
(1996) 11 P&H CK 0044

In the Punjab And Haryana At Chandigarh

Case No : Income-tax Reference No. 63 of 1983

Commissioner of Income Tax

APPELLANT

Vs

Ajay Textiles

RESPONDENT

Date of Decision : 18-11-1996

Acts Referred:

Income Tax Act, 1961 — Section 271(1)

Citation : (1997) 224 ITR 98

Hon'ble Judges : N.K. Agrawal, J; Ashok Bhan, J

Bench : Division Bench

Advocate : R.P. Sawhney and Mahavir Ahlawat, for the Appellant; B.R. Mahajan and Suvir Sehgal, for the Respondent

Judgement

Ashok Bhan, J.—The Income Tax Appellate Tribunal, Amritsar Bench, Amritsar (for short, "the Tribunal"), has referred the following two questions of law along with the statement of the case, for the opinion of this court :

" 1. Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was justified in holding that there is no evidence on record to prove that the assessee committed any fraud or gross or wilful neglect ?

2. Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was correct in ;

(a) not holding that the assessee had concealed the particulars of his income by not producing the books of account ; and

(b) not upholding the penalty imposed by the Inspecting Assistant Commissioner ?"

2. For the assessment year 1967-68, relevant to the accounting period ending March 31, 1967, the assessee filed its return of income on August 24, 1971, declaring a total income of Rs. 17,180. Claiming a brought forward loss of Rs. 70,172 against the above income, a net loss of Rs. 52,992 was declared by the

assessee. The Income Tax Officer required the assessee to produce its books of account in support of the income/loss shown in the return of income. The assessee did not comply with the requirement of the Income Tax Officer and did not produce the books of account. The Income Tax Officer examined both the partners of the firm, namely, Tilak Raj and Sat Pal, and both of them denied having the possession of the books of account. The Income Tax Officer specifically made the two partners aware of the consequences which could follow in case the books of account were not produced, but, despite several opportunities and enough time allowed, the books of account were not produced before the Income Tax Officer for examination. The Income Tax Officer, under the circumstances, completed the assessment u/s 144 of the Income Tax Act, 1961 (hereinafter referred to as "the Act"), to the best of his judgment on a net income of Rs. 50,000. He also initiated penalty proceedings u/s 271 of the Act and as the minimum penalty imposable exceeded a sum of Rs. 1,000, he referred the case to the Inspecting Assistant Commissioner u/s 274(2) of the Act. The orders passed by the Income Tax Officer in the quantum case were affirmed in appeal.

3. The Inspecting Assistant Commissioner, in due course and after allowing the assessee an opportunity of being heard, imposed a penalty of Rs. 70,000 u/s 271(1)(c) of the Act read with its Explanation.

4. Aggrieved by the order of penalty passed by the Inspecting Assistant Commissioner, the assessee went in appeal before the Tribunal. After hearing both the parties and after going through the record, the Tribunal cancelled the penalty of Rs. 70,000 imposed by the Inspecting Assistant Commissioner u/s 271(1)(c) of the Act. It was held by the Tribunal that the assessment in this case was completed u/s 144 on an estimated income of Rs. 50,000 on account of the failure on the part of the assessee to produce its books of account for examination before the Income Tax Officer, and there being no evidence to show that there was any positive concealment on the part of the assessee, the penalty imposed under the Explanation to section 271(1)(c) of the Act was not sustainable as there was no element of mens rea or conscious concealment on the part of the assessee. Holding that the penalty proceedings partake of the character of criminal prosecution and the onus squarely lies on the Department to bring home the offence of concealment on the part of the assessee, which the Department failed to discharge, the penalty levied was cancelled. For this, reliance was placed on a judgment of the Supreme Court in Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, and a judgment of this court in Additional Commissioner of Income Tax Vs. Karnail Singh V. Kaleran, . In both these judgments, it was held that the onus to prove that there was any concealment of income was on the Department and as the Department had failed to discharge the onus, the penalty could not be levied.

5. The petition filed u/s 256(1) of the Act was dismissed by the Tribunal. The Department filed a petition u/s 256(2) of the Act in this court for issuance of a

mandamus directing the Tribunal to refer the questions of law arising out of the order of the Tribunal to this court for its opinion. The petition u/s 256(2) of the Act was allowed and in compliance with the directions of this court dated November 25, 1982, the Tribunal has referred the two questions of law, reproduced above, to this court for its opinion.

6. Mr. R. P. Sawhney, learned counsel appearing for the Department, relying upon a Full Bench judgment of this court in *Vishwakarma Industries Vs. Commissioner of Income Tax*, which was later on approved by their Lordships of the Supreme Court in *Commissioner of Income Tax Vs. Mussadilal Ram Bharose*, and *Chuharmal Vs. Commissioner of Income Tax, M.P.*, argued that the Explanation to section 271(1)(c) of the Act added by the Finance Act of 1964, creates a rebuttable presumption of law to the effect that where the total income returned by the assessee is less than 80 per cent. of his total assessed income, he shall be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income for the purpose of section 271(1)(c) of the Act 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. The Explanation, thus shifts the burden to the assessee in the situation covered by it. It was argued that the Tribunal has erred in putting the onus or burden of proof on the Department and it was for the assessee to prove to the contrary.

7. We find substance in this submission of learned counsel for the Department.

8. In *Vishwakarma Industries Vs. Commissioner of Income Tax*, the judgment of this court in *Additional Commissioner of Income Tax Vs. Karnail Singh V. Kaleran*, was specifically overruled. The ratio of *Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali*, which had considered the earlier provisions of section 28(1)(c) of the Indian Income Tax Act, 1922, was held to be no longer applicable in view of the object and intent of the Legislature in omitting the word "deliberately" from Clause (c) of section 271(1) of the Act and adding the Explanation thereto by the Finance Act of 1964 was to bring about a change in the existing law regarding the levy of penalty so as to shift the burden of proof from the Department to the assessee in a case where the returned income of the assessee was less than 80 per cent. of the assessed income.

9. It was also held that the statute visualised that the assessment proceedings and the penalty proceedings were wholly distinct and independent of each other, at least so far as the applicability of the Explanation is concerned. The assessment proceedings precede the penalty proceedings and the assessment proceedings are the very foundation of the subsequent penalty proceedings, if any. The Explanation provides a strictly objective and an almost mathematical test. If the difference between the returned income as against the income assessed by the Department is more than 20 per cent., the provisions of the Explanation become at once applicable with the resultant attraction of the presumption against such an assessee regarding the concealment of the income. The presumption raised is rebuttable which the assessee can either discharge by

rendering an explanation that the failure to return the correct income did not arise from any fraud or any gross or wilful neglect on his part, or by the existing material on record in a specific case.

10. In the case in hand, the returned income being less than 80 per cent. of the assessed income, the provisions of the Explanation became at once applicable with the resultant attraction of the presumption against the assessee. The onus shifted on the assessee to prove that the failure to return the correct income did not arise from any fraud or any gross or wilful neglect on its part. The assessee did not render any explanation in the penalty proceedings. From the existing material as well, it cannot be held that the failure to return the correct income by the assessee did not arise from any fraud or any gross or wilful neglect on its part. As the assessee failed to discharge the onus placed upon it, the presumption raised against the assessee converts itself into a finding attracting the levy of penalty. The finding recorded by the Tribunal that the onus was on the Department to prove that there was any deliberate concealment on the part of the assessee cannot be sustained in view of the Explanation to section 271(1)(c) of the Act added by the Finance Act of 1964, which creates a rebuttable presumption of law that where the total income returned by the assessee is less than 80 per cent. of his total assessed income, he shall be deemed to have concealed the particulars of his income or furnished inaccurate particulars of his income for the purposes of section 271(1)(c) 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. The assessee failed to discharge the initial onus placed upon it, thereby making itself liable for levy of penalty u/s 271(1)(c) of the Act.

11. For the reasons stated above, question No. 1 is answered in the negative, i.e., in favour of the Department and against the assessee, as the assessee failed to discharge the initial onus placed upon it that the failure to return the correct income did not arise from any fraud or any gross or wilful neglect on its part. Similarly, parts (a) and (b) of question No. 2 are also answered in the negative, i.e., in favour of the Department and against the assessee. No costs.