(1990) 06 MAD CK 0027

In the Madras High Court

Case No : Tax Case No. 463 of 1978

Commissioner of Income Tax	APPELLANT
Vs	
C.R. Niranjan	RESPONDENT

Date of Decision : 14-06-1990

Acts Referred:
Income Tax Act, 1961 — Section 2(24), 27(1), 271(1), 4, 64

Citation : (1990) 84 CTR 259 : (1991) 187 ITR 280

Hon'ble Judges : V. Ratnam, J;K.A. Thanikkachalam, J

Bench : Division Bench

Advocate : C.V. Rajan, for the Appellant; P.P.S. Janardhanaraja, for the Respondent

Judgement

Thanikkachalam, J.—In compliance with the directions u/s 256(2) of the Income Tax Act, 1961 (hereinafter referred to as the ""Act""), in

T.C.P. No. 232 of 1976 dated November 2, 1976, the Tribunal referred the following questions for our opinion :

(1) Whether, on the facts and in the circumstances of the case and having regard to the provisions of section 27(1)(c) of the Income Tax Act,

1961, read with the Explanation thereto, the Appellate Tribunal was right in reducing the penalty from Rs. 2,53,351 to Rs. 45,737 on the ground

that the loss returned by the assessee should not be added to the income finally assessed for the purpose of levy of penalty ?

(2) Whether. On the facts and in the circumstances of this case, the Appellate Tribunal had materials to hold that the addition of Rs. 29,000

representing unexplained credit should not be treated as the concealed income of the assessee ?

2. The assessee in an individual doing contract business. The previous year

relevant to the assessment year 1969-70 ended on March 31, 1969.

3. Originally, the assessee filed a return with a loss of Rs. 1,14,330. The Income Tax Officer, after discussing with the assessee''s representative,

determined the income as ""nil"" from the business activity and brought to tax a sum of Rs. 5,110 being the share income from a firm in which the

assessee was a partner. Thereafter, the assessee filed an appeal against the disallowance of the loss and the Appellate Assistant Commissioner set

aside the assessment and directed the Income Tax Officer to redo the same. That assessment was made on May 31, 1971. During the course of

examination of the accounts, the Income Tax Officer found that books contained many defects such as erasures, overwritings and interpolations.

The Income Tax Officer examined the assessee and also the cashier and the accountant. On the basis of the evidence collected, the Income Tax

Officer came to the conclusion that the books were manipulated and hence he rejected the account books and estimated the income from contract

business at Rs. 34,157 by applying the net profit rate of 7% on the total receipts of the year amounting to Rs. 4,87,959. The Income Tax Officer

also added some cash credits, but finally the Tribunal sustained only a sum of Rs. 29,000 as ""unexplained cash credit"" in the assessee''s own

account. There were also certain other credits in the name of Messrs. Glassware and Co., to the extent of Rs. 11,580 and this was sustained by

the Appellate Tribunal, for these various additions, the Income Tax Officer initiated penalty proceedings u/s 271(1)(c) and referred the matter to

the Inspecting Assistant Commissioner of Income Tax, the Inspecting Assistant Commissioner, after considering the written representation

submitted by the assessee, came to the conclusion that the assessee had deliberately manipulated his accounts and furnished inaccurate particulars

with the obvious intention to conceal the income. Accordingly, relying on the Explanation to section 271(1)(c) of the Act, the Inspecting Assistant

Commissioner held that the maximum penalty leviable works out to Rs. 5,06,702. Considering the circumstances, ultimately, he levied the minimum

penalty of Rs. 2,53,351 u/s 271(1)(c) of the Act. At that time. The order of the Tribunal was not available to him and hence the quantum was

determined with reference to the appellate order of the Appellate Assistant Commissioner of Income Tax.

4. Aggrieved, the assessee filed an appeal before the Appellate Tribunal. The Tribunal, on considering the facts appearing in this case, ultimately

held that the penalty u/s 271(1)(c) read with the Explanation is exigible in the case of the assessee. While considering the quantum of penalty, the

Tribunal pointed out that the Inspecting Assistant Commissioner was not correct in levying penalty u/s 271(1)(c) on the loss. Therefore, the

Tribunal reduced the penalty from Rs. 2,53,351 to Rs. 45,737. With regard to the sum of Rs. 29,000, the Tribunal further held that it cannot be

taken as concealed income, because even though the Explanation is applicable for determining the exact quantum of concealed income, it has to be

shown that the credit did represent an income receipt which was concealed. According to the Tribunal, the addition of Rs. 29,000 was sustained

on the basis that the assessee''s contention was untenable and it does not lead to the conclusion that it was income which was concealed.

Therefore, the Tribunal held that this sum cannot be taken as concealed income for the purpose of levy of penalty.

5. The first question referred to us relates to the reduction of the penalty u/s 271(1)(c) of the Act from Rs. 2,53,351 to Rs. 45,737 on the ground

that the loss returned by the assessee should not be added to the income finally assessed for the purpose of levy of penalty, the second question

relates to Rs. 29,000 which was held by the Tribunal as an income not concealed by the assessee.

6. While making his submissions, learned standing counsel, with regard to question No. (1). Contended that income includes loss, since the loss is

also a negative income. Therefore, according to learned standing counsel, furnishing inaccurate particulars with regard to loss would also attract

penalty u/s 271(1)(c) of the Act. In order to support this contention, learned standing counsel for the Department drew our attention to a passage

occurring at page 1205 in Volume I of Law and Practice of Income Tax by Kanga and Palkhivala. So also learned standing counsel brought to our

notice a passage occurring at page 4090 in Volume V of Sampath Iyengar''s Law of Income Tax. Our attention was also drawn to a circular

issued by the Central Board of Direct Taxes in this regard, in order to support his contention, learned standing counsel also relied upon certain

decisions. According to learned standing counsel, the assessed income was arrived at after taking into account the loss returned by the assessee and after set off of the loss. Hence, it was submitted that there is no need to reduce the quantum of penalty determined by the Inspecting Assistant

Commissioner.

7. On the other hand. Learned counsel appearing for the assessee submitted that the current loss was not considered and determined in the

assessment proceedings and, therefore, while levying penalty u/s 271(1)(c) of the Act in the case of the assessee, the loss cannot be added to the

assessed income. Further, learned counsel pointed out that neither the Department nor the Tribunal has given a finding to the effect that the

assessee furnished any inaccurate particulars or concealed any particulars, in so far as the loss in concerned. According to learned counsel,

income"" occurring in section 271(1)(c) would mean a positive income and not a negative income like loss. Learned counsel further submitted that

wherever it is necessary to consider the loss as income, the Act specifically stated so. For instance, in Explanation 2 to section 64 of the Income

Tax Act, 1961, it is clearly stated that income includes loss also. Therefore, learned counsel pointed out that u/s 271(1)(c) of the Act nowhere is it

stated that the word ""income"" includes also loss, learned counsel further submitted that where two interpretations are possible. That which is in

favour of the assessee has to be followed. It was, therefore, pleaded that the penalty levied on the loss of Rs. 1,14,330 is unsustainable and the

Tribunal was correct in reducing the penalty.

8. We have heard the rival submissions. The fact remains that while confirming the penalty levied u/s 271(1)(c) of the Act read with the

Explanation, the Tribunal reduced the penalty from Rs. 2,53,351 to Rs. 45,737 on the ground that the loss returned by the assessee should not be

added to the income finally assessed for the purpose of levying penalty. According to the Revenue, loss should be considered as income and

penalty is exigible even on loss also, the submission of the assessee was that loss is not positive income and. Therefore, it should not be considered

for the purpose of levying penalty u/s 271(1)(c) of the Act, for the assessment year 1969-70, the assessee who is an individual filed his return,

claiming a loss of Rs. 1,14,330. After examining the books of accounts, the Income Tax Officer rejected the same on the ground that the account

books were manipulated and. Therefore, according to the Income tax Officer, they are not reliable. Thereafter, the Income Tax Officer estimated

his income from contract business by applying the net profit rate of 7% on the total business receipts of the year. He also added some cash credits.

Finally, the Income Tax Officer completed the assessment as under :

Rs.

Business : share income 5,110

(b) The books were rejected on account of the

defects and income estimated at 7% of receipts 34,157

(c) Credits unexplained Rs. 1,37,604. This was

later reduced in appeal by Rs. 32,725. 1,04,879

1,44,146

Less : Loss carried forward 5,125

1,39,021

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9. As can be seen from the assessment order extracted in the order passed by the Inspecting Assistant Commissioner, it is clear that the Income

Tax Officer has not given any finding to the effect that the amount of loss claimed by the assessee was disallowed and the same was added back to

the estimated income. It may be that the Income Tax Officer would have considered the loss and estimated the income. If that is so. The Inspecting

Assistant Commissioner in the penalty proceedings cannot make further addition, viz., the loss to the estimated income. The Income Tax Officer

allowed only the carried forward loss of Rs. 5,125. Thus, there is no material on record to show that the current loss claimed by the assessee was

dealt with in the assessment order. Even in the penalty order the Inspecting Assistant Commissioner has not given any finding to the effect that the

assessee furnished inaccurate particulars with regard to current loss claimed. But, according to the Inspecting Assistant Commissioner, the

Explanation to section 271(1)(c) applies to the facts of this case, these are the facts on which the penalty was levied.

10. In the matter of deciding the question whether income includes loss also,

several decisions were brought to our notice. One such decision was

reported in the case of Commissioner of Income Tax (Central), Delhi Vs. Harprasad and Co. P. Ltd., . According to the facts appearing in this

case, during the accounting period ending April 30, 1954, relevant to the assessment year 1956-56, the assessee sold certain shares at a loss of

Rs. 28,662, which it claimed as a revenue loss. While deciding this issue in the light of the provisions contained in sections 2(6C)(vi), (15), 3,4(1),

6(vi), 12B, 22(2A), 24(1), (2), (2A), (2B) of the Indian Income Tax Act, 1922, the Supreme Court held as under (at p. 124) :

Section 2(6C) provides that ''income'' includes (among other things.

''(vi) any capital gain chargeable u/s 12B''.

From the charging provisions of the Act, it is discernible that the words ''income'' or ''profits and gains'' should be understood as including losses

also, so that, in one sense, ''profits and gains'' represent ''plus income'' whereas losses represent ''minus income''. In other words, loss is negative

profit. Both positive and negative profits are of a revenue character. Both must enter into computation, wherever it becomes material, in the same

mode of computing the taxable income of the assessee. Although section 6 classifies income under six heads, the main charging provision is section

3 which levies Income Tax, as only one tax, on the ''total income'' of the assessee as defined in section 2(15). An income in order to come within

the purview of that definition must satisfy two conditions, firstly, it must comprise the ''total amount of income, profits and gains referred to in

section 4(1)''. Secondly, it must be computed in the manner laid down in the Act. If either of these conditions fails, the income will not be a part of

the total income that can be brought to charge"".

11. It remains to be seen that this decision was rendered in accordance with the provisions contained in the abovesaid sections in the Indian

Income Tax Act, 1922. Even according to this decision, the income must be computed in the manner laid down in the Act in order to come within

the purview of the definition given u/s 2(15).

12. Another decision cited before us was that reported in the case of CIT v. J. H. Gotla . In this decision, while considering the facts appearing in

that case in the light of the provisions contained in sections 16(3)(a) and 24(2) of Indian Income Tax Act, 1922, and the Explanation added by the

Finance Act, 1979, to section 64 of the Income Tax Act, 1961, the Supreme Court held as under (at p. 340) :

In view of the aforesaid and in view of the attitude of the law makers in dealing with this problem as evidenced by the amendment and in the

circular originally issued prior thereto and bearing in mind that under the scheme of the Act where the wife or minor child carries on a running

business. The right to carry forward the loss in the running business would be available to the wife or minor child if they themselves were assessed,

but the right would be completely lost if the individual in whose total income the loss is to be included is not permitted to carry forward the loss u/s

24(2), since that would be the result of the strict literal construction. It is apparent that could not have been the intent of Parliament. Therefore,

where section 16(3) of the Act operates, the profit or loss from a business of the wife or minor child included in the total income of the assessee

should be treated as the profit or loss from a ''business carried on by him'' for the purpose of carrying forward and set off of such loss u/s 24(2) of

the Act"".

13. The facts appearing in the abovesaid case are entirely different. Further, this decision was rendered after taking into consideration Explanation

2 to section 64 of the Act. Therefore, the above-cited case will not render any assistance to decide the issue arising in the present case.

14. On this aspect, another decision brought to our notice was that reported in the case of Commissioner of Income Tax Vs. India Sea Foods, . In

this case, one of the questions referred to the opinion of the High Court was whether the word ""income"" occurring in section 271(1)(c) of the

Income Tax Act, 1961, refers to a positive figure only and not to a loss, while deciding this question. The Kerala High Court held as under

(headnote) :

When, on the facts of the case which arose for decision before it, the Tribunal had already come to the specific finding that concealment of income

by the assessee had been proved by the Department and that a penalty could, therefore, be imposed against the assessee, there was no scope or

occasion for raising and considering the question whether penalty would be leviable in cases where an assessee is found to have suffered a net loss

and, hence, not to have had any ""total income"" for the concerned assessment year. Therefore, the question whether the word ""income"" in section

271(1)(c) should refer to a positive figure only and not to a loss, could not be said to be a question of law arising out of the order of the Tribunal

and had not to be answered"".

15. In the above cited decision, the question whether income includes loss also was not decided. Hence, this decision also will not render any help

in deciding the issue arising in the present case.

16. Yet another decision brought to our notice was that reported in the case of Commissioner of Income Tax Vs. Jaora Oil Mill, . In this case,

while considering the provisions contained in section 271(1)(c) of the Income Tax Act, 1961, the Madhya Pradesh High Court, held as under

(headnote) :

The definition of ''income'' in section 2(24) of the Income Tax Act. 1961, is an inclusive definition and it covers even such items which are not

income in the natural sense of the word. Even in its broadest connotation, ''income'' refers to monetary return ''coming in'' and is conceptually

contradictory to ''loss''. Section 4 taxes income and not loss which can be carried forward under certain circumstances.

17. This is the only decision touching the point in issue arising in the present case.

18. So also our attention was drawn to another decision of this court reported in the case of Cement Distributors Private Ltd. Vs. Commissioner

of Income Tax, . According to the facts appearing in this case, the assessee disclosed the total profits for the accounting year ended October 31,

1953, relevant to the assessment year 1954-55 as Rs. 2,10,941. The directors declared a dividend of Rs. 81,150. At the time of assessment, the

Income Tax Officer determined the income at Rs. 3,91,143. This increase was due to the disallowance of a claim of alleged trading loss of Rs.

2,12,691. This loss was held to be not genuine. On appeal, the Appellate Assistant Commissioner as well as the Tribunal held that the transactions

leading to the alleged loss were unreal and had been recorded with an ulterior motive. On these facts, this court held as under :

(i) that penalty could be levied u/s 28(1)(c) for deliberate furnishing of inaccurate particulars of income; (ii) as the loss was not real. The

disallowed amount could be added back and treated as part of the commercial profits when applying section 23A.

19. According to the facts appearing in this decision, the Income Tax Officer determined the total income at Rs. 3,91,143 after including the

trading loss claimed at Rs. 2,12,691. Therefore, it is on the assessed income that penalty was levied. On the other hand, according to the facts

appearing in the present case, the current loss claimed was not added to the income assessed by the Income Tax Officer. Again, in this decision

nowhere it is stated that income includes loss also for the purpose of levying penalty u/s 28(1)(c) of the Indian Income Tax Act, 1922. Further, in

the above-cited case, there were some categorical findings given by the Income Tax Officer, the Inspecting Assistant Commissioner and the

Tribunal that the loss was unreal and had been claimed with an ulterior motive. But, according to the facts appearing in the present case, there is no

such finding given either in the assessment proceedings or in the penalty proceedings. Therefore, that decision is distinguishable on the facts

appearing in the present case.

20. Clause (iii) of section 271(1) of the Income Tax Act, 1961, as it stood during the relevant assessment year was as under :

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"".

21. The relevant words are ""the amount of income"". The word ""income"" has been defined u/s 2(24) of the Income Tax Act, 1961. It is an inclusive

definition and it takes into its fold not only the real income. But also such items which are not income in the natural sense of the word. Even in

section 4, which is a charging section, nowhere is it stated that income includes loss, it is also significant to note that wherever it is necessary to

consider loss. It is also significant to note that wherever it is necessary to consider loss as income, the Act specifically stated so. As can be seen

from Explanation 2 to section 64. On the other hand, in sections 271(1)(c) and 271(1)(iii), nowhere is it stated that income includes loss, one other

method of testing the contention put forward by the Department was that if income includes loss, then the assessee returned a loss of Rs. 1,14,330.

The Income Tax Officer assessed the net income at Rs. 1,39,021 under the head

""Business income"" as can be seen from the Inspecting Assistant

Commissioner''s order; then where is the difference of 20 per cent between the returned loss and the assessed income, in order to invoke the

presumption as contemplated under the Explanation to section 271(1)(c).

22. But it remains to be seen that, according to the facts appearing in this case. The Income Tax Officer estimated the income and while

determining the business income, the current loss claimed by the assessee was not disallowed and added back, the Inspecting Assistant

Commissioner in the penalty proceedings also has not given any finding to the effect that the assessee concealed or furnished any inaccurate

particulars with regard to the current loss claimed. A plain reading of the assessment order as extracted by the Inspecting Assistant Commissioner

in his order would show that the Income Tax Officer has not specifically dealt with the current loss claimed by the assessee. Therefore, even

assuming during the assessment year under consideration, penalty u/s 271(1)(c) is income based, since the loss was not disallowed and added

back. Penalty is not exigible on loss in this case. Therefore, considering the facts appearing in this case on this point in the light of the judicial

pronouncements cited supra, we are of the opinion the Tribunal was correct in holding that the penalty u/s 271(1)(c) in the present case cannot be

levied on the loss.

23. Another question in this reference is whether the Tribunal was correct in holding that the assessee did not conceal or furnish inaccurate

particulars with regard to an unexplained cash credit of Rs. 29,000. According to the Tribunal, even though the Explanation is applicable for

determining the exact quantum of concealed income, it has to be shown that the credit did represent an income receipt which was concealed.

According to the assessee''s counsel, this addition was sustained on the basis that the assessee''s explanation was untenable and, therefore that

itself would not lead to the conclusion that it was income which was concealed. According to learned counsel for the assessee, the Tribunal

accepted in the quantum appeal the explanation offered by the assessee to delete a portion of the so-called unexplained cash credit in the books.

Learned counsel submitted that the explanation offered by the assessee will hold good for the entire cash credit. Learned counsel further contended that the Explanation to section 271(1)(c) will not be applicable to the facts of this case, learned standing counsel contended that the Explanation to

section 271(1)(c) will be applicable to the facts of this case. Hence, it was submitted that the Tribunal was not correct in deleting the penalty on

Rs. 29,000. The submission of learned standing counsel was that the Explanation to section 271(1)(c) of the Act is applicable to the facts of this

case and the assessee has not discharged the initial burden placed upon him by producing any material and. Therefore, the Tribunal was not

correct in deleting the penalty on Rs. 29,000.

24. In order to support his contention, learned standing counsel relied upon a decision of this court rendered in the case of Commissioner of

Income Tax Vs. Bala I.M. Rao, , wherein this court held that, according to the facts appearing in that case, there was difference of 20% between

the assessed income and the returned income and hence an Explanation to section 271(1)(c) is applicable, but the assessee has not produced any

material to discharge the burden placed upon him and, therefore, penalty u/s 271(1)(c) was exigible. To the same effect, there is also another

decision of this court in the case of Commissioner of Income Tax Vs. T.K. Manicka Gounder, . These are the cases where the Explanation to

section 271(1)(c) is clearly applicable, according to the facts appearing in these cases and, further, the assessees failed to discharge the initial

burden placed upon them.

25. But, according to the facts appearing in the present case, the assessee filed a return showing a loss of Rs. 1,14,330. The Income Tax Officer

rejected the account books and estimated the business income. But, for the purpose of making certain additions, the Income Tax Officer again

relied on the account books. One such addition made by the Income Tax Officer was with regard to unexplained cash credits. On appeal, the

Tribunal accepted the explanation offered by the assessee and deleted a portion of the so-called unexplained cash credit. And sustained an

addition of Rs. 29,000. In the penalty appeal, the Tribunal pointed out that this addition was made because the explanation offered by the assessee

was not accepted. The fact remains that the assessee furnished books of account. The assessee also offered his explanation was accepted by the

Tribunal for the purpose of deleting a portion. If that is so, it cannot be said that the assessee failed to furnish any material to discharge the initial

burden. On the other hand, the assessee furnished sufficient materials to discharge the initial burden. The assessee''s accountant and cashier were

examined. Therefore, the assessee discharged the initial burden placed upon him. Thereafter the Department has not brought any materials to show

that the assessee had concealed or furnished inaccurate particulars with regard to the abovesaid cash credit.

26. The function of the fiction created by the Explanation to section 271(1)(c) is to convert a case where the returned income is less than eighty per

cent of the assessed income into a case which would be covered by section 271(1)(c), unless the assessee proves that he was not guilty of any

fraud or any gross or wilful neglect in filing the return of his income. The Explanation exhausts itself once this purpose is achieved and does not

create any further fiction to the effect that the assessed income has to be taken as the correct income for the purpose of imposition of penalty u/s

271(1)(c). For the purpose of fixing the quantum of penalty u/s 271(1)(iii), the amount of income in respect of which particulars have been

furnished, has to be found by the authority concerned. Any other interpretation would make the proceedings for levy of penalty completely

subservient to the assessment proceedings which does not appear to be the scheme of the Act. This was the view taken by this court in the case of

M. Radhakrishniah Vs. Commissioner of Income Tax, Madras, .

27. Under the Explanation to section 271(1)(c), to prove the absence of fraud or gross or wilful neglect, ordinarily and generally there cannot be

any direct evidence. The assessee merely has to place materials of the primary facts or the circumstances which in all reasonable probability would

show that he was not guilty of any fraud or gross or wilful neglect. The facts appearing in this case would go to show that the assessee produced

primary facts before the Inspecting Assistant Commissioner to dislodge the burden placed upon him. On the other hand, in the penalty

proceedings, no materials were brought in by the Department to show that the assessee concealed or furnished inaccurate particulars. In fact in the

quantum appeal, the Tribunal accepted the explanation offered by the assessee and deleted a portion of the unexplained cash credit. It is under

these circumstances and after taking note of all these facts that the Tribunal pointed out that even though the explanation is applicable for

determining the exact quantum of concealed income, it has to be shown that the credit did represent an income receipt which was concealed, in

such circumstances, therefore, we consider that the Tribunal was correct in holding that Rs. 29,000 cannot be termed as concealed income.

28. In that view of the matter, we answer both the questions referred to us in the affirmative and against the Department. The assessee is entitled to

his costs. Counsel''s is fixed at Rs. 500.

