(1979) 07 RAJ CK 0002

In the Rajasthan High Court

Case No : Civil Income Tax Application No. 64 of 1968

Commissioner of Income Tax APPELLANT

Vs

A.K. Sharma RESPONDENT

Date of Decision : 31-07-1979

Acts Referred:
Income Tax Act, 1961 — Section 256, 271(1)

Citation : (1979) 12 CTR 84 : (1983) 141 ITR 23

Hon'ble Judges : N.M. Kasliwal, J;Dwarka Prasad, J

Bench : Division Bench

Judgement

1. This is a reference application u/s 256(2) of the I.T. Act, 1961 (hereinafter referred to as "the Act"), for giving a direction to the Income Tax Appellate Tribunal for stating the case and to refer the question of law arising out of its order dated April 14, 1976.

2. The non-petitioner, Dr. A.K. Sharma (hereinafter referred to as "the assessee") is a medical practitioner in the employment of the Rajasthan Govt. The assessee filed a return for the assessment year 1966-67 on May 21, 1967, showing his total income of Rs. 21,745 which included rupees 18,000 as income from private practice. The assessing authority determined the income of the assessee from private practice at Rs. 25,000 on estimate basis. Subsequently the ITO came to know that the assessee had not disclosed his true income from private practice and as such the assessing authority initiated proceedings for the reassessment u/s 147(a) of the Act. In the course of the reassessment proceedings it was brought to the notice of the assessee that he had received Rs. 60,751 as consultation and injection charges from the employees of the Posts and Telegraphs Dept. which he had failed to mention in his Income Tax returns. The assessee contended before the assessing authority that the aforesaid amount was excessive and he could not have received more than Rs. 40,000 by way of gross receipts from the employees of the Posts and Telegraphs Dept. during the relevant year of assessment. As regards the income from other Central Govt.

employees his case was that he had received income to the extent of Rs. 2,000 to Rs. 3000 only. The ITO made an assessment estimating the income of the assessee from the employees of the Posts and Telegraphs Dept. and from the other Central Govt. employees at Rs. 65,571, out of which he allowed expenses to the extent of Rs. 6,000. On appeal, the AAC enhanced the amount of expenditure to Rs. 12,000 and also reduced the amount to Rs. 2,500 in place of Rs. 5,000 towards the income from the employees other than the Posts and Telegraphs Dept. The assessee as well as the Department, both filed appeals before the Income Tax Appellate Tribunal. The Income Tax Appellate Tribunal, Jaipur Bench, vide its order dated June 21, 1974, allowed the appeal filed by the Department in part and increased the amount of Rs. 2,500 to Rs. 5,000 on account of income from departments other than the Posts and Telegraphs Dept. and dismissed the appeal filed by the assessee.

3. The penalty proceedings under the provisions of Section 271(1)(c) of the Act were initiated by the ITO against the assessee on the aforesaid facts and the IAC, Jaipur Range I, Jaipur, vide his order dated January 31, 1975, held that the assessee had concealed income of Rs. 25,071 and imposed a penalty of Rs. 25,071 as hundred per cent. of the concealed income. In arriving at the above figure the IAC took the gross receipts from Posts and Telegraphs Dept. as Rs. 60,571. As regards gross receipts from persons other than Posts and Telegraphs employees he took the view that though the figure of Rs. 5,000 was a very fair estimate as upheld by the Tribunal yet for the current exercise of penalty proceedings he adopted the figure of Rs. 2,500, being the mean of the figures of Rs. 2,000 and Rs. 3,000 reported by the assessee himself in his statement of February 4, 1971, and took this figure to be Rs. 2,500. From the above two sums he allowed a sum of Rs. 20,000 as representing expenditure claimed to have been incurred by the assessee, vide his letter dated February 10, 1971, and thus by reducing this amount of Rs. 20,000 from the above two amounts of Rs. 60,571 and Rs. 2,500 he arrived at a figure of Rs. 43,071. Deducting an amount of Rs. 18,000 declared by the assessee in his original return the IAC held that the assessee was guilty of concealing an income of Rs. 25,071. The assessee filed an appeal before the Income Tax Appellate Tribunal, Jaipur Bench, against the order of the IAC dated January 31, 1975, in the penalty proceedings. It was contended by the assessee before the Appellate Tribunal that the IAC did not confront him with the original bills on the basis of which the figures of Rs. 60,571 had been arrived at. It was also submitted that the bills having been weeded out were not available and in the absence of primary evidence of the bills it could not be said that the assessee had concealed the particulars of his income. It was contended on behalf of the Department that the question whether action u/s 147 of the Act was valid or not, stood in any case concluded by the order of the Tribunal in quantum proceedings, and that the same could not be allowed to be re-agitated in the penalty proceedings. It was also urged that the assessee had never requested the ITO or any other authority during the course of assessment proceedings or even in the penalty proceedings that the original bills and

vouchers be shown to him on the basis of which the figure of Rs. 60,571 had been arrived at. On the other hand, when the assessee was confronted with the figure of Rs. 60,571 he merely stated that the aforesaid figures appear to be excessive to him and admitted that according to him he should not have received more than Rs. 40,000 from the Posts and Telegraphs Dept. In spite of the best efforts of the IAC for getting the original bills, the Postmaster-General informed that the bills in question had been weeded out as the time-limit for their retention had expired. The Appellate Tribunal held that the assessee had not disclosed truly and fully all the material facts which were necessary for his assessment and action u/s 147 of the Act was, therefore, valid. The Tribunal further held that turning to the merits of the case and as per the admission of the assessee himself, he had a gross earning of not less than Rs. 40,000 from the Posts and Telegraphs Dept. Besides he had admitted further income of Rs. 2,000 to Rs. 3,000 from other Central Govt. employees, the gross income from private practice had a thus been admitted by him at Rs. 43,000 approximately. The maximum expenses which he claimed at any stage as having been incurred by him were Rs. 20,000. The said amount is deducted from the admitted income of the assessee, even then, the net income as per the own figures of the assessee would be Rs. 23,000 as against the sum of Rs. 18,000 returned by the assessee in his original return. Thus, there was a difference of Rs. 5,000 and the assessee was thus liable to the extent of Rs. 5,000 of concealing his income and the imposition of penalty for concealment of income was clearly warranted on the facts and circumstances of the case. Coming to the question as to what penalty should be imposed on the assessee, the Tribunal took the view that the law as obtained on the date of the assessment order would govern the computation of penalty. The Tribunal placed reliance for this point on the decision of the Supreme Court in the case of Jain Bros. and Others Vs. The Union of India (UOI) and Others, and also on a decision of the Rajasthan High Court in the case of Commissioner of Income Tax Vs. Mukanddas Vishnukumar and Another, It was further observed by the Tribunal that the assessee had not accepted the figure of Rs. 60,571 as having been received by him from the Posts and Telegraphs Dept. and in the case of penalty proceedings, he wanted that the figures adding up to the aforesaid amount should be shown to him so that he could rebut them. As the said figures could not be made available to him by the IAC for the reason that the original bills which added up to the amount of Rs. 60,571 had been weeded out, a benefit of doubt with regard to the correctness or otherwise of the sum of Rs. 60,571 was given to the assessee. Thus, taking in view the facts of the case and conduct of the assessee, the Tribunal was of the opinion that the quantum of penalty be reduced from Rs. 25,071 to Rs, 7,500 to meet the ends of justice as the law as it stood on March 17, 1971, the minimum penalty would be Rs. 5,000 and the maximum Rs. 10,000, while according to the law as it stood on May 21, 1966, i.e., the date of the filing of the return, the penalty at the minimum would be Rs. 3,000 and the maximum, Rs. 22,500.

4. The Commissioner of Income Tax, Rajasthan-I, Jaipur Circle, Jaipur, submitted

an application u/s 256(1) of the Act asking the Tribunal to state the following case and to refer the same for being decided by the hon''ble High Court.

"Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal misdirected itself by ignoring material evidence on record in computing the amount of concealed income at rupees 5,000 as against Rs. 25,071 computed by the Inspecting Assistant Commissioner and thus in reducing the penalty imposed u/s 271(1)(c) of the Income Tax Act, 1961, to a sum of Rs. 7,500 only ?"

5. The Tribunal, vide its order dated August 22, 1977, held that no question of law arose for stating a case and for referring the same for being decided by the hon''ble High Court, dismissed the reference application.

6. Under the above facts and circumstances, the Commissioner has filed the present application u/s 256(2) of the Act.

7. Mr. Mehta, learned counsel for the Revenue, has argued that the Tribunal has committed an error of law in not relying upon the finding of the Tribunal in quantum proceedings which is a relevant consideration in penalty proceedings. It was clear from the records of the Posts and Telegraphs Dept. that the assessee had concealed gross receipts in his income from private practice to the extent of Rs. 65,571. The Tribunal had placed reliance on the record of the Posts and Telegraphs Dept. in quantum proceedings and had held :

"Looking to the entire facts and material on record and the conduct of the assessee, we are of the opinion that the Income Tax Officer was able to accept that the income of the assessee from private practice from the Posts and Telegraphs Department could not be less than Rs. 60,571."

8. In the penalty proceedings the assessee had not placed any further material to show that he was not guilty of concealing his income and as such the order of the Tribunal dated August 22, 1977, holding that the assessee was guilty of concealing his income of Rs. 5,000 only is based on surmises and conjectures. The original bills had been weeded out by the Posts and Telegraphs Dept. and as such it was not possible for the Department to produce those bills. But on this account the Tribunal was wrong to give any benefit of doubt in favour of the assessee. It is clear from the conduct of the assessee that he was guilty of concealing the income as he himself had admitted that the income from the Posts and Telegraphs Dept. was not more than Rs. 40,000. The assessee in the quantum proceedings had taken the stand that, according to him, he should not have received more than Rs. 40,000 from the Posts and Telegraphs Dept. This means that the assessee had not made a categorical denial that he had not received Rs. 60,571 from the Posts and Telegraphs Dept. and when there was positive evidence for the said figure from the information conveyed by the Postmaster-General, there was no basis to hold that the assessee was liable to the penalty of Rs. 7,500 only of his concealed income of Rs. 5,000. It is also argued that an Explanation to Section 271 of the Act was inserted by the Finance

Act, 1964, with effect from 1st April, 1964, which reads as under :

"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."

9. This Explanation was in force at the date when the default which attracted penalty was committed. It was an admitted case that the total income returned by the assessee was less than 80% of the total income as assessed and thus the burden lay upon the assessee to prove that failure to return the correct income did not arise from any fraud or any gross or wilful neglect on his part. The Tribunal committed an error of law in not applying the above Explanation in the case and wrongly gave a benefit of doubt to the assessee. Reliance is placed on the following observations of their Lordships of the Supreme Court in Addl. Commissioner of Income Tax Vs. Swastik Mineral Corporation,

"The Tribunal has set aside the penalty of Rs. 7,500 levied on the assessee by the ITO and confirmed by the IAC, following a judgment of this court in Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, . We see the plausibility of Mr. Ahuja''s submission on behalf of the appellant that the Tribunal appears to have overlooked the amendment made by Act 5 of 1964 to Section 271 of the I.T. Act, 1961. The word ''deliberately'', which occurred in the unamended section, was omitted by the amendment and an Explanation was added to that section which was previously not there. These amendments, undoubtedly, ought to have been considered by the Tribunal, but taking an overall view of the matter we are unable to agree that this is a fit case for asking the Tribunal to make a reference to the High Court. We would only like to add that the circumstance that we are dismissing this appeal shall not be construed as our approval of the Tribunal''s judgment."

10. Mr. Ranka, learned counsel for the assessee, has contended that the income of the assessee in the quantum proceedings was based on mere estimate and thus any finding in the quantum proceedings cannot be taken as a basis in the penalty proceedings to hold that the assessee had concealed the particulars of his income. The IAC did not confront the assessee with the original bills on the basis of which the figure of Rs. 60,571 was arrived at. In the absence of such bills it cannot be definitely said that the assessee had received Rs. 60,571 from the employees of the Posts and Telegraphs Dept. during the relevant assessment year. The assessee had made an admission that he had not received more than Rs. 40,000 from the employees of the Posts and Telegraphs Dept. and as such

the Tribunal was right in taking this figure in the penalty proceedings. It was also contended that the quantum of penalty should have been calculated on the basis of the law as obtained on the date when the original return was filed by the assessee because if a default or concealment had at all taken place, it was in respect of the said return. According to Clause (i) to Section 271 of the Act at the relevant time, in the cases referred to in Clause (a), in addition to the amount of the tax, if any, payable by him, a sum equal to 2% of the assessed tax for every month during which the default continued, but not exceeding in the aggregate 50% of the assessed tax, could be levied. It is further argued that the Department nowhere in the penalty proceedings placed reliance on the Explanation to Section 271 of the Act and as such reliance cannot be placed by the Department on the Explanation in the reference proceedings. In the alternative, it is submitted that in case this court is inclined to call for any reference, in that case the assessee is also entitled to pray to call for reference the following questions of law :

"1. Whether the learned Income Tax Appellate Tribunal was correct in law in holding that the penalty should be imposed on the assessee by computing on the basis of the law as obtained on the date of the assessment order and not on the basis of the law as obtained on the date of furnishing of return, i. e., May 21, 1966 ?

2, Whether the learned Tribunal was correct in law in holding that the reassessment proceedings were validly initiated u/s 147 of the Act and the learned Income Tax Officer had jurisdiction to frame the assessment order dated March 6, 1971 ?"

11. Reliance in this connection is placed on the following observations in Educational and Civil List Reserve Fund No. I, Udaipur and Others Vs. Commissioner of Income Tax, Delhi and Rajasthan, New Delhi,

"But before we deal with this question, we would like to dispose of the point whether, in an application for reference made by the assessee, it is open to the department also, on such an application, to ask for a reference on a question of law, which, according to it, arises from the order of the Tribunal. This question came up before a Bench of the Bombay High Court in Girdhardas and Co. Ltd. Vs. Commissioner of Income Tax, Ahmedabad, It was there held, relying on an earlier decision of the same court, that, no matter, whoever may be a party who asks for a reference, once it is decided to be made by the Tribunal, all questions of law which arise out of the order of the Tribunal, can be referred to the High Court for its determination, and that such questions may be suggested not only by the party which wants a reference but by the party which is content with the decision of the Tribunal. It was further held that once the decision of the Tribunal is assailed and is required to be brought before the High Court, there is no reason why the party that loses should be given the sole or exclusive right of suggesting questions of law that arise from the order of the Tribunal, but it should be equally open to the winning party to point out to the Tribunal that certain other questions of law also arise from its order and that these may well be considered by the High Court."

12. There is no doubt, that in the present case the assessee had concealed his income when he filed his original return of income at Rs. 18,000. The Tribunal has also held that he did not agree with the contentions of the learned chartered accountant, Shri M.R. Verma, that the assessee has not concealed his income when he returned his income at Rs. 18,000. In the quantum proceedings, which have become final, the Tribunal has held that even when the assessee filed a revised return showing an income of Rs. 26,800, he had not come with clean hands. During the course of assessment proceedings, he stated that his income from private practice could be Rs. 40,000, but even this figure was given by the assessee without any basis. The assessee had not maintained any record regarding his income from private practice. No satisfactory explanation was given as to why such a record was not maintained. The Tribunal thus finally held that looking to the entire facts, materials on record and the conduct of the assessee, they were of the opinion that the ITO was able to establish that the income of the assessee from private practice from the employees of the Posts and Telegraphs Dept. could not be less than Rs. 60,571. It is no doubt true that this finding cannot be the sole basis in the penalty proceedings but at the same time it is a relevant consideration and cannot be totally ignored. The only ground given by the Tribunal on which the figure of Rs. 60,571 has not been taken to be correct in the course of penalty proceedings is that the said figure could not be made available to the assessee by the IAC for the reason that the original bills which added up to the amount of Rs. 60,571 had been weeded out and a benefit of doubt with regard to the correctness or otherwise of the sum of Rs. 60,571 was given to the assessee. We think that merely because the original bills had been admittedly weeded out and could not be produced to support the amount of Rs. 60,571 it cannot be taken to mean that the other records produced in support of the above figure should be excluded from consideration. It was necessary for the assessee to raise some doubt in showing that records of the Posts and Telegraphs Dept. showing an amount of Rs. 60,571 paid to him did not relate to the relevant assessment year or were payments made to some other doctors and wrongly included as payments made to him. During the assessment proceedings on a question put to the assessee as under :

"On the basis of information in my possession I find that you have received Rs. 60,571 as consultation and injection charges, etc. What have you to say ?"

13. the answer to the above question given by the assessee was as under:

"This figure is very much inflated. It can be nearly Rs. 40,000 only as per my estimate."

14. Thus, even in an answer to the above question the assessee never raised an objection that the amount of Rs. 60,571 was of any period other than the relevant assessment year or that the amount included some amounts paid to

other doctors. There is no basis for such doubt now sought to be created by the learned counsel for the assessee in the reference proceedings. The assessee himself was not sure and merely gave an answer that it could be nearly Rs. 40,000 only as per his estimate. The learned counsel for the assessee have not placed any authority before us to show that when the original bills, which admittedly could not be produced as having been weeded out, the other records which had been relied upon by the Tribunal itself in the quantum proceedings, cannot be taken into consideration at all. The question whether the Explanation to Section 271 of the Act which was in existence at the relevant time and according to which it was for 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 his part is to be supplied by the assessee is not free from doubt. If this Explanation is to be applied, in that case the entire reasoning given by the Tribunal in the penalty proceedings falls to the ground. However, this matter can be examined only after the reference is called from the Tribunal. We are, thus, clearly of the opinion that the Tribunal committed a clear error in holding that no question of law arises for making a reference to this court u/s 256(1) of the Act.

15. Thus in view of the above discussion we hold that the following question of law arises in this case :

"Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal misdirected itself in computing the amount of concealed income at Rs. 5,000 as against Rs. 25,071 computed by the IAC and thus in reducing the penalty imposed u/s 271(1)(c) of the Income Tax Act, 1961, to a sum of Rs. 7,500 ?"

16. The next point for consideration is as to whether the assessee is also entitled to get any questions of law to be referred by the Tribunal. As already held by this court in Educational and Civil List Reserve Fund No. I, Udaipur and Others Vs. Commissioner of Income Tax, Delhi and Rajasthan, New Delhi, with which we also agree, if a reference is called, both parties are entitled to suggest questions for reference provided the same arise out of the order of the Tribunal. The controversy in this regard is whether the penalty on the assessee should be reduced by computing on the basis of the law as obtained on the date of the assessment order or on the basis of the law as obtained on the date of furnishing of the return. In our view this question does arise from the order of the Appellate Tribunal and requires a final determination by this court. Thus, the following question is also framed for being determined by this court :

"Whether the learned Income Tax Appellate Tribunal was correct in law in holding that the penalty should be imposed on the assessee by computing on the basis of the law as obtained on the date of the assessment order and not on the basis of the law as obtained on the date of furnishing of return, i.e., May 21, 1966 ?"

17. As regards the second question sought by the assessee for calling a reference, we agree with the following finding of the Tribunal :

"The contention of the assessee that the reassessment proceedings u/s 147, during the course of which the penalty proceedings now being questioned were initiated, were bad in law, is in our opinion, not justified. There is nothing on record to show that the Income Tax Officer who made the original assessment, i.e., Shri G. Saran, had information in his possession as contained in the letter of the Postmaster-General dated January 4, 1971, which was endorsed to Shri R.L. Kalia, the then Income Tax Officer, Salary Circle. The Inspecting Assistant Commissioner of Income Tax has given a categorical finding in his order that the said letter is not traceable on record and that its whereabouts are not known. In the circumstances, it cannot be said that the Income Tax Officer in question had taken into account the information contained therein while framing the original assessment. May be that it is the fault of the department on account of which the aforesaid letter has been lost. But on account of such slip on the part of some Income Tax employees it cannot be said that so far as the assessee was concerned, he had done his duty and placed the true and full facts before the Income Tax Officer as known to him."

18. Thus, in the facts and circumstances of this case, no question of law arises on this point. The prayer of the assessee for calling a reference on question No. 2 as framed by him is, therefore, rejected.

19. In the result this reference application is allowed and the Income Tax Appellate Tribunal Jaipur Bench, Jaipur, is directed to state a case and make a reference of the two questions mentioned above for being decided by this court. In the facts and circumstances of the case the parties are left to bear their own costs of this reference application.