
(1984) 12 CAL CK 0017

In the Calcutta High Court

Case No : Income-tax Reference No. 346 of 1975

Commissioner of Income Tax

APPELLANT

Vs

Bhotica Textiles

RESPONDENT

Date of Decision : 14-12-1984

Acts Referred:

Income Tax Act, 1961 — Section 271(1)

Citation : (1985) 49 CTR 245 : (1986) 159 ITR 355 : (1985) 22 TAXMAN 70

Hon'ble Judges : R.N. Pyne, J;Ajit K. Sengupta, J

Bench : Division Bench

Advocate : B.N. Bagchi, for the Appellant; None, for the Respondent

Judgement

Ajit Kumar Sengupta, J.—For the assessment year 1964-65, the assessee, an unregistered firm, filed the return of income on November 5, 1964, disclosing an income of Rs. 39,328. The assessment was completed on March 3, 1969, u/s 144 of the Income Tax Act, 1961, on a total income, of Rs. 1,86,500, comprising estimated business income of Rs. 60,000 and that from other sources at Rs. 1,26,500. The said best judgment assessment u/s 144 of the said Act was made as the assessee failed to comply with the specific requisition to produce books of account, bank pass book, etc., on the specified date. In the course of the assessment proceeding, the Income Tax Officer noticed loan accounts in the name of five parties, which inclusive of interest payments amounted to Rs. 1,26,500. Summons u/s 131 of the Act were issued to the five creditors but those could not be served on two creditors. Though the other three parties accepted the summons, they did not comply with the terms of the said summons. As the assessee did not avail of the opportunities given for producing the five creditors before him for the purpose of verification of the loans, the Income Tax Officer treated the sum total of the credit with interest at Rs. 1,26,000 as the assessee's income from undisclosed source. Penalty proceeding u/s 271(1)(c) of the Act was initiated and the same was referred to the Inspecting Assistant Commissioner for imposition of penalty as the minimum

penalty exigible would exceed Rs. 1,000.

2. In the course of the penalty proceeding, the Inspecting Assistant Commissioner heard the assessee. In his opinion, there could not be any charge of concealment of income on account of addition to the business income. The assessee denied any charge of concealment of income inasmuch as the confirmation letters stating Income Tax file number were submitted from the loan creditors, and, therefore, the onus of proving the loans was claimed to have been discharged. The Inspecting Assistant Commissioner found that after the confirmation letters were issued, three of the five creditors confessed before the Department that the loan transactions in their respective names were bogus with the exception of four transactions in the name of one M/s. Sureka Jute Co. Relying upon this confession and the assessee's inability or unwillingness to produce the creditors with their accounts, the Inspecting Assistant Commissioner made a strong presumption of concealment of income against the assessee within the meaning of the Explanation to Section 271(1)(c) of the Act and levied a penalty of Rs. 42,000.

3. Being aggrieved, the assessee-firm preferred an appeal before the Income Tax Appellate Tribunal against the imposition of penalty. It was contended on behalf of the assessee that the imposition of penalty was not justified because the Inspecting Assistant Commissioner had taken into account the material which was not properly brought on record. It was also submitted that the confessional statements of some of the creditors stating that the loans were bogus were yet to be admitted by giving an opportunity to the assessee by the Appellate Assistant Commissioner to whom the assessment appeal had been remanded by the Appellate Tribunal. Great emphasis was laid on the confirmation letters of the creditors who were also Income Tax assesseees and it was claimed on behalf of the assessee that the burden was shifted to the Department to show that the evidence given by it in support of the genuineness of the loans were false. The Revenue relied upon the confessional statements of some of the creditors. The Departmental representative submitted before the Tribunal that the assessee must be in the know of the true facts and when the assessee was unable to produce the creditors for examination, it must be presumed that the assessee knew that the loans were not genuine and that in view of the fact that the Explanation to Section 271(1)(c) would apply to the case, it would be for the assessee to show that the failure to give the true facts was not due to any fraud or gross or wilful neglect. The departmental representative further submitted that since the quantum matter (which was sent back by the Tribunal to the Appellate Assistant Commissioner for giving an opportunity to the assessee to meet the confessional statement) was pending before the Appellate Assistant Commissioner, the hearing of the penalty appeal should be deferred to await the decision of the Appellate Assistant Commissioner on the confession of creditors. After considering the submissions from both sides, the Appellate Tribunal concluded that the alleged confessional statements of some of the creditors denying the genuineness of loans had not been proved in any proceeding against

the assessee before the penalty was imposed and, therefore, by submitting the confirmation letters from the creditors who were Income Tax assesseees, the assessee had discharged its burden which was thereafter shifted to the Department. According to the Tribunal, penalty could not be imposed when the guilt of the assessee was not brought home by the facts on record and, therefore, the Department's contention to defer the hearing of the case until the decision of the Appellate Assistant Commissioner on the question of the confessions made by the creditors was rejected. It was observed that the Appellate Assistant Commissioner's decision would amount to material available to the Revenue after the order of penalty was passed and evidence gathered after the order of penalty was passed could not be used to support the imposition of penalty. The penalty order was, therefore, cancelled.

4. The Revenue filed an application u/s 256(1) of the Income Tax Act, 1961, requiring the Tribunal to refer the following questions to this court :

"1. Whether, on the facts and in the circumstances of the case and in view of the fact that the appeal against the addition of unexplained cash credits which was restored by the Tribunal to the file of the Appellate Assistant Commissioner were still pending, the Tribunal misdirected itself in law in holding that the Appellate Assistant Commissioner's findings in the restored proceedings cannot be used in support of the imposition of penalty and in that view deciding the appeal before it without waiting for the Appellate Assistant Commissioner's decision ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was correct in holding that the assessee had discharged its onus under the Explanation to Section 271(1)(c) of the Income Tax Act, 1961 ?"

3. Whether, on the facts and in the circumstances of the case and on a correct interpretation of the Explanation to Section 271(1)(c) of the Income Tax Act, 1961, the Tribunal was justified in cancelling the order of penalty made u/s 271(1)(c) of the Income Tax Act, 1961 ? "

5. However, the Tribunal referred only one question which is in the following terms :

" Whether, on the facts and in the circumstances of the case, the Tribunal was right in cancelling the penalty levied under the Explanation to Section 271(1)(c) of the Income Tax Act, 1961, relating to the assessment year 1964-65?"

6. It has been contended by Mr. Bagchi, learned advocate on behalf of the Revenue, that since the appeal against the assessment was restored to the file of the Appellate Assistant Commissioner for giving an opportunity to the assessee to meet the case made out against the assessee in the confessional statements of the alleged creditors and since the said appeal was pending before the Appellate Assistant Commissioner, the bearing of the penalty appeal by the Tribunal should have been adjourned till the decision of the Appellate Assistant Commissioner on the confessional statements made by the creditors. He has

further submitted that if the Appellate Assistant Commissioner after giving opportunity to the assessee comes to a finding that the confessional statements are true, in that event, the assessee's claim that the cash credits are genuine loans would be false and thus penalty would be leviable in this case. In that view of the matter, the Tribunal should not have disposed of the penalty appeal until the decision of the Appellate Assistant Commissioner was known.

7. On the facts and in the circumstances of this case, we are unable to accept the contention of Mr. Bagchi. The question before the Tribunal in the penalty proceeding was whether the assessee discharged the onus lay on it to prove that the loans obtained by the assessee were genuine. The assessee filed letters of confirmation and furnished other relevant information about the creditors and their assessments. The nature and source of the credit, identity of the creditors and the creditworthiness of the creditors had been proved by the assessee. The confessional statements had not been produced before the Inspecting Assistant Commissioner who imposed the penalty in this case. The Tribunal found that the assessee has discharged the initial negative onus imposed on him by Section 271(1)(c)? This finding was challenged by the Commissioner in a specific question being question No. 2 in the reference application. But the Tribunal rejected the said question.

8. The second question asked for by the Department in the reference application challenges the view taken by the Tribunal that the findings in the proceeding restored before the Appellate Assistant Commissioner could not be used in support of the imposition of penalty. The Tribunal also rejected the said question. The Revenue thereafter did not make any application u/s 256(2) of the Act against the refusal of the Tribunal to refer the first two questions in the reference application. Mr. Bagchi cannot, therefore, press the said contention. Even assuming that the question referred to us covers the aspect of the matter which Mr. Bagchi sought to argue, even then on the facts we are unable to uphold the contention of Mr. Bagchi. The assessee was never confronted with the confessional statements of the creditors who had allegedly denied the genuineness of the loans. Such confessional statements had not been proved in any proceeding against the assessee before the penalty was imposed. Nor were they proved before the Inspecting Assistant Commissioner in the penalty proceeding. The Tribunal held that the assessee discharged the burden that lay on it and thereafter the onus was shifted to the Department and the Department failed to discharge such onus in proving that there was concealment of income. As indicated earlier, this finding was challenged by the Commissioner by a specific question but the said question was rejected. Even if the Appellate Assistant Commissioner in the quantum appeal, which was restored to him by the Tribunal, holds that the confessional statements were correct and the loans to the assessee were not genuine, even then the position would not be changed. No penalty can be imposed on the basis of the subsequent findings of the Appellate Assistant Commissioner in the quantum appeal. The Revenue did not contend that the penalty appeal should also be remanded to the Inspecting

Assistant Commissioner with a direction to pass a fresh order after considering the evidence as may be found before the Appellate Assistant Commissioner. The contention was that the penalty appeal should be decided after a finding was given by the Appellate Assistant Commissioner as regards the genuineness of the loan on the basis of the alleged confessional statements. The Tribunal could not have looked into the subsequent findings even if such findings were against the assessee in the quantum appeal, inasmuch as such findings were not before the Inspecting Assistant Commissioner who imposed the penalty. The jurisdiction of an authority to impose penalty must be decided with reference to the facts found or brought on record in the penalty proceeding. If any materials are gathered in the penalty proceeding, such materials can be relied on by the authority imposing the penalty after giving the assessee a reasonable opportunity of being heard before the order imposing penalty is passed. But after a penalty has been imposed on the basis of the facts found and materials available at the time of imposition of penalty, the Tribunal has to decide the validity of such imposition with reference to those facts and materials. In this case, the penalty was imposed by the Inspecting Assistant Commissioner solely on the basis of the confessional statements which were not proved before him in any proceeding against the assessee. Even if in the quantum appeal restored to the Appellate Assistant Commissioner by the Tribunal, any finding is recorded in favour of the Revenue in respect of the confessional statements, such finding cannot be relied on by the Revenue before the Tribunal in the penalty appeal as the conclusion of the Inspecting Assistant Commissioner was not based on such findings. If, however, before the penalty was imposed, confessional statements had been proved against the assessee before the Appellate Assistant Commissioner, the Inspecting Assistant Commissioner would have been entitled to rely on such finding to come to his conclusion that the loans were bogus and represented the concealed income of the assessee. Penalty proceedings are penal in character. It is settled law by now that an order imposing penalty is a result of quasi-criminal proceeding. The validity of the order, of penalty must be determined with reference to the information, facts and materials in the hands of the authority imposing the penalty at the time the order is passed and further discovery of facts subsequent to the imposition of penalty cannot validate the order of penalty which when passed was not sustainable. The Tribunal was, therefore, right in its conclusion that the findings gathered after the order of penalty was passed could not be used to support the imposition of penalty.

9. Mr. Bagchi has relied on the judgment of this court in the case of Dilip Kumar Mitra Vs. Commissioner of Income Tax, , in support of his contention, that the Tribunal should have kept the matter pending until the Appellate Assistant Commissioner decided the issue as regards the confessional statements allegedly made by the creditors. The said decision has no application on the facts of this case. In that case, the Tribunal upheld the penalty. This court held that the Tribunal was justified in sustaining the penalty, but, as the Tribunal had remanded in the quantum appeal, the matter relating to the inclusion of capital

gains in the assessment of the assessee, this court directed the Tribunal to recompute the quantum of penalty in accordance with the quantum of assessment which may be sustained ultimately. That was a case where penalty was imposable and imposed. If certain income is ultimately deleted from the assessment, the quantum of penalty might be reduced. That is why the court directed the Tribunal to decide the quantum of penalty. In this case, such question does not arise. Neither on facts nor on principles the said decision has any bearing on the issues involved in this case.

10. In the premises, we answer the question in the affirmative and in favour of the assessee.

11. There will be no order as to costs.

R.N. Pyne, J.

12. I agree.