CASE NO.:
Appeal (civil) 5204-5207 of 2002

PETITIONER:
Sudarshan Silks & Sarees

RESPONDENT:
Commissioner of Income Tax, Karnataka

DATE OF JUDGMENT: 11/04/2008

BENCH:
ASHOK BHAN & DALVEER BHANDARI

JUDGMENT:
J U D G M E N T
Reportable

CIVIL APPEAL NOS. 5204-5207 OF 2002

BHAN, J.

1. These appeals have been filed by the assessee against the final judgment and order dated 6th October 2001 passed by the High Court of Karnataka at Bangalore in ITRC Nos. 684/98, 685/98, 686/98 and 687/98 by which the High Court while setting aside the order of assessment passed by the Income Tax Appellate Tribunal (for short, 'the Tribunal') and that of the Commissioner of Income Tax (Appeals), held that the facts and circumstances of the case warranted levy of penalty under Section 271(1)(c) of the Income Tax Act, 1961 (for short "the Act").

2. The assessment years involved in the present Appeals are 1984-85, 1985-86, 1986-87 and 1987-88.

Facts:

3. A search was conducted on the premises of the assesses on 14th and 15th of October, 1987 and incriminating documents evidencing concealment of income by the assessee were unearthed apart from cash and jewellery found at the time of search. It was found that the appellant was maintaining double set of books and was accounting for only 50% of sales in the regular set of books. This fact was admitted by Shri J.S. Ramesh, a partner of the firm in the statement recorded under Section 132(4) of the Act. Shri J.S. Ramesh is the person-in-charge of the entire group. The total turn over suppressed by the assessee for the assessment year 1987-88 was found to be to the tune of Rs.44,07,783/-. These have been discussed in detail in the order of assessment. Assessing Officer estimated that the sales of the assessee were Rs.50,000/- per day, whereas the accounted sales were not found even 50% of the total sales. Apart from this, it was found that certain purchases were also not being accounted for. Similarly certain payments made were not being accounted for. All these were pointed out to the assessee. The assessee came forward with offer of additional income. Assessee filed a revised return on 31st March, 1989 declaring a total income for this year at Rs.3,74,226/- as against the earlier amount of Rs.43,650/-. This was accepted and after verification

the assessment was completed on 29th December, 1989.

4. During the course of recording the statement under Section 132(4) of the Act, Shri Ramesh agreed to declare such additional income as had been estimated by the search party in the office of the appellant and its sister concerns. On the basis of these calculations, revised returns were filed by the appellant for all the years under appeal. The income as per revised returns were also accepted in toto. In the course of assessment proceedings, penal action under Section 271 (1) (c ) of the Act was initiated and, after considering the reply filed by the appellant, the learned Assistant Commissioner of Income Tax / Assessing Officer chose to levy maximum penalty under Section 271 (1) (c ). While levying the penalty, the Assessing Officer repelled the contention of the appellant that a promise had been made not to levy the penalty, as there was no evidence to this effect on record. It was also held that the appellant was not entitled to the immunity given under Section 132(4) read with Section 271 (1) (c ) of the Act.

5. Aggrieved against the levy, the appellant filed appeal before the CIT (Appeals). The CIT (Appeals) after detailed discussion and going through the appeal papers, recorded the following findings:
"Besides there are several factors which would clearly show that the appellant filed the return merely for the purpose of purchasing peace. Although I have held that the provisions of Section 132 (4) r/w Explanation 5 to Sec. 271(1)(c) are not applicable, the record show very clearly that the appellant was under a strong impression that the statement by which he was disclosing additional amounts was made under the provisions of Section 132 (4). Question 88, which has come at the end of an extremely long session of questioning (the record of which itself runs to 30 pages) is as follows:-

"I have explained to you the provisions of section 132 (4) of the I.T. Act, 1961 would you like to make any disclosure?"

In the context of the pointed reference made to section 132 (4) by the interrogator, the appellant’s partner indicated that he would like to offer additional incomes and then he proceeded to make estimates of the sales and the profits that would have arisen thereon. It is quite clear that at the end of the long session of questioning (coupled with the fact that in respect of current period there had been discovery of suppression of sales) and inducement had been offered in the form of question 88. At the same time the appellant was quite apprehensive

that there would be a lot of difficulties, litigation, etc. in store, regard had of the fact that for the current period, suppression had been discovered. Although the appellant's partner knew that no books, documents etc. relating to the earlier periods had been discovered, he was aware that the discovery of books for the current period could lead to litigation in respect of the earlier years incomes, by a process of extension. To avoid this litigation, and in order to purchase peace, he offered additional amounts for taxation in the firm's hands. A perusal of the statement accompanying the revised return also clearly showed that the higher incomes were returned with the following legend "Total income as agreed before the DDI", (emphasis supplied). This coupled with the fact that the statement made was in answer to question 88 (which question was a clear inducement to purchase peace, with a pointed reference to section 132 (4) would indicate that the appellant's offer of higher income was only a preoccupation with agreed settlement.

In these circumstances I am of the view that the appellant clearly offered the amount for taxation for the purpose of purchasing peace. Together with this finding, I also notice that no books of accounts or other documentary evidence was discovered, that proved any concealment for the earlier years. I am of the view that the Supreme Court's decision in 168 ITR 705 supporting the proposition that no penalty is leviable when unproved income is offered to purchase peace would be directly applicable, particularly considering that the additional income returned, have only been on the basis of the appellant's own estimates and the appellant's own admission, unsupported by the discovery of any other documentary evidence relevant to years for which the higher incomes were returned."

6. On the basis of these findings, the CIT (Appeals) accepted the appeal and set aside the orders of the Assessing Officer. It was held that in the facts and circumstances of the case, no case for levy of penalty under Section 271 (1) (c ) was made out.

7. Aggrieved against the order passed by the CIT (Appeals), the Revenue filed the appeals for all the assessment years before the Tribunal.

8. The Tribunal upheld the findings recorded by the CIT

(Appeals) and recorded a finding to the following effect:

"\005\005 Although there is nothing on record to show that he was given an assurance that no penalty would be levied, the fact however clearly suggest that such an inducement must have been given by the searching party. When only partial evidence in support of concealment for a very limited period was detected during the search, why would a man go to offer much higher amounts for a large number of years unless he was promised some reciprocal benefit like not being visited with penalty? The learned DR has tried to argue before us that a change of heart might have taken place as a result of which Sri Ramesh came forward with all the disclosures for different years voluntarily. But looking into the hard facts of life and the general experience of mankind, especially with regard to financial affairs, it would be difficult to accept such a proposition. Evidently, huge amount of unexplained investments including unexplained stock was found at the time of search. Ultimately, almost the same amount of income was offered by the assessees over a number of years. As the tax rates over the entire period was more or less the same, the tax effect, either from the point of view of the Dept., or the assesses would have more or less the same, had the entire undisclosed assets been subjected to tax in the year of search or the entire income was spread over a number of years as has been done in the present assessments. In view of the deposition given u/s. 132 (4) followed by the cooperating attitude of the assesses in paying up the tax, it would be clear that no penalty u/s. 271 (1) ) would have been leviable had the entire undisclosed income been assessed in the year of search. Instead of going for that simple way, Sri Ramesh went into the question of admitting undisclosed income on estimated basis for the different past years. He must have felt that in that process alone, he would avoid the levy of penalty by the departmental authorities. The facts and circumstances strongly indicate that an inducement and an allurement had been provided to him at the time of search in that matter.

Again, although incriminating materials were found out during the search, such materials were however ultimately not used by the departmental authorities in making the assessments. The assessments were made totally on

the basis of estimation income for the earlier years as disclosed in the revised returns. The revised returns should therefore be considered as having been filed in good faith. So far as assessment of the undisclosed income is concerned, such revised returns would be sufficient evidence for that purpose. However, for levying penalty, some further and stronger evidences were surely required In the cases relied upon by the learned DR, the search itself discovered the undisclosed income. In the instant cases, the search merely led to certain clues to the undisclosed income and but for the statement made by Sri Ramesh, it would perhaps have not been possible for the Dept. to assess the undisclosed income over all these years in the way in which such assessments have been made. The only way for the dept. in such a case would have been to assess the entire amount of undisclosed investments for the year of search as has been discussed by use above, the Dept. could not have been in a position to levy penalty for concealment in such a case. We are therefore of the opinion that the case laws as cited by the Dept., do not exactly support its case, so far as the present appeals are concerned. On the other hand, most of the judgments cited by the learned counsel for the assesses support the case of the assesses that on account of strong circumstantial evidences being there about inducement having been given by the departmental authorities for not levying penalty in case of disclosure of income over the earlier years, no penalty can actually be levied by the Dept."

9. Revenue thereafter filed a reference application under Section 256(1) of the Act. The Tribunal referred the following question to the jurisdictional High Court for its opinion:
"Whether on the facts and in the circumstances of the case ITAT is right in law in upholding the orders of the CIT(A) canceling the penalty levied u/s.271(1)(c)?

10. High Court on consideration of the matter concluded that the findings recorded by the Tribunal and CIT (Appeals) being perverse, which no reasonable person could have taken, are liable to be set aside and accordingly accepted the reference and held that in the facts and circumstances of the case, Tribunal was not right in upholding the order of the CIT (Appeals) in canceling the penalty levied under Section 271 (1)(c). It was held that in the facts of the case the penalty under Section 271 (1)(c) is clearly exigible. Reference

was answered in favour of the Revenue and against the assesee.

11. Being aggrieved, the assessee has filed these appeals.

12. The only contention raised by the learned counsel for the appellant is that the Tribunal is the final fact-finding authority and its decision on the facts can be gone into by the High Court only if a question has been referred to it which says that the finding of the Tribunal on facts is perverse, in the sense that it is such as could not reasonably have been arrived at on the material placed before the Tribunal. In the absence of such a question having been claimed, the High Court was obliged to accept the findings of fact arrived at by the Tribunal and then proceed to decide the question of law referred to it. Relying upon the two judgments of this Court in K. Ravindranathan Nair v. Commissioner of Income Tax, (2001) 247 ITR 178 (SC) and T. Ashok Pai v. Commissioner of Income Tax, (2007) 292 ITR 11 (SC), it was contended that the High Court exceeded its jurisdiction in coming to the conclusion that the finding recorded by the Tribunal were perverse as no question of law to that effect had been either claimed or referred by the Tribunal to the High Court for its opinion.

13. We find substance in this submission. In K. Ravindranathan Nair's case (supra) the question referred to the High Court was:

"Whether on the facts and in the circumstances of the case, the assessee is entitled to claim deduction of Rs. 4,18,107, under section 37 of the Income Tax Act, 1961. "

14. The High Court instead of answering the question of law referred to it came to the conclusion that the Tribunal had misdirected itself in law in arriving at the findings as according to the High Court the Tribunal had overlooked or ignored a clinching document present on record to prove to the contrary and because it had wrongly cast the burden of proving the facts on a party. Reversing the finding recorded by the High Court, it was held as under:-

"The High Court overlooked the cardinal principle that it is the Tribunal which is the final fact-finding authority. A decision on fact of the Tribunal can be gone into by the High Court only if a question has been referred to it which says that the finding of the Tribunal on facts is perverse, in the sense that it is such as could not reasonably have been arrived at on the material placed before the Tribunal. In this case, there was no such question before the High Court. Unless and until a finding of fact reached by the Tribunal is canvassed before the High Court in the manner set out above, the High Court is obliged to proceed upon the findings of fact reached by the Tribunal and to give an answer in law to the question of law that is before it.

The only jurisdiction of the High Court in a reference application is to answer the questions of law that are placed before it. It is only when a finding of the Tribunal on fact is challenged as being perverse, in the sense set out above, that a question of law can be said to arise."

(Emphasis supplied)

15. To the similar effect is the judgment of this Court in T. Ashok Pai's case (supra). Relying upon the judgments of this Court in CIT v. Mukundray K. Shah, (2007) 290 ITR 433 (SC), Century Flour Mills Ltd. v. CIT, (2001) 247 ITR 276 (SC) and K. Ravindranathan Nair's case (supra), it was held: -

"Reference of the question to the High Court as noticed hereinbefore was general in nature. No question was referred as to whether the finding of the Tribunal was perverse or not. Existence of mens rea is essentially a question of fact. The Tribunal alone, as the highest authority empowered to determine the question of fact, would be entitled to go thereinto. We may, however, hasten to add that the same would not mean that the High Court will have no jurisdiction in this behalf. The High Court, it is well known, should not ordinarily disturb the finding of fact arrived at by the Tribunal. The question of law should generally arise only accepting the finding of fact to be correct."

16. In the present case, the question of law referred to the High Court for its opinion was, as to whether the Tribunal was right in upholding the findings of the CIT (Appeals) in canceling the penalty levied under section 271(1)(c). Question as to perversity of the findings recorded by the Tribunal on facts was neither raised nor referred to the High Court for its opinion. The Tribunal is the final court of fact. The decision of the Tribunal on the facts can be gone into by the High Court in the reference jurisdiction only if a question has been referred to it which says that the finding arrived at by the Tribunal on the facts is perverse, in the sense that no reasonable person could have taken such a view. In reference jurisdiction, the High Court can answer the question of law referred to it and it is only when a finding of fact recorded by the Tribunal is challenged on the ground of perversity, in the sense set out above, that a question of law can be said to arise. Since the frame of the question was not as to whether the findings recorded by the Tribunal on facts were perverse, the High Court was precluded from entering into any discussion regarding the perversity of the finding of fact recorded by the Tribunal.

17. Accordingly, the Orders under appeal are set aside and that of the CIT (Appeals) and Tribunal restored. It is held that in the facts and circumstances of the case, penalty under Section 271(1)(c) was not exigible. The

appeals are accepted with costs.