

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.2.2006

CORAM

THE HON'BLE MR.JUSTICE P.D.DINAKARAN
AND
THE HON'BLE MR.JUSTICE P.P.S.JANARTHANA RAJA

T.C.(A).No.250 of 2006

Commissioner of Income Tax
Tamil Nadu VII, Madras.

Appellant

Vs.

A. Hariraman

Respondent

Appeal under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Chennai 'A' Bench dated 25.8.2005 in ITA No.1678/Mds/1999 for the assessment year 1992-93 against ITA.No.101/99-00 order dated 30.8.1999 for the assessment year 1992-93 on the file of the Commissioner of Income Tax (Appeals-IX), Chennai and G.I.No.321-H Order dated 29.4.1999 on the file of the Assistant Commissioner of Income Tax (Asst-1) Circle-1, Chennai-34.

For Appellant

: Mr.J. Naresh Kumar, Jr.S.C.

J U D G M E N T

(Delivered by P.D.DINAKARAN, J.)

The above tax case appeal is directed against the order of the Income-tax Appellate Tribunal in dated 25.8.2005 made in ITA No.1678/Mds/1999, raising the following substantial questions of law.

"1. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in deleting the penalty, even though the assessee was concealed any income or furnished inaccurate particulars of income under the meaning of section 271(1)(c) of the Income Tax Act?

(2) Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in cancelling the penalty under Section 271(1)(c), on the ground the assessee's income computed by the assessing officer is a net loss?

2. The facts which led to the rise of the above appeal by the revenue are as under.

The assessee publishes and prints five tamil magazines, apart from doing job works, in the name of M/s. Parvathy Publication and M/s. Parvathy Art Printers. The assessee filed the return admitting a loss of Rs.9,45,242/- for the assessment year 1992-93. On perusal of the account books, the assessing officer came to the conclusion that an attempt had been made to reconcile paper purchases account by making transfer entries and inflation of paper purchases account etc. and treating the purchases of Rs.3,07,172/- and Rs.4,00,723/- made from Kothandapani Paper Stores and Karpagam Agencies as bogus purchases, added the same to the total income, thereby computing the loss at Rs.19,874/- and consequently, initiated penalty proceedings under section 271(1)(c) of the Act. Hence, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals), who dismissed the appeal confirming the penalty levied. The Income Tax Appellate Tribunal, on appeal, allowed the appeal in favour of the assessee holding that quantum proceeding and penalty proceeding are separate and because of the quantum, penalty cannot be levied automatically. Hence, the present appeal by the revenue.

3. It would be appropriate to refer Section 271(1)(c) of the Act in this regard, which reads as under:

"Failure to furnish returns, comply with notices, concealment of income etc.

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

(a) ...

(b) ...

(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, -

(i) Omitted by the Direct Tax Laws (Amendment) Act, 1989, with effect from 1.4.1989

(ii) in the cases referred to in clause (b), in addition to tax, if any, payable by him, a sum of ten thousand rupees for each such failure;

(iii) in the cases referred to in clause (c), in addition to tax, if any, payable by him, a sum which shall not be less than, but which shall not exceed three times, the amount of tax sought to be evaded by reason of the concealment of particulars of his income or the furnishing of inaccurate particulars of such income. "
(emphasis supplied)

4. The words "in addition to tax, if any, payable him" employed in clauses (ii) and (iii) above and the words "amount of tax sought to be evaded by reason of such concealment of particulars of his income" employed in clause (iii) of Section 271(1)(c) of the Act are the deciding factors for invoking penalty proceedings under Section 271(1)(c) of the Act. A plain reading of clauses (ii) and (iii) in Section 271(1)(c) of the Act, particularly in the context of the words "in addition to tax, if any, payable him" employed in clauses (ii) and (iii) would make it clear that the penalty contemplated in all the above clauses is a measure of tax payable by the assessee. In other words, if no tax is payable by the assessee, there would be no penalty which could be levied on the assessee.

4.2. As per the language in Section 271(1)(c) of the Act, there could be no case in which penalty could be levied where no tax is payable by the assessee since the quantification of the penalty is totally dependent upon the tax payable by the assessee. Therefore, the conclusion is irresistible that when the assessee is not liable to pay any tax, no penalty can be levied on the assessee, vide ADDL. CIT v. MURUGAN TIMBER DEPOT (113 ITR 99).

4.3. It is trite law that the loss cannot be taken into account in computing penalty. Similarly, the amount representing unexplained credit cannot be treated as concealed income for levying penalty, vide CIT v. C.R. NIRANJAN (187 ITR 280).

4.4. The word "income" occurring in clause (c) and (iii) of Section 271(1) of the Act refers to positive income only and not a loss. Penalty could be imposed only in addition to the tax payable. When there is no tax payable, the question of any

penalty does not arise. In fact, evasion of tax is the sine qua non for imposition of penalty. If there is no taxable income or tax assessed for payment during a particular year, the question of evasion and consequently, penalty do not arise. The penal provisions of Section 271(1)(c), therefore, are attracted only in the case of an assessee having positive income and not loss, as the question of concealment of income to avoid payment of tax would arise only in the former case. Penalty is a deterrent measure to prevent evasion of tax and when there was no tax payable, there could be any such evasion so as to provide a scope for levying any penalty, vide CIT v. PRITHIPAL SINGH AND CO. (183 ITR 69).

4.5. The view taken by the Punjab & Haryana High Court in CIT v. PRITHIPAL SINGH AND CO. (183 ITR 69) was upheld by the Supreme Court in CIT v. PRITHIPAL SINGH AND CO. (249 ITR 670).

4.6. This Court, in RAMNATH GOENKA v. CIT (259 ITR 229), following the decisions cited above, held that penalty is imposable only in cases where tax has been levied and that no penalty can be levied when the result of the computation made by the assessing officer is a loss. In other words, penalty is not leviable when the assessment did not show any taxable income, but net loss.

5. Applying the ratio laid down in the decisions cited supra, we do not find any error or illegality in the order of the Tribunal in deleting the penalty taking into account the income of the assessee is a net loss. Finding no substantial question of law arising for consideration, the appeal is dismissed.

kpl

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. THE ASSISTANT REGISTRAR,
INCOME TAX APPELLATE TRIBUNAL
III FLOOR, RAJAJI BHAVAN
BESANT NAGAR, CHENNAI-90.

2. THE COMMISSIONER OF INCOME TAX
APPEALS IX,
CHENNAI-34

3. THE ASSISTANT COMMISSIONER OF
INCOME TAX (ASST.I)
CIRCLE-1, CHENNAI-34.

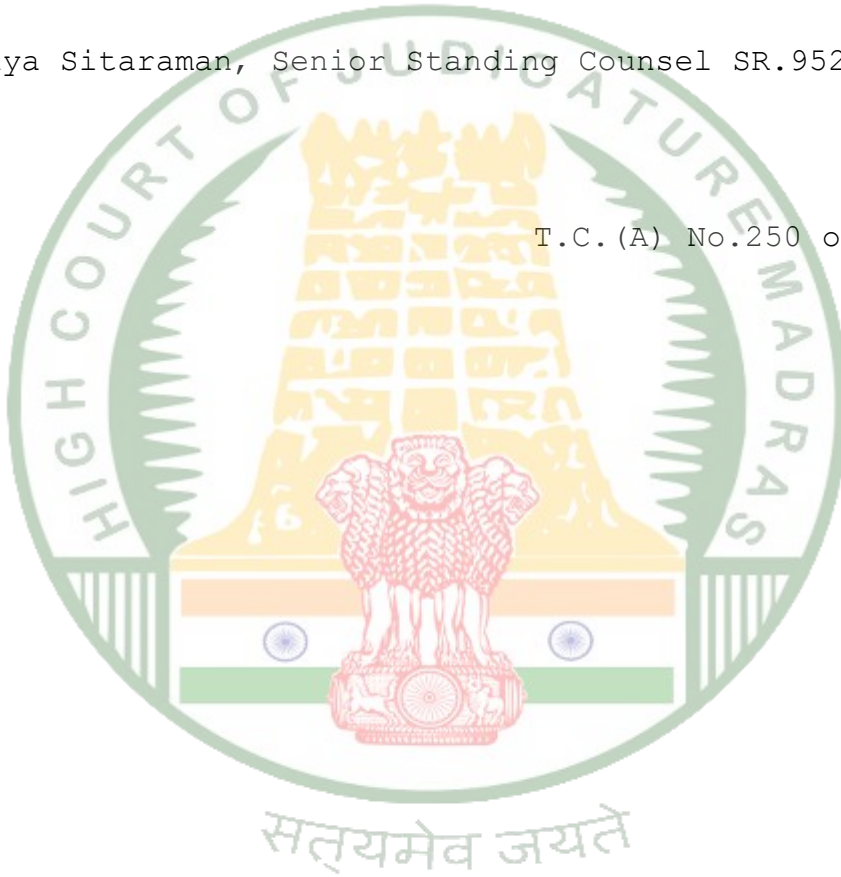
4. THE COMMISSIONER OF INCOME TAX
TAMIL NADU VII,
MADRAS

1 cc to M/s.Pushya Sitaraman, Senior Standing Counsel SR.9521

je (co)

dv/2.5.06

T.C.(A) No.250 of 2006.



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