**income-tax Officer Vs. Devanand Singh Jogendra Singh**

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**Court** : Income Tax Appellate Tribunal ITAT Patna

**Decided On :** May-16-1984

**Reported in** : (1984)10ITD81(Pat.)

**Judge** : R Swarup, B Nath

**Appellant** : income-tax Officer

**Respondent** : Devanand Singh Jogendra Singh

**Judgement** :

1. One appeal has been filed by the department against the order of the Commissioner (Appeals), cross-objection has bean filed by the assessee and the assessee has also filed a separate appeal against the same order of the Commissioner (Appeals). As all the three appeals relate to one order of the Commissioner (Appeals), these are being taken up together for consideration and disposal.

2. The appeal of the department and the cross-objection filed by the assessee were fixed for hearing, thrice and twice adjournments were granted at the request of the assessee. The appeal was first fixed for hearing on 4-4-1983. The departmental representative requested for adjournment and the hearing was adjourned. Again it was fixed for hearing on 23-4-1984. Even then request for adjournment was made on behalf of the assessee and the hearing was adjourned to 10-5-1984.

Again request for adjournment has been made which has been rejected as there was no sufficient ground mentioned for making request for adjournment and the assessee has already been granted adjournment twice. The only cause mentioned in the petition for adjournment dated 9-5-1984 is that certain evidences which were relevant in the appeal were yet to be obtained from the partner who was out of Patna. In our opinion, the request for adjournment has been made without any reasonable or sufficient cause. It has been rejected. The appeals are being disposed of on merits after hearing the departmental representative. Even the appeal of the assessee against the same order of the Commissioner (Appeals) was fixed for hearing on 10-5-1984 which was served by registered post much in advance. Even no petition for adjournment has been filed. This appeal is also being disposed of accordingly.

3. The appeal filed by the department is against the order of the Commissioner (Appeals) reducing the quantum of penalty levied by the ITO for concealment under Section 271(1)(c) of the Income-tax Act, 1961 ('the Act'). The assessee is a contractor. He declared receipts of only Rs. 5,95,461. The ITO made direct enquiries from the office of the paying authority [Executive Engineer (Civil), All India Radio, Calcutta] and he found that the gross receipts of the assessee were Rs. 10,70,353 and net receipts Rs. 7,75,275. The ITO computed net profit by applying rate of 11 per cent on

the gross receipts. In the appeal filed against the assessment, the Commissioner (Appeals) reduced the net profit from 11 per cent to 10 per cent and confirmed the computation of total income at Rs. 1,07,035. The ITO thereafter levied penalty for concealment of Rs. 48,680 (difference between the returned income and the income finally assessed). The Commissioner (Appeals) while dealing with the penalty matter held that no profit had arisen on the turnover represented by the cost of materials supplied according to the decision of the Supreme Court in Brij Bhushan Lal Parduman Kumar v. CIT [1978] 115 ITR 524. As the ITO while levying the penalty had taken into account the total income finally confirmed which included the profit even on the materials supplied, the Commissioner (Appeals) while dealing with the appeal against the order under Section 271(1)(c) reduced the penalty levied by the ITO of Rs. 48,680 by Rs. 25,089 confirming the penalty to the extent of Rs. 23,591 only.

4. As mentioned above, both the assessee and the department are in appeal against the said order of the Commissioner (Appeals) by which he has confirmed part of the penalty levied and deleted the balance. We would first deal with the cross-objection and the appeal of the assessee filed against the order of the Commissioner (Appeals) confirming part of the penalty levied. It is argued in the cross-objection as also in the appeal of the assessee that the whole of the penalty should have been deleted and that the assessee bonafidely relied upon the certificate issued by the paying authority which turned out to be incorrect. It has thus been argued in the grounds of appeal that the assessee should not be penalised, as he acted on the basis of incorrect certificate issued by the A.I.R. and that the assessee did not know that the certificate issued was wrong.

5. We have considered the contention raised by the assessee. In our opinion, the contention raised is wholly unacceptable and baseless. The assessee was maintaining books of account and he has filed trading and profit and loss account. Even in the trading account, the receipts are shown at much lesser figure than the actual receipts of the assessee.

It is clear that even in the books of account the assessee has suppressed the receipts and part of the receipts were not shown in the books of account at all. It is not the assessee's case that there were no accounts and he was not aware of the correct receipts as no accounts were kept. The assessee is stated to have kept accounts and it cannot be held that the assessee was unaware of the actual receipts. It is clear from the fact mentioned in the order of the ITO/Commissioner (Appeals) that the assessee suppressed the receipts purposely to evade the payment of proper taxes. The assessee not only suppressed the receipts in the account books produced before the income-tax authorities but also managed to obtain wrong certificates from A.I.R.It was a clear case of concealment and in this respect we agree with the order of the Commissioner (Appeals) fully. The appeal of the assessee and the cross-objection raised to the effect that whole of the penalty should have been cancelled are rejected.

6. Now coming to the appeal of the department, the following grounds have been raised in the appeal of the department : (i) On the facts and in the circumstances of the case, the Commissioner (Appeals) erred in concluding that receipts of Rs. 5,85,461 disclosed by the assessee were net receipts.

(ii) On the facts and in the circumstances of the case, the Commissioner (Appeals) erred in concluding that the decision of the Supreme Court in the case of Brij Bhushan Lal Parduman Kumar v. CIT [1978] 115 ITR 524, is applicable to the facts of

the case.

(iii) On the facts and in the circumstances of the case, the Commissioner (Appeals) had no jurisdiction to give a finding on quantum of the income of assessee.

(iv) On the facts and in the circumstances of the case, the Commissioner (Appeals) erred in reducing the penalty to Rs. 23,591 and allowing a relief of Rs. 25,089.

In the first ground it is mentioned that the Commissioner (Appeals) erred in concluding that the receipts of Rs. 5,85,461 were net receipts as disclosed by the assessee. This ground of appeal is not a correct ground at all. The Commissioner (Appeals) has held in para 3 of his appellate order as under : The actual net receipts for the year amounted to Rs. 8,21,373 exclusive of the value of the material supplied. The appellant had shown the receipts at Rs. 5,58,461. Thus, receipts have been declared short to the extent of Rs. 2,35,912.

Thus, the Commissioner (Appeals) has not concluded that the net receipts of the assessee were only Rs. 5,85,461. He has merely mentioned that the assessee had declared receipts at Rs. 5,85,461 which were far lesser than the actual receipts. This ground being incorrect is rejected.

7. The next ground taken in the departmental appeal is that the Commissioner (Appeals) erred in concluding that the decision of the Supreme Court in Brij Bhushan Lal Parduman Kumar's case (supra) is applicable in the facts of the case. The departmental representative has argued that in the said case before the Supreme Court it was found as a fact that the materials remained the property of the Government in substance and in reality and these remained in the custody of the Government. These were only issued from time to time for being used in the works and the assessee had no opportunity to use the materials otherwise. Thus, their Lordships of the Supreme Court held that in the facts of that case no element of profit was involved in the turnover represented by the cost of materials supplied by the Government to the assessee. It is argued that their Lordships of the Patna High Court in the case of Ramesh Chandra Chaturvedi v. CIT [1980] 121 ITR 116 have held as under : The answer to the question as to whether the value of the materials supplied by the Government would figure for the purpose of ascertaining a contractor's net profit would be different according to the form of the contract. For example, in an overall contract, net profit will have to be ascertained upon the entire value of the contract, including the value of the materials also. In a works contract, the value of the materials has to be wholly excluded, because the contractor has no concern whatsoever with the materials except for the purpose of putting them into the shape as desired by the person giving the contract. In a lump sum contract, that part of the value of the materials which the assessee arranged himself, has to be included in determining his net profits from the contract. So far as the supply of materials made by the Government department is concerned it has again to be seen whether the supply was made by the department to the assessee just as one selling its goods to a purchaser, or whether the supplies were made to the assessee keeping the ownership over the materials supplied by the supplier himself.

In the latter case, the value of the materials cannot be included in the gross receipts from the contract, because the assessee had no control whatsoever over the materials. It was just given to it by the other party to be used in the contract and the assessee never got concerned about its value. Therefore, no hard and fast rule can be

laid down as to whether the value of the materials should or should not be included in a contractor's turnover from business, for determining his net profits.

In the instant case the assessee-firm did not maintain a stock register for the materials received from the Government department or for materials purchased by the assessee itself. The assessee also did not maintain an issue register. Since there were no other circumstance to show that the materials were throughout under the control of the Government department and were not under the control of the assessee (contractor) except for the purpose of using it in the construction, the Tribunal was right in holding that the gross payment should be adopted as the basis for working out the profit of the assessee.(p. 116) It was, thus, argued by the departmental representative that it cannot be held as a rule that any contractor would not earn any profit on the cost of materials supplied. It depends on the facts of each case and if the materials were supplied to the assessee and the assessee became the owner of the materials and used the materials in his own way, having ownership over the materials supplied to him, the ratio of the decision in Brij Bhushan Lal Parduman Kumar's case (supra) could not apply according to the decision of their Lordships of the Patna High Court in the case of Ramesh Chandra Chaturvedi (supra).

8. We have considered the arguments of the departmental representative and we are of the opinion that the argument is correct. In the case under consideration before us it is not proved and it is not shown that the materials were under the ownership of the Government all the time and these were under the custody of the Government all the time and these were only issued to the assessee from time to time for execution of the contract work and that the assessee had no control over it. As all these facts have neither been shown nor proved, it cannot be held that the ratio of the decision of their Lordships of the Supreme Court in Brij Bhushan Lal Parduman Kumar's case (supra) would apply. We hold that the Commissioner (Appeals) was not correct and was not justified in excluding the value of materials supplied while computing the profit of the assessee and that also while dealing with the appeal of the assessee against the order under Section 271(1)(c) of the ITO levying penalty for concealment. Once the quantum of appeal has been decided and the net income worked out therein while dealing with the appeal against the penalty order, the Commissioner (Appeals) cannot come to a different total income contrary to the conclusion given in the quantum appeal. Further, such a conclusion was neither correct nor was in accordance with the actual facts as discussed above. We hold that the Commissioner (Appeals) was not correct in holding on the facts of the case that there was no profit element on the turnover represented by cost of materials supplied.

9. Grounds of appeal Nos. 2 and 3 of the department, therefore, are allowed.

10. As far as ground of appeal No. 4 is concerned, according to the finding given above in this order, the reduction in the amount of penalty allowed by the Commissioner (Appeals) is cancelled and the amount of penalty levied by the ITO at Rs. 48,680 is restored.

11. In the result, the appeal of the department is allowed and the cross-objection of the assessee is rejected. The appeal of the assessee has already been rejected as mentioned above in this order.