Income Tax Appellate Tribunal - Jaipur
Kanhaiya Lal Doshi vs Assistant Commissioner Of Income ... on 19 July, 1995
Equivalent citations: (1996) 56 TTJ JP 207
ORDER M. A. A. KHAN, J. M. :

These cross-appeals are directed against the order of the learned CIT(A), dt. 7th March, 1990, confirming the levy of penalty under s. 271(1)(c) of the IT Act, 1961 (the Act) but reducing quantum thereof from Rs. 1,64,900 to Rs. 1,31,925.

2. The relevant facts are that the assessee is a partner in the firm of M/s Champalal Gordhanlal. A search and seizure operation was carried out in the business/residential premises of the assessee during the period between 21st and 23rd Dec., 1983. In the course of search certain documents, cash, silver, gold, bullion, etc., were found and seized. The documents seized showed assessee carrying on money lending business wherefrom income was earned but such income was not disclosed to the Department. Orders under s. 132(5) and 132(12) were passed estimating assessees income from various sources in different years.

3. For the asst. yrs. 1984-85 the assessee returned his income in the following manner :

Rs.

Rs.

Share from the firm 22,305 Investment in money lending in S. Y. 2039 as per order u/s. 132(12) 1,06,584 1,28,889 Less : Deduction u/s. 80C 1,720 1,27,169 The total income of the assessee was, however, finally computed at Rs. 3,88,400 in the following manner :

Rs.

Rs.

Assessed share income 60,087 Income from other sources on account of unexplained cash 61,072 Unexplained investment in acquisition of gold ornaments 92,902 Unexplained investment in silver 70,003 Unexplained investment in money lending.

1,31,169 Interest income worked out by the assessee himself.

26,159

4. In the course of assessment proceedings the Assessing Officer (AO) after having prima facie felt satisfied that the assessee had concealed the particulars of his income or had furnished inaccurate particulars of such income, initiated penalty proceedings under s. 271(1)(c) of the Act against the assessee.

5. After having given an opportunity of being heard, the AO held that the assessee had failed to disclose his full and true income with wilful intention to avoid the incidence of tax. He categorically held that since the assessee had not furnished the true and correct particulars of his income, he had committed default punishable under s. 271(1)(c) of the Act. Holding thus, he levied a penalty of Rs. 1,64,900 being equal to 125% of the tax on the concealed income.

6. In appeal the learned CIT(A) examined various objections of the assessee in sufficient detail and agreed with the AO that the assessee had furnished inaccurate particulars of his income and had thus committed default punishable under s. 271(1)(c). The learned CIT(A), however, reduced the quantum of penalty from 125% of the tax on concealed income to the minimum amount of the penalty imposable at Rs. 1,31,925. The order of the learned CIT(A) confirming the penalty to that extent caused grievance to the assessee who has preferred ITA No. 524/Jp/90. The reduction of the penalty amount from Rs. 1,64,900 to Rs. 1,31,925 caused grievance to the Revenue wherefrom ITA No. 712/Jp/90 was filed by it.

7. We heard the learned counsel for the parties at sufficient length and went through the bulky paper book filed on behalf of the assessee in the light of the case laws relied upon by the parties.

8. Relying upon the decisions reported in CIT & Anr. vs. Anwar Ali (1970) 76 ITR 696 (SC), CIT vs. Smt. Satnam Malik (1987) 167 ITR 764 (Raj), CIT vs. Khoday Eswarsa & Sons (1972) 83 ITR 369 (SC), CIT vs. Dharam Chand Shah (1993) 204 ITR 462 (Bom), CIT vs. V. L. Balkrishnan (1981) 130 ITR 138 (Mad), CIT vs. Goswami (Smt.) Chandra Lata Bahuji (1980) 125 ITR 700 (Raj), CIT vs. Bharat Umbrella Mfg. Co. (1987) 167 ITR 683 (AP) at page 686 and 52 STC 279, it was vehemently urged on behalf of the assessee that the penalty proceedings were quasi-criminal proceedings in nature and levy of penalty was not automatic and neither consequential to the assessment proceedings. It was submitted that since by their very nature the penalty proceedings were quasi-criminal proceedings, the burden to prove the guilt of the assessee remains on the Revenue. The learned counsel further submitted that in the present case Revenue had miserably failed to discharge its burden that the assessee had concealed his income or had furnished inaccurate particulars of such income. The learned counsel further submitted that the explanations offered by the assessee in respect to the various items of additions made to the returned income were not considered in right perspective and, therefore, the penalty levied on the basis of orders passed on the quantum side was not justified. Referring to the cases reported in CIT vs. Jewels Paradise (1975) 101 ITR 265 (Kar), Behari Lal Ram Charan vs. ITO (1981) 131 ITR 129 (SC), Mehta Parikh & Co. vs. CIT (1956) 30 ITR 181 (SC) and Pushkar Narain Saraf vs. CIT (1990) 183 ITR 388 (All), it was further submitted that it is never safe to levy penalty in respect of an income which has been treated assessees income by application of certain deeming provisions in the Act. It was stressed that the provisions of s. 132(4) had restricted applicability and the presumption raised therein should not be extended to the assessment proceedings.

9. The learned counsel vehemently urged that in the course of proceedings under s. 132(11) the assessee was given an assurance that no penal action shall be taken against him provided he declared some income and pays tax accordingly. It was submitted that relying upon such assurances given by the CIT in the course of proceedings under s. 132(11) the assessee had accepted such income also as belonging to him which, in fact, did not belong to him. It was urged that in view of the assurance given to the assessee by the learned CIT no penalty should be levied in the present case.

10. The learned Departmental Representative, on the other hand, not only supported the order under appeal but further submitted that present case was a glaring instance of deliberate suppression and concealment of ones income from undisclosed sources. It was submitted that the assessee had been carrying on money lending business which was not disclosed upon the Revenue. It was further submitted that since incriminating documents and bullion, ornaments and cash were found from the possession of the assessee in the course of the search proceedings, the assessee saw no escape from the irresistible conclusion that the material found from his possession fully incriminated him, he had, on his own, surrendered his undisclosed income for taxation. The learned Departmental Representative further submitted that the orders made by the authorities under the Act including the Tribunal were not only relevant in penalty proceedings but were also material evidence on the point of the conduct and behaviour of the assessee. It was submitted that at no stage of the proceedings under s. 132 the assessee was ever given any assurance by any authority that no penal action shall be taken against him if he surrenders some income. It was submitted that the authorities acting under the summary proceedings were not competent and empowered to offer any assurance to the assessee and that is why no such assurance was contained in the orders made by those authorities. The learned Departmental Representative submitted that no amount of affidavits would alter the legal position and, therefore, the affidavit of the Chartered Accountant of the assessee filed on behalf of the assessee served no purpose at all and has rightly been overlooked by the assessing authorities. In support of his arguments the learned Departmental Representative relied upon the cases reported in Anantharam Veerasinghaiah & Co. vs. CIT (1980) 123 ITR 457 (SC), Rahmat Development & Engg. Corpn. vs. CIT (1981) 130 ITR 602 (Cal), CIT vs. N. Sowbhagmull Mahavirchand (1983) 142 ITR 747 (Mad), CIT vs. E. V. Rajan (1985) 151 ITR 189 (Mad) and Shri Loknath Chowdhury vs. CIT (1985) 155 ITR 291 (Cal).

11. After having given our thoughtful consideration to the arguments advanced before us, we entertain no doubt at all that on appreciation of the material on record and considering the facts and circumstances of the case there is no escape from the conclusion that the assessee had concealed the particulars of his income relating to the cash found in his possession at the time of search. But penalty referable to the investments allegedly made by him in acquisition of gold and silver ornaments as also earning interest income on accrual basis is difficult to be sustained in the present case.

12. On a study of the material before us, we find that penalty referable to the following points has been levied upon the assessee :

(1) Cash : In the course of search, cash amounting to Rs. 92,894 was found in possession of the assessee out of which a sum of Rs. 92,000 was seized. Out of the seized amount the unexplained portion of cash was finally assessed at Rs. 61,072 and penalty referable to this amount has been levied. It is gathered from the study of the material on record that at the time of search assessees statement was recorded under s. 132(4) of the Act and in response to question No. 9 which related to his possession of Rs. 92,800 plus in cash, the assessee had replied that the same was business income and that such income was hidden income on which he was prepared to pay tax. Subsequently the assessee changed his stand and took the plea that at the time of his marriage with Smt. Amrit Bai about 40 years back an amount of Rs. 1,001 was given by his father to his wifes father as security for the future life of his daughter, i.e., assessees wife, that by the Samvat Year 2002 the aforementioned amount of Rs. 1,001 swelled to Rs. 3,000 which was given to the assessee by the eldest son-in-law of his father-in-law under the will of the deceased father-in-law of the assessee. The further contention of the assessee was that with the aforementioned amount of Rs. 3,000 he had purchased cows and buffalows and started running a dairy and thus an amount of Rs. 60,823 was accumulated from savings from dairy business. This version was sought to be supported with certain writings in the Bahi by Shri Dev Chand who happened to be the eldest son-in-law of Shri Jorawarmal, the deceased father-in-law of the assessee and the affidavits of S/Shri Devchand, Badamilal, Jodhkaran and Nanu Ram.

13. We have closely studied all these pieces of evidence sought to be relied upon by the assessee before us. We find that the theory advanced by the assessee with the help of these documents not only runs counter to his very statement in answer to question No. 9 recorded under s. 132(4) but also was fully considered and discussed by the Tribunal in assessees appeal in ITA No. 827/Jp/88 and rejected as being afterthought. It does not appeal to our reasons that the assessee would have been accumulating the savings from the dairy business for more than 30 or 35 years and was keeping the amount in cash with him. In fact, at the time of search the assessee was found in possession of 2 cows, 3 buffalows and 2 calves. The milk and butter available to the assessee from these two cows and three buffalows would have met the requirement of his family only which consisted of 16 members. Therefore, the theory advanced was not acceptable and rejected by the Tribunal.

14. The learned counsel has vehemently urged that the affidavits filed by the persons named above in support of the theory advanced by the assessee went unrebutted and, therefore, the deposition made therein should be accepted. It was further submitted that the uncrossed testimony in an affidavit should not be lightly rejected. It was further submitted that the effect of the statement of the assessee recorded under s. 132(4) should not be unduly enlarged so as to demolish the theory advanced by him subsequently and which theory stood supported by the affidavits of other persons.

15. We have given due consideration to the arguments advanced by the learned counsel. The proposition of law as canvassed before us is certainly subject to the dispute but that is not the end of the matter in the present case. In the instant case, huge amount in cash was seized from the possession of the assessee and when at the time of search he was asked about his possession of cash in such huge quantity, the assessee came out with the statement that it was his money earned in business but not disclosed to the Department. That was the first version given by the assessee in

regard to his possession of the cash in question. This was an instantaneous statement of a person who was found in possession of certain property and who was asked to explain the nature and source of his possession of that property. Such a statement is required to be given due weight. In appreciating the stand of the assessee it shall have to be kept in mind that he had been carrying on money lending business and the income from such business was not disclosed to the Department. That apart, he was earning some income from other sources like selling milk, etc. With such facts, the assessee could have stated that the cash found in his possession had come to him from income-earning activities and thus there was the element of truth in his statement recorded under s. 132(4). We agree that the statement of an assessee recorded under s. 132(4) is to be considered mainly in those summary proceedings. But such a statement may also be relied upon by the Revenue against the assessee at the assessment proceedings, provided the assessee has been given an opportunity of explaining the statement so recorded under s. 132(4) and which is sought to be relied upon against him by Revenue. In the instant case, we find that the consistent stand of the Revenue has been that the assessee had accepted his ownership to the cash found and seized from his possession at the time of search.

16. In so far as the evidentiary value of the affidavits of the 3/4 persons named above is concerned, we do not dispute the general rule that if the deposition made in the affidavits is not tested on the altar of cross-examination, the same should be accepted. But before acceptance of any deposition contained in an affidavit, it is always necessary that the deposition made should inspire confidence and should appeal to the reasons of a prudent man. In the instant case, it does not appeal to our reason that the father of the assessee would give a sum of Rs. 1,000 to the father of the bride as a security money and the father of the bride would keep such money with him only to be bequeathed by him in favour of his daughter or son-in-law at a subsequent period. That apart, it does not inspire any confidence that a sum of Rs. 3,000 would have been given by the elder son-in-law of the deceased Shri Jorawarmal to the assessee some 30/35 years back and then the assessee would have started running a dairy with that amount. No account of income and expenditure of such dairy was ever kept. Merely because the assessee was found in possession of 2 cows and 3 buffalows at the time of search, it cannot be inferred that he was running a dairy business and that such dairy business was started with the paltry amount of Rs. 3,000 received by the assessee from his father-in-law through his brother-in-law. On the face of it such a theory does not inspire confidence and, therefore, the uncrossed testimony of four persons contained in their respective affidavits carries no weight. Such a theory stood contradicted by assessees own statement recorded under s. 132(4) at the time of search.

17. To sum up, we are clearly of the opinion that the learned IT authorities have rightly concluded that the sum of Rs. 60,823 represented assessees concealed income. We accordingly hold that penalty referable to Rs. 60,823 was imposable and has rightly been imposed upon the assessee under s. 271(1)(c) of the Act and the same is hereby confirmed.

18. (2) Silver And Gold Ornaments : As stated above, gold ornaments weighing 6719 gms. and silver ornaments and bullion weighing 65.855 kgs. were found in the possession of the assessee at the time of search. Of the gold ornaments found, addition in respect of 522.340 gms. was finally sustained. Similarly, addition on account of silver bullion weighing 4.865 kgs. only was sustained in appeal.

The factual position clearly shows that major portion of the gold ornaments and silver ornaments and bullion was accepted as belonging to the other members of the family of the assessee. The consistent stand of the assessee in respect to the silver and gold ornaments and silver bullion had been that the same was acquired by different members of his family over the years. On a study of the various orders of the authorities adjudicating upon the issue, we find that almost on every level relief in varying degree was allowed to the assessee and finally ownership of 522.340 gms. of gold ornaments and 4.865 kgs. of silver bullion was attributed to the assessee. We could have safely proceeded on the footing that since upto the stage of Tribunal ownership to the extent of above mentioned quantity of the gold and silver ornaments and silver bullion had been established with the assessee, penalty referable to that extent may be imposed upon the assessee. But on thoughtful consideration we have been of the opinion that the possibility of the silver and gold ornaments, the ownership of which has been attributed to the assessee, being vested in other members of the family cannot be ruled out. At every stage of assessment proceedings the extent of the ownership to the silver and gold ornaments got varied and altered. That shows that the ownership of the assessee to the remaining part of silver and gold ornaments cannot be said to have been established beyond reasonable doubt. Moreover, the plea advanced by the assessee may be false. But the basis for levy of penalty under s. 271(1)(c) would not be the rejection of a false plea of an assessee. Penalty under s. 271(1)(c) should be referable to the income actually concealed by the assessee. In the instant case it was with the help of deeming provision in the Act that the investment made in the acquisition of silver and gold ornaments was considered to have been made by the assessee. This conclusion was arrived at after rejecting the plea of the assessee as a false plea. There is no positive evidence to hold that the investment had, in fact, been made by the assessee in the acquisition of the silver and gold ornaments. In this behalf, it cannot be lost sight of that assessees wife was a wealth-tax assessee. Here it may be pointed out that in the case of CIT vs. Khoday Eswarsa & Sons (supra), the Supreme Court laid down the law in the following terms :

"Penalty proceedings being penal in character, the Department must establish that the receipt of the amount in dispute constitutes income of the assessee. Apart from the falsity of the explanation given by the assessee, the Department must have before it before levying penalty cogent material or evidence from which it could be inferred that the assessee has consciously concealed the particulars of his income or had deliberately furnished inaccurate particulars in respect of the same and that the disputed amount is a revenue receipt."

Judged in the light of the above observations, we are of the opinion that it would not be safe to sustain the penalty referable to the additions made on account of acquisition of silver and gold ornaments by the assessee. In other words penalty referable to the amounts of Rs. 92,902 + Rs. 17,003 shall stand cancelled.

19. (3) Interest income : Penalty referable to interest income of Rs. 26,159 was also levied and sustained. On a study of the material placed at pages 45, 46 and 120 of the paper book, we are satisfied that whereas the assessee adopted cash system of accounting, the addition on account of interest income was made on accrual basis. Obviously interest income added to the total income of the assessee on accrual basis would not make a firm basis for levy of penalty under s. 271(1)(c) of the Act. We, therefore, hold that penalty referable to the interest income of Rs. 26,159 shall also stand

cancelled.

20. The learned counsel for the assessee had also urged that the provisions of Expln. 5 to s. 271(1)(c) were not applicable to the present case and reliance in that behalf was placed on CIT vs. Devidayal Aluminium Industries Pvt. Ltd. (1988) 171 ITR 683 (All), (1992) 198 ITR 176 (sic) and Diamond Trust Investment (P) Ltd. vs. Asstt. CIT (1994) 51 ITD 123. We have not appreciated the facts in the instant case with reference to Expln. 5 to s. 271(1)(c) and would, therefore, not like to make any comments in that respect.

21. The learned counsel had further submitted that in the course of proceedings under s. 132(11) the CIT had given assurance to the authorised representative of the assessee that if the disclosure of his income was truly made by the assessee, no penalty would be levied. It was submitted that such an assurance must be honoured and no penalty referable to any addition whatsoever be sustained in the present case. In that behalf the affidavit of authorised representative of the assessee, Shri P. K. Chaparwal, was relied upon. The learned Departmental Representative vehemently opposed such an argument and submitted that if such sort of arguments are allowed to prevail over the written orders passed by judicial or quasi-judicial authorities then there would remain no sanctity of the orders passed or action taken by such authorities. The learned Departmental Representative further submitted that while sitting in appeal under s. 132(11), the CIT may decide an issue judiciously but cannot extend any assurance contrary to what he decides in his written order. It was submitted that such an argument should not be entertained at all.

22. We have gone through the order under s. 133(12) as placed at page 105 to 119 of the paper book and failed to notice therein any assurance of the nature alleged to have been given by the learned CIT to Shri P. K. Chaparwal, authorised representative of the assessee. The contents of a judicial order cannot be allowed to be disproved by any amount of oral evidence. The learned CIT instead of giving verbal assurance to the assessee could have decided the contention of the assessee in his favour while dictating the order under s. 132(12) of the Act. He could not have given an assurance of the nature stated to have been given by him to the assessees authorised representative. We, therefore, find no merits either in the affidavit of Shri Chaparwal or the contention based on such evidence. We reject the argument advanced in that behalf.

23. To sum up, the above discussion takes us to hold that minimum penalty referable to the addition of Rs. 60,823 made on account of unexplained cash is sustainable and is hereby sustained. Penalty referable to the other additions is hereby cancelled. In view of this conclusion, the appeal preferred by Revenue for restoring the penalty levied by the AO shall stand dismissed.

24. In the result, the appeal filed by the assessee is partly allowed, but that of the Department is dismissed.