

(2003) 02 CAL CK 0015
In the Calcutta High Court

Case No : Income Tax Reference No. 39 of 1997

Commissioner of Income Tax

APPELLANT

Vs

Bimal Kumar Damani

RESPONDENT

Date of Decision : 10-02-2003

Acts Referred:

Customs Act, 1962 — Section 135(1)

Income Tax Act, 1961 — Section 132A, 256(1), 271(1), 273(1), 69A

Citation : (2003) 180 CTR 452 : (2003) 261 ITR 87 : (2003) 129 TAXMAN 564

Hon'ble Judges : R.N. Sinha, J;D.K. Seth, J

Bench : Division Bench

Advocate : Joydeb Saha, for the Appellant;Jayanti Prosad Khaitan, for the Respondent

Judgement

D.K. Seth, J.—The assessee and another were intercepted by the customs authority on November 19, 1983, and from them US \$ 47,700 and Indian currency of Rs. 1,500 were recovered. A proceeding u/s 135(1) of the Customs Act was initiated against the said two persons for possessing and dealing with smuggled currency. The customs authority had passed on the information to the Income Tax Department. The Income Tax Department did not take any steps. On October 9, 1986, the assessee filed a return seeking immunity under the voluntary disclosure scheme. The assessee denied the ownership but made out an alternative case, if found otherwise, for deduction of the amount confiscated by the customs authority as business loss. This was not accepted by the Assessing Officer, the Commissioner (Appeals) as well as the learned Tribunal. Reference u/s 256(1) of the Income Tax Act, 1961, therefrom was pending adjudication before this court. Subsequent to the conclusion of the assessment proceeding, a proceeding, for imposition of penalty under Sections 271(1)(c), 273(1)(b) and 271(1)(a) of the 1961 Act was initiated. The Assessing Officer and the Commissioner (Appeals) had rejected the claims of the assessee for amnesty. However, the learned Tribunal, in the penalty proceeding, found favour with the assessee's claim and held that the assessee was entitled to immunity under the

amnesty scheme ; though in the quantum appeal the learned Tribunal found that the assessee was not entitled to the benefit of amnesty scheme (page 106, PB). In these circumstances, the following question was referred to this court:

"Whether, on the facts and in the circumstances of the case, the Tribunal was justified in setting aside the penalty orders passed by the Commissioner of Income Tax (Appeals) and the Assessing Officer and in directing the Assessing Officer to cancel the penalties levied under Sections 271(1)(c), 273(1)(b) and 271(1)(a) of the Income Tax Act, 1961 ?"

2. Admittedly, the return under the voluntary disclosure scheme was filed on October 9, 1986. The information was passed on by the customs authority to the Income Tax Department before that date. But the Income Tax Department did not take any steps till October 9, 1986. Therefore, in the penalty proceeding, it was treated by the learned Tribunal to be a voluntary disclosure. If it is a voluntary disclosure, then it would enable the assessee to avail of the immunity under the amnesty scheme. A voluntary disclosure is a disclosure of undetected concealed income without any compulsion to disclose the income concealed. Once it is detected, it would not attract the provisions of the amnesty. If it is disclosed before detection, then it would not attract the provisions for penalty provided in the Act, since been applied by the Assessing Officer and the Commissioner (Appeals) against the assessee.

3. Having regard to the facts and circumstances of the case, we are now to consider whether the disclosure was made before the detection or after detection or whether the other provisions provided in the amnesty scheme were satisfied or not. Mr. Sana, however, raised another point that the very amnesty scheme is not applicable in the case of the assessee. He has also pointed out that there must be an element of voluntariness in the disclosure itself.

4. Both learned counsel had addressed the court on the respective points and relied on various decisions to which we will be referring at appropriate stages.

5. The amnesty scheme, we may find from the circular/order at Shivajirao Angre Vs. Commissioner of Income Tax, . This was floated on February 14, 1986. In terms of the said order, the authority under the Income Tax Act was directed not to initiate any proceeding for imposition of penalty in respect of the assessment for the period up to the assessment year 1985-86 provided the conditions stipulated therein are satisfied. Condition (a) postulates that such voluntary disclosure is to be made (i) within the stipulated time mentioned therein, namely, between November 15, 1985, and March 31, 1986, (ii) voluntarily, and (iii) in good faith and fully and truly, (iv) before detection by the Income Tax authority of the concealment of a particular income or of the inaccuracy of particulars furnished in respect of such income. The second condition in Clause (b) is that such assessee has to pay the tax on or before March 31, 1986, on the incomes so disclosed. The third condition in Clause (c) is that he had co-operated in the enquiry relating to the assessment of his income.

6. Now, let us examine as to whether these conditions have been fulfilled. It is not in dispute that the disclosure was made within the time stipulated. A clarification was issued by Circular No. 451, dated February 17, 1986--[1986] 158 ITR 135. Referring to question No 1, Mr. Sana pointed out that the scheme for voluntary disclosure was applicable only in respect of those asses-sees whose assessment was complete or was pending in respect of those years and not to an assessee who, for the first time, disclosed his income, the assessment whereof was neither complete nor pending. This proposition seems to be fallacious, inasmuch question No. 1 that was answered in the said circular was specific and clear as made out therein. The question contemplated clarification in respect of the proceedings for those mentioned in clauses (a) and (b) of the said question. The said question did not include cases of persons whose assessment was neither complete nor pending. Therefore, the answer to the said question cannot determine the application of the scheme to persons other than those whose income was complete or pending. If it was so, it was not difficult to include such person in another clause in the said question. But at the same time, it may be understood that there was no difficulty in respect of the procedure to be followed in respect of the income of those persons who filed their return for the first time and whose assessment was neither complete nor pending. Since such procedure did not pose any difficulty, therefore, there was no scope of clarification in respect thereof. That apart the circular/ order No. 281/8/86-IT (Inv. III), dated February 14, 1986 (see Shivajirao Angre Vs. Commissioner of Income Tax,), provided benefit thereof to the disclosure "of the concealment of particulars of income" and that "of the inaccuracy of particulars furnished in respect of such income". The concealment may be of the whole of the income. But the inaccuracy related to particulars already furnished in respect of such income, the assessment whereof might have been complete or be pending. The language used in the order did not exclude its application to those whose assessment was neither complete nor pending. Therefore, we are unable to agree with the proposition advanced by Mr. Saha in this respect. Therefore, the assessee in this case was entitled to avail of the benefit of the amnesty scheme provided, he satisfied the other tests.

7. The next question that has been raised by Mr. Saha is that it was not a case of voluntary disclosure before detection. According to him, the information about the seizure, having been passed on by the customs authority, was already with the Income Tax authority and that a proceeding was undertaken for issuing notice u/s 132A of the Act. But that is not on record. On the other hand, as pointed out by Mr. Khaitan, we find from pages 104-11 that the learned Tribunal had addressed itself on the materials available before it and had come to the conclusion that only the information with regard to the seizure was before the Department. But nothing was brought on record to show that there was material before the Income Tax authority to the extent that there was a taxable concealed income. In fact, from the materials placed before us, we have not been able to find out any materials to show that the Income Tax authority could have come to

any opinion that there was a detection of concealment of income. Seizure of an asset and detection of a concealed income are two completely different things. It was only the existence of the asset that was detected by the seizure and it was this information of detection of the asset that was with the Income Tax authority. Detection is a positive action something more than mere receipt of information. There was no material to show detection of concealment of the income by the Income Tax authority before October 9, 1986, or earlier. We find that the Income Tax authority had not acted upon the information passed on to them until the income was disclosed.

8. Mr. Khaitan had relied on *Anand Kumar Saraf and Others Vs. Commissioner of Income Tax and Others*, . In this case, this court had held that in case of the seizure, where certain documents were seized, until the seized papers were scrutinized and an investigation is carried out prior to the disclosure of the income, it cannot be said that there was any detection of the concealed income, even though there might be a prima facie belief about the existence of such income. Such a situation would not deprive the assessee of the benefit of the amnesty scheme. We may refer to question No. 19 of the Circular No. 451, dated February 17, 1986 ([1986] 158 ITR 135). In the said question, the meaning of the expression "detection" has been clarified since quoted in *Anand Kumar Saraf and Others Vs. Commissioner of Income Tax and Others*, .

9. In the present case, even the documents were also not before the Income Tax authority. Neither those were scrutinized nor there was any investigation. Mr. Saha contended that a process was undertaken for issuing notice u/s 132A for requisitioning the materials from the customs authority. This at best could be an attempt to get hold of the documents. Until those documents are requisitioned, scrutinised and investigated upon there is no question of detection. Neither it can be said that there were materials to detect. The present case stands on a better footing than that of *Anand Kumar Saraf and Others Vs. Commissioner of Income Tax and Others*, . Therefore, it cannot be said that there was any detection before the disclosure.

10. We have already found that the disclosure was made prior to the detection. Any disclosure made within the stipulated time before detection would be a voluntary disclosure once it is so claimed by the assessee while disclosing the income. Here, in this case, it was so claimed by the assessee and as such it would be a voluntary disclosure even though there was an information with the Income Tax authority about the seizure of the amount by the customs authority.

11. Now we may examine whether the disclosure was a voluntary one. In fact, an element of voluntariness is essential. The question of voluntariness arises when an income is disclosed without any compulsion. The question of compulsion arises not on the detection of the assets by the customs authority but on the detection of concealed income by the Income Tax Department. The compulsion of the assessee would arise only when the Income Tax Department would start investigation on the basis of the scrutiny or examination of the material before

them. No investigation has since been initiated. Initiation of process u/s 132A would not amount to an investigation. Until the documents are requisitioned the Income Tax authority could not form an opinion about the concealment of the income. The only material information before them was in relation to the existence of an asset. Whether this asset represents a concealed income or not has to be scrutinized and investigated upon. If upon such investigation, there appears some material, then the concealment is detected and then only the absence of voluntariness would come into play. Therefore, the seizure of the assets by the customs authority, in the absence of any active consideration towards detection of concealment of income by the Income Tax authority despite the information of seizure being passed on to them, cannot rule out the element of voluntariness. In our view, the disclosure was a voluntary one since the assessee had disclosed the income voluntarily.

12. Mr. Sana had also pointed out that the finding in the quantum proceedings is staring on the face of the assessee and is binding on the penalty proceedings as between the parties and operate as *res judicata*. This question also does not seem to be of any substance, inasmuch as penalty is not automatic, as was held in *Commissioner of Income Tax Vs. Calcutta Credit Corporation*, cited by Mr. Khaitan. Under Sections 271 and 273, penalty is contemplated in the manner laid down therein. It is an independent proceeding, which is required to be initiated and penalty can be imposed only after giving opportunity to the assessee.

13. Therefore, it is required to be considered as to whether the finding in the quantum proceeding should be binding in the penalty proceeding as between the parties. The question of bindingness is dependent on the principle of *res judicata*. The principle of *res judicata* applies in a case where between the same parties the question was in issue directly or substantially in the earlier proceeding and had since been decided. Until this criterion is fulfilled, the principle of *res judicata* has no manner of application. In this case the issue, whether the penalty proceeding should be initiated or not or whether the penalty should be imposed or not, by no stretch of imagination, could be involved in the quantum proceeding in between the parties. Neither there was any finding with regard thereto. Therefore, even if any observation is made, the same would not be a finding in respect of an issue directly or substantially involved in between the parties to operate as *res judicata* and make the finding binding on the parties in the subsequent penalty proceeding. The penalty proceeding is initiated on certain grounds as provided in the respective provisions contained in Sections 271 and 273. But by reason of the circular dated February 14, 1986 (see *Shivajirao Angre Vs. Commissioner of Income Tax*,), the Income Tax authority is precluded from initiating the penalty proceeding if the conditions stipulated therein are satisfied. We do not think that a finding in the quantum proceeding would be binding in the penalty proceeding with regard to the availability of the amnesty, since the penalty proceeding is an independent one and the issues involved therein could not have been involved in the quantum proceeding.

14. Mr. Khaitan had relied on Commissioner of Income Tax Vs. H. Abdul Bakshi and Bros., : Commissioner of Income Tax Vs. H. Abdul Bakshi and Bros., . In the said decision, it was held that the finding in the quantum proceeding is not binding on the penalty proceeding. Similar view was taken in BANARAS TEXTORIUM Vs. COMMISSIONER OF Income Tax., , holding that the finding in quantum proceeding is not res judicata in penalty proceeding. The Delhi High Court in Commissioner of Income Tax Vs. Chetan Dass Lachhman Dass, had also taken the same view. The Kerala High Court and Gauhati High Court in Commissioner of Income Tax Vs. T. Govindankutty Menon, and Commissioner of Income Tax Vs. Gurudayalram Mukhlal, , respectively, had taken the same view. Therefore, we are unable to agree with the contention of Mr. Saha that the question was closed in the quantum proceeding.

15. The next condition is that the disclosure has to be made in good faith and such disclosure must be full and true. The question of full and true disclosure in good faith is intertwined with and implicit in each other. We are concerned with the question as to whether the disclosure was full and true and was made in good faith. Mr. Saha contended that disclosure in Part III is not a disclosure. The word "disclosure" means to disclose, reveal, unravel or bring to the notice. Disclosure in Part III satisfies the above test of disclosure. In our view, though disclosed in Part III, yet it was a disclosure.

16. Now we may examine whether the disclosure was full. The Income Tax authority in the assessment proceeding has not come to any conclusion that there was any other income, which was not disclosed. Therefore, admittedly, the disclosure was full.

17. Whether it was true disclosure or not and whether it was made in good faith is the question now we are to look into. The word "good faith" means making of a clean breast, to come straight and clean, bona fide, genuinely, free from intent to deceive, etc. The amount, in this case, was disclosed but it was claimed that it did not belong to the assessee, alternatively it was claimed that if his explanation u/s 69A appeared to be unsatisfactory, then by way of precautionary measure, he had asked for deduction treating the same as business loss. Therefore, it does not seem that the disclosure was made bona fide or in good faith and true. He had claimed that the amount did not belong to him and attempted to explain the situation satisfactorily u/s 69A and only by way of an alternative case and as a precautionary measure he claimed that this may be treated as business loss. He had taken a chance. He did not come with the truth. Therefore, we cannot say that there was any good faith or bona fides and truthfulness in the disclosure.

18. The other condition, to be satisfied, that he has to co-operate in the enquiry relating to the assessment is in Clause (c). The word "co-operation" employed in the scheme, is required to be read and interpreted in the context of the scheme. The scheme related to a voluntary disclosure for unearthing concealed income. Denial contradicts and is opposed to co-operation. Once the income is denied and alternatively claimed as business loss, the element of cooperation evaporates. Co-

operation means to work together or in conjunction or to help each other for the same end, a fair contest. Here the assessee had made an attempt to deny the ownership of the amount disclosed. He had attempted to avoid through contest. From the facts disclosed, the contest does not seem to be fair. Therefore, it is not a co-operation within the meaning of the said scheme.

19. The other question that was raised by Mr. Sana is with regard to the payment of tax before March 31, 1986. We do not think that there is any substance in the submission of Mr. Sana, inasmuch as the tax is payable only when according to the assessee's assessment the tax is payable and not otherwise. But, at the same time, it has to be found out whether the assessee did not pay tax under Clause (b) bona fide or had attempted to avoid payment of tax. If it is found that there is an arguable claim for deduction, then in that event, it would shield the mischief of Clause (b) even though tax is not paid within the time stipulated on the ground that the assessee is entitled to deduction and he has claimed for such deduction bona fide. Mr. Khaitan had relied upon the decision in Cement Marketing Co. of India Ltd. Vs. Assistant Commissioner of Sales Tax, Indore and Others, and contended that when there is an arguable claim for deduction, it cannot be said to be a non-disclosure. Having regard to the said principle, in our view, we have found in the quantum proceedings that there was an arguable claim for deduction, which was not free from doubt, therefore, non-payment of tax under Clause (b) would not disentitle the assessee from the benefit of the amnesty scheme.

20. In Income Tax Officer and Others Vs. Burmah Shell Oil Storage and Distributing Co. of India Ltd., cited by Mr. Khaitan, it was held that a disallowed claim for deduction is not a concealment. In Commissioner of Income Tax Vs. Off Shore India Ltd., , cited by Mr. Khaitan, it was held that when a reference is made on a question of law, then the bona fides of the assessee cannot be ruled out. Therefore, in the present case the claim made by the assessee for deduction will not disentitle him either from claiming voluntary disclosure or from claiming amnesty from payment of tax under Clause (b) of the amnesty scheme.

21. Mr. Saha relied on the decision in Commissioner of Income Tax Vs. Vidyagauri Natverlal and Others, and contended that in this case it was a concealment disentitling the assessee from the amnesty scheme. We have gone through the said decision. On the facts, the same is distinguishable, as pointed out by Mr. Khaitan.

22. Mr. Saha then relied upon the decision in Nauranglal Chiranjilal Vs. Commissioner of Income Tax, . In that case though notice u/s 139(2) was issued, yet it was held that the imposition of penalty was justified. The facts of the said case are completely different since it was not a case within the scope of the amnesty scheme and as such the principle laid down therein does not help us for our present purpose. Mr. Saha had also relied upon the decision in Commissioner of Income Tax Vs. Sulekha Works (P.) Ltd., . The said decision also proceeded on the same view taken by the Gujarat High Court in 154 ITR (sic). That decision is

also not helpful to us because it was not concerned with the amnesty scheme with which we are now concerned. It is not the question of issue of notice u/s 139(2), which is relevant for our purpose. It is the question of entitlement under the amnesty scheme, which excludes exemption from initiation of penalty proceedings or imposition of penalty. Therefore, this decision has no relevance for our present purpose. Mr, Saha relied upon the decision in Jaswant Rai and another Vs. Central Board of Direct Taxes and others, . This case was covered under the voluntary disclosure scheme promulgated by an Ordinance in January 1965, since replaced by the Income Tax (Amendment) Act, 1965, incorporating a new Section 271(4A), The provision of sub-section (4A) of Section 271 as amended was something different from the present amnesty scheme. It postulated waiver of penalty but not embargo on the Income Tax authority prohibiting initiation of the penalty proceedings altogether. Therefore, the ratio decided therein cannot be applied in the present case. On the facts, the said decision seems to be distinguishable. The decision in P. Govindaswamy Vs. Commissioner of Income Tax, , relied on by Mr. Saha, also does not help us in the present case, since the same is distinguishable on facts.

23. In our view the disclosure in this case had satisfied almost all the conditions except that the disclosure was made bona fide or in good faith and a true disclosure and that there was co-operation in the enquiry, as we observed earlier, therefore, the assessee was not entitled to the benefit of the said scheme since at least one of the conditions was not fulfilled. The meaning of the phrase "in good faith" and "true disclosure" has to be construed in a wider amplitude. It is not the disclosure of the amount alone but also the nature of the amount of the concealed income of the assessee. If one claims that this was not a concealed income of the assessee and income of someone else, then it cannot be said to be a true disclosure of concealed income. The truthfulness of the concealment means that this income was the income of the assessee, which he was disclosing. There cannot be any element of chance. The assessee cannot get the benefit of the dictum "Heads I win tails you lose". He cannot speculate. Such speculation cannot be treated to be bona fide or to have been made in good faith and true disclosure nor can it be treated to be a situation within the meaning of Clause (c). In order to get the benefit of the said circular, one has to satisfy all the tests together. If one test fails, the assessee cannot get the benefit of the said circular.

24. Though for different reasons, we find that the learned Tribunal was not justified in deleting the penalty imposed. Therefore, we answer the question in the negative in favour of the Revenue. This reference is thus answered. There will be no order as to costs.

25. On the facts, it appears that the learned Tribunal has not addressed itself on the question on the merits as to whether the penalty u/s 271(1)(a), (c) and Section 273(1) is imposable on the assessee or not. Therefore, the matter is remanded to the learned Tribunal for deciding the question on the merits in the light of the observation made above on the footing that the assessee is not

entitled to the amnesty scheme but the penalty has to be imposed on a liability accrued on him on the facts and to the extent he is liable therefore. Such proceeding is to be concluded as early as possible after giving opportunity to the assessee.

26. Parties shall act on a xerox signed copy of the operative part of this judgment.

R.N. Sinha, J.

27. I agree.