

(1978) 06 BOM CK 0049
In the Bombay High Court
Case No : W.T. Ref. No. 15 of 1968

Balkrishna Binani

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 27-06-1978

Acts Referred:

Income Tax Act, 1961 — Section 2(45), 3, 4
Wealth Tax Act, 1957 — Section 2

Citation : (1979) 9 CTR 62 : (1980) 121 ITR 442

Hon'ble Judges : R.M. Kantawala, C.J.; S.K. Desai, J

Bench : Division Bench

Judgement

Desai, J.—In this reference the question referred to us for our opinion by the Income Tax Appellate Tribunal u/s 27(1) of the Wealth-tax Act, 1957, is as follows :

"Whether on the facts and in the circumstances of the case any part of the tax paid u/s 68 of the Finance Act, 1965, was a "debt owed" on the relevant valuation dates within the meaning of s. 2(m) of the Wealth-tax Act, 1957"

2. The assessee is an individual and is a regular assessee under the Income Tax Act. He follows the Samvat Year as the Previous year for his Income Tax assessment. He had been last assessed to tax for the year 1962-63 by the order of the Income Tax Officer dated 16th October 1962. For the assessment year 1963-64 for which the previous year was S.Y. 2018 (ending of 28th October 1962), the assessee had filed a return of income. Similarly he had filed a return of income for the assessment year 1964-65, for which the previous year was S.Y. 2019. The assessments for these two years were, however, pending. Thereafter Parliament enacted the Finance Act, 1965, which inter alia provided for voluntary disclosure of certain income u/s 68 of the said Act. Taking advantage of the scheme, the assessee first made a voluntary disclosure on 30th March, 1965 (though dated 27th March 1965) of an income of Rs. 16,16,193/-. He made a subsequent disclosure on 19th May 1965 (though dt. 17th May 1965) of a further

income of Rs. 1,75,000/-. Thus the total disclosure was in the aggregate amount of Rs. 17,91,193/-. With regard to the amount initially disclosed viz. Rs. 16,16,193/-, the assessee was liable to pay tax at the flat rate of 57% of the amount disclosed, which was duly paid before the stipulated date. With regard to the further disclosure of Rs. 1,75,000/-, he was liable to pay Income Tax at the flat rate of 60% which was also paid before the stipulated date. The aggregate tax so paid totalled Rs. 10,26,230. Now, according to the first disclosure, the income of Rs. 16,16,193 was represented by the total assets held by the assessee on the 15th November 1963. Again, according to the second disclosure, the further income disclosed viz. Rs. 1,75,000 was represented by further assets, again as on 15th November, 1963. In the annexures to the disclosures the assessee gave certain details of the financial year or years in which the income disclosed was earned; this break-up, however, was given only in respect of the initial disclosure of Rs. 16,16,193/- and no break-up was given in respect of the further disclosure of Rs. 1,75,000/-.

3. It would appear that although the assessee had wealth liable to be taxed, built had neither made a return of his net wealth nor had been assessed to wealth-tax in any of the years to-date. Acting on the information thus revealed, the WTO started proceedings under the wealth-tax Act and completed the assessments for all the years from 1957-58 to 1965-66 under consideration in this reference, all on the same day, namely, 18th January 1966. The WTO however, did not allow as a deduction any part of the tax paid by the assessee in accordance with the disclosures made under s. 68 of the Finance Act, 1965, as a "debt owed" in computing the "net wealth" of the assessee in terms of s. 2(m) of the Wealth-tax Act for any of the years. He just computed the "net wealth" of the assessee for the respective years on the basis of the income finally disclosed as above and as represented by the assets held by the necessary details in this connection :-

3. Being aggrieved by this disallowance, the assessee preferred an appeal to the Appellate Assistant Commissioner. Before the Appellate Assistant Commissioner reliance was placed on the decision of the Supreme Court in *Kesoram Industries and Cotton Mills Ltd. v. CWT (Central,)* Calcutta. The Appellate Assistant Commissioner was of the opinion that the decision did not at all help the assessee. He dismissed the appeal as to the main contention but gave partial relief to the assessee, with which we are not concerned.

4. Aggrieved by the order of the Appellate Assistant Commissioner the assessee then went in further appeal to the Income Tax Appellate Tribunal. Before the Tribunal it was argued :

"(i) It was accepted by the Department that the net wealth of the assessee on different valuation dates was computed on the basis of the income earned in the various years which had remained un-assessed til the same was disclosed by the assessee by his disclosure u/s 68 of the Finance Act 1965;

(ii) once it is accepted that the wealth was comprised of the incomes earned

during the different years, it is plain that the same attracted tax at the rates prescribed by the respective Finance Acts and that till the same were actually paid they could be claimed as debts due; and

(ii) The quantum of tax due according to the respective Finance Acts were always higher than the tax paid by the assessee under the disclosure scheme. The smaller amounts, in proportion of tax actually paid latter, were claimed as debts due. These should have been allowed".

The Tribunal, however, examined several decisions and the relevant statutory provisions and ultimately rejected the contentions advanced on behalf of the assessee in the following words :-

"After a very careful consideration of the matter, we have come to the final conclusion that it is only s. 68 of the Finance Act which cast the liability on the assessee, though in sense that liability was left to be invited by the assessee, to pay the tax and there was no such liability for payment of tax on the concerned valuation dates as the liability under the charging section of the Income Tax Acts could only be attracted if the income disclosed could be said to have formed part of the total income of the assessee in the respective years. We are, therefore, of the opinion that the Department was right in not allowing any deduction of the proportionate tax paid by the assessee as a debt owed on the respective valuation dates".

Accordingly the Tribunal dismissed the appeals for the several years under consideration. Being aggrieved by this decision, the assessee has carried the matter further and invited the High Court to give its opinion on the question which we have earlier set out.

5. Before us counsel on behalf of the assessee has urged that the tax at the flat rates paid by the assessee u/s 68(3) of the Finance Act, 1965, is Income Tax which is payable under the Income Tax Act, although at the rate fixed by s. 68(3) of the Finance Act, and, therefore, the matter would be squarely covered by the decision of Kesoram Industries and Cotton Mills Ltd."s case, in which the Supreme Court had held that this was a debt owed which was liable to be allowed as a deduction in computing the net wealth for the purpose of levy of wealth-tax. In other words, it was submitted that s.68 of the Finance Act, 1965, was not the charging section but merely prescribed the procedure for assessment of concealed income and the and the rate of tax. According to this submission, the charging section remains what it was under the Income Tax Acts i.e. s. 3 of the Indian Income Tax, 1961. According to this submission, the Income Tax liability of the assessee was assessed and quantified in 1965 in the manner provided u/s 68 of the Finance Act which would qualify the amount paid as Income Tax under the provisions as a deduction allowable, which deduction fell squarely within the ratio of the Supreme Court decision in Kesoram Industries and Cotton Mills Ltd."s case. On the other hand, counsel on behalf of the Revenue strongly urged that the tax at the flat rates paid on concealed income

disclosed by the assessee u/s 68 of the Finance Act, 1965, was not in satisfaction of any liability u/s 3 of the Indian Income Tax Act, 1922, or s. 4 of the Income Tax Act, 1961, but was in satisfaction of a new liability to tax in respect of a particular item of income viz. concealed income disclosed by the assessee. It was, therefore, submitted that for the purposes of computing the net wealth of the assessee the amount paid as provided u/s 68(3) of the Finance Act, 1965, could not be deducted as a debt owed by him on the last day of relevant account year in which such concealed income was earned. It may be stated that in support of the respective contentions counsel relied on authorities of different High Courts, the High Courts, of Kerala, Delhi, Allahabad and Calcutta having taken the view canvassed for our acceptance by counsel for the assessee, whereas the submissions made on behalf of the Revenue have found favour with the Gujarat High Court. It may be further stated that the decision of the Gujarat High Court, which upheld the contentions advanced on behalf of the Revenue, was subsequently considered by the Delhi, Allahabad and Calcutta High Courts in their decisions which expressly dissented from the Gujarat view.

6. The claim of the assessee starts from the decision of the Supreme Court in *Kesoram Industries and Cotton Mills Ltd.*'s case. The assessee before the Supreme Court was a public limited company which had in its balance-sheet for the year ending 31st March, 1957 shown certain amount as a provision for payment of Income Tax and super-tax in respect of that years of account. The question was whether that amount was a debt owed within the meaning of s. 2(m) of the Wealth-tax Act, 1957, as on 31st March 1957, which was the valuation date, and as such was deductible in computing the net wealth of the assessee company. It was held by a majority (i) that the word "owe" meant "to be under an obligation to pay" it did not really add to the meaning of the word "debt"; (ii) that "debt owed" within the meaning of s. 2(m) of the Wealth-tax Act, 1957, could be defined as the liability to pay in present or in futuro an ascertainable sum of money, (iii) that the charging section for the purposes of Income Tax was s. 3 of the Indian Income Tax Act, 1922, and the annual Finance Acts only gave the rate for quantifying the tax, and (iv) that a liability to pay Income Tax a present liability though the tax became payable after it was quantified in accordance with ascertainable date. It was held further that there was a perfect debt at any rate on the last day of the accounting year and not a mere contingent liability. It was observed that the rate was always easily ascertainable; if the finance act was passed, it was the rate fixed by that Act; if the finance act was not yet passed, it was the rate proposed in the Finance Bill pending before Parliament or the rate in force in the preceding year, whichever was more favourable to the assessee. On these considerations it was concluded that the amount of the provision for payment of Income Tax and super-tax in respect of the year of account ending 31st March 1957 was a debt owed within the meaning of s. 2(m) on the valuation date viz. 31st March, 1957, and was as such deductible in computing the net wealth.

7. This view was subsequently reiterated by the Supreme Court (for wealth-tax

liability) in H. H. Sethu Parvati Bayi v. CWT Kerala.

8. In the matter before us we are concerned with the charge of Income Tax provided u/s 3 of the Indian Income Tax Act, 1922, which will involve application of both s. 3 of the said act as well as s. 4 of the Income Tax Act, 1961. S. 3 of the Act of 1922 reads as follows :-

"3. Charge of Income Tax - Where any Central Act enacts that Income Tax shall be charged for any year at any rate or rates, tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions of this Act in respect of the total income of the previous year of every individual. Hindu undivided family, company and local authority, and of every firm and other association of persons or the partners of the firm or the members of the association individually".

9. "Total income" has been defined under s. 2(15) of the said Act and reads as under :-

"2(15) "Total income" means total amount of income, profits and gains referred to in Sub-s. (1) of s. 4 computed in the manner laid down in this Act, and

"total world income" includes all income, profits"

10. The charging section under the Income Tax Act, 1961, is s. 4; the relevant portion thereof reads as follows :-

"(4) Charge of Income Tax -(1) Where any Central Act enacts that Income Tax shall be charged for any assessment year at any rate or rates, Income Tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions of this Act in respect of the total income of the previous year or previous years, as the case may be, of every person :

.... .."

11. The definition of "total income" is to be found in s. 2(45) of the above Act and that of "previous year" in s. 3 of the said Act. It is found that between the two charging sections there is no material difference.

12. Chronologically speaking, the matter came up for consideration for the first time before the Kerala High Court in C. K. Babu Naidu v. WTO. In that decision the learned single Judge of the Kerala High Court upheld the action of the WTO in not deducting Income Tax liability of the various valuation dates for the four years in question on the amount declared by the assessee u/s 68(2) of the Finance Act. 1965. This was on the basis of the reasoning which was subsequently observed as unsatisfactory by a Division Bench of the Gujarat High Court, which came to a similar conclusion but for different reasons. We need not examine this decision further in as much as the decision of the learned single Judge was subsequently set aside in appeal by a Division Bench of the Kerala High Court in C. K. Babu Naidu v. WTO. The Division Bench of the Kerala High Court has observed whilst allowing the appeal that if the provisions of s. 68 of

the Finance Act, 1965 are read along with s. 4 of the IT Act, 1961, the irresistible conclusion would be that the Finance Act, 1965, only provided the rate of tax that is to be imposed and the same was considered to be only a machinery provision to provide for what was envisaged u/s 4 of the Income Tax Act, 1961. According to the Division Bench, the provision for voluntary disclosure did not alter the liability of the assessee, a liability which arose and stemmed from the existence of the Income Tax Act containing the charging section viz. s. 4. In the view of the appeal court of the Kerala High Court, therefore, the matter fell squarely within the ratio of the decision of the Supreme Court in *Kesoram Industries and Cotton Mills Ltd.*'s case and *Sethu Parvati Bayi*'s case and was required to be decided in favour of the assessee. We do not find, however very detailed or careful analysis of the provisions of s. 68, although the conclusion of the Kerala High Court summarised above was given in fairly categorical terms.

13. It is the Gujarat High Court, which then applied its mind to the matter and in a careful, considered judgment in *CWT Gujarat I. v. Ahmed Ibrahim Sahigara*, decided in favour of the Revenue. It considered the charge u/s 3 of the Indian Income Tax Act, 1922, and u/s 4 of the Income Tax Act, 1961, and the provisions of s. 68 of the Finance Act, 1965, and concluded that the tax paid on the concealed income disclosed by the assessee u/s 68 of the Finance Act, 1965, was not in satisfaction of any liability u/s 3 of the Act of 1922 or u/s 4 of the Act of 1961, but in satisfaction of a new liability to tax in respect of a particular item of income viz. concealed income disclosed by the assessee, which arose for the first time u/s 68 of the Finance Act, 1965. On that basis it was concluded that it was not available for being deducted as a debt owed by the assessee for the purpose of computing the net wealth of the assessee on the last date of the relevant account year in which such concealed income was earned. The Division Bench of the Gujarat High Court very fairly stated that the question was not free from difficulty, and, indeed. It was observed that it has caused to the bench some anxiety before the conclusion was reached. As stated earlier, the provisions of s. 68 of the Finance Act, 1965, have been carefully considered in the above decision and the following extract from the judgment may be usefully reproduced :

"If we examine the language of s. 68 of the Finance Act, 1965, it is clear that it does not provide for quantification, at concessional rate, of the liability u/s 3 of the Indian Income Tax Act, 1922, or s. 4 of the Income Tax Act, 1961, and payment of Income Tax u/s 68 is not in satisfaction of that liability. Sub-s. (1) of s. 68 provides that where any person makes a declaration in respect of the concealed income, he shall, notwithstanding anything contained in the Income Tax Act, be charged Income Tax at the rate specified in Sub-s. (3) in respect of the concealed income so declared, if one of the three conditions specified in clause (i) to (iii) is satisfied. The important words in Sub-s. (1) are "charged income tax". These words show that Sub-s. (1) imposes a charge to Income Tax on the concealed income disclosed by the assessee. Now, it may be argued that these words are used in the same sense in which the words "income tax shall be

charged" are used in the various Finance Acts. They have reference to charge of Income Tax under the Income Tax act but that rate specified in Sub-s. (3). What Sub-s. (1) seeks to provide is that the disclosed income shall be charged to tax under the Income Tax Act not at the rate laid down in the Finance Act but at the rate Specified in sub-s. (3). The emphasis in sub-s. (1) is on the prescription of the rate at which the Income Tax is to be charged and not no charging, which is done by the Income Tax Act. But this argument cannot prevail because it is contrary to the provisions of s. 68 as also against the scheme of the Income Tax Act. In the first place, the charge under the Income Tax Act is on the total income of the previous year and not on any particular item of income. S. 3 of the Indian Income Tax Act, 1922, as also s. 4 of the Income Tax Act, 1961, do not levy the charge of Income Tax on a particular item of income. The concept of a charge on a particular item of income is completely alien to the Income Tax Act. In fact, it would be wholly inappropriate under the Income Tax Act to speak of quantification of tax liability on a particular item of income. The charge of Income Tax referred to in Sub-s. (1) of s. 68 cannot, therefore, be construed to mean charge of Income Tax under the Income Tax Act. Secondly, payment of Income Tax u/s 68 has no reference to any assessment year. It is outside the pale of assessment for any particular asst. yr. Clause (b) of Sub-s. (2) does contemplate that the assessee may give details of the financial year or years in which the disclosed income was earned and the amount pertaining to each year, but that is expected to be given only "Where available" and, therefore, there may be cases, the present being one of them, where the disclosed income may not be related to any particular financial year or years. The chargeability to Income Tax under the Income Tax Act would break down in such cases, because the whole basis of the charge under the Income Tax Act is the total income of the previous year and if the disclosed income is not related to any particular year or years, it cannot be included as part of the total income of a particular previous year so as to be brought to tax. Yet, u/s 68, it would be chargeable to Income Tax irrespective of the financial year or years in which it was earned. Thirdly, the disclosed income is chargeable to Income Tax u/s 68 without taking into account any deductions or allowances which would be permissible, if the charge were under the Income Tax Act. These three circumstances clearly show that s. 68 is not intended to lay down a concessional rate at which Income Tax may be charged under the Income Tax Act. It does not provide a method of quantification of the liability to Income Tax under the Income Tax Act. It enacts a new charge to tax, on an ad hoc basis, on disclosed income irrespective of the assessment year in which it was earned" (pp. 293, 294, 295).

14. The Division Bench of the Gujarat High Court thereafter considered the provisions of Sub-s. (6) of s. 68 and observed that if the conditions specified in Sub-s. (6) of s. 68 are satisfied, the concealed income disclosed by the assessee would cease to be liable to be included in his total income for the purpose of assessment under the Income Tax Act. This was obviously because it had already borne tax u/s 68. Thus, according to the division bench "This item of income

having been subjected to a distinct and separate process of assessment u/s 68 is taken out of the purview of assessment under the Income Tax Act". On these considerations the Division Bench came to the conclusion that the tax paid on concealed income disclosed by the assessee u/s 68 was not in satisfaction of any liability u/s 3 of the Act of 1922 or u/s 4 of the Act of 1961 but in satisfaction of a new liability. It was, therefore, of the opinion that it cannot be deducted as a debt owed by the assessee on the last day of the relevant account year.

15. A Division Bench of the Delhi High Court in *Commr. of WT, Haryana, H.P. and Delhi III v. Girdhari Lal*, dissented from the view expressed by the Gujarat High Court in *Ahmed Ibrahim Sohigara's* case, observing that the amount which a person declared u/s 68 of the Finance Act, 1965, represented the assessee's income which in the ordinary course was assessable under the Indian Income-tax Act, 1922, or the Income Tax Act, 1961. In the view of the Delhi High Court s. 68 of the Finance Act, 1965, like the Finance Act of every year, only prescribed the rate of tax which is to be charged. This view of the Delhi High Court appears to be based on a proposition that the Finance Acts by themselves cannot impose a tax on any amount which is not the total income of a person under the Indian Income Tax Act, 1922, or under the Income Tax Act, 1961. In other words, the charge to tax was required to be under the Income Tax Acts only. For this proposition the Delhi High Court found support in the Supreme Court in *CIT v. Khatau Makanji Spinning & Weaving Co. Ltd.* In the view of the Delhi High Court if s. 69 of the Finance Act, 1965, was required to be considered as a separate charging provision, it would not be in conformity with what was decided by the Supreme Court in *Khatau Makanji's* case and, therefore, would suffer from the vice of unconstitutionality. It was principally on this feeling that it proposed to read the provisions of s. 68 of the Finance Act, 1965, as merely prescribing a rate of tax, which has the character of Income Tax which is payable by virtue of the charging provision of the Income Tax Act (see page 92 of the report). In arriving at this conclusion it expressly disagreed with the reasons given by the Gujarat High Court in *Ahmed Ibrahim Sahigara's* case. As stated earlier, if the observations of the Supreme Court in *Khatau Makanji's* case, are carefully examined, it does not appear that the Supreme Court in the said case laid down any rule of the nature as considered by the learned Judges of the Delhi High Court, and our attention was expressly drawn at the bar to a later decision of the Supreme Court in *Madurai District Central Co-operative Bank Ltd. III ITO, Madurai*, in which the power of Parliament to impose a new charge by a Finance Act was considered and upheld. It is true that counsel for the appellants before the Supreme Court expressly gave up the challenge to the power of Parliament; but the Court proceeded to consider the argument observing that the concession was properly made and gave its reasons for the observation.

16. S. 68 of the Finance Act, 1965, once again came to be considered by a Division Bench of the Allahabad High Court in *Commr. of WT v. B. K. Sharma*, where, without referring to the judgment of the Delhi High Court the learned Judges of the Allahabad High Court considered the statutory provisions. They

examined the judgment of the Gujarat High Court in Sahigara's case, and expressly differed therefrom. The Division Bench of the Allahabad High Court upheld the allowance of deduction to the assessee applying the ratio of Kesoram Industries and Cotton Mills Ltd.'s case. In the reference before the Allahabad High Court concerned had made a voluntary disclosure of his concealed income of rupees five lakhs u/s 68 of the Finance Act, 1965. It was the assessee's case that he had earned this income during a number of years in the past, and in the wealth-tax returns for the asst. yrs. 1960-61 and 1961-62 he included in his net wealth the sum of Rs. 2,25,000/- in the first year and the sum of Rs. 2,80,000/- in the next year out of the concealed income. The WTO accepted the amounts; but when subsequently before the Appellate Assistant Commissioner the assessee claimed deduction on account of the Income Tax payable on the two amounts, the claim was rejected on the basis that there was no debt owed by the assessee within the meaning of s. 2(m) of the Wealth-tax Act. In appeal the Tribunal upheld the contention of the assessee and it was from this decision that the reference was preferred to the Allahabad High Court. As regards the two amounts, which were subsequently disclosed under the Voluntary Disclosure Scheme enacted and provided for by Parliament u/s 68 of the Finance Act, 1965, but which amounts were originally concealed by the assessee, the Allahabad High Court observed as follows :

"Now, admittedly, the assessee was in possession of the two sums of Rs. 2,25,000 and Rs. 2,80,000 on the respective valuation dates of the two asst. yrs. in question on which the assessee was liable to pay the wealth-tax. Admittedly, again, these two amounts came out of the concealed income of rupees five lakhs which the assessee ultimately declared in the year 1965. Assuming that these two amounts were earned in the previous years relevant to the asst. yrs. 1960-61 and 1961-62, which fact has been accepted by the Income Tax authorities, the assessee was clearly liable to Income Tax on these two amounts. If the assessee had not concealed the income and had offered it for assessment at the appropriate time and if the tax had remained unpaid on the valuation dates, the arrears of tax would constitute a debt liable to be deducted in the computation of total income. This position is again unexceptionable. Now, the mere fact that the amounts had not been offered for assessment and no tax was levied thereon, will not, in our opinion, alter the position so far as the computation of wealth-tax is concerned. It must be remembered that under the I.T. Act tax becomes payable immediately on the expiry of the previous year in which the income is earned. The assessment may take place later but the assessment merely quantifies the tax. The liability to pay tax arises much earlier, namely, on the close of the previous year in which the income is earned. It follows that if the assessment in the relevant asst. yr. but the assessments had not been made on the valuation dates, even the then assessee would be entitled to deduct the Income Tax payable by him and such liability would amount to a debt owed by him. The fact that he did not disclose this income at the appropriate time, and evaded the tax, does not mean that he was not liable to

pay the tax. As stated earlier, the liability to pay Income Tax arises when the income is earned and not when it is disclosed or discovered. The quantification and determination of tax may be delayed because of the attempt of the assessee to conceal it from the Department but his liability remains". (p. 904-905).

The position as expounded by the Allahabad High Court in respect of the normal Income Tax liability for the amount of concealed income was not seriously disputed at the bar by counsel for the Revenue. But it was urged that the position would be different in respect of payment of Income Tax u/s 68 of the Finance Act, 1965, and the same or similar considerations as would be available for the ordinary liability of Income Tax u/s 3 and 4 of the Income Tax Act of 1922 and 1961 respectively read with the relevant Finance Acts for the asst. yrs. in question would not be available for application to the payment of Income Tax u/s 68 of the Finance Act, 1965. In dealing with such a contention the Allahabad High Court observed :

"It is not disputed that if the assessee had been assessed to tax under the Income Tax Act in respect of the two amounts in question in the relevant assessment years and if the tax liability was outstanding, he would be entitled to a deduction of the tax liability in the computation of his net wealth. There is no reason why the tax payable under the disclosure scheme should also not be allowed to him as a deduction in computing his wealth". (page 905).

At page 907 of the report the Allahabad High Court considered the decision of the Gujarat High Court in Ahmed Ibrahim Sahigara's case, and considered the various reasons indicated by the Gujarat High Court as the basis for its ultimate conclusion. According to the Allahabad High Court, the Gujarat High Court had erroneously considered sub-s. (1) of s. 68. In the opinion of the Allahabad High Court the following words occurring therein, namely, "notwithstanding anything contained in the Income Tax Act" qualified the subsequent words "rate of tax". It was observed further that if these words are understood ... in the sense as propounded by the Allahabad High Court, they would clearly indicate that the Finance Act, 1968, was prescribing a distinct rate of tax on an item of total income which was already subjected to the ordinary charge of Income Tax u/s 3 and s. 4 of the Income Tax Acts of 1922 and of 1961 respectively. In that view of the matter it was observed that the Income Tax paid by the assessee in accordance with s. 68(3) was in lieu of his liability under the charging section of the two Income Tax Acts read with the relevant Finance Act and was not a new liability. The view taken by the Allahabad High Court of the ordinary liability of the assessee to pay Income Tax even on the item of concealed income expressed in the lengthy passage earlier extracted appeared to be unexceptionable. But it is difficult to agree fully with its observations on the provisions contained in s. 68(1) of the Finance Act, 1965, and its conclusion based on such reading of the said statutory provisions. It is true that payment of Income Tax u/s 68 may be broadly stated to be in lieu of the liability of the assessee to pay Income Tax under the charging sections of the Income Tax Acts read with the relevant

Finance Acts for the appropriate years. But that would not be saying that it is the identical liability which is being provided for by a new rate or that this would merely constitute the Finance Act, 1965, a machinery provision like the usual Finance Acts for every year of account. Here again, the Allahabad High Court seems to have missed or avoided giving consideration to certain provisions to be found in s. 68 which have been considered by the Gujarat High Court, particularly sub-s. 16 of the Finance Act, 1965, which provides that if certain conditions are satisfied, the item of concealed income disclosed, on which Income Tax as provided by s. 68(3) has been paid, would be excluded from the total income of the assessee for a particular year of account. This would seem to suggest that this is a different liability which is being provided for and a new and distinct charge and, further, that until the conditions specified are fully met, the original liability and charge u/s 3 and s. 4 would continue to remain.

18. The last of the decisions cited at the bar in which almost all the earlier judgments have been considered and a conclusion reached in favour of the assessee is the decision of the Calcutta High Court in *Commr. of WT v. Bansidhar Poddar*. In the said decision it was observed by the Calcutta High Court that s. 68 of the Finance Act, 1965, did not impose an entirely new tax or a new charge. In *Bansidhar Poddar's* case the Calcutta High Court considered the decision of the Gujarat High Court in *Ahmed Ibrahim Sahigara's* case, and observed that the disclosure envisaged u/s 68 was in respect of the amount which is already liable to be assessed as income under the relevant Income Tax Act and, further, that the view that s. 68 does impose an entirely new tax was one which was difficult to accept since no machinery was provided by which the tax could be assessed, levied and the payment of the same enforced. It was further observed that the section viz. s. 68 described the tax as Income Tax and as such it is assessed and collected as Income Tax under the Income Tax Act. With respect to these observations, it may be respectfully pointed out that in view of the scheme of voluntary disclosure provided for in s. 68 of the Finance Act, 1965, the question of providing machinery for assessment, levy and payment of amount at the flat rates contemplated by s. 68(3) does not arise. Further, although it is true that s. 68 designates the tax collected at the flat rates as Income Tax, it does not necessarily follow that such Income Tax collected at flat rates provided is Income Tax assessed and collected under the Income Tax Act. In respect of Income Tax so called paid u/s 68 and the Income Tax paid and collected u/s 3 and s. 4 of the Income Tax Acts there are obvious and glaring differences which have been summarized by the Gujarat High Court in its decision. The Calcutta High Court, however, goes on to observe;

19. "In our opinion, the principles laid down by the Supreme Court in the case of *Kesoram Industries & Cotton Mills Ltd.*, apply in all force to the facts and circumstances of this case. The Supreme Court has clearly laid down that a liability to pay Income Tax is present liability though it become payable after it is quantified in accordance with its ascertainable data. The liability to pay tax on undisclosed income is also a present liability. It may become payable when it is

discovered and brought to tax or it may become payable when it is disclosed u/s 68 of the Finance Act, 1965, or otherwise disclosed. The liability is always there and is quantified either in the regular course under the Income Tax Act or under the said scheme as laid down by s. 68 of the Finance Act. All the ingredients of a debt are present in such a case." (page 968-69).

20. It was submitted by learned Counsel for the Revenue that the view propounded by the Gujarat High Court was the correct view and that it was impossible on a careful reading of the provisions of s. 68 of the Finance Act, 1965, to hold that this was a mere machinery section which provided for the rate, a special rate at which Income Tax was to be charged on one item of total income. On the other hand, counsel on behalf of the assessee submitted that the view expressed and the conclusion reached by the Gujarat High Court had been considered and expressly dissented from subsequently by three High Courts viz. the Delhi High Court in Girdhari Lal's case, and the Calcutta High Court in Bansidhar Poddar's case. He submitted that the view in favour of the assessee which had been arrived at on several different processes of reasoning by the three High Courts was the correct view. In the alternative, it was urged that even if it be regarded that two views were possible in the matter, it is now well settled that in construing or applying a taxing provision that Court should adopt or prefer the view more favourable to the assessee; and we were on this footing invited to accept the conclusion reached by the Delhi, Allahabad, and the Calcutta High Courts in preference to the conclusion reached by the Gujarat High Court, even though we may feel inclined to hold that the analysis of the statutory provision is more thoroughly done by the Gujarat High Court or even if the conclusions may appear more logical and, therefore, correct. In the further alternative it was submitted that even on the footing that the amount paid u/s 68 was not the Income Tax charged on the assessee u/s 3 or s. 4, the assessee was always entitled to claim a deduction of the amount chargeable as Income Tax under the Income Tax Acts (as quantified by the several Finance Acts) as a debt owed. Inasmuch as he has in fact paid Income Tax at a figure (under the Voluntary Disclosure Scheme provided for in the Finance Act, 1965) lower than the Income Tax which would be chargeable u/s 3 or s. 4, the assessee would be precluded from claiming the higher deduction (which is allowable under the ratio in Kesoram Industries case) but must be allowed deduction at the lower figures (to be found in column 7 of the table earlier set out in this judgment) for each of the years in question. The submission was principally based upon the argument which was accepted by the Allahabad High Court and found contained in the lengthy passage from its Judgment which we have extracted earlier. The observations were to the effect that in respect of the concealed income the assessee was entitled to a deduction of the Income Tax payable by him and such liability would amount to a debt owed by him irrespective of the fact that he had tried to conceal this income and not disclosed it at the appropriate time, such concealment, even if successful, and the consequential non-disclosure in the year of account would seem to make no difference to the principle enunciated by the

Supreme Court in Kesoram Industries and Cotton Mills Ltd's case, and subsequently reiterated in Sethu Parvati Bayi's case.

21. It was submitted that on a proper and fair reading of the Voluntary Disclosure Scheme, the Income Tax paid u/s 68 of the Finance Act, 1965, much be considered and accepted to be Income Tax paid in lieu of the ordinary charge of Income Tax under the Income Tax Acts. This submission was made on the footing that the court may not be prepared to accept the principal contention that this was Income Tax charged under the Income Tax Act quantified by a special rate. It was urged that even if it be regarded as composition of the ordinary liability of Income Tax at an amount less than the ordinary normal Income Tax liability, and even though quantified on a different footing, the assessee would be entitled in the computation of his net wealth to deduct this lesser figure even though it may not strictly considered to be the Income Tax charged u/s 3 or s. 4 of the two Income Tax Acts. It was submitted that an amount paid in lieu of such charge was liable to be considered in the same manner as the tax charged under the Income Tax Acts. It is this consideration and reason which seems to us to have principally appealed to the Allahabad and Calcutta High Court in their decisions. Looked at from this angle, it appears to us that although it is not possible to say that the amount of Income Tax paid u/s 68 of the Finance Act, 1965, is Income Tax under the charging s. 3 or s. 4 of the Income Tax Acts, it must be regarded as Income Tax paid in lieu of such Income Tax and would be entitled to the same consideration as lavished by the Supreme Court on the ordinary charge of Income Tax.

22. It is on this footing that we would answer the question referred to us in the affirmative and in favour of the assessee. It is clarified that the deduction which the amounts specified in column 7 of the table to be found in para 3 of the statement of case which we have extracted earlier in our judgment.

23. We, however, direct the parties to bear their own costs of the reference.