

HC justified levy of concealment penalty as assessee had claimed dep. on non-existing assets

Summary – The High court of Madras in a recent case of Sundaram Finance Ltd., (the Assessee) held that where assessee claimed depreciation on non-existent assets, penalty under section 271(1)(c) was to be levied for filing inaccurate particulars of income

Facts

- The assessee was engaged in the business of hire purchase, equipment leasing and allied activities. The assessee purchased air pollution control equipment from company, PE and leased back same to company, PIL. A search under section 132 was conducted in the case of PE by the Investigation Wing during which a sworn statement was recorded from a Managing Partner of the said company, that his company had not sold any air pollution control equipment to any leasing company including the assessee-company. It was found that various current accounts were opened in the name of PE company showing different proprietors at different addresses and amounts received from various finance companies were deposited in those accounts and such amounts were withdrawn in cash or through cheque and major portion of the amount was transferred in favour of PIL, with whom the assessee had entered into lease transaction.
- Based on the information received, the Assessing Officer found that no air pollution control equipment was supplied and even though it was stated that the assessee-company sent a person for inspection, the inspection report was vague and therefore, concluded that no inspection was in fact carried out. The Assessing Officer treated the lease transaction entered into with PIL, by the assessee, as finance transaction. The Assessing Officer pointed out that the primary condition for claiming depreciation was not only that the asset must be owned by the assessee used for business and, therefore, before claiming depreciation, it was a duty of the assessee to ensure that the assets existed. Therefore, it was held that merely relying on the version of the lessee or on a self-serving inspection report did not exonerate the assessee from its obligations. Thus, it was concluded that by claiming depreciation on machinery which did not exist or which was never supplied, the assessee had not only concealed particulars of its income, but had also furnished inaccurate particulars of income. Thus, the Assessing Officer disallowed the depreciation and levied penalty under section 271(1)(c).
- Before the appellate authority, the assessee had admitted that they had claimed depreciation on an asset which was not in existence and therefore, the finding of the Assessing Officer was confirmed. The levy of penalty was also upheld on the ground that the assessee concealed particulars of its income and furnished inaccurate particulars.
- On appeal, the Tribunal also upheld the order of the Commissioner (Appeals).
- On appeal to the High Court:

Held

- Penalty under the said section is a civil liability, *mens rea* is not an essential element for imposing penalty for breach of civil obligations or liabilities, wilful concealment is not an essential ingredient for attracting civil liability, existence of conditions stipulated in section 271(1)(c) is a *sine qua non* for initiation of penalty proceedings under section 271 and the existence of such conditions should be discernible from the assessment order or order of the appellate authority or revisional authority, the imposition of penalty is not automatic, imposition of penalty even if the tax liability is admitted is not automatic and if explanation offered is not substantiated, an order imposing penalty could be passed. Notice proposing to impose penalty should specifically state the grounds mentioned in section 271(1)(c) and findings recorded in the assessment proceedings insofar as concealment of income and furnishing of inaccurate particulars would not operate as *res judicata* in penalty proceedings and it is open to the assessee to contest the said proceedings on merits.
- The assessee's case before the authorities and the Tribunal was that it claimed depreciation on a genuine belief that the transaction was *bona fide* and that the depreciation was claimed on the basis of documents and other evidence made available to it at that point of time in good faith. Therefore, the assessee contended that it has neither concealed any particulars of income nor furnished any inaccurate particulars of income.
- The entire issue came to light on account of a search under section 132 was conducted in the case of PE company by the Investigation Wing during which a sworn statement was recorded from a Managing Partner of the said company, who had stated that his company had not sold any air pollution control equipment to any leasing company including the assessee-company. It was found that various current accounts were opened in the name of company, PE showing different proprietors at different addresses and amounts received from various finance companies were deposited in those accounts and such amounts were withdrawn in cash or through cheque and major portion of the amount was transferred in favour of PIL, with whom the appellant/assessee had entered into lease transaction. Based on the information received, the Assessing Officer found that no air pollution control equipment was supplied and even though it was stated that the assessee-company sent a person for inspection, the inspection report was vague and therefore, concluded that no inspection was in fact carried out. The Assessing Officer pointed out that the primary condition for claiming depreciation was not only that the asset must be owned by the assessee used for business and therefore, before claiming depreciation, it was a duty of the assessee to ensure that the assets exist. Therefore, it was held that merely relying on the version of the lessee or on a self-serving inspection report does not exonerate the assessee from its obligations. Thus, it was concluded that by claiming depreciation on machinery which did not exist or which was never supplied, the assessee had not only concealed particulars of its income, but had also furnished inaccurate particulars of income.
- The appellate authority, who confirmed the order passed by the assessing authority, held that there was no asset in existence and the assessee themselves accepted said fact and reversed the claim for depreciation and therefore, the assessee had concealed particulars of its income and furnished

inaccurate particulars. The correctness of this order was tested before the Tribunal. The Tribunal confirmed the order of levying penalty. Thus, if the facts are tested on the anvil of the legal principles as has been stated above, it is not necessary that there should be wilful concealment for attracting a civil liability of penalty under section 271(1)(c). The existence of the condition mentioned under section 271(1)(c) are writ large on the face of the order of the Assessing Officer as well as the first appellate authority. The authorities concurrently rejected the explanation offered by the assessee. One is in agreement with the factual findings rendered by the authorities since the petitioner is a leasing company as it is very hard to believe a case where the leasing company had made advances for leasing out a machinery, which never in existence. That apart, the assessee has not mentioned either before the lower authorities or before this Court as to what action they had initiated against the lessee, who is alleged to have committed fraud. The entire issue would not have come to light but for the search conducted in the case of PE company and when the assessee was confronted with the findings, they have voluntarily reversed depreciation claimed by them. Thus, the Assessing Officer, first appellate authority and the Tribunal rightly held that the assessee is liable for penalty.

- The assessee further seeks to contend that the notices issued under section 274 read with section 271 are vitiated since it did not specifically state the grounds mentioned in section 271(1)(c).
- The relevant columns of the notice have been marked, more particularly, when the case against the assessee is that they have concealed particulars of income and furnished inaccurate particulars of income. Therefore, the contention raised by the assessee is liable to be rejected on facts. That apart, this issue can never be a question of law in the assessee's case, as it is purely a question of fact. Apart from that, the assessee had at no earlier point of time raised the plea that on account of a defect in the notice, they were put to prejudice. All violations will not result in nullifying the orders passed by statutory authorities. If the case of the assessee is that they have been put to prejudice and principles of natural justice were violated on account of not being able to submit an effective reply, it would be a different matter. This was never the plea of the assessee either before the Assessing Officer or before the first appellate authority or before the Tribunal or before this Court when the Tax Case Appeals were filed and it was only after 10 years, when the appeals were listed for final hearing, this issue is sought to be raised. Thus on facts, one could safely conclude that even assuming that there was defect in the notice, it had caused no prejudice to the assessee and the assessee clearly understood what was the purport and import of notice issued under section 274 read with section 271. Therefore, principles of natural justice cannot be read in abstract and the assessee, being a limited company, having wide network in various financial services, should definitely be precluded from raising such a plea at this belated stage.
- Thus, for the above reasons, substantial questions of law are answered against the assessee and in favour of the revenue.