
(1982) 04 AHC CK 0044
In the Allahabad High Court
Case No : Income-tax Reference No. 4 of 1978

Additional Commissioner of Income Tax	APPELLANT
Vs	
Mangalsen Mohanlal	RESPONDENT

Date of Decision : 21-04-1982

Acts Referred:

Income Tax Act, 1961 — Section 271(1)

Citation : (1982) 31 CTR 218 : (1982) 136 ITR 905 : (1982) 10 TAXMAN 313

Hon'ble Judges : R.R. Rastogi, J;K.N. Seth, J

Bench : Division Bench

Advocate : M. Katju, for the Appellant; R.K. Gulati, for the Respondent

Judgement

R.R. Rastogi, J.—In compliance with the direction of this court, at the instance of the Additional Commissioner of Income Tax, Kanpur, the Income Tax Appellate Tribunal, Delhi Bench "A" (hereafter "the Tribunal") has drawn up a statement of the case and referred the following questions for the opinion of this court:

"1. Having regard to the circumstances in which the Tribunal itself in the quantum appeal had confirmed an addition of Rs. 30,000 for unexplained investment in property, whether the Income Tax Appellate Tribunal was right in holding that the assessee could not be deemed to have concealed the particulars of its income in terms of the Explanation to Section 271(1)?

2. Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was legally justified in cancelling the penalty imposed upon the assessee in terms of the Explanation, to Section 271(1)(c) of the Income Tax Act, 1961 ?"

2. The assessee, Mangahen Mohanlal, a HUF, was engaged in the business of manufacture and sale of Boora and Batasa. It had also income from sale of controlled sugar. For the assessment year 1967-68, the assessee disclosed its income at Rs. 10,737. During the course of assessment proceedings the ITO found that in the relevant previous year the assessee had constructed four flats

in the town of Mathura, the cost whereof was shown at Rs. 6,000. According to the assessee considerable old material was available to it and it utilised the same in the new construction and, therefore, the cost was not much. The ITO did not accept that contention and estimated the cost of construction at Rs. 30,000 and thus added back a sum of Rs. 24,000 as the assessee's income from undisclosed sources. Further, the ITO found that during this year the assessee had purchased two shops on July 20, 1976, for a sum of Rs. 18,000. They were purchased in the names of Brij Mohan and Banwari Lal, the two sons of Mangalsen, karta of the family. In regard to this transaction the assessee's contention was that the shops had been purchased by Brij Mohan and Banwari Lal themselves and the assessee had nothing to do with the same. That contention as well did not find favour with the ITO, He held that the two shops had been purchased by the assessee itself in the names of the two sons of the karta and hence this amount of Rs. 18,000 was added in the assessee's income as unexplained investment. Thus, the total income was determined at Rs. 63,420 as against the returned income of Rs. 10,737. Since the difference between the returned income and the income assessed was more than 20%, he initiated penalty proceedings u/s 271(1)(c) read with the Explanation thereto and referred the case to the IAC u/s 274(2)

3. Pursuant to the notice the assessee submitted a written statement in which it was stated that there was no evidence on record to show that the assessee had concealed the particulars of its income or had deliberately furnished inaccurate particulars of the same and as such, the notice was not warranted, that the ITO had estimated the business income at Rs. 20,000 as against Rs. 9,000 disclosed by the assessee which on appeal had been reduced to Rs. 11,000 and on that account no question of penalty arose. As regards the purchase of two shops it was urged that they had been separately purchased by the karta's sons, Brij Mohan and Banwari Lal, for Rs. 9,000 each. Their names had been recorded in the municipal records and they were realizing rent from the tenants. As for the source of consideration it was stated that Banwari Lal had borrowed Rs. 3,000 from his maternal uncle, Babu Lal, and the remaining amount came from his past savings. Similarly, Brij Mohan had taken a loan of Rs. 3,000 from his father-in-law, Laxman Das, and another sum of Rs. 3,000 from his maternal uncle, Babu Lal, and the remaining amount came out of his past savings. It was stated that all these persons had been examined before the ITO and they had filed their confirmation letters. As for the cost of construction of four flats it was stated that mostly old materials were used and further the mortar used was of cheap material and, therefore, the cost was much less.

4. The IAC was not satisfied with this explanation and held that the case set up about the purchase of shops was far fetched and improbable. He also took into consideration the fact that though the assessee was being assessed to Income Tax since 1957-58, it never produced any proper account books and year after year the income had been estimated. As regards the unexplained investment of Rs. 24,000 in the construction of the four flats as well, the IAC did not accept the

assessee's contention and held that the unexplained investments represented the assessee's concealed income. In the result, he imposed a penalty in the sum of Rs. 12,000.

5. The assessee appealed. The Appellate Tribunal deleted the penalty order observing :

"It is clear from a perusal of the order passed by the Tribunal in the quantum appeal that the additions have been sustained on the ground that the assessee had not been able to explain the sources of the expenditure which, according to the Income Tax, authorities the family incurred in respect of certain flats. It is also the case of the assessee that the two shops in question did not belong to the family but belonged only to two individual coparceners. This explanation has not been believed. It is settled law that in respect of additions made in circumstances similar to the assessment, there could be no levy of penalty u/s 271(1)(c) of the Income Tax Act, 1961 Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, . Merely because the additions were made in the assessment, it cannot be postulated that they represented the real income of the assessee for the accounting year under consideration. Respectfully following the above decision of the Supreme Court, we hold that on the facts and in the circumstances of the case, the imposition of penalty was misconceived. Accordingly, we vacate the penalty."

6. Now, at the instance of the Commissioner, the questions indicated above have been referred to this court.

7. It was submitted before us on behalf of the revenue by the learned standing counsel that the view taken by the Tribunal was erroneous in law inasmuch as it wrongly relied on the decision in Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, and omitted to consider the application of the Explanation to Section 271(1)(c) to this case. On the other hand, it was urged before us on behalf of the assessee by Sri R.K. Gulati that in spite of the insertion of the Explanation to Section 271(1)(c) by the Finance Act, 1964, with effect from April 1, 1964, the decision in Anwar Ali's case is still good law, that the Tribunal was conscious of the application of the Explanation to the instant case and thus, in accepting the assessee's explanation, did not commit any error of law.

8. In our opinion, the view taken by the Appellate Tribunal is misconceived in law. It has absolutely omitted to consider the effect of the Explanation to Section 271(1)(c) to the facts of this case. Without entering into the controversy as to whether even after the insertion of the Explanation the decision in Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, is or is not good law, in our opinion, the Explanation has brought about a material change in the situation. u/s 271(1)(c) of the I.T. Act, 1961, the position, of course, was that the (penalty) proceedings under the Act were quasi-criminal in nature and the onus was on the department to prove that the assessee concealed the income

and furnished inaccurate particulars of the income in respect of the same and that it did so deliberately and further that the findings given in the assessment proceedings were admissible and good evidence but did not constitute conclusive proof of concealment or furnishing of inaccurate particulars. Apart from the assessment order the department was required to establish from some other material the fact of concealment or furnishing of inaccurate particulars.

9. The Explanation introduced by the Finance Act, 1964, read as under :

"Explanation.--Where the total income returned by any person is less than eighty per cent. of the total income (hereinafter in this Explanation referred to as the correct income) as assessed u/s 143 or Section 144 or Section 147 (reduced by the expenditure incurred bona fide by him for the purpose of making or earning any income included in the total income but which has been disallowed 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 wilful 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 this sub-section."

10. This provision is certainly a rule of evidence. The requirement now is that the department is first to establish that the total income returned by any person was less than eighty per cent. of the total income assessed, as reduced by the expenditure incurred bona fide by him for the purpose of making or earning any income included in the total income but which has been disallowed as a deduction. If the department succeeds in establishing this fact then it is to be presumed that the assessee had concealed the particulars of his income or furnished inaccurate particulars of such income. This is, however, a rebuttable presumption. The assessee can discharge the onus by showing that the failure to return the correct income did not arise from any fraud, or any gross or wilful neglect on his part. This onus is of a negative nature. Further, the extent of the onus is as in a civil case and certainly not as in a criminal case where the prosecution is required to establish the guilt of the accused beyond all reasonable and probable doubts. The assessee can discharge this onus by relying on direct or circumstantial evidence. He can rely on the evidence given and the circumstances which obtained in the assessment proceedings as also furnish fresh evidence in penalty proceedings. Penalty proceedings are separate from assessment proceedings. It may also be mentioned that there is a vital difference between making an assertion and proving an assertion. The two are not co-extensive. The mere making of an assertion cannot be taken as proof of an assertion. Of course, the matter in its ultimate analysis is to be decided on the preponderance of probabilities after considering the materials placed on the record. We may in this behalf refer to a decision of this court in *Rukmani Bahu Vs. Addl. Commissioner of Income Tax*, .

11. Now let us analyse what the Tribunal has done in this case. We have already extracted above the relevant part of its order. The view taken by it is that in

regard to both the construction of flats and purchase of shops, the explanation of the assessee had not been believed and relying on the decision in Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, , in its opinion "it is settled law that in respect of additions made in similar circumstances to the assessment, there could be no levy of penalty u/s 271(1)(c) of the Income Tax Act, 1961". Further in its opinion "merely because the additions were made in the assessment, it cannot be postulated that they represented the real income of the assessee for the accounting year under consideration". In other words, the Tribunal is labouring under a conception that apart from the "assessment order the department must by other materials establish that the disputed addition constituted the concealed income of the assessee for the year under consideration and that merely because the assessee's explanation was rejected in the assessment proceedings, it would not mean that it was guilty of concealment of income or furnishing inaccurate particulars in respect of the same. There is not a whisper in the order of the Tribunal to show that the provisions of the Explanation to Section 271(1)(c) was in the background of its mind when it was considering this case. All that was in the background of its mind was the decision in Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, . It appears to be oblivious of the fact that the Explanation to Section 271(1)(c) was attracted to the case and if so, what was its effect.

12. The IAC had in a detailed order considered the explanation of the assessee and given his reasons for not accepting the same. On a reappraisal of the facts and circumstances of the case the Tribunal could have come to a different finding but unfortunately it has not done so. It has not referred to the reasons given by the IAC for not accepting the assessee's explanation. It has also not taken into consideration the fact whether there was any material on record to support this explanation. The position, therefore, is that the case is to be sent back to the Tribunal with a direction to look into the record and dispose of the appeal on the basis of the same and in the light of the observations which we have made above.

13. Accordingly, we return the questions unanswered with a direction to the Appellate Tribunal to look into the record and dispose of the appeal on the basis of the same and in the light of the observations made by us above. In the circumstances, we make no order as to costs.