

(1972) 04 P&H CK 0025

In the Punjab And Haryana At Chandigarh

Case No : Income-tax Reference No. 45 of 1971

Commissioner of Income Tax

APPELLANT

Vs

Bhan Singh Boota Singh

RESPONDENT

Date of Decision : 25-04-1972

Acts Referred:

Income Tax Act, 1922 — Section 28
Income Tax Act, 1961 — Section 271, 271(1)

Citation : (1974) 95 ITR 562

Hon'ble Judges : Rajendra Nath Mittal, J; D.K. Mahajan, J

Bench : Division Bench

Advocate : D.N. Awasthy and B.S. Gupta, for the Appellant; Bhagirath Dass, B.K. Jhingan, S.K. Hirajee and Kulwant Rai Jain, for the Respondent

Judgement

1. The Income Tax Appellate Tribunal, Chandigarh Bench, has referred the following question of law for our opinion :

" Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in deleting the penalty of Rs. 10,500 levied under the Explanation to Section 271(1)(c) ? "

2. The assessee is Messrs. Bhan Singh Buta Singh of Amritsar. They are commission agents of goats and sheep. In the assessment year 1963-64, the assessee filed a return showing his income as Rs. 60,166. This return was filed on 9th April, 1964. By then Section 271, as amended, was in the field, for this section had been made applicable with effect from 1st April, 1964. The total income of the assessee was computed by the Income Tax Officer at Rs. 1,27,820. The Income Tax Officer added back an amount of Rs. 41,420 which was claimed by the assessee as bad debts for the reason that the assessee had neither adduced any evidence to indicate the nature of the debt nor to establish that the debt had become bad. The Income Tax Officer further added an amount of Rs. 18,000 on account of cash credit in the account of Shri Sujan Singh Sadana as assessee's income from undisclosed sources. The Income Tax Officer started

penalty proceedings u/s 271(1)(c). Inasmuch as the minimum penalty that was imposable was more than Rs. 1,000 he referred the case to the Inspecting Assistant Commissioner of Income Tax. The assessee preferred an appeal against the assessment to the Appellate Assistant Commissioner. The assessee contested the disallowance of bad debt only to the extent of Rs. 31,350 but without success. Out of the addition of Rs. 18,000, the Appellate Assistant Commissioner sustained the addition of Rs. 15,000. The assessee then preferred an appeal to the Income Tax Appellate Tribunal. The Appellate Tribunal affirmed the decision of the Appellate Assistant Commissioner with regard to the amount of Rs. 41,420 but modified the decision with regard to the addition of Rs. 15,000 on account of cash credits. The Tribunal held that only an addition of Rs. 8,000 was justified. Thus, the total amount that had not been disclosed in the return or, in other words, which had been concealed from assessment amounted to Rs. 49,420. In this view of the matter, the Inspecting Assistant Commissioner imposed a penalty of Rs. 10,500 under the Explanation to Section 271(1)(c) of the Income Tax Act, 1961. An appeal was preferred against this imposition before the Tribunal. The Tribunal, following the observations of the Delhi Bench, in Income Tax Appeal No. 6343 of 1965-66, deleted the imposition of penalty. The observations of the Delhi Bench on which they relied are as follows:

" By virtue of this Explanation, filing of return of income at a figure less than 80% of the assessed income which was not an offence liable to penalty u/s 271(1)(c) has been made a substantive offence and penalty u/s 271(1)(c), therefore, can be imposed. Unless there is an express provision to the contrary such a substantive and far-reaching change in the law cannot be given a retrospective effect."

3. So far as the Tribunal itself is concerned, it observed as follows :

" The argument of the revenue that this Explanation must be held to apply to the facts of the case because the return of income was filed after April 1, 1964, when the Explanation had come into force is untenable inasmuch as the applicability of the provision of any particular law has to be determined with reference to the state of law in force on the 1st day of the assessment year and not with reference to the date on which the return was filed. There is nothing in the Explanation to suggest that the applicability thereof has been made determinable with reference to the date of the filing of the return and not with reference to the assessment involved."

4. At the instance of the department, the Tribunal has referred the question of law as already set out for our opinion.

5. Mr. Awasthy, learned counsel for the department, has contended that on the clear and plain language of Section 271(1)(c), read with the Explanation, the penalty imposed by the Inspecting Assistant Commissioner of Income Tax was valid and could not have been deleted by the Tribunal. The relevant part of Section 271 is in the following terms :

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

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

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

(iii) in the cases referred to in Clause (c) in addition to any tax payable by him, a sum which shall not be less than, but which shall not exceed twice, the amount of the income in respect of which the particulars have been concealed or inaccurate particulars have been furnished.

Explanation.--Where the total income returned by any person is less than eighty per cent. of the total income (hereinafter in this Explanation referred to as the correct income) as assessed u/s 143 or Section 144 or Section 147 (reduced by the expenditure incurred bona fide by him for the purpose of making or earning any income included in the total income but which has been disallowed as a deduction), such person shall, unless he proves that the failure to return the correct income did not arise from any fraud or any gross or wilful neglect on his part, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income for the purposes of Clause (c) of this subsection."

6. It is common ground that the Explanation was added by the Finance Act of 1964 with effect from 1st April, 1964. In fact, Clause (c) of Section 271(1) was amended and the word " deliberately " was omitted.

7. The answer to the question that has been referred to us lies in the answer to the question as to when the concealment took place. So far as the department is concerned, it is maintained, that the concealment will be when the true state of facts is not disclosed to the department in the return, i.e., the true particulars of the income are not disclosed to it in the return that is filed. Therefore, the disclosure, so far as the department is concerned, is necessarily by a return. If the return had been filed before the 1st of April, 1964, obviously the provision of Section 40 of the Finance Act of 1964 would not have come into play. This is conceded by the learned counsel for the department. But, in the present case, the return was filed on the 9th of April, 1964, when the provision of Section 271, as they emerge after the Finance Act of 1964, had come into operation. Therefore, those provisions must govern the case because the concealment would be when the return is filed, and not prior to it. It is only when the material is furnished to the department that they are in a position to arrive at a finding whether there is or there is no concealment. The view we have taken of the matter finds ample support from certain decided cases. Those cases are under the Indian Income Tax Act, 1922, and, therefore, it would be necessary to set out Section 28 of that Act, namely, the Indian Income Tax Act of 1922 :

"28. (1) If the Income Tax Officer, the Appellate Assistant Commissioner or the

Appellate Tribunal, in the course of any proceedings under this Act, is satisfied that any person--...

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

he or it may direct that such person shall pay by way of penalty, in the case referred to in Clause (a), in addition to the amount of the Income Tax and super-tax, if any, payable by him, a sum not exceeding one and a half times that amount, and in the cases referred to in Clauses (b) and (c), in addition to any tax payable by him, a sum not exceeding one and a half times the amount of the Income Tax and super-tax, if any, which would have been avoided if the income as returned by such person had been accepted as the correct income :

Provided that-

(a) no penalty for failure to furnish the return of his total income shall be imposed on an assessee whose total income is less than three thousand five hundred rupees unless he has been served with a notice under Sub-section (2) of Section 22;

" (b) where a person has failed to comply with a notice under subsection (2) of Section 22 or Section 34 and proves that he has no income liable to tax, the penalty imposable under this sub-section shall be a penalty not exceeding twenty-five rupees;

(c) no penalty shall be imposed under this sub-section upon any person assessable u/s 42 as the agent of a person not resident in the taxable territories for failure to furnish the return required under Section 22 unless a notice under Sub-section (2) of that section or u/s 34 has been served on him ;

(d) when the person liable to penalty is a registered firm or an unregistered firm which has been assessed under Clause (b) of Sub-section (5) of Section 23, then, notwithstanding anything contained in the other provisions of this Act, the amount of Income Tax and super-tax payable by the firm itself shall be taken to be an amount equal to the tax which would have been payable by an unregistered firm on an income equal to the firm's total income, and, in the cases referred to in Clauses (b) and (c), the amount of the Income Tax and super-tax which would have been avoided if the income as returned had been accepted as the correct income, shall be taken to be the difference between the amount of the tax which would have been payable by an unregistered firm on an income equal to the firm's total income and the amount of the tax payable by an unregistered firm on an income equal to the income of the firm as actually returned by the firm....."

8. In *The Commissioner of Income Tax Vs. A. Rm. A.L.A. Arunachalam Chettiar*, while dealing with Clause (c), which before the amendment by the Finance Act of 1964 stood in the same terms, it was observed :

"the Income Tax authorities are entitled to look at the previous incorrect return and are u/s 28 entitled to inflict a penalty upon the person who has made, it."

9. In *M. Ayyasami Nadar and Bros., Colombo Vs. Commissioner of Income Tax, Madras*, it was observed :

"Even apart from this, we consider that Section 28(1)(c) would be attracted if there had been a deliberate concealment of particulars in any return, and in the circumstances of the present case it is clear that the original return did not disclose considerable portions of the income and the finding is that the concealment was deliberate."

10. In *Dayabhai Girdharbhai Vs. Commissioner of Income Tax, Madhya Pradesh and Bhandara, Nagpur*, it was observed :

" The actual result of the assessment has nothing whatever to do with an attempt made by the assessee to conceal particulars of his income by his first return by which he deliberately furnished inaccurate particulars of his income."

11. In this very decision, it was also observed :

" If the omission is deliberate, then in respect of the original return the provisions of Section 28(1)(c) apply, because that sub-section provides that the Income Tax Officer, if he is satisfied that the assessee " has concealed the particulars of his income or deliberately furnished inaccurate particulars of his income " he may be subjected to a penalty."

12. These authorities support the view we have taken that it is the return that is filed which has to be seen to determine whether there has been concealment or not, or in other words, whether the provisions of Section 28, as in those cases, and Section 271 as in the present case, can be invoked. It is no doubt true that in the matter of assessment of income, the law, as it prevails on the first day of the assessment year, will be applicable. But that would not be the position in the case of imposition of penalty. Their Lordships of the Supreme Court in *Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali*, made it plain that the penalty proceedings for certain purposes could not be equated with the assessment proceedings. The relevant observations of their Lordships are as follows:

" One line of argument which has prevailed particularly with the Allahabad High Court in *LAL CHAND GOPAL DAS Vs. COMMISSIONER OF Income Tax, U.P. AND V.P.*, case is that there was no essential difference between tax and penalty because the liability for payment of both was imposed as a part of the machinery of assessment and the penalty was merely an additional tax imposed in certain circumstances on account of the assessee's conduct. The justification of this view was founded on certain observations in *C.A. Abraham, Uppotttil, Kottayam Vs. The Income Tax Officer, Kottayam and Another*, It is true that penalty proceedings u/s 28 are included in the expression "assessment" and the true

nature of penalty has been held to be additional tax. But one of the principal objects in enacting Section 28 is to provide a deterrent against recurrence of default on the part of the assessee. The section is penal in the sense that its consequences are intended to be an effective deterrent which will put a stop to practices which the legislature considers to be against the public interest. It is significant that in C. A. Abraham's case this court was not called upon to determine whether penalty proceedings were penal or of quasi-penal nature and the observations made with regard to penalty being an additional tax were made in a different context and for a different purpose. It appears to have been taken as settled by now in the sales tax law that an order imposing penalty is the result of quasi-criminal proceedings (Hindustan Steel Ltd. Vs. State of Orissa, In England also it has never been doubted that such proceedings are penal in character; Fattorini (Thomas) (Lancashire) Ltd. v. Inland Revenue Commissioners, [1942] A.C. 643 : 24 T.C. 328 : [1943] 11 I.T.R 50 (H.L.). ".

13. In this situation, it. will not be open to us to go beyond the plain language of Section 271 and on that basis it must be held that the Tribunal was in error in deleting the penalty. The view we have taken of the matter finds support from the decision of the Allahabad High Court in Saeed Ahmad Vs. Inspecting Assistant Commissioner of Income Tax, Range II, . Of course, the learned judges of the Allahabad High Court proceeded on a different ground, namely, that the change in Section 271 by the Finance Act of 1964 was merely a change in the matter of onus and did not affect the substantive rights of the assessee. However, a contrary view has been taken by the Kerala High Court in HAJEE K. ASSAINAR Vs. COMMISSIONER OF Income Tax, KERALA., In this decision, it has been held that the imposition of penalty is intermixed with the substantive right of taxation, and, therefore, what the amendment affects is a vested right.

14. In our opinion, the correct view of the matter is the one taken by the Allahabad High Court and, in any event, if is not necessary to go to that length because on the plain reading of the provision and the decisions already referred to, what is to be looked at is the return and it is on the basis of that return that certain consequences follow. If there is a false return the penalty provisions become operative, otherwise not, and the question whether the return is false or not falls for determination when the return is filed. In the present case the return was filed on the 9th of April, 1964, when Section 271, as it stands amended., was on the statute book and, therefore, effect had to be given to that provision.

15. For the reasons recorded above, We answer the question referred to us in the negative, i.e., in favour of the department and against the assessee. In view of the fact that the assessee has been fairly penalised, we would make no order as to costs.