
(1974) 08 RAJ CK 0009

In the Rajasthan High Court

Case No : Civil Income Tax Case No. 128 of 1973

Addl. Commissioner of Income Tax

APPELLANT

Vs

Gem Palace

RESPONDENT

Date of Decision : 13-08-1974

Acts Referred:

Income Tax Act, 1961 — Section 256(2), 271(1)

Citation : (1975) 98 ITR 640 : (1974) RLW 466 : (1974) 7 WLN 548

Hon'ble Judges : B.P. Beri, C.J.; D.P. Gupta, J

Bench : Division Bench

Advocate : S.C. Bhandari, for the Appellant; B.P. Agarwal, for the Respondent

Judgement

Gupta, J.—This is an application by the Additional Commissioner of Income Tax, Rajasthan u/s 256(2) of the Income Tax Act, 1961, praying that the Income Tax Appellate Tribunal, Jaipur Bench, may be directed to state a case and refer the following question to this court:

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in cancelling the penalty of Rs. 13,000 levied by the Inspecting Assistant Commissioner under the Explanation to Section 271(1)(c) ?"

The circumstances in which this application comes to be filed are that the assessee, who is carrying on business in precious stones, filed a return showing its income as Rs. 32,940 for the assessment year 1967-68. The Income Tax Officer, "A" Ward, Jaipur, assessed the total income of the assessee for the year in question at Rs. 74,613 by including an estimated amount by way of gross profit and by disallowance of some of the expenses claimed by the assessee.

2. On appeal by the assessee, the Appellate Assistant Commissioner reduced the total income of the assessee to Rs. 66,401. As the returned income was less than 80% of the assessed income penalty proceedings u/s 271(1)(c) of the Income Tax Act, 1961 (hereinafter referred to as "the Act"), were initiated against the assessee. The Income Tax Officer being of the view that the minimum penalty

leviable exceeded Rs. 1,000, referred the matter to the Inspecting Assistant Commissioner of Income Tax, Jaipur Range I, who levied a penalty of Rs. 13,000.

3. The assessee filed an appeal before the Income Tax Appellate Tribunal, Jaipur Bench, who took the view that the addition in gross profits was made on account of a routine defect in the accounts of the assessee and that disallowance of expenses bona fide incurred by the assessee did not lead to the conclusion that the assessee deliberately concealed his income or committed gross or wilful neglect in furnishing the return of its income. It would be proper to reproduce the operative part of the Tribunal's finding, which is as under :

"This is a case in which the assessee has maintained regular books of account and the return of income was also based on those accounts. The accounts were rejected on the technical ground that there was no day-today stock account. The gross profit estimate has also been made on a purely subjective basis without any indication from the accounts of any actual concealment or manipulation indulged in by the assessee. The assessee's statement that it agrees to an addition of Rs. 6,000 by way of enhancement of gross profit, in the circumstances and background of the case, could not be equated with a categorical acceptance of concealment of income on its part. The case of the assessee is clearly distinguishable on facts from the case of *Durga Timber Works Vs. Commissioner of Income Tax*, , relied on by the learned departmental representative. In that case, there was a categorical acceptance by the assessee of concealment of income and an agreement that such income may be included in its total income as its concealed income. Having regard to all the circumstances of the case, we are unable to infer any fraud or gross or wilful neglect on the part of the assessee which had contributed to the difference between the income returned and the income assessed. Accordingly, we cancel this penalty and allow the appeal."

The Additional Commissioner of Income Tax, Rajasthan, thereupon submitted an application u/s 256(1) of the Act before the Appellate Tribunal requiring it to draw up a statement of the case and refer the above-mentioned question to this court for an answer. However, the Tribunal was of the opinion that the finding arrived at by it was only a finding of fact, as the question whether an assessee committed an act of concealment or committed fraud or gross or wilful neglect in making the return of its income is a question of fact. The Appellate Tribunal, therefore, by its order dated January 15, 1973, refused to refer the aforesaid question and hence this application has been filed before us on behalf of the revenue.

4. Mr. Bhandari, learned counsel appearing on behalf of the revenue, submitted that the Explanation to Section 271(1)(c) of the Act created a legal fiction that in cases where the total income returned by an assessee is less than 80% of the total income assessed, it should be deemed that the assessee has concealed the particulars of his income or furnished inaccurate particulars and further that in the present case the assessee failed to prove that its failure to return the correct

income did not arise from any fraud or from any gross or wilful neglect on its part and as such the Tribunal was not right in cancelling the penalty levied upon the assessee by the Inspecting Assistant Commissioner. The contention of the learned counsel is that the Tribunal did not keep in view the Explanation to Section 271(1)(c) of the Act and failed to consider that the very action on the part of the assessee to file a return in respect of less than 80% of its assessed income is sufficient to assume that there was a deliberate concealment or fraud or wilful neglect on the part of the assessee in returning its income and as the assessee was unable to place any material on record to show that its failure to return the correct income did not arise on account of fraud or gross or wilful neglect, the imposition of penalty upon the assessee was justified and should not have been cancelled by the Tribunal, The learned counsel for the assessee supported the order of the Tribunal and argued that no question of law arose out of the order of the Tribunal and as such the reference application was rightly rejected by the Tribunal.

5. Section 271(1) of the Act, so far as material for our present purpose, runs as under :

"271. (1) If the Income Tax Officer or the Appellate Assistant Commissioner in the course of any proceedings under this Act, is satisfied that any person--

(c) has concealed the particulars of his income or furnished inaccurate particulars of such income,

he may direct that such person shall pay by way of penalty,--

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"

The aforesaid Explanation, as a bare reading of its language shows, does not create any legal fiction but it merely gives rise to a rebuttable presumption."Fiction" has its origin in "fictio" which in old Roman law was properly a term of pleading, and signified a false averment on the part of the plaintiff which the defendant was not allowed to traverse (see Maine's Ancient Law, Chapter II). According to Wharton's Law Lexicon (fourteenth edition) "fictions" are "those things that have no real essence in their own body but are so accepted in law for a special purpose". Webster's Third New International Dictionary. describes a fiction as "an allegation or supposition in law of a state of facts assumed to exist which the practice of the courts allows to be made in

pleading and refuses to allow the adverse party to disprove". According to Words and Phrases, permanent edition, volume 16A (published by West Publishing Company, St. Paul, U.S.A.) a "fiction of law" is "an assumption or supposition of law that something which is or may be false is true, or that a state of facts exists which has never really taken place : *Leavell v. Blades*, 141 SM 893, 237 No. 695. "Thus, fiction in law is the assumption or invention that something is true which is or may be false and it cannot be contradicted. However, the words "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" in the Explanation to Section 271(1)(c) of the Act clearly point out that the assumption which the aforesaid Explanation authorises to be made can be rebutted by the assessee by leading evidence to disprove the same. Such an assumption, therefore, cannot be considered to be a fiction as it can be contradicted. In essence, the Explanation authorises the making of a presumption which is rebuttable. A presumption, according to Stroud's Judicial Dictionary (third edition), is "the evidence of things not seen; where, from an apparent effect, you may infer a probable cause". Wharton's Law Lexicon describes a rebuttable presumption as "a presumption established in law till the contrary be proved". Similarly, Words and Phrases, permanent edition, volume 33A, "describes a presumption as "a rule of procedure used to supply want of facts, and its only effect is to cast burden on opposite party of going forward with proof. Presumptions are artificial Rules which have a legal effect independent of any belief, and stand in the place of proof until the contrary be shown : *In re Blake's Will*, 120 A 2d 745, 749; 21 NJ 50." According to Webster's Third New International Dictionary, presumption is "an inference as to the existence of the fact not certainly known from the known or proved existence of some other fact, sometimes operating as evidence, sometimes as a rule of procedure as to who must proceed with evidence on the main issue, or as to who has the burden of proof and sometimes having no effect as evidence, once evidence on the issue is in". In this view of the matter, the Explanation only gives rise to a rebuttable presumption and has the effect of placing the burden of proof on the assessee which formerly, before the Explanation was introduced, was on the department. We are, therefore, unable to accept the contention of the learned counsel for the revenue that the Explanation gives rise to a legal fiction.

6. We are further of the opinion that the Tribunal was right in holding that the question whether there was any concealment of income and whether there was any fraud or gross or wilful neglect in the filing of the proper return of its income on the part of the assessee is essentially a question of fact and from the finding of the Tribunal, set out above, it cannot be said that the Tribunal was not mindful of the Explanation to Section 271(1)(c) of the Act. It was on account of the very fact that the returned income was less than 80% of the income assessed that the proceedings u/s 271(1)(c) of the Act were initiated by the Income Tax Officer and referred to the Inspecting Assistant Commissioner. The facts of this case are similar to those of *ADDITIONAL COMMISSIONER OF Income Tax, RAJASTHAN Vs. NOOR MOHD and CO. AND OTHERS.*, and it would be pertinent to quote the

following observations made in that case :

". . . where the income returned is less than 80 per cent, of the income assessed the burden of proof would be on the assessee to show that this disparity was not the result of any fraud or wilful or gross neglect. We have no doubt in our minds that when the Tribunal set aside the imposition of the penalty in these cases it was aware of the existence of the Explanation, the purpose it served and its applicability to the cases in hand. The disparity between the incomes returned and the incomes assessed was less than 80 per cent, and they related to the assessment years which were governed by the Explanation. In fact the Tribunal has referred to the Explanation in so many words. The Tribunal, however, felt satisfied that the presumption raised by the Explanation stood rebutted because the additions made to the incomes returned were merely estimated or notional and the difference was also not substantial and the Tribunal was not prepared to conclude fraud, wilful or gross neglect. The evidence which satisfied the Tribunal were the facts and circumstances of the cases which it had decided itself. The evidence may be direct or circumstantial or both. Mere statement of the assessee may be enough in some cases. What quantum of evidence would rebut a legal presumption in a given set of facts does not admit of any rigid rule. Nor does it raise a question of law. No single fact but it is the cumulative impact of all the facts which affords the answer. We have quoted the relevant extracts from the order setting aside the penalties. The factors have been considered in the light of the presumption. We may perhaps concede that the conclusions could be differently expressed. But that does not detract from the spirit of the conclusions. In the ultimate analysis the question which confronted the Tribunal was whether the facts and circumstances appearing on the records of the cases were adequate to rebut the presumption of fraud, wilful or gross neglect. The Tribunal found in the negative. The presumption stood rebutted. In AIR 1930 91 (Privy Council) their Lordships of the Privy Council have firmly ruled that the question whether the statutory presumption is rebutted by evidence or not is always a question of fact."

The aforesaid observations fully govern the matter in question before us. We may also refer to the decision of their Lordships of the Supreme Court in Commissioner of Income Tax v. Khoday Eswarsa and Sons [1972] 83 ITR 389 wherein on the basis of certain facts the Appellate Tribunal came to the conclusion that the assessee did not make any deliberate attempt at concealment. The Supreme Court held that the conclusions drawn by the Appellate Tribunal with regard to concealment of income by the assessee were findings of fact and that no question of law arose for reference being made to the High Court.

7. The Appellate Tribunal came to the conclusion that there was no fraud or gross or wilful neglect on the part of the assessee and on the basis of that finding the penalty was cancelled. In our view it is purely a finding of fact and no question of law arises and as such we decline to direct the Tribunal to refer the aforesaid

question to us.

8. The application for making a reference has, therefore, no merit and is dismissed. The parties are left to bear their own costs.