
(1975) 01 AHC CK 0013

In the Allahabad High Court

Case No : Income-tax Reference No. 228 of 1972

Additional Commissioner of Income Tax

APPELLANT

Vs

Kishan Singh Chand

RESPONDENT

Date of Decision : 16-01-1975

Acts Referred:

Income Tax Act, 1961 — Section 271(1)

Citation : (1977) 106 ITR 534

Hon'ble Judges : R.L. Gulati, J;C.S.P. Singh, J

Bench : Division Bench

Advocate : Deokinandan, for the Appellant; Ashok Gupta, for the Respondent

Final Decision : Dismissed

Judgement

Gulati, J.—The assessee is a firm engaged in the business of execution of contracts with the M.E.S. For the assessment year 1967-68, he filed a return declaring a total income of Rs. 29,016 showing a net profit of 7"5 per cent. on the total receipts. The assessee's books of accounts were found to be defective inasmuch as the expenses were not open to verification. The Income Tax Officer assessed the taxable income at Rs. 54,196 by applying a flat rate of profit of 12"5 per cent. on the total receipts. The Income Tax Officer also initiated proceedings for imposition of penalty u/s 271(1)(c), which provides that the Income Tax Officer may impose penalty if an assessee has concealed the income or has furnished inaccurate particulars thereof. As the minimum penalty imposable was more than Rs. 1,000, the matter was referred to the Inspecting Assistant Commissioner of Income Tax as required by Section 274(2) of the Act. The Inspecting Assistant Commissioner of Income Tax levied a penalty of Rs. 5,000, On appeal the penalty has been set aside by the Income Tax Appellate Tribunal on the ground that the assessee could not be said to have committed any fraud or willful neglect as mentioned in the Explanation to Section 271(1)(c) and hence the provision of penalty will not be applicable because the onus lay upon the department which onus the department has failed to discharge. At the

instance of the Commissioner, however, the Tribunal has referred the following question of law for the opinion of this court:

"Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that there was no fraud or gross or willful neglect on the assessee's part within the meaning of the Explanation to Section 271(1)(c) of the Income Tax Act, 1961 ?"

2. To begin with, we find that the Tribunal has misdirected itself in relying upon the Explanation to Section 271(1)(c). u/s 271(1)(c) a penalty is imposable if the assessee has concealed the particulars of his income or has furnished inaccurate particulars of such income. This is a penal provision and the onus clearly lies upon the department to prove the concealment, etc. The Explanation added to Section 271(1)(c) by the Finance Act of 1964, however, casts the onus on the assessee in certain cases. It provides that where the total income returned by any person is less than 80 per cent. of the total income as assessed u/s 143 or Section 144 or Section 147 minus the expenditure incurred bona fide by him for the purpose of earning any income which has been included in the income but has been disallowed by the Income Tax Officer as a deduction, such person, shall, unless he proves that the failure to return the correct income did not arise from any fraud or any gross or willful neglect on his part, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income for the purposes of Clause (c) of that Sub-section. The Explanation, however, does not apply to all the cases of suspected concealment but applies only where the income returned is less than 80 per cent. of the income assessed minus the expenses incurred bona fide and disallowed by the Income Tax Officer as a deduction. There is no finding that this requirement was satisfied in the instant case. In fact, the Inspecting Assistant Commissioner of Income Tax did not rely upon this Explanation and, as such, he did not record a finding that the income returned was less than 80 per cent. of the assessed income, attracting the Explanation nor has the Tribunal done so. Once the Explanation is out of the way, the case, in our opinion, would be governed by the law laid down by the Supreme Court in Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, . In that case the Supreme Court held that proceedings u/s 28(1)(c) of Indian Income Tax Act, 1922, which corresponds to Section 271(1)(c) of the Act of 1961, are penal in nature and the burden is on the department to establish that the assessee has been guilty of concealment, etc. Such a finding has to be recorded on positive material and cannot be inferred from the fallacy of the assessee's explanation.

3. Now, in the instant case, the assessee no doubt accepted the fiat rate assessment because the expenses recorded in its books of accounts were not open to verification. It also agreed to the flat rate of 12 5 per cent. as against a rate of 7.5 per cent. disclosed in the return. But, obviously, the assessee did so not because he had concealed his income but because it was not possible for him to resist a flat rate assessment in view of the defective nature of his books of

accounts. According to the assessee, he agreed to a higher rate on the understanding given by the Income Tax Officer that he would not impose any penalty. This is the plea which he took in his reply to the show cause notice as also before the Inspecting Assistant Commissioner of Income Tax. The Inspecting Assistant Commissioner refused to accept this plea on the ground that the record did not disclose that there was any such understanding between him and the Income Tax Officer. This approach is obviously wrong, because the understanding was oral and it could not find place in the records. Having regard to the normal human conduct we cannot understand how an assessee would agree to an enhanced assessment unless he had been motivated by a cogent reason. The motive is obvious, namely, that he got an understanding from the Income Tax Officer to escape penalty. We are satisfied that the petitioner's agreement to be assessed at a higher flat rate does not amount to a confession of concealment. The department had to prove by positive material as held by the Supreme Court in the case of Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, , that the addition made by the Income Tax Officer to the declared income was, in fact, the assessee's income earned from his business which he had deliberately concealed. There is no such material on the record.

4. Mr. Deokinandan, appearing for the Commissioner of Income Tax, has relied upon the following observations of this court in Commissioner of Income Tax Vs. Mansa Ram and Sons, :

"Where an assessee admits a cash credit or a deposit to be his income and surrenders it for assessment to tax, no further onus is left upon the department to prove the charge of concealment. Such a case would clearly not come within the principle enunciated by the Supreme Court in the case of Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, ."

5. But the learned counsel has omitted to take note of the following observations which immediately follow the above-noted observation:

"But in the instant case the admission of the assessee does not appear to be voluntary or free. It is clear that after the assessee had written its first letter disowning the cash credit, there was a discussion between its representative and the Income Tax Officer, as a result whereof, the cash deposits were surrendered for assessment, as desired, provided no penalty was imposed. The Income Tax Officer must have induced the assessee to surrender the cash deposit so as to avoid penalty which could be as high as one and a half times the tax sought to be evaded. It is possible that the surrender was made in order to escape the penal liability."

6. In our opinion, the present case is of a similar nature. Here also, we are satisfied that the assessee must have agreed to enhanced assessment in order to escape penalty. The admission made by the assessee was not voluntary or free. Since we have held that the Explanation to Section 271(1)(c) is not applicable, a reference to it shall be omitted and the question will have to be re-drafted.

7. We accordingly re-draft the question of law as :

"Whether, on the facts and in the circumstances of the case, the Tribunal was justified in cancelling the penalty ?"

8. and answer it in the affirmative in favour of the assessee and against the department. The assessee is entitled to the costs which we assess at Rs. 200.