case, no interference is called for.

The civil appeal is dismissed.

No order as to costs."

On perusal of the judgement above quoted, we do not see any affirmation of any principle of law laid down by Punjab and Haryana High Court. Hon'ble Supreme Court have clearly stated that the Departmental appeal was being dismissed because on the facts of that case no interference is called for. Assessment year in that case was 1970-71. Explanation 4 did not apply. Hence iron the judgement of Hon'ble Supreme Court, no way it can be stated that the ratio of High Court judgement would apply even to the cases arising after 1.4.76. We therefore do not see any assistance to the case of the assessee from the fact that in the civil appeal filed by revenue, Hon'ble Supreme

Court decided to interfere in the High Court judgement in the case of Prithipal Singh and Co. (183 ITR 69) (P&H) in view of the facts of that case.

8. We shall now deal with the second contention of the learned counsel of the assessee that amendments brought by Finance Act, 2002, should be interpreted to mean that prior to 1.4.2003, no penalty u/s. 271(1)(c) can be imposed where the result of the assessment is loss. Here we find that Memorandum explaining the provisions in the Finance Bill, 2002. annexed to Finance Bill. 2002, in this behalf has the following headings :-

"Clarification, amendment in section 271 relating to penalty for concealment of income etc."

Thus memorandum to the Finance Bill. 2002, has made it very clear that the proposed amendments were only clarificatory.

9. We shall now come to the main contention of the learned counsel of the assessee based on the judgement of Hon'ble Punjab and Haryana High Court in the case of CIT v. Prithipal Singh and co. (183 ITR 69) (P&H) that in view of the words "in addition to any tax payable" in the main provision of section 271(1)(c), there has to be assessment of income in the first instance, irrespective of the provisions of Explanation 4. We find that word "in addition to any tax payable" have been interpreted differently by Hon'ble Kerala High Court in their judgement in the case of CIT v. Rowthor Brother (119 ITR 353) (Ker). At page 356. Hon'ble High Court have observed as under :-

"It would be noticed that under the section all that is required for the imposition of a penalty under cl. (c) of sub-s. (1) of the section is that the officer concerned must be satisfied that any person has concealed the particulars of his income or has furnished inaccurate particulars of such income. In other words. for the purposes of cl. (c). there is no need to find any failure to furnish a return or failure to comply with a notice, etc., which are the necessary ingredients under cls. (a) and (b). Again in the matter of computation of penalty under cls. (a) and (b) it would be seen that under the sub-Cls. (1) and (ii) after cl. (c), the penalty imposed is geared to the tax payable or avoided whereas in the case referred to under cl. (c), it is not necessarily geared to the tax payable, but is in addition to any tax payable (if no tax is payable this will not enter the reckoning), an amount not more than twice the amount of the income concealed or the inaccurate particulars furnished."

It therefore follows that even before the judgement of Hon'ble Punjab and Haryana High Court in the case of Prithipal Singh and Co. (supra). Hon'ble Kerala High Court had interpreted the words "in addition to any tax payable" to enter into the reckoning only in the case where there is any tax payable and not otherwise.

10. We find that the judgement of Hon'ble Punjab and Haryana High Court in the case of Prithipal Singh and Co. (supra) has been considered in a number of decisions of the Tribunal and found to be not applicable after 1.4.76. In the case of Dasti Sugar Mills Co. Ltd. v. ITO (22 ITD 246) (Del) the

Tribunal held that after Explanation 4 there could not be any doubt that the penalty u/s 271(1)(c) is impossible even in the cases of losses. In the case of Omrao Industrial Corpn. (P) Ltd. v. ITO (35 ITO 42) (All). the judgement of Hon'ble Punjab and Haryana High Court in the case of Prithipal Singh and Co. (supra) was specifically considered but the Hon'ble Bench preferred to follow the view taken by Hon'ble Kerala High Court in the case of CIT v. Rowther Bros. (supra). In the case of Laxmichand Bagaji v. DCIT (48 ITD 322) (Bom) the judgement of Hon'ble Punjab and Haryana High Court was once again considered and the Bench referred to follow the decision of Allahabad Bench in the case of Omrao Industrial Corpn. (P.) Ltd. (supra). The issue once again arose in the case of ACIT v. Sharma Cold Storage and Ice Factory (P.) Ltd. (64 ITD 129) (Pat) (TM). In that case, while the Hon'ble Accountant Member found that in view of Explanation 4 the judgement of Hon'ble Punjab and Haryana High Court in the case of Prithipal Singh and Co. (supra) was distinguishable. Hon'ble Judicial Member, after meticulous reading of the judgement, did not find so. On reference to Third Member, the Hon'ble Third Member went into the Wanchoo Committee Report which had resulted into intro section of Explanation 4 and found that the intent of Legislature was to levy penalty u/s 271(1)(c) even in cases of losses.

11. The ratio of the judgement of Hon'ble Punjab and Haryana High Court in the case of CIT v. Prithipal Singh and Co. (supra) has been considered in a recent judgement of Hon'ble Karnataka High Court in the case of P.R. Baravappa and sons v. CIT (243 ITR 776) (Kan). After consideration, Hon'ble Karnataka High Court have held that the judgement is in respect of the assessment year 1970-71. i.e., before the insertion of Explanation 4, and hence cannot help the case of the assessee. following this judgement of Hon'ble Karnataka High Court and various other decision of the Tribunal having the same view as referred to in this order. We hold that the learned CIT(A) erred in coming to the conclusion that in view of the final assessed figure remaining as a loss. Penalty u/s 271(1)(c) was not leviable.

12. We find that the impugned order of the learned CIT(A) has been given entirely on the question of law. He has not considered as to whether, on the facts and in the circumstances of the case, on merits, any penalty u/s 271 (1)(c) is impossible. Therefore restore this issue to the file of the learned CIT(A) for decision afresh on the merits of the case.

13. For statistical purposes, this appeal filed by revenue shall be treated as allowed.