
(1977) 01 MAD CK 0042

In the Madras High Court

Case No : Tax Case No"s. 272 of 1972 and 145 to 150 of 1975 (Reference No"s. 59 of 1972 and 128 to 133 of 1975)

Additional Commissioner of Income Tax

APPELLANT

Vs

E. Bhoopathy

RESPONDENT

Date of Decision : 18-01-1977

Acts Referred:

Income Tax Act, 1961 — Section 271(1)

Citation : (1978) 113 ITR 188

Hon'ble Judges : Sethuraman, J;Ismail, J

Bench : Division Bench

Advocate : J. Jayaraman and Nalini Chidambaram, for the Appellant; V.V. Nagarajan and R. Venkataraman, for the Respondent

Judgement

Sethuraman, J.—At the instance of the Additional Commissioner of Income Tax the following question of law has been referred to this court:

" Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that no penalty was leviable in terms of the Explanation to Section 271(1)(c) of the Income Tax Act, 1961, for each of the assessment years 1959-60, 1960-61, 1961-62, 1962-63, 1964-65 and 1965-66 ? "

2. As the Commissioner of Income Tax was not satisfied with the question as referred to the High Court in T.C. No. 272 of 1972 there was a petition u/s 256(2) for each of the years, namely, 1959-60 to 1961-62 and 1963-64 to 1965-66. As directed by this court, further questions were referred and those questions have been set out in T. C. Nos. 145 to 150 of 1975. Except for the assessment year 1963-64, the questions that have been directed to be referred by this court are :

" 1. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in cancelling the penalty levied under the provisions of Section 271(1)(c) of the Income Tax Act, 1961, for the assessment years

1959-60, 1960-61, 1961-62, 1964-65 and 1965-66 ?

2. Whether the conclusion of the Appellate Tribunal that there was no concealment of income by the assessee within the purview of Section 271(1)(c) is a reasonable view to take on the facts and in the circumstances of the case ? "

3. For the assessment year 1963-64, the following two questions have been referred by the Tribunal as directed by this court :

"1. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in cancelling the penalty levied under the provisions of Section 271(1)(c) of the Income Tax Act, 1961, for the assessment year 1963-64 ?

2. Whether the conclusion of the Appellate Tribunal that there was no concealment of income of the assessee within the purview of Section 271(1)(c) is a reasonable view to take on the facts and in the circumstances of the case ? "

4. The facts in relation to each of these questions that has been referred are as follows :

The assessee is a contractor executing sanitary contract works mostly for Government departments. He claimed that he did not maintain books of account for the years under reference. He filed returns of income on the basis of his own estimates. It is necessary to differentiate the two sets of assessment years 1959-60 to 1961-62 and 1963-64 to 1965-66. We shall now confine ourselves to the assessment years 1959-60 to 1961-62. For those years, assessments were originally completed under the provisions of Section 23(3) of the Indian Income Tax Act, 1922. Subsequently, on the basis of the statements of assets and liabilities filed by the assessee showing the position of his wealth as on March 31, 1958, and as on March 31, 1961, the Income Tax Officer considered that income had escaped assessment and he, therefore, initiated reassessment proceedings u/s 147 for each of these three years. The Income Tax Officer found that the increase in wealth during the period between March 31, 1958, and March 31, 1961, came to about Rs. 85,000 and that such increase in wealth was much in excess of the total income assessed for these years as reduced by the household expenses, tax payments, marriage expense, etc. The Income Tax Officer worked out the unexplained increase in wealth during these years at Rs. 56,000 and spread over this sum of Rs. 56,000 between the three years as follows:

Rs. 1959-60 18,000 1960-61 18,000 1961-62 20,000

5. In other words, he added these sums of Rs. 18,000, Rs. 18,000 and Rs. 20,000 to the income as originally assessed for these assessment years. The assessee filed appeals for these years before the Appellate Assistant Commissioner. The Appellate Assistant Commissioner gave a reduction of Rs. 10,500 with reference to these years and with reference to each one of these years, he reduced the income as assessed by Rs. 3,500.

6. The Income Tax Officer initiated penalty proceedings u/s 271(1)(c) for each of these three years and referred the matter for levy of penalty to the Inspecting Assistant Commissioner of Income Tax as required by the law as then in force. The Inspecting Assistant Commissioner after giving the necessary opportunity to the assessee imposed the following amounts as penalty u/s 271(1)(c) of the Act.

Rs. 1959-60 7,150 1960-61 4,600 1961-62 6,000

7. Against these orders levying penalty, the assessee appealed to the Appellate Tribunal. The Tribunal had before it the appeals not only for these three years, but also for the other assessment years to which we have made reference. But as far as these three years are concerned, the Tribunal dealt with them separately in its order. The finding of the Tribunal was that with reference to these three years, the levy of penalty u/s 271(1)(c) was not proper and, therefore, cancelled these penalties. Aggrieved by this conclusion of the Tribunal, the Commissioner of Income Tax applied for a reference and got further directions from this court in the manner mentioned above.

8. The question that arises with reference to these years is whether the assessee has concealed the particulars of his income or filed inaccurate particulars thereof. The Income Tax Officer made an estimate of the income for these years in the following manner. He arrived at a sum of Rs. 1,98,000 as net wealth as on March 31, 1961. He deducted therefrom a sum of Rs. 27,000 being the estimate of household expenses for the three years at Rs. 750 per month on an average. He further estimated an addition of Rs. 10,000 on account of the marriage expenses of the assessee's daughter. By this process, the Income Tax Officer arrived at an accretion of Rs. 1,68,000 in the period from April 1, 1958, to March 31, 1961. As against this there was the assessed income of Rs. 1,12,000 for the three years. The difference between the assessed income and the income which was reflected in the shape of accretion to wealth came to Rs. 56,000. It is this sum of Rs. 56,000 that was spread over the assessment years 1959-60 to 1961-62 at the rate of Rs. 18,000 for each of the two years 1959-60 and 1960-61 and that Rs. 20,000 for 1961-62. In the appeal filed before the Appellate Assistant Commissioner, the Appellate Assistant Commissioner gave a reduction of Rs. 3,500 with reference to the marriage expenses and he further gave a reduction with reference to the household expenses by a sum of Rs. 8,000. As a result of these reductions, the amount that had to be spread over came down by Rs. 10,500 and it was this sum that was distributed equally for three years as already mentioned. It is on these facts that the Tribunal came to examine the question whether the levy of penalty u/s 271(1)(c) was proper. The Tribunal found in paragraph 8 of its order as follows :

" We find that there are considerable difficulties in sustaining the penalties for these three years. What the Income Tax Officer has found is that there is an unexplained increase of Rs. 45,500 in the three assessment years involved and has assessed it as escaped income for these years. This may be quite valid. But this stand of the Income Tax Officer as regards the penalties in question is

weakened by the clement of estimate present in his computation, viz., the estimate for household expenditure and marriage expenditure. A more serious flaw is : he has spread over the income of Rs. 45,500 over three years as the assessee's business income. Nor did he have any material to hold that the assessee concealed an income of Rs. 14,500 for each of the assessment years 1959-60 and 1960-61 and Rs. 16,500 for the assessment year 1961-62. This is pure guess work on the part of the Income Tax Officer and while it may be valid in the circumstances of the case for the purpose of assessment, it will not be sufficient for the purpose of a levy of penalty u/s 271(1)(c). The ratio of Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, will apply here fully. The department has not brought any evidence to show that the additional income assessed for these years was the undisclosed business income of the assessee and that the assessee was guilty of concealing Rs. 14,500 for each of the assessment years 1959-60 and 1960-61 and Rs. 16,500 for the year 1961-62. It can well be that the assessee concealed the entire income of Rs. 45,500 (not necessarily from the disclosed business) in one assessment year or in two assessment years or even in three assessment years taken by the Income Tax Officer, but it is quite a different proposition. These are matters of speculation and fall outside the ambit of penal provisions. The penalties levied for three years are, therefore, cancelled. "

9. The conclusion of the Tribunal as will be clear from the above passage is that the Income Tax Officer has resorted to a guess work with reference to these three years. There is absolutely no material on record to show that the assessee earned the said sum of Rs. 14,500, Rs. 14,500 and Rs. 16,500 in each of these three years, namely, 1959-60, 1960-61 and 1961-62, respectively. Therefore, the Tribunal was justified in its view that in the absence of any material to show that the assessee had earned the income for these three years in the manner allocated the penalty provisions would not be attracted. In these circumstances the order of the Tribunal with reference to these three years will have to stand.

10. We shall DOW take up for consideration the assessment years 1963-64, 1964-65 and 1965-66 ; with reference to these years also, the assessee had filed his returns of income by estimating the same at 15 per cent. for the first two years and at 121/2 per cent. for the third year. The Income Tax Officer did not accept the income as returned by the assessee for these years as the assessee had not produced any books of account; the turnover admitted could not also be accepted as there were discrepancies in the serial number of the bill. The Income Tax Officer further found that there was an increase in the net wealth of the assessee between March 31, 1961, and March 31, 1966. This increase came to Rs. 2,00,000. The income for the 5 years, namely, 1962-63 to 1966-67, as returned came only to Rs. 1,45,327. There was a difference of Rs. 55,000 representing, in the Income Tax Officer's view, unexplained increase in the wealth. Instead of adding this sum as the income of the assessee for the relevant years, the Income Tax Officer estimated the business income of the assessee at 20 per cent. of the estimated turnover for the respective years. The result was

that there, was an addition to the income as returned by the assessee for these years. The assessee did not file any appeal with reference to these years before the Appellate Assistant Commissioner. The Income Tax Officer had referred the question of levy of penalty to the Inspecting Assistant Commissioner. The Inspecting Assistant Commissioner, after giving the necessary opportunity to the assessee to be heard, levied the following amounts as penalty.

Rs. 1963-64 3,800 1964-65 3,000 1965-66 3,500

11. The assessee went in appeal to the Income Tax Appellate Tribunal. The Tribunal dealt with these three years separately in its order dated 27th December, 1971. The Tribunal held that, even for these years, penalty could not have been levied by the Inspecting Assistant Commissioner. It is this conclusion of the Tribunal that is challenged in the form of the questions extracted already.

12. As far as these years are concerned, they do stand on a different footing from the earlier three years, which we have dealt with already. For these three years the assessments themselves have been made not by spreading over any unexplained accretion by resorting to any guess work, The Income Tax Officer himself had actually arrived at the estimate of the business income for each of these three years by applying a rate of 20 percent, to the estimated turnover. With reference to these years, the Tribunal observed in its order as follows :

" Though a reference is made to unexplained accretion to wealth, the additional income estimated, is not based on any definite findings on the part of the. Income Tax Officer showing clearly what was the income concealed for each of the years in question. An overall comparison is made for a period of 5 years including the assessments for 1962-63 at one end and 1966-67 at the other. A certain figure is arrived at as the unexplained accretion to wealth in this period. But then no attempt is made to apportion with reference to any definite evidence as to which particular assessment year this pertained or could have pertained. Because the Income Tax Officer had no specific evidence, he had chosen to make a routine estimate of the turnover and the net profit. While, therefore, the addition made by him to the business income could possibly be supported on the grounds accorded by him, it does not follow that he has conclusively established that the assessee was guilty of concealment. "

13. The Tribunal has not applied its mind properly to the facts of these three assessment years. The Income Tax Officer himself had actually made an estimate only on the basis of the turnover with reference to each of these years. Though for the purpose of supporting the actual assessment made, the Income Tax Officer has referred to the accretion in the wealth for the five years, still the actual assessment has only been made on the basis of the income earned in these years. The Income Tax Officer has to make an estimated assessment only because the assessee did not produce any accounts for these years. Therefore, as far as the assessment itself is concerned, it has actually been based on the relevant figures for these years. Therefore, the Tribunal was wrong in proceeding

as if the levy of penalty for these years would stand on a weaker ground than for the assessment years 1959-60 to 1961-62. As far as these years are concerned, the Income Tax Officer has done what he could do, namely, he could make an estimate on the materials available before him and as estimated by the assessee. The assessee has not been in a position to explain as to why the estimate was made by him at the rate of 15 per cent. for the first two years and at the rate of 121/2 per cent. for the third year. It is a clear case where the return filed by the assessee himself shows that there should be an inference of concealment. It was pointed out by a decision of this court in A.K. Bashu Sahib Vs. Commissioner of Income Tax, Madras, in more or less similar circumstances as follows (page 743) :

" We are also unable to agree with the argument that in all cases where the taxing authorities estimated the income at a higher figure than what was estimated by an assessee, no penalty was leviable. Where the estimate of the assessee amounts to deliberate under-estimate, an inference of concealment of income could certainly be drawn. "

14. In the present case, the assessee himself had accepted the estimate at 20 per cent. as made by the Income Tax Officer. The assessee has not also been able to show that his own estimate was a bona fide or proper estimate. In these circumstances, there is a clear scope for the finding that the assessee has concealed the particulars of income in these three years or filed inaccurate particulars thereof for these three years. The difference between the assessed income and the income as returned by the assessee would represent the concealment. In view thereof the penalty as levied for these three years could not have been properly cancelled by the Tribunal. In this view, we do not consider it necessary to go specifically into the applicability of the explanation for each of these years. Therefore, the question based on the explanation to Section 271(1)(c) does not require to be answered for any of these years. As far as the other questions are concerned we answer them for the reasons aforesaid as follows : For the assessment years 1959-60, 1960-61 and 1961-62 the two questions referred are answered in the affirmative and against the revenue. For the assessment years 1963-64, 1964-65 and 1965-66 the two questions are answered in the negative and in favour of the revenue.

15. There will be no order as to costs.