
(1991) 04 AP CK 0007

In the Andhra Pradesh High Court

Case No : Case Referred No. 91 of 1984

Commissioner of Income Tax

APPELLANT

Vs

Brindavan Hotel

RESPONDENT

Date of Decision : 15-04-1991

Acts Referred:

Income Tax Act, 1961 — Section 143, 143(2), 144, 147, 271(1)

Citation : (1991) 94 CTR 249 : (1991) 192 ITR 12

Hon'ble Judges : P. Venkatarama Reddi, J;A. Lakshman Rao, J

Bench : Division Bench

Advocate : S.R. Ashok, for the Appellant; Y. Ratnakar, for the Respondent

Judgement

P. Venkatarama Reddi, J.—As per the direction of this court, the following question has been referred by the Income Tax Appellate Tribunal u/s 256(2) of the Income Tax Act, 1961 :

"Whether, on the facts and in the circumstances of the case, the Tribunal is right in holding that there is no concealment of income in spite of discovery of suppression of sales from the seized material of the assessee ?"

In fact, in the reference application filed by the Department u/s 256(1) before the Tribunal, certain other questions including a comprehensive question as to whether the Tribunal was justified in holding that the provisions of section 271(1) (c) were not attracted in spite of suppression of sales was sought to be referred. But, in the section 256(2) application filed before this court, this question was given up.

2. The assessment years involved are 1970-71 and 1971-72. The respondent-assessee is a firm carrying on hotel business in Hyderabad city. For the year 1970-71, the assessment was made on a total income of Rs. 25,000 as against the income of Rs. 5,871 returned by the respondent. The respondent did not produce and account books stating that they were lost in the separate Telangana agitation. Hence, the Income Tax Officer estimated the net income from Boarding

and lodging at a sum of Rs. 25,000 to which the assessee agreed. On November 19, 1971, the Department conducted a search of the business premises. The scrutiny of books and vouchers seized during the search revealed suppression of sales, short-totalling of the figures in the ledger, short-postings from the collection register and short-posting of bills-in all to the tune of Rs. 56,784. Certain unaccounted payments made to various parties were also noticed. Proceedings were, therefore, initiated to reopen the assessment. In response to the reassessment notice, the assessee filed a return declaring an income of Rs. 25,000. The Income Tax Officer, having found that there was no basis for the returned income of Rs. 25,000 and that the books of account maintained by the assessee did not reveal the correct picture, proceeded to estimate the income. By taking the net profit at 25% and after giving some allowance for the possible dislocation in the business due to the Telangana agitation, the Income Tax Officer estimated the income at Rs. 1,45,000. On appeal, the Appellate Assistant Commissioner held that the estimate of the income was on the high side and he reduced the income figure to Rs. 75,000. Both the assessee and the Department filed appeals to the Income Tax Appellate Tribunal. The Tribunal dismissed the assessee's appeal and partly allowed the Departmental appeal. The Tribunal, while upholding the view of the Income Tax Officer that the case called for an estimate, determined the income at Rs. 82,500. The Tribunal adopted the percentage of net profit at 15%. Thereafter, penalty proceedings were initiated u/s 271(1)(c) for concealment of income. The Inspecting Assistant Commissioner levied a penalty of Rs. 57,500. On appeal to the Tribunal the Tribunal cancelled the penalty, stressing the aspect that conscious concealment of income had been made out by the Department.

3. For the assessment year 1971-72, the assessee-firm filed a return declaring an income of Rs. 27,059. For this year also, on verification of certain subsidiary account books seized in the course of search conducted on November 19, 1971, the Income Tax Officer found suppression of receipts including lodging collections to the tune of Rs. 52,308. The Income Tax Officer also found non-accounting of payments made to certain parties and inflation of certain expenditure. According to the Income Tax Officer, the concealed income even as per the books of the assessee was Rs. 16,544. In the course of hearing of the case u/s 143(2), the assessee filed a revised income of Rs. 50,000. The assessee admitted the omission of receipt for which he tried to shift the responsibility on his staff in charge of preparation of the accounts. The Income Tax Officer felt that the books did not disclose the correct income and that it was a case for making an estimate. The estimate was made more or less on the same basis as for the previous year and the taxable income was arrived at Rs. 1,60,000. On appeal, the Appellate Assistant Commissioner reduced the income to Rs. 85,000. On further appeals filed by the assessee and the Department before the Income Tax Appellate Tribunal, the Tribunal dismissed the assessee's appeal and partly allowed the Department's appeal. The Tribunal determined the taxable income at Rs. 90,000. Thereupon, the Inspecting Assistant Commissioner initiated penalty

proceedings u/s 271(1)(c) and levied a penalty of Rs. 62,941. On appeal to the Tribunal, this order was set aside and the penalty cancelled.

4. The Tribunal passed a common order for the years 1970-71 and 1971-72 cancelling the penalty. The reference u/s 256(2) is a sequel to that order. It may be noticed that the Inspecting Assistant Commissioner not only applied clause (c) of section 271(1), but also the Explanation thereto for the purpose of imposing the penalty. The Income Tax Appellate Tribunal referred to the decided cases dealing with the scope and ambit of section 271(1)(c) and held that this being a case of "pure estimate of income" which had varied from stage to stage, the Department cannot be said to have discharged the burden of proving conscious concealment of the particulars of income. The Tribunal also referred to the explanation of the assessee that the employees of the firm were to be blamed for irregular maintenance of accounts and the non-disclosure of correct particulars and observed as follows :

"No penalty can be levied cases of real inadvertence or innocent mistake. To recall, it was the stand of the assessee that the understatement of income to the extent it occurred in both the years was as a result of the mischief of the accountant or employees of the firm and that no motive for concealment can be attributable to the partners of the firm themselves. We see no reason why we should not accept this case of the assessee."

Let us notice the relevant provision of law, viz., section 271(1)(c) (as it stood then) and the Explanation thereto :

"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 purposes 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 willful neglect on his part, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income for the purpose of clause (c) of this sub-section."

As already noticed. The question referred for our decision is whether the Tribunal is right in holding that there was no concealment of income. In view of the language of section 271(1)(c), it would have been more appropriate if, instead of the words "concealment of income", "concealment of particulars of income" had been mentioned. Accordingly, we reframe the question as follows to which counsel for both parties have no objection :

"Whether, on the facts and in the circumstances of the case, the Tribunal is right in holding that there was no concealment of the particulars of income by the assessee in spite of discovery of suppression of sales from the seized material ?"

It is true that, in order to amount to concealment of particulars of income within the meaning of clause (c) of section 271(1), the non-disclosure of the particulars of income should be the result of a conscious or deliberate act on the part of the assessee. It is also true that the burden of proving that the assessee had consciously suppressed the particulars of his income is on the Department and the falsity of the explanation of the assessee by itself is not sufficient to infer an act of concealment of the particulars of income. But, from these well-settled propositions, it does not follow that a case of estimate of income can never give rise to penal action u/s 271(1)(c). It depends upon the facts and circumstances of a given case. However, it is not necessary for us to delve deep into this aspect and express our final opinion with regard to the applicability of the main clause (c) of section 271(1) to the facts of this case as we feel that, in the instant case, much turns on the applicability of the Explanation to section 271(1)(c). If the respondent's explanation takes him out of the mischief of the Explanation to section 271(1)(c), he can claim immunity under the main clause as well. We shall, therefore, devote our attention to the Explanation to section 271(1)(c) which has been extracted supra. In the present case, the total income returned by the respondent-assessee is undoubtedly less than eighty per cent. of the total income assessed. In other words, the difference between the income returned and the "correct income" assessed is more than twenty per cent. Therefore, the assessee must be deemed to have concealed the particulars of his income. This deeming provision which is said to be in the nature of a rebuttable presumption fully operates unless the assessee is able to prove that the failure to return the correct income did not arise from any fraud or any gross or willful neglect on his part.

5. The Explanation was the subject-matter of consideration by a Full Bench of this court to which one of us (LAKSHAMANA RAO J.) was a party in Commissioner of Income Tax Vs. H. Abdul Bakshi and Bros., . The Full Bench observed (p. 99) :

"Once the income returned is less than 80 per cent. of the assessed income, the Explanation becomes applicable. Then two presumptions will follow. They are :

(a) The amount of the assessed income is the correct and it is in fact the income of the assessee;

(b) Failure of the assessee to return the correct assessed income was due to

fraud or gross or wilful neglect on the assessee's part.

From the factum of presumptions spelt out, the Explanation becomes a rule of evidence. Presumptions raised by the Explanation are not conclusive presumptions, but are rebuttable. The initial burden of discharging the onus of rebuttal is on the assessee. Once that initial burden is discharged, the assessee would be out of the mischief of the Explanation until and unless the Revenue is able to establish afresh that the assessee in fact concealed the particulars of income or furnished inaccurate particulars thereof. It, therefore, follows that when an assessee on whom the initial burden is placed fails to discharge the same, his case would fail and he would straightaway come within the mischief of the Explanation. If, however, the assessee discharges the initial burden, the presumptions stand rebutted and the burden shifts to be Revenue to establish that the assessee has concealed income. The assessee can be said to have discharged the initial burden by a preponderance of probabilities and evidence. Such a burden can be discharge by the material already existing on the record or by the assessee choosing to adduce fresh evidence during the course of the penalty proceedings. If the assessee does not choose to adduce fresh evidence or produce fresh material, it is still open to him to show and prove that on the existing material itself, the presumptions raised by the Explanation would stand rebutted. Broadly, these are the basic principles governing the applicability of the Explanation to section 271(1)(c) of the Act."

In that case, the Full Bench found fault with the penalty proceedings on the ground that the Inspecting Assistant Commissioner did not himself apply his mind to the evidence on record but merely recorded his satisfaction regarding the applicability of the Explanation based upon the findings reached in the assessment proceedings. As penalty proceedings are distinct form assessment proceedings and the findings in the assessment proceedings are not conclusive, the Full Bench held that the Revenue failed to make our a case under the Explanation to section 271(1)(c). According to the Full Bench (p. 101), "the Inspecting Assistant Commissioner did not point out any circumstance in his order which supports the plea that in spite the above evidence, the assessee failed to prove that the failure to return the correct income did not arise from any fraud or gross or wilful neglect on his part."

6. Coming back to the facts of his case, the Tribunal readily believed the explanation of the assessee that the understatement of income was attributable to the mischief played by its employees. Excepting a bare assertion, no attempt whatsoever had been made by the assessee at any stage of the proceedings to furnish the particulars of the employees, the motive behind such reprehensible acts, the action, if any, taken by the respondent-assessee, not to speak of adducing positive evidence. The Tribunal, without giving any reasons and without any discussion, believed this sweeping explanation which could be given by any assessee placed in the same predicament as the respondent. The Tribunal had not even discussed whether it would not amount to gross neglect on the part of

the assessee, even if the assessee's plea is taken to be correct on its face value. As pointed out by the Supreme Court in *Commissioner of Income Tax Vs. Mussadilal Ram Bharose*, (headnote) "the burden placed upon the assessee is not discharged by any fantastic explanation. Nor is it the law that any and every explanation by the assessee must be accepted. It must be an explanation acceptable to the fact-finding body." After referring to the facts of the case and the conclusion reached by the Tribunal, the Supreme Court observed that (p. 23 of 165 ITR) "the Tribunal had borne in mind the relevant principles of law and had also judged the facts on record. This was not a case where there was no evidence; nor a case where no reasonable person would have accepted the explanation of the respondent." In our opinion, the bald conclusion reached by the Tribunal cannot be equated to a finding of fact that could be reasonably arrived at. The conclusion has been reached without any basis and without any discussion and the so-called finding is vitiated by non-application of mind. We are, therefore, not inclined to take it as a valid explanation in support of the plea that the assessee was not actuated by any fraudulent motive or that he was not guilty of gross or wilful neglect. If the matter had rested there, we would have answered the reference in favour of the Revenue, but we feel that there is something more which needs to be probed into by the Tribunal before coming to a firm conclusion in regard to the applicability of of the Explanation to section 271(1)(c).

7. It is apparent from the Tribunal's order in the tax appeals (ITA Nos. 1678 to 1680/HYD. 1976-77) that the respondent contended that the suppression of sales was more than offset by omission of purchases and the additional demand raised against the assessee towards electricity charges. This explanation given by the assessee cannot be said to be irrelevant or extraneous to the subject-matter of enquiry, viz., the conduct of the assessee and the possible justification for the understatement of income. Whether the explanation is factually correct or whether it deserves acceptance is, of course, a matter for the Tribunal to go into. Apart from referring to the untenable plea of the assessee throwing the blame on the employees, the Tribunal had not referred to or considered any other plea or explanation. At least for the year 1970-71, we find that there is some explanation by the assessee which needs to be considered and which ought to have been considered. We are not sure whether there is a similar explanation in respect of the subsequent year 1971-72. If there is any explanation on record for the year 1971-72, that should also be considered by the Tribunal. In the present state of things, we are unable to express any definite view as to whether the respondent-assessee had discharged the burden of proving that there was no fraud or gross or wilful neglect on his part. We, therefore, decline to answer the reference but leave it to the Tribunal to arrive at a finding of fact on a consideration of the assessee's explanation and material already on record.

8. The Tribunal will have to examine on the basis of the material on record whether the assessee discharged the initial burden of rebutting the presumption that the particulars of income have been concealed. When once that question is

answered either way, it would be redundant to go into the applicability of the main clause (c) of section 271(1).

9. In view of the decision of this court in Commissioner of Income Tax Vs. Sait Khubchand Perumal, and the judgment of the Supreme Court in COMMISSIONER OF Income Tax, WEST BENGAL I Vs. INDIAN MOLASSES CO. P. LTD., , the reference court has no doubt the jurisdiction to made appropriate observations regarding the disposal of the appeal by the Tribunal even while declining to answer the question referred to it for decision. The Tribunal will, therefore, rehear the appeals and pass appropriate orders in regard to the levy of penalty in the light of the observations made in this judgment.

10. The reference is answered accordingly. There will be no order as to costs.