
(1979) 09 PAT CK 0014
In the Patna High Court
Case No : Taxation Case No. 12 of 1975

Commissioner of Income Tax

APPELLANT

Vs

Binod Company

RESPONDENT

Date of Decision : 24-09-1979

Acts Referred:

Income Tax Act, 1961 — Section 271(1)

Citation : (1980) 15 CTR 309 : (1980) 122 ITR 832

Hon'ble Judges : Shiveshwar Prasad Sinha, J; Nagendra Prasad Singh, J

Bench : Division Bench

Advocate : B.P. Rajgarhia and S.K. Sharan, for the Appellant; None, for the Respondent

Judgement

S.P. Sinha J.

1. At the instance of the Commissioner of Income Tax, Bihar, Patna, the Patna Bench of the Income Tax Tribunal has referred the undermentioned question of law, for the opinion of this court, u/s 256(1) of the Income Tax Act, 1961 (hereinafter referred to as " the Act ");

" Whether, on the facts and in the circumstances of this case, the cancellation of the penalty of Rs. 5,400 imposed upon the assessee was legal and proper within the meaning of Section 271(1)(c) read with the Explanation of the Income Tax Act, 1961 ? "

2. The facts are simple. The assessee is an unregistered firm and the matter relates to levy of penalty on the said firm u/s 271(1)(c) of the Act. The assessment year in question is 1968-69 to which the said Explanation to Section 271(1)(c) of the Act would be clearly applicable. In terms of the said Explanation, where the total income returned by any person is less than eighty per cent, of the total income assessed, 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 Section 271(1)(c) of the Act.

3. In the instant case, the assessee's total income had been computed by making two additions to the returned income, namely, (i) an addition of Rs. 2,775 by applying a profit rate of five per cent, on the turnover, and, (ii) by adding a sum of Rs. 5,400 which was a cash credit standing in the assessee's accounts in the name of one Shri Gouri Shankar. During the course of the assessment proceeding when the assessee was asked about the nature or source of the said cash credit, it had explained that the said amount represented a borrowing by it from the said Gouri Shankar, but the same may be added to its total income provided no further additions were made to the trading account and no penal action was taken for this addition of Rs. 5,400.

4. Consequent upon the said two additions, the assessee's case fell within the mischief of the Explanation to Section 271(1)(c) of the Act and a notice u/s 271(1)(c) was issued to the assessee to show cause as to why it should not be penalised for concealing the particulars of its income. The assessee challenged the said notice on the ground that no penalty u/s 271(1)(c) of the Act was attracted to its case because concealment of income had not been established against it. The assessee further submitted by reference to the decision of the Supreme Court in the case of CIT v. Anwar Ali [1970] 76 ITR 696 that merely because its explanation regarding a particular cash credit was not considered satisfactory, it could not entail the levy of penalty on it.

5. Now, the IAC, who was dealing with the penalty matter, observed that since the assessee accepted the addition of Rs. 5,400 on the condition set out in its letter, such a condition could not absolve it from the levy of penalty. The IAC then held:

" In the circumstances concealment of income to the extent of Rs. 5,400 is proved beyond doubt and the assessee is liable for penalty for this concealment within the meaning of Section 271(1)(c) of the Act."

6. The assessee then took an appeal to the Income Tax Appellate Tribunal and contended that the nature and source of the cash credit of Rs. 5,400 having been duly explained by it as a loan from Shri Gouri Shankar, the simple rejection of the explanation by the department will not entitle it to levy a penalty u/s 271(1)(c) of the Act. The assessee further contended that the difference between the returned and the assessed income was merely on the basis of an estimate which also did not entail the levy of penalty.

7. The department, on the other hand, contended that since the assessee had itself admitted that the said cash credit of Rs. 5,400 be added to its total income for the purposes of taxation, it clearly suggested that the assessee had concealed this income and that, therefore, the penalty had been rightly imposed.

8. The Tribunal considered the arguments of the contending parties and came to

the conclusion that although there was that difference between the returned and the assessed income, yet that was mainly due to the inclusion of Rs. 5,400, the cash credit, in the assessee's income. The Tribunal further observed that the assessee had put forward an explanation about the source and the nature of the cash credit, but the same was not accepted by the department. The Tribunal then held that:

" There is nothing to suggest that the amount in question was the concealed income of the assessee." The Tribunal, thereafter referred to the decision of the Punjab High Court in the case of Gumani Ram Siri Ram Vs. Commissioner of Income Tax, and ultimately cancelled the penalty levied on the assessee.

9. These are the relevant facts in the case.

10. Mr. Rajgarhia, appearing for the department, submitted that obviously the trend of the order of the Tribunal indicated that it was oblivious of the provisions contained in the Explanation to Section 271(1)(c) of the Act, because had that not been so, there would have been no necessity for the Tribunal to make a reference to the decision of the Punjab High Court in the case of Gumani Ram Siri Ram Vs. Commissioner of Income Tax, . Such being the position, according to Mr. Rajgarhia, the principle enunciated by this court in the case of Commissioner of Income Tax Vs. Parmanand Advani,) should apply, and the question must be so answered that the Tribunal may look into the facts over again and then decide as to whether or not the levy of penalty on the assessee was justified.

11. I may straightaway observe that the fact that the Tribunal has made a reference to the decision of the Punjab High Court in the case of Gumani Ram Siri Ram Vs. Commissioner of Income Tax, does not at all indicate that the Tribunal was oblivious of the provision contained in the Explanation to Section 271(1)(c) of the Act. On the contrary, it is clear that the Tribunal was conscious of such a provision being there, otherwise it would not have been necessary for the Tribunal to observe : " the difference between the returned and the assessed income was mainly due to the inclusion of Rs. 5,400 being credit in the assessee's books of account ". Such an observation would not have been relevant, but for the consciousness of the Tribunal about the provisions contained in the Explanation to Section 271(1)(c) of the Act. Being conscious of that provision and yet finding that a certain sum of money had been added to the assessee's income, which addition the assessee had conceded, the Tribunal went into the question as to whether that addition could justify the conclusion that the assessee really concealed its income to the tune of the cash credit visible in its accounts. The Tribunal then on consideration of the facts and the arguments of the department and the assessee observed; " there is nothing to suggest that the amount in question was the concealed income of the assessee ". Such being the finding, which was clearly a finding of fact, it is rather surprising that the question should have been posed for answer by this court. If there is no concealment of income, there can be no occasion to levy a penalty upon the

assessee for concealment.

12. Mr. Rajgarhia has, however, urged that the assessee had conceded to the additions in the assessment and thereby it should be presumed that the said amount was the assessee's concealed income. It is difficult to accept such an argument. The assessee, no doubt, conceded to the addition of the said sum of Rs. 5,400 to its income in the assessment proceeding, but all the same had clearly stated that let this concession be not used for the purpose of levy of penalty for concealing income and no penalty should be levied upon it for having permitted the department to make this addition to its income. Now, the department, in the penalty proceedings took it for granted that since the addition of the said sum of Rs. 5,400 to its income had been conceded by the assessee, it obviously meant that the said sum was an income of the assessee and it had not returned it. Being in that frame of mind, they did not do anything except penalising the assessee u/s 271(1)(c) of the Act on the ground that the circumstances indicated the said sum to be a concealed income and that concealment had been proved beyond doubt. Mr. Rajgarhia reiterates this stand of the department.

13. This court has on several occasions tried to analyse the scope of the Explanation to Section 271(1)(c) of the Act. In the case of Commissioner of Income Tax Vs. Gopal Vastralaya, it was observed that even in the case where the Explanation to Section 271(1)(c) of the Act was attracted, the department is not to sit quiet and merely go on rejecting the explanations offered by the assessee, to justify the levy of penalty. The effect of the Explanation to that section is that the initial burden is upon the assessee and if it gives a plausible and cogent explanation for the difference between the income returned and the income assessed, the assessee would be deemed to have discharged its initial burden and then it will be for the department to try to shift that onus again on to the assessee by considering whether the explanation offered by the assessee would be true or could even be probable. This is the least that the department is expected to do. Only then the department would be justified in taking recourse to action u/s 271(1)(c) of the Act read with the Explanation thereto.

14. Mr. Rajgarhia has referred to one of the decisions of this court in the case of Commissioner of Income Tax Vs. Parmanand Advani, . In that case, this court had to answer the question against the assessee because it was found that the Tribunal, while setting aside the levy of penalty on the assessee, was oblivious of the effect of the provision of the Explanation to Section 271(1)(c) of the Act, as if there was no such provision in the Act and only the old provisions were there for dealing with penalty matters for concealment of income. Such is not the question in the instant case. Here, as I have observed earlier, the Tribunal is fully conscious of the provisions of Explanation to Section 271(1)(c) of the Act. The Tribunal is also conscious of the rights and obligations of the assessee and of the department in the matter relating to penalty u/s 271(1)(c) of the Act. Being conscious of all these matters, the Tribunal has gone into the facts and has found

that the department has done nothing to show that the assessee's explanation was unbelievable or false. The Tribunal has, therefore, come to the conclusion that it becomes a case in which the department has failed to discharge its onus, when it got shifted on to it by virtue of the explanation offered by the assessee.

15. It was a similar situation in which this court in the case of Addl. Commissioner of Income Tax Vs. Kashiram Mathura Prasad,) observed that the mere fact that the assessee permitted the department to add a certain sum of money to its total income, did not prove that the assessee was guilty of concealment of that income. The department had still to discharge its onus that the income conceded to be added could not but be the assessee's concealed income.

16. Mr. Rajgarhia has laid great reliance upon the decision of the Delhi High Court in the case of Durga Timber Works Vs. Commissioner of Income Tax, for the proposition that the department is not bound to adduce independent evidence, if concealment of income is admitted by the assessee.

17. It will at once be seen that this decision has hardly any application to a case where there is no admission to the concealment of income. The assessee might concede to the addition of an amount to its income, but that is not the same thing as admitting its guilt of having concealed its income. The two things are wholly distinct, and there should be no confusion between admission of concealment of income and conceding to the addition of a certain sum to income.

18. Having regard to the discussion made above, the question is answered in the affirmative and against the department. Since nobody has appeared on behalf of the assessee, there will be no order as to costs.

Nagendra Prasad Singh, J.

19. I agree.