

(1989) 01 MAD CK 0034
In the Madras High Court
Case No : Tax Case No. 1000 of 1979

Commissioner of Income Tax

APPELLANT

Vs

C.J. Sheth

RESPONDENT

Date of Decision : 24-01-1989

Acts Referred:

Income Tax Act, 1922 — Section 28(1)
Income Tax Act, 1961 — Section 143, 144, 147, 148, 2(8)

Citation : (1989) 76 CTR 132 : (1989) 179 ITR 30

Hon'ble Judges : V. Ratnam, J; Bhakthavatsalam, J

Bench : Division Bench

Advocate : C.V. Rajan, for the Appellant; V. Ramachandran, for the Respondent

Judgement

Ratnam, J.—At the instance of the Revenue, u/s 256(2) of the Income Tax Act, 1961 (hereinafter referred to as "the Act"), the following

questions have been referred to this court for its opinion :

(1) Whether, on the facts and in the circumstances of the case and having regard to the provisions of the Explanation to section 271(1)(c), the

Appellate Tribunal was right in cancelling the penalty of Rs. 3,06,225 imposed u/s 271(1)(c) in this case for the assessment year 1959-60 ?

2. (2) Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in holding that the concealment, if at all there

was any concealment, had occurred when the original return was filed by the assessee prior to the completion of the original assessment ?

3. (3) Whether the conclusion of the Appellate Tribunal that there was no concealment of income by the assessee is a reasonable view to take on

the facts and in the circumstances of the case ?

2. The assessee is a firm consisting of two partners and it derives income from

business in Oilman Stores. For the assessment year 1959-60, on May 11, 1959, it filed a return admitting an income of Rs. 1,09,555 and the assessment was completed on August 12, 1960, on the total income of Rs. 1,18,317. Subsequently, the assessment was reopened u/s 147(a) to consider the assessment of certain spurious hundi loans in the name of Multani Bankers and a notice was also issued u/s 148 of the Act and in response to that notice, on August 22, 1969, the assessee filed a return showing the income as originally assessed on August 12, 1960. In the course of the reassessment proceedings, since the assessee did not substantiate the genuineness of the hundi credits, despite a number of opportunities given, the Income Tax Officer treated Rs. 2,45,000 representing increase in the peak of non-genuine hundi credits as income from undisclosed sources and also disallowed a sum of Rs. 61,225 being the interest relating to that and completed the reassessment on February 29, 1972. The assessee preferred appeals before the Appellate Assistant Commissioner and also before the Tribunal, but the addition of credits, as well as the disallowance of interest, were sustained. Pursuant to the completion of the reassessment proceedings, penalty proceedings were initiated against the assessee and in the course of those proceedings, numerous opportunities were given to the assessee, but the assessee merely asked for adjournments and did not offer any explanation as such. The Inspecting Assistant Commissioner took the view that in view of the Explanation to section 271(1)(c) of the Act introduced with effect from April 1, 1964, the assessee must be deemed to have concealed income or furnished incorrect particulars of the income and that presumption not having been in any manner attempted to be discharged by the assessee, penalty should be levied on the assessee and accordingly imposed a minimum penalty of Rs. 3,06,225 as the return had been filed on August 22, 1969, i.e., after April 1, 1964. Aggrieved by this, the assessee preferred an appeal to the Tribunal and the Tribunal viewed the concealment as referable only to the original return filed by the assessee on May 11, 1969, and, therefore, section 28(1)(c) of the Indian Income Tax Act, 1922, would be applicable and further that the filing of a revised return on August 22, 1969, cannot be taken as amounting to concealment in 1959. On this reasoning, the Tribunal further held that the burden of establishing that the

unexplained cash credits were the income of the assessee was on the Department and as the Department had not produced evidence to show that such credits were either false or represented the income of the assessee or that the payments were fictitious, no penalty was leviable and deleted the penalty.

3. We may take up the second question referred for consideration first. Learned counsel for the Revenue contended that the view taken by the

Tribunal that the concealment related to the year when the original return was filed by the assessee and that section 28(1)(c) of the Indian Income

tax Act, 1922, alone would be applicable is incorrect. Relying upon section 297(2) (g) of the Act, learned counsel submitted that as the

reassessment in this case had been completed on February 29, 1972, long after April 1, 1962, the proceedings for the levy of penalty would be

governed by the provisions of the Act and not by section 28(1)(c) of the Indian Income Tax Act, 1922, as erroneously assumed by the Tribunal.

In this connection, strong reliance was placed by learned counsel for the Revenue upon the decisions reported in Jain Bros. and Others Vs. The

Union of India (UOI) and Others, ; R. Kuppuswamy Chetty Vs. Commissioner of Income Tax, Madras, ; Maya Rani Punj Vs. Commissioner of

Income Tax, Delhi, and Commissioner of Income Tax Vs. Bihar Cotton Mills Limited, . Learned counsel for the assessee, however, attempted to

sustain the approach of the Tribunal on its reasoning.

4. Before proceeding to consider the correctness of the order of the Tribunal and decide whether section 28(1)(c) of the Indian Income Tax Act,

1922, or the provisions of the Act would be applicable, it would be necessary to refer to the provisions relating to repeals and savings u/s 297 of

the Act. u/s 297(1), the India Income Tax Act, 1922, was repealed. Section 297(2)(f) and (g) are the relevant provisions and they are as follows :

297. (2) Notwithstanding the repeal of the Indian Income Tax Act, 1922, (11 of 1922) (hereinafter referred to as the repealed Act), -

(f) any proceeding for the imposition of a penalty in respect of any assessment completed before the 1st day of April, 1962, may be initiated and

any such penalty may be imposed as if this Act had not been passed;

(g) any proceeding for the imposition of a penalty in respect of any assessment for the year ending on the 31st day of March, 1962, or any earlier

year, which is completed on or after the 1st day of April, 1962, may be initiated and any such penalty may be imposed under this Act;"".

5. A consideration of the aforesaid provisions establishes that the completion of the assessment before April 1, 1962, or on or after April 1, 1962,

would be determinative of the applicability of the provisions of the Indian Income Tax Act, 1922, or the Act, as the case may be. In this case,

though on the basis of the return originally submitted by the assessee, the assessment was completed on August 12, 1960, there was a reopening

of the assessment and the reassessment was completed only on February 29, 1972. The word ""assessment"" has been defined in section 2(8) of the

Act as including reassessment and the definition provision would apply, if there is nothing repugnant in the subject or the context and there is

nothing to indicate that the definition u/s 2(8) of the Act cannot be read into section 297(2)(g) of the Act. Thus, if a reassessment for the year

ending on March 31, 1962, or any earlier year, was completed on or after April 1, 1962, proceedings for penalty could be initiated and penalty

also imposed or levied under the provisions of the Act. That this is the proper interpretation of section 297(2)(g) of the Act has been laid down in

several decisions relied on by learned counsel for the Revenue to which we shall presently refer.

6. The Supreme Court in Jain Bros. and Others Vs. The Union of India (UOI) and Others, dealt with the question whether section 297(2)(f) and

(g) of the Act were discriminatory and violative of article 14 of the Constitution of India. On the basis of the return filed on November 18, 1961,

for the assessment year 1960-61, the Income Tax Officer completed the assessment on November 23, 1964, and on the same day, a notice was

issued u/s 271 read with section 274 of the Act calling upon the firm to show cause why penalty should not be levied owing to its failure to file its

return in time. After considering the explanation submitted by the firm on November 19, 1966, penalty was levied u/s 271(1)(a) of the Act for non-

compliance with the notice u/s 22(2) of the Indian Income Tax Act, 1922. In the writ petition filed by the assessee challenging the validity and

constitutionality of section 297(2)(g) and section 271(2) of the Act, the High Court declined to issue a writ and that was how the matter was

carried in appeal to the Supreme Court. The Supreme Court observed at page 117 as follows :

We are further unable to agree that the language of section 271 does not warrant the taking of proceedings under that section when a default has been committed by failure to comply with a notice issued u/s 22(2) of the Act of 1922. It is true that clause (a) of subsection (1) of section 271 mentions the corresponding provisions of the Act of 1961, but that will not make that part relating to payment of penalty inapplicable once it is held that section 297(2)(g) governs the case. Both sections 271(1) and 297(2)(g) have to be read together and in harmony and so read the only conclusion possible is that for the imposition of a penalty in respect of any assessment for the 1 year ending on March 31, 1962, or any earlier year which is completed after the first day of April 1962, the proceedings have to be initiated and the penalty imposed in accordance with provisions of section 271 of the Act of 1961. Thus, the assessee would be liable to a penalty as provided by section 271(1) for the default mentioned in section 28(1) of the Act of 1922, if his case falls within the terms of section 297(2)(g).

7. The above observations of the Supreme Court clearly lay down that what is relevant is the date of completion of the assessment and that in respect of any assessment for the year ending on March 31, 1962, or any earlier year completed after April 1, 1962, proceedings for the initiation as well as the imposition of penalty would be governed by the provisions of section 271 of the Act. We may also in this connection refer to the decision of the Full Bench of the Court reported in *R. Kuppuswamy Chetty Vs. Commissioner of Income Tax, Madras*, . In that case, one Kuppuswamy Chetty, who was running a business in gunny bags, settled on his son, Janakiah Chetty, his properties and his business and in the course of the assessment proceedings of Janakiah for the assessment year 1962-63, it was found that there were quite a number of borrowings on hundis from June 4, 1960, and they varied from time to time and they were ultimately squared up and the borrowings were partly utilised in the acquisition of investments and the balance was employed as circulating capital in the business of Janakiah Chetty. Janakiah Chetty was unable to prove that the hundi borrowings represented real transactions and Kuppuswamy Chetty filed a voluntary disclosure petition to the effect that the amounts represented by the hundi borrowings were really undisclosed income in the various years and they may be spread over the assessment

years 1954-55 to 1961-62 and he also agreed to the levy of a penalty at 5 % of the tax. On this statement being accepted, Kuppuswamy filed

revised returns of income admitting amounts of income as disclosed in the disclosure petition and the assessments were duly completed on

September 17, 1969, accepting the returns. However, penalty proceedings were initiated u/s 271(1)(c) of the Act and penalty was also levied in

respect of the assessment years 1954-55 to 1961-62 amounting to 20% of the tax avoided which, according to the Inspecting Assistant

Commissioner, was the minimum penalty leviable and this was also affirmed by the Tribunal. In the references at the instance of Kuppuswamy

Chetty, it was contended that the concealment, which had given rise to the penalty proceedings, was in the original returns filed. In repelling this

argument, the Full Bench pointed out, after referring to section 297(2)(f) and (g) of the Act, that a combined reading of those clauses would show

that in order to determine the law under which the penalty is to be imposed, it would be necessary to examine when the relevant assessment was

completed and that if it was completed before April 1, 1962, the penalty would have to be imposed under the Act of 1922, as if the new Act had

not been passed, but that if the assessment was completed on or after April 1, 1962, the penalty proceedings would have to be initiated and the

penalty imposed under the provisions of the Act. Referring to the completion in that case of the reassessment on September 17, 1969, the Full

Bench pointed out that the completion of the original assessments would not be relevant, because with reference to the relevant returns for those

years, forming the basis of the original assessments there was no finding or even a possibility of a finding that there was any concealment which

could lead to the initiation of proceedings for penalty and the levy of penalty and that only when the credits in the accounts of Janakiah Chetty

came to be examined in relation to the assessment year 1963-64, did the existence of large credits come to light and it was at that stage, that the

assessee and his son came forward with petitions which had served as the foundation for the issue of notices u/s 148 of the Act and the

reassessments on the basis of the returns submitted pursuant to such notices. It was, therefore, emphasised that at the time when the original

assessments were completed, there could be no proceedings for the levy of penalty and the penalty became leviable only after the completion of

reassessment proceedings. Similar is the situation in this case also. At the time when the assessment was completed, there was no finding nor even any possibility of a finding that there was any concealment which would justify the initiation of proceedings for the levy of penalty and also the imposition of penalty and it was only at the stage of reassessment, that it came to light that large unexplained hundi credits existed and that formed the basis of the reassessment which was completed on February 29, 1972. Under those circumstances, there could be no question of any concealment prior to the completion of the original assessment on the basis of the original returns filed by the assessee. The Full Bench has also observed at page 253 that ""what is relevant is the reassessment and so long as it took place on or after April 1, 1962, the provisions of the 1961 Act would have to be applied"". Applying the ratio of the decision of the Full Bench to the facts of this reference, it is seen that there was no possibility of any finding regarding concealment at the stage of the original assessment and such concealment became known only at the time of the reassessment proceedings and what was, therefore, relevant for the purpose of initiating action for levy of penalty was only the reassessment and not the original assessment and since the reassessments were completed only on February 29, 1972, according to section 297(2)(g) of the Act, proceedings for levy of penalty could be initiated and penalty also levied only in accordance with the provisions of section 271 of the Act.

8. We may now refer to the decision of the Supreme Court reported in *Maya Rani Punj Vs. Commissioner of Income Tax, Delhi*, . In that case,

the assessee, for the assessment year 1961-62, had to file the return by September 28, 1961, but it was not so filed nor was any extension of time asked for. However, the return was filed after seven months delay on May 3, 1962, after the provisions of the Act had come into force with effect from April 1, 1962, Penalty proceedings were initiated u/s 271(1)(a) of the Act and a penalty was also imposed on the assessee on the

ground that she had not been prevented by any reasonable cause from filing the return in time. The Appellate Tribunal held that though the penalty was leviable u/s 271(1)(a) of the Act, the quantum had to be fixed according to section 28 of the 1922 Act and reduced the penalty. On a

reference, the High Court took the view that it was not competent for the Tribunal to reduce the penalty levied u/s 271(1)(a) of the Act to a figure

lower than that equal to 2% per month during which the default continued but not exceeding 50% in the aggregate of the tax. On further appeal to

the Supreme Court, following the principles laid down in the decision in *Jain Bros. and Others Vs. The Union of India (UOI) and Others*, the

Supreme Court ruled that the proper provision to deal with the situation relating to penalty is as provided in section 271(1)(a) of the Act and this

was on the footing that for the imposition of penalty, it was not the assessment year or the date of the filing of the return that was important but it

was the satisfaction of the Income Tax authorities that a default had been committed by the assessee which attracted the provisions for levy of

penalty and that the proper provision to apply for dealing with a situation relating to penalty is as provided in section 271(1)(a) of the Act. This

decision would also clearly establish that section 297(2)(g) would apply to the proceedings for penalty and that in turn enable the application of

section 271 of the Act for initiating the penalty proceedings and for its imposition. In *Commissioner of Income Tax Vs. Bihar Cotton Mills Limited*,

, the decisions of the Supreme Court in *Jain Bros. and Others Vs. The Union of India (UOI) and Others*, and *Maya Rani Punj Vs. Commissioner*

of Income Tax, Delhi, have been applied to hold that the date of satisfaction is the relevant date for the application of the law and that the law

applicable on the completion of the reassessment proceedings governed the penalty proceedings. The Tribunal completely overlooked and ignored

the scope and effect of section 297(2)(g) of the Act and had proceeded to regard the concealment established as a result of the reassessment

proceedings completed on February 29, 1972, as referable only to the original return filed on May 11, 1959, and erred in considering the question

of levy of penalty and in approaching it in the light of section 28(1)(c) of the Indian Income Tax Act, 1922. It follows that if section 271(1)(c) and

the Act and the Explanations stood attracted u/s 297(2)(g) of the Act taking into account the date of completion of the reassessment of February

29, 1972, there is no need for the Revenue to establish that the unexplained cash credits represented the concealed income of the assessee or that

such credits were false or in the nature of income of the assessee as stated by the Tribunal, which might have been relevant only u/s 28(1)(c) of the

Indian Income Tax Act, 1922, and not under the provisions of the Act. The principle laid down in *Commissioner of Income Tax, West Bengal I*,

and Another Vs. Anwar Ali, would, therefore, be wholly inapplicable. We find that the Tribunal has totally misdirected itself in its approach to the

consideration of the question of the proper provisions applicable for the initiation of action for penalty proceedings and its imposition as well and

also in viewing the concealment as one which had occurred when the original return was filed and prior to the completion of the assessment on that

basis. We, therefore, answer the second question referred to us in the negative and in favour of the Revenue.

9. We now proceed to consider the first question. We have earlier pointed out that having regard to the date of the completion of the reassessment

on February 29, 1972, u/s 297(2)(g) of the Act, penalty proceedings could be initiated only u/s 271 of the Act and not u/s 28(1)(c) of the Indian

Income Tax Act, 1922. The following Explanation to section 271(1)(c) of the Act has been inserted by the Finance Act, 1964, with effect from

April 1, 1964;

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 willful 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 sub-section".

10. There is no dispute in this case that the income returned by the assessee in respect of the relevant assessment year was far less than 80% of the

total income assessed. Therefore, the requirement of the first part of the Explanation is fully satisfied. That would suffice to attract the other part of

the Explanation in order to deem that the assessee had concealed the particulars of income or furnished inaccurate particulars of such income,

unless the assessee proves that the failure to return the correct income did not arise from any fraud or gross or willful neglect on his part. On the

application of the Explanation to the assessee, what emerges is that the income of the assessee as assessed is the correct income and, in fact, such

income is that of the assessee and the failure on the part of the assessee to return the correct assessed income was due to fraud or gross or willful

neglect on its part. This could no doubt be rebutted by the assessee by establishing that the failure to return the correct income was not owing to

fraud or gross or willful neglect on its part. In this case, as could be gathered from the order of the Inspecting Assistant Commissioner, the

assessee, in the course of the penalty proceedings, has merely asked for adjournments, which had been granted but had not made any attempt to

establish that the failure to return the correct income did not arise from any fraud or gross or willful neglect on its part. The assessee, therefore, has

not made any attempt whatever to dislodge the presumptions arising as a result of the application of the Explanation to the facts. The Supreme

Court in Commissioner of Income Tax Vs. Mussadilal Ram Bharose, , construing the Explanation to section 271(1)(c) of the Act, pointed out that

the effect of the Explanation was that where the total income returned by any person was less than 80% of the total income assessed, the onus was

on such person to prove that the failure to file the correct income did not arise from a fraud or any gross or willful neglect on his part and unless he

did so, he should be deemed to have concealed the particulars of his income or furnished inaccurate particulars for the purposes of section 271(1)

(c) or the Act and that the position is that the moment the stipulated difference was there, the onus to prove that it was not the failure of the

assessee or fraud of the assessee or neglect of the assessee that caused the difference shifted to the assessee, but it has to be borne in mind that

though the onus shifted, the onus that was shifted was rebuttable. In so holdings, the Supreme Court approved the decision of the Full Bench of the

Punjab and Haryana High Court in Vishwakarma Industries Vs. Commissioner of Income Tax, holding that the application of the Explanation

raised three legal presumptions, viz., (i) that the amount of the assessed income is the correct income and it is in fact the income of the assessee

himself (ii) that the failure of the assessee to return the correct assessed income was due to fraud; or (iii) that the failure of the assessee to return the

correct assessed income was due to gross or wilful neglect on his part. Again, the Supreme Court in Chuharmal Vs. Commissioner of Income Tax,

M.P., , held that the Explanation applied in a case where the assessee had shown an income as Rs. 3,113 and a further sum of Rs. 87,455 was

added, and as the income returned was less than 80% of the assessed income, the Revenue had discharged the onus of proving concealment of income. In this case no explanation at all was offered by the assessee regarding the increase in the peak of non-genuine hundi credits. No further evidence was also produced by the assessee despite the opportunities given to it to prove the genuineness of the hundi credits. We find from the order of the Inspecting Assistant Commissioner that some discharged hundi khokas alone were produced which had also been produced at the time of the reassessment. We may also observe that the Tribunal, while dealing with the appeals against the order of assessment for the relevant year, has also categorically found that the assessee did not place any evidence to show that it had made any effort to obtain the particulars of the credit or had met with practical difficulties in that regard. We are of the view that as the entire facts and materials considered during the reassessment proceedings established clearly and cogently that there had been concealment and the Explanation to section 271(1)(c) stood attracted, the assessee cannot be allowed to get away without any penalty on the ground that the Revenue had not produced materials, as viewed by the Tribunal. Further, it may be that the assessee, in the course of the reassessment proceedings, produced the discharged hundi khokas, but the reassessment was made only after taking into account those materials and not being satisfied with the materials so made available. Even assuming that the assessee can rely upon the same materials to show that there has been no concealment, equally, the Revenue may rely upon the assessment proceedings made after a consideration of those materials already on record as justifying the presumption of concealment and in that context, mere reliance upon the material in the course of the assessment proceedings may not avail the assessee to claim that that would constitute his explanation for the concealment established by the reassessment proceedings. We are, therefore, satisfied that in this case the assessee had not in any manner attempted to discharge the presumption by virtue of the applicability of the Explanation of section 271(1)(c) of the Act and, therefore, the Tribunal was not right in having cancelled the penalty imposed on the assessee. We also find that the quantum of penalty imposed is also in order, for, at the relevant time, clause (iii) as applicable to section 271(1)(c) of the Act, provided for the levy of penalty in 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. We find that the imposition of the penalty by the Inspecting Assistant Commissioner on the assessee has been done properly by invoking the Explanation to section 271(1)(c) of the Act and also bearing in mind the imposable quantum thereof. We, therefore, answer the first question referred to us in the negative and in favour of the Revenue.

11. We may next consider the third question referred to us. We have earlier noticed how the Tribunal had misdirected itself with reference to the appropriate provision of law applicable to the case of the assessee and how on such an erroneous approach, the Tribunal had proceeded to delete the penalty imposed on the assessee in the view that section 28(1)(c) of the Indian Income Tax Act, 1922, applied, which, according to the Tribunal, required that evidence must be available at the instance of the Revenue that the unexplained cash credits were either false or fictitious or that they represented the income of the assessee. This approach, as we have pointed out earlier, is thoroughly erroneous and cannot be sustained at all. We do not find in the order of the Tribunal a reference to any other material which would justify the conclusion that there was no concealment of income by the assessee. We have referred already to the attitude of the assessee in the course of the assessment proceedings and also the penalty proceedings and no material at all has been made available by the assessee in support of its claim that there was no concealment of income. We have, therefore, to hold that, on the facts and the circumstances, the view taken by the Tribunal that there was no concealment of income by the assessee is not a reasonable one to be taken. We, therefore, answer the third question in the negative. The Revenue will be entitled to its costs. Counsel's fee Rs. 500