
(1991) 05 AHC CK 0036

In the Allahabad High Court

Case No : Income-tax Reference No. 229 of 1979

Additional Commissioner of Income Tax

APPELLANT

Vs

Irshad Ali

RESPONDENT

Date of Decision : 03-05-1991

Acts Referred:

Income Tax Act, 1961 — Section 271(1)

Citation : (1992) 197 ITR 144

Hon'ble Judges : R.K. Gulati, J;K.P. Singh, J

Bench : Division Bench

Judgement

K.P. Singh, J.—This reference has been made by the Income Tax Appellate Tribunal, Allahabad Bench, Allahabad, on the direction of this court in terms of Section 256(2) of the Income Tax Act, 1961. The Tribunal has drawn up the statement of facts and has referred the following questions for the opinion of this court :

" 1. Whether, on the facts and in the circumstances of the case, the Tribunal was legally justified in placing the burden of proof on the Department in a case covered by the Explanation to Section 271(1)(c) of the Income Tax Act, 1961?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was legally justified in cancelling the penalty of Rs. 19,000 imposed by the Inspecting Assistant Commissioner u/s 271(1)(c) of the Income Tax Act, 1961 ?"

2. The relevant assessment year under our consideration is 1967-68. The Income Tax Officer by his judgment dated January 2, 1970, did not believe the stand of the assessee that he had spent the money out of his past savings and running income towards the expenses in connection with bus No. UPD 7036 and bus No. UPD 9039 in the relevant year. The Income Tax Officer, against the returned income of Rs. 10,225, made an assessment on the assessee on a total income of Rs. 28,670. According to him, since the assessee had concealed particulars of his income, action u/s 274/271(1)(c) was suggested to be taken separately. The

Inspecting Assistant Commissioner of Income Tax, Lucknow, through his order dated February 15, 1972, imposed a penalty of Rs. 19,000 and directed the Income Tax Officer to issue the demand notice and challan.

3. In appeal against the order of the Inspecting Assistant Commissioner, the Tribunal set aside the order imposing penalty by the Inspecting Assistant Commissioner as is evident from the order of the Tribunal dated September 19, 1973. In paragraph 2 of the order, the Tribunal expressed itself as below :

"The penalty in the present case has been imposed in terms of the Explanation to Section 271(1)(c) of the Act. The assessee maintained regular books of account on the basis of which he filed the return. The Revenue did not accept the investment made by the assessee during the year for the acquisition of buses and thereby certain additions were made and thus disparity arose between the income assessed and income returned. The Revenue has not proved that the disparity arose because the assessee earned a higher income but he did not disclose it in his return and thereby he either concealed the amount or filed inaccurate particulars of his income. Negative burden on the assessee, in view of the Explanation to Section 271(1)(c) was discharged when the assessee filed the return on the basis of his books of account. The Revenue has mainly relied on the assessment order where the addition had been made for unexplained investment. But the Revenue has not proved by cogent material that the assessee either earned a higher profit and he did not disclose the income in his return. In the absence of material to prove the concealment of income, we cannot sustain the penalty and hence the penalty order passed by the Inspecting Assistant Commissioner is set aside. The Income Tax Officer is directed to refund the penalty if already collected."

4. It appears that the Additional Commissioner of Income Tax, Lucknow, applied for a reference u/s 256(1) and, thereafter, this court directed the Tribunal to draw up the statement of the case u/s 256(2) of the Act. Therefore, the above-mentioned two questions have been referred for our consideration in the above-noted reference.

5. Learned counsel for the Department has contended before us that the Tribunal was not legally justified in placing the burden of proof on the Department in the case covered by the Explanation to Section 271(1)(c) of the Act. He has also contended that the Tribunal was not legally justified in cancelling the penalty of Rs. 19,000 imposed by the Inspecting Assistant Commissioner u/s 271(1)(c) of the Act.

6. There is no dispute that the assessee had returned an income of Rs. 10,225 and the Income Tax Officer had assessed him on a total income of Rs. 28,670. The income fixed by the Income Tax Officer was ultimately reduced by the Tribunal in the assessment proceedings but it has not been disputed before us that the income returned by the assessee was less than eighty per cent, of the income at which he was assessed in the relevant year.

7. In Commissioner of Income Tax Vs. Mussadilal Ram Bharose, , their Lordships of the Supreme Court have considered the scope of the provision of Section 271(1)(c) read with Section 274(2) of the Income Tax Act, 1961. Vide paragraph 11, their Lordships have observed as below (at page 20) :

"... where Sandhawalia C, J., speaking for the Full Bench, observed that the object and intent of the Legislature in omitting the word "deliberately" from Clause (c) of Section 271(1) of Income Tax Act, 1961, and adding an Explanation thereto by the Finance Act, 1964, was to bring about a change in the existing law regarding the levy of penalty so as to shift the burden of proof from the Department on to the assessee in the class of cases where the returned income of the assessee was less than 80 per cent, of the assessed income. The learned Chief Justice noted that the significant thing about the change made in Clause (c) of Section 271(1) was the designed omission of the word "deliberately" therefrom, whereby the requirement of a designed furnishing of inaccurate particulars of income was obliterated. According to the learned Chief Justice, the language of the Explanation indicated that for the purposes of levying penalty, the Legislature had made two clear-cut divisions. This had been done by providing a strictly objective and an almost mathematical test. According to the Chief Justice, the touchstone therefore was the income returned by the assessee as against the income assessed by the Department which was designated as the correct income". The case where the returned income was less than 80 per cent, of the assessed income can be squarely placed into one category. Where, however, such a variation is below 20 per cent., that would fall in the other category. To the first category, where there is a larger concealment of income, the provisions of the Explanation become at once applicable with the resultant attraction of the presumptions against such an assessee. Once the Explanation is held to be applicable to the case of an assessee, it straightaway raises three legal presumptions, viz., (i) that the amount of the assessed income is the correct income and it is in fact the income of the assessee himself ; (ii) that the failure of the assessee to return the correct assessed income was due to fraud ; or (iii) that the failure of the assessee to return the correct assessed income was due to gross or willful neglect on his part. But it must be emphasised that these are presumptions and become a rule of evidence, but the presumptions raised are not conclusive presumptions and are rebuttable.

We are of the opinion that the view of the Full Bench of the Punjab and Haryana High Court is the correct view when it states that it only makes a presumption but the presumption is a rebuttable one and if the fact-finding body on relevant and cogent materials comes to the conclusion that in spite of the presumption the assessee was not guilty, such conclusion does not raise any question of law.

Our attention was drawn to the decision of the Division Bench of the Allahabad High Court in Addl. Commissioner of Income Tax Vs. Lakshmi Industries and Cold Storage Co. Ltd., . There, the High Court found that the assessee had not given any explanation. So, on the facts found, the inference of the Tribunal that the

amounts had been added and the evidence had been found unsatisfactory was "not correct. Penalty was eligible in that case and the High Court found that the Tribunal was wrong in cancelling the penalty.

As mentioned hereinbefore, it depends upon the facts and circumstances of each case. If a party comes within the mischief of the Explanation, then there is a presumption against him and the onus to discharge the presumption lies on the assessee, but being a presumption, it is a rebuttable one and, if on appropriate materials, the Tribunal has rebutted that presumption, no question of law can be said to arise. . . .

Similarly, the Full Bench of the Patna High Court in the case of Commissioner of Income Tax Vs. Nathulal Agarwala and Sons, , had occasion to consider this. The High Court reiterated that the onus to discharge the presumption raised by the Explanation was on the assessee and it was for him to prove that the difference did not arise from any fraud or willful neglect on his part. The court should come to a clear conclusion whether the assessee had discharged the onus or rebutted the presumption against him. The Patna High Court emphasised that as to the nature of the explanation to be rendered by the assessee, it was plain on principle that it was not the law that the moment any fantastic or unacceptable explanation was given, the burden placed upon him would be discharged and the presumption rebutted. We agree. We further agree that it is not the law that any and every explanation by the assessee must be accepted. It must be an acceptable explanation, acceptable to a fact-finding body."

8. In the present case, we have quoted paragraph 2 of the judgment of the Tribunal dated September 19, 1973, wherein the Tribunal has set aside the order imposing penalty on the ground that a negative burden on the assessee, in view of the Explanation to Section 271(1)(c), was discharged when the assessee filed the return on the basis of his books of account. According to the Tribunal, the Revenue had mainly relied on the assessment order where the addition had been made for unexplained investment. The Revenue had not proved by cogent material that the assessee had either earned a higher profit or that he had not disclosed the income in his return. In the absence of material to prove the concealment of income, the Tribunal did not sustain the penalty.

9. In the facts and circumstances of this case, the Inspecting Assistant Commissioner of Income Tax, Lucknow, did not accept the claim of the assessee regarding past savings and running income. Merely because the assessee produced books of account, it cannot be said that the assessee has discharged the burden arising out of the Explanation added to Section 271(1)(c), specially when the assessed income was 150 per cent, more than the returned income. The presumptions mentioned in paragraph 11 of the above-mentioned Supreme Court ruling fully apply to the case of the assessee under consideration. According to the observations made in the foregoing paragraphs, the assessed income of the assessee would be the correct income and the failure of the assessee to return the correct income would be due to fraud, gross or willful

neglect. If the Appellate Tribunal did not agree with the Inspecting Assistant Commissioner, it was required of the Tribunal to deal with the books of account to show that the assessee had discharged the burden in view of the Explanation to Section 271(1)(c). To us, it appears that the Tribunal has placed the burden on the Department wrongly while setting aside the penalty imposed upon the assessee. It is noteworthy that the Tribunal should have indicated in its order the cogent evidence in the books of account of the assessee to justify that the initial burden on the assessee stood discharged. According to the observations made by their Lordships of the Supreme Court in the case mentioned above, it is evident that every explanation by the assessee cannot be accepted. In the facts and circumstances of the case, a perusal of the order of the Appellate Tribunal does not indicate as to what cogent explanation was in the books of account which necessitated the Tribunal to place the burden upon the Department to prove that the assessee had earned a higher amount.

10. Relying upon the decision of the Supreme Court mentioned above, their Lordships of the Supreme Court in *Commissioner of Income Tax, Madras Vs. K.R. Sadayappan*, , have indicated that when the presumption arising out of Explanation to Section 271(1)(c) is attracted, the assessee would be guilty of fraud or willful neglect as a result of which the assessee had concealed the income. The presumption can be rebutted only by cogent, reliable and relevant material. In the present case, the Appellate Tribunal has not indicated that the books of account relied upon by the assessee furnished cogent evidence to rebut the presumption against him. In our opinion, the Tribunal should have indicated the material rebutting the presumption against the assessee before waiving the penalty. Since the Appellate Tribunal has placed the burden upon the Department wrongly, its approach to the problem under consideration is vitiated in law. In the facts and circumstances of this case, it is necessary to observe that the Tribunal should rehear the assessee and his further explanations and the question of cancellation of the imposed penalty. The Tribunal should also re-examine the books of account in the light of the discussions in this judgment.

11. For the foregoing discussions, we answer question No. 1 in the negative, in favour of the Department and against the assessee. At present, we refrain from answering the second question but it is expected that the Appellate Tribunal shall decide the claim of the assessee hereinafter in the light of the discussions in this judgment. There will be no order as to costs.