(1986) 07 CAL CK 0018

In the Calcutta High Court

Case No : Income-tax Reference No''s. 49 of 1982 and 19 of 1983

Buddhadeb Dutta APPELLANT

Vs

Commissioner of Income Tax RESPONDENT

Date of Decision : 11-07-1986

Acts Referred:
Income Tax Act, 1961 — Section 147, 271(1)

Citation : (1986) 57 CTR 49 : (1987) 166 ITR 428 : (1986) 29 TAXMAN 253

Hon'ble Judges : Monjula Bose, J;Dipak Kumar Sen, J

Bench : Division Bench

Advocate : P.K. Pal and R.N. Dutt, for the Appellant;M.L. Bhattacharya, for the Respondent

Judgement

Dipak Kumar Sen, J.—Buddhadeb Dutta, the assessee, was assessed to Income Tax for the assessment year 1963-64. On a notice issued u/s 147 of the Income Tax Act, 1961, the assessee filed a return on May 18, 1974, showing that his income in the said assessment year was nil. On an investigation, the Income Tax Officer found that during the relevant assessment year, a property had been purchased at 18/48, Dover Lane, Calcutta, in the name of the assessee and his five brothers. The? share of the assessee in the said property was shown as one-sixth. The Income Tax "Officer treated one-sixth of the purchase price, namely, Rs. 15,830 as having been contributed by the assessee and accordingly he made an addition of Rs. 15,830 to the income of the assessee. On appeal, the Appellate Assistant Commissioner as also the Income Tax Appellate Tribunal confirmed the assessment made by the Income Tax Officer.

2. In the meantime, the Income Tax Officer initiated penalty proceedings u/s 271(1)(c) of the Act of 1961. A show cause notice was issued by the Income Tax Officer to the assessee. The assessee did not file any explanation in writing in response to the said notice. The assessee, however, appeared before the Income Tax Officer and submitted that an appeal had been preferred to the Income Tax Appellate Tribunal against the decision of the Appellate Assistant Commissioner

confirming the addition to the assessee''s income. The Income Tax Officer found that the assessee had not filed any satisfactory explanation as to why penalty should not be imposed on him and passed an order on March 11, 1977, imposing a penalty of Rs. 15,830, the minimum imposable on the assessee.

3. Being aggrieved, the assessee filed an appeal against the order of penalty before the Appellate Assistant Commissioner. It was contended before the Appellate Assistant Commissioner that an explanation had been filed before the Income Tax Officer who did not consider the same and imposed the order of penalty without giving the assessee any opportunity of being heard. It was also contended that the quantum of penalty was not computed properly.

4. The Appellate Assistant Commissioner considered the order passed by the Income Tax Officer, the order passed in the appeal preferred against the assessment dated September 8, 1976, as also the order of the Tribunal confirming the addition made by the Income Tax Officer dated January 18, 1979.

5. On perusal of the said orders, the Appellate Assistant Commissioner came to the conclusion that there was nothing to hold that the assessee actually concealed any income or failed to furnish correct particulars thereof and that no case of concealment had been made out. He held that mere addition in the assessment was not sufficient to uphold the penalty even though the same was confirmed by the Tribunal and accordingly set aside the order of penalty.

6. Being aggrieved, the Revenue came up in appeal from the order of the Appellate Assistant Commissioner before the Income Tax Appellate Tribunal, It was contended on behalf of the Revenue before the Tribunal that the Explanation to Section 271 of the Act was applicable to the facts of this case. It was further contended that the assessee had made an investment of Rs. 15, 830 during the relevant assessment year and knowingly filed a nil return for the said assessment year. No explanation was filed by the assessee before the Income Tax Officer in respect of the proposed order of penalty and it should be held that the assessee had knowingly and wilfully concealed the particulars of his income.

7. It was contended on behalf of the assessee, on the other hand, that penalty could not be imposed on the basis of mere confirmation of an addition. He submitted further that no opportunity had been given to the assessee by the Income Tax Officer in the penalty proceedings. It was contended that during the relevant period, the assessee was a student and could not have any income. It was contended that the Explanation to Section 271 of the Income Tax Act, 1961, was not applicable in the asses-see''s case inasmuch as the Income Tax Officer did not apply the Explanation specifically.

8. The Tribunal held that on the facts, there was nothing on record to infer that at the relevant time, the assessee was a student and did not entertain the attempt of the assessee to bring on record such fresh evidence. By reason of the confirmation of the addition to the total income of the assessee by the Tribunal, it was quite clear that the assessee had income in the relevant assessment year

which he failed to show in his return and thereby committed breach of the provisions of Section 271 of the Act.

9. The Tribunal held that the Income Tax Officer had duly required the assessee to show cause in the penalty proceedings but the assessee did not file any explanation before the Income Tax Officer and, therefore, the Income Tax Officer had to depend on the facts available on record. The Tribunal held further that the Explanation to Section 271 was definitely applicable to the facts of the assessee''s case. It was held that the assessee had failed to discharge the burden cast on him under the Explanation to Section 271 and that the Revenue had proved whatever was necessary in order to attract the provisions of the said Section. The Tribunal held further that the Income Tax Officer imposed the order of penalty relying on the Explanation to Section 271. The Tribunal allowed the appeal of the Revenue and confirmed the order of penalty.

10. On an application of the assessee u/s 256(1) of the Income Tax, 1961, the following question has been referred as a question of law arising out of the order of the Tribunal for the opinion of this court:

" Whether, on the facts and in the circumstances of the case and on a correct interpretation of Section 271(1)(c) read with the Explanation thereto, the levy of penalty was valid ? "

11. This question has come up in Income Tax Reference No. 49 of 1982.

12. On an application of the assessee u/s 256(2) of the Income Tax Act, 1961, the Tribunal was also directed to refer the following questions, as questions of law arising out of its order, for the opinion of this court:

" (1) Whether, on the facts and in the circumstances of the case, the findings of the Tribunal that there is nothing on record to infer that at the relevant time, the assessee was a student and/or the assessee made an investment of Rs. 15,830 in the purchase of a property at 18/48, Dover Lane, Calcutta, are sustainable in law ?

(2) Whether the findings of the Tribunal that at the relevant time, the assessee had income which he failed to show in his return and thereby committed breach of the provisions of law contained in Section 271 of the Income Tax Act, 1961, are perverse and/or are based upon no material ?

(3) Whether, on the facts and in the circumstances of the case, the Tribunal misdirected itself in law in reaching its conclusion that the assessee had not correctly shown his income or had knowingly concealed the particulars or furnished inaccurate particulars thereof ? "

13. The above questions have come up in Income Tax Reference No. 19 of 1983.

14. The two references were heard together. At the hearing, the learned advocate for the assessee contended that in the penalty proceedings, the Revenue authorities had all considered and proceeded on the basis of the records

and orders passed in the assessment proceedings where the addition was made and confirmed as the income of the assessee. He drew our attention to the order of the Tribunal passed in the assessment proceedings. It appeared from the said order that an explanation was given in the said proceedings as to the source of the money out of which the property was purchased. The explanation was that the money had come from the mother of the assessee. It was submitted that the mother received a sum of Rs. 40,000 by way of a gift from her mother-in-law and had kept the amount in cash and the balance Rs. 55,000 was claimed to be past savings by the mother out of family expenses and had been received from her husband from time to time. Her husband, the father of the assessee, was a practising advocate at Balurghat, West Bengal. It was also noted as found by the Income Tax Officer that when the property was purchased, all the brothers of the assessee except one were earning. One of the brothers was a businessman, another was a service holder, the third one was an advocate and the fourth one was a medical practitioner. The assessee and another brother were students at that time. On the basis of the aforesaid, the learned advocate submitted that these materials were on record and were available to the authorities. It was submitted that the Income Tax Officer, the Appellate Assistant Commissioner and the Tribunal took note of and proceeded on the basis of the records in the assessment proceedings in the penalty proceedings.

15. The learned advocate for the assessee submitted further that none of the authorities from the Income Tax Officer upwards imposed or confirmed the penalty by strict application of the Explanation to Section 271(1)(c). Having proceeded on the basis of the materials on record, it was submitted that the authorities had erred in holding that there was no explanation from the assessee and that the assessee had in fact concealed his income deliberately. The learned advocate last submitted that at least the matter should be remanded to the authorities below to reconsider the evidence on record.

16. The learned advocate for the Revenue contended, on the other hand, that in the instant case, all that was on record was the show-cause notice issued by the Income Tax Officer to the assessee and whatever was stated by the assessee before the Income Tax Officer in the penalty proceedings. The Income Tax Officer noted that the assessee did not file any explanation as called upon but only stated that an appeal against the addition to his income was pending before the Tribunal. No explanation having been furnished by the assessee, the Income Tax Officer correctly applied the provision of Section 271(1)(c).

17. The Tribunal has confirmed the order of the Income Tax Officer and has noted that no explanation had been filed before the Income Tax Officer who had to depend on the facts available on record.

18. The learned advocate for the Revenue submitted that the total income returned by the assessee in the instant case which was nil was admittedly less than 80% of the total income as assessed u/s 143 read with Section 147 and, therefore, the assessee came specifically within the mischief of the said

Explanation. The assessee also failed to prove and also did not attempt to prove that the failure to return his correct income did not arise from any fraud or gross or wilful neglect on his part. Therefore, the penalty was properly imposed in the instant case.

19. In support of the respective contentions of the parties, a number of decisions were cited at the Bar which are dealt with hereafter.

(a) K.S. Kannan Kunhi Vs. Commissioner of Income Tax, . This decision of the Kerala High Court was cited for the proposition that where an assessee was known to be carrying on or involved in income-earning activities, the amounts found with the assessee could be readily inferred to constitute his income in the absence of satisfactory explanation from him? But such inference should not be readily made in the case of a person who had no business or other source of income or who could even be reasonably suspected as being engaged in any income-earning activity.

(b) Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, . This well known decision of the Supreme Court was cited for the following observations (at page 701);

"Before penalty can be imposed, the entirety of circumstances must reasonably point to the conclusion that the disputed amount represented income and that the assessee had consciously concealed the particulars of his income or had deliberately furnished inaccurate particulars."

(c) The Commissioner of Income Tax, Kerala, Ernakulam Vs. K.S. Kannan Kunhi, Killara House, Kattoor,) . This decision was cited to show that the Supreme Court approved the decision of the Kerala High Court in the case of K.S. Kannan Kunhi Vs. Commissioner of Income Tax, . The Supreme Court refused to interfere with the decision of the Kerala High Court on the ground that the Revenue authorities and the Tribunal had not examined the merits of the assessee''s case and had arbitrarily rejected the explanation given by the assessee.

(d) Commissioner of Income Tax Vs. Nav Bharat Automobiles, . This decision of a Division Bench of the Allahabad High Court was cited for the proposition that the Revenue could rely on the Explanation to Section 271(1)(c) only when it was shown that the income returned by the assessee was less than 80% of the assessed income. In order to find out whether the income returned was less than 80% of the assessed income, any expenditure incurred bona fide for making or earning such income and which had been included in the total income would have to be deducted. This meant that the income assessed by the Income Tax Officer had to be recomputed without which the Explanation to Section 271(1)(c) could not apply

(e) Commissioner of Income Tax Vs. Ketini Krishnamurty and Partners, . This decision of a Division Bench of the Orissa High Court was cited for the proposition that in proceedings u/s 271(1)(c) of the Income Tax Act, 1961, the onus is on the assessee to establish that the concealment of income was not deliberate. Such onus may be discharged if the expiation furnished by the assessee was accepted or the case of the assessee was established from other materials available on record.

(f) Commissioner of Income Tax Vs. Laxmi Auto Stores, . This decision, also of a Division Bench of the Orissa High Court, was cited for the proposition that after the Explanation to Section 271(1)(c) of the Income Tax Act, 1961, came into force, in the absence of any evidence from the assessee to show that failure to return the correct income did not arise from any fraud or '' any gross or wilful neglect on his part, he would be deemed to have concealed the particulars of his income.

(g) Commissioner of Income Tax Vs. W.J. Walker and Company, . In this case, a Division Bench of this court held that after the Explanation to Section 271(1)(c) of the Income Tax Act, 1961, came into force, the assessee had to prove positively that his failure to return the correct income did not arise from any fraud or gross or wilful negligence on his part and it is only after that that the principles laid down by the Supreme Court in Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, , would come into play. In that case, it was found that the Tribunal had misinterpreted the Explanation to the said Section and the matter was remanded to the Tribunal for being considered afresh.

(h) Commissioner of Income Tax Vs. Bankim Chandra Dutt, . This is also a decision of a Division Bench of this court, where it was held that where a return was filed by an assessee after the introduction of the Explanation to Section 271(1)(c) of the Income Tax Act, 1961, the assessee, if he filed an incorrect return, would come within the mischief of the said Explanation if the other conditions were satisfied and could not challenge a penalty imposed on the basis of such explanation.

(i) Commissioner of Income Tax Vs. Jagadish Prasad Agarwalla, . This decision was cited for the following observation by a Division Bench of this court (at page 731):

" This court has followed the Supreme Court and in certain cases has directed the Tribunal to make a further enquiry on fresh evidence to determine the controversy. This cannot be done in each and every case. Such course was adopted by the Supreme Court in the following cases: (a) where the language used by the Tribunal in recording its finding was obscure and its meaning could not be determined ; (b) where the Tribunal failed to consider and decide the applicability of the provisions of a statute; (c) where the Tribunal had completely misdirected themselves on a question of fact; (d) where the Tribunal had overlooked any significant material on record or failed to consider any relevant material or evidence; (e) where the Tribunal had failed to draw necessary conclusions from the primary facts as found. "

(j) Commissioner of Income Tax Vs. Rupabani Theatres P. Ltd., . This decision of another Division Bench of this court was cited for the following observations (at page 766):

" The fact that there has been rejection of the explanation given by the assessee about the source is also not conclusive of the fact either of concealment of income which is a positive act or negative act of furnishing inaccurate particulars, which is presumed by the operation of the Explanation to the Section which was implied before the introduction of the Explanation and had to be proved before the introduction of the Explanation. It is not conclusive nor ipso facto proof and, hence, the nature of the circumstances are material evidence. For example, the assessee gives an explanation and adduces evidence and the nature of the evidence adduced may provide cogent material to come to the conclusion that the assessee was deliberately trying to secrete the income or that the explanation given in a particular case was to conceal the income or was a deliberate attempt to furnish inaccurate particulars. The explanation presumes that certain conduct must have been done. Unless the assessee discharges that onus, the presumption would be operative, unless that presumption is rebutted by evidence. Now, the quantum of evidence, whether negative or positive or whether small or large, must depend upon the facts and circumstances of each case and the nature of evidence adduced either in the assessment proceedings or after that."

(k) Sunderdas Thackersay and Bros. Vs. Commissioner of Income Tax, . This decision was cited for the following observations of a Division Bench of this court (at page 651):

" If a finding is arrived at by a wrong reading of the Section, that is to say, from a wrong reading of the provisions of law, that no application could be filed after the expiration of the time for filing the return, then, in our opinion, such a finding of fact cannot be said to be binding on this court, nor that finding of the Tribunal that there was no reasonable cause could substitute the finding that is necessary to be made by the Income Tax Officer for the imposition of the penalty. "

(1) Commissioner of Income Tax Vs. Sardar Bhagat Singh, . This decision of the Patna High Court was cited for the following observation (at pages 841 and 842) ;

" What will amount to furnishing of inaccurate particulars with an element of fraud or gross or wilful neglect on the part of the assessee will depend upon the facts and circumstances of each case. A high standard is always applied for the proof of a positive fact, while the standard of preponderance of probability is sufficient to prove a negative fact. What the Explanation demands or requires of the assessee is the discharge of the onus of proof of a negative fact, namely, that there has been no active concealment or fraud or wilful neglect on the part of the assessee. Where the onus is on one to prove a negative fact, direct evidence, generally and ordinarily, may be hardly possible. It is, however, too well-settled that circumstances of mere suspicion will not warrant the conclusion of fraud.

If the broad probabilities of the explanation offered are such as may be believed, though not sufficient for conclusive proof, the onus to prove such '' a negative fact can well be said to have been discharged by the assessee. He may discharge this onus by placing the facts found in the assessment order to show that the facts found therein had not in the least given an inkling as to fraud or gross or wilful neglect on the part of the assessee and, therefore, it must be held without proof of any other fact that there was no fraud committed by the assessee in his failure to return the correct income nor that he was acting grossly or wilfully negligently."

(m) Shri Loknath Chowdhury Vs. Commissioner of Income Tax, . In this case, a Division Bench of this court held that where an addition to the income of an assessee was made u/s 69 of the Income Tax Act, 1961, on the basis of an estimate, the said addition would be deemed to be the income of the assessee for the purpose of levy of penalty. If the said addition continued to remain unexplained, penalty for concealment of income was imposable.

20. On a consideration of the facts and circumstances of this case, it appears to us that it cannot be disputed that the assessee did not file any explanation before the Income Tax Officer in the penalty proceedings when called upon to do so. The assessee did not adduce nor attempted to adduce any evidence to establish that he had not concealed particulars of his income deliberately or that the failure to furnish the correct income did not arise from any fraud or gross or wilful neglect on his part.

21. The assessee did not even record before the Income Tax Officer that the explanation furnished by him in the assessment proceedings should be treated as explanation furnished in the penalty proceedings also. It is also not on record that the assessee at all called upon the Income Tax Officer to look into the records of the assessment proceedings. The Income Tax Officer records, in his order dated March 11, 1977, that the assessee has not filed any explanation as to why Section 271(1)(c) would not be applicable in his case.

22. The Appellate Assistant Commissioner no doubt set aside the order of the Income Tax Officer. The Appellate Assistant Commissioner also recorded that he has perused all the orders passed in the assessment proceedings. But the Appellate Assistant Commissioner does not record in his order that sufficient or any evidence at all had been furnished by the assessee in the assessment proceedings which could be of relevance in the penalty proceedings or that on the basis of such evidence, it could be held that the assessee had not deliberately concealed his income or furnished inaccurate particulars of income fraudulently or negligently. The reasoning of the Appellate Assistant Commissioner is that a mere addition to the assessment is not sufficient to uphold the penalty. This reasoning is contrary to the Explanation to Section 271(1)(c).

23. The Tribunal, in its order, has noted that the assessee did not file any explanation before the Income Tax Officer. It has also found that on the facts

available on record, the assessee had not correctly shown his income or concealed the particulars of his income. The Tribunal came to the conclusion that the Explanation to Section 271(1)(c) was applicable to the case of the assessee.

24. The Tribunal held that there was nothing on record to show that at the relevant time the assessee was a student. Fresh evidence on this point was not entertained.

25. From the orders passed in the assessment proceedings, it does not appear that any particular" evidence, oral or documentary, was adduced by the assessee in the assessment proceedings which were available to be considered either at the assessment proceedings or at the penalty proceedings. A contention was made on behalf of the assessee in the assessment proceedings that he was a student at the relevant time. But it is a mere contention without any evidence.

26. In any event, it appears to us that penalty proceedings are separate from assessment proceedings. The records, exhibits and orders passed in the assessment proceedings would undoubtedly be cogent evidence in the penalty proceedings but the same have to be relied on and brought on record in the penalty proceedings. They do not automatically become evidence in penalty proceedings unless the Revenue or the assessee chooses to bring them on record.

27. It appears to us that the assessee did not show any proper cause nor furnish any evidence in support of his case that he had not deliberately concealed his income or had not furnished inaccurate particulars of his income or had not furnished inaccurate particulars of his income fraudulently or negligently. In the absence of any evidence adduced, the assessee clearly comes within the mischief of the Explanation to Section 271(1)(c) and it cannot be held that the Revenue authorities in imposing the penalty on the assessee has acted erroneously or improperly. In our view, if the assessee does not choose to adduce evidence or give a proper explanation when called upon to do so, the Revenue authorities are not still bound to sift the proceedings in assessment and bring out facts and/or evidence in support of the case of the assessee.

28. For the above reasons, we answer the question referred in the Income Tax Reference No. 49 of 1982 in the affirmative and in favour of the Revenue.

29. Question No. (1) in Income Tax Reference No, 19 of 1983 is answered in the affirmative and in favour of the Revenue. Questions Nos. (2) and (3) in the said reference are both answered in the negative and also in favour of the Revenue.

30. In the facts and circumstances, there will be no order as to costs,

Monjula Bose, J.

I agree.

