
(1974) 02 AHC CK 0024

In the Allahabad High Court

Case No : Income-tax Reference No. 457 of 1971

Commissioner of Income Tax

APPELLANT

Vs

Data Ram Satpal

RESPONDENT

Date of Decision : 21-02-1974

Acts Referred:

Income Tax Act, 1961 — Section 271, 271(1)

Citation : (1975) 99 ITR 507

Hon'ble Judges : Satish Chandra, J; R.L. Gulati, J

Bench : Division Bench

Advocate : R.R. Misra, for the Appellant; N.C. Rajvanshi, for the Respondent

Final Decision : Disposed Of

Judgement

Gulati, J.—This is a reference u/s 256(1) of the Income Tax Act, 1961, at the instance of the Commissioner of Income Tax, U. P., Kanpur.

2. The assessee is a partnership firm carrying on business in liquor contract. For the assessment year 1963-64 it returned a loss of Rs. 316 from the business. The Income Tax Officer found that the assessee's books were unreliable inasmuch as the sales had been noted in lump sum at the end of the day and the excise register was not produced before him. He, therefore, estimated the income of the assessee at Rs. 33,200 by applying a flat rate of profit @ 8 per cent. to the estimated turnover of Rs 4,15,000. The Income Tax Officer also issued a notice u/s 274 read with Section 271(1)(c) of the Income Tax Act for the purposes of levying penalty. From the assessment there was an appeal. The Appellate Assistant Commissioner of Income Tax agreed with the Income Tax Officer that in the circumstances the income had to be assessed on estimate basis but he reduced the estimate of income to Rs. 28,000. Thereafter, the Inspecting Assistant Commissioner of Income Tax, Meerut, continued the penalty proceedings. He found that the return of income was filed on October 13, 1964, and, therefore, the case was governed by the provisions of Section 271, as amended by the Finance Act of 1964. He next observed that the total income as

returned by the assessee was less than 80 per cent. of the income assessed and the assessee had failed to prove that the disparity in the income returned and assessed was not due to any gross or wilful neglect on his part. He, therefore, imposed the penalty of Rs. 7,000 by his order dated 22nd July, 1967. The assessee appealed against the penalty order to the Income Tax Appellate Tribunal. The Tribunal found that the case was clearly one where, but for the amended provisions of Section 271, no penalty could be imposed against the assessee inasmuch as the assessment had been made on the basis of estimate and no concealment of income had been proved. In the opinion of the Tribunal, however, the amendment applied with effect from the 1st April, 1964, and, as such, was not applicable to the assessment year 1963-64. The Tribunal observed that though the return had been filed after 1st April, 1964, yet the law applicable to the assessment year 1963-64 was that which prevailed on the 1st day of April, 1963. The Tribunal, therefore, held that the Inspecting Assistant Commissioner of Income Tax was wrong in invoking the provisions of the amended Section 271 and, without the aid of the amendment, penalty could not be imposed as there was no independent proof of concealment. The Income Tax Appellate Tribunal accordingly cancelled the penalty. The Commissioner of Income Tax is aggrieved and at his instance the Tribunal has referred the following two questions for the opinion of this court:

" 1. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was justified in law in holding that the Explanation to Section 271(1) was not applicable to the case?

2. If the answer to question No. 1 is in the negative whether, on the facts and in the circumstances of the case, the Appellate Tribunal was justified in cancelling the penalty imposed u/s 271(1)(c) of the Income Tax Act, 1961 ?"

3. In order to answer these questions it is necessary to set out the relevant provisions. Section 271(1)(c), before its amendment, was as under :

"271. Failure to furnish returns, comply with notices, concealment of income, etc.--(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 deliberately furnished inaccurate particulars of such income,

he may direct that such person shall pay by way of penalty,--

(i) in the cases referred to in Clause (a), in addition to the amount of the tax, if any, payable by him, a sum equal to two per cent. of the tax for every month during which the default continued, but not exceeding in the aggregate fifty per cent. of the tax ;

(ii) in the cases referred to in Clause (b), in addition to any tax payable by him, a sum which shall not be less than ten per cent. but which shall not exceed fifty per cent. of the amount of the tax, if any, which would have been avoided if the

income returned by such person had been accepted as the correct income ;

(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 twenty per cent. but which shall not exceed one and a half times the amount of the tax, if any, which would have been avoided if the income as returned by such person had been accepted as the correct income."

4. This provision was amended by the Finance Act of 1964. The word "deliberately" occurring in Clause (c) before the words "furnished inaccurate particulars" was omitted and the following Explanation was added at the end of Section 271(1)(c):

" 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 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 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 this subsection."

5. This amendment came into effect from 1st April, 1964. It will be noticed that as a result of this amendment a legal presumption arises of concealment and furnishing inaccurate particulars if the income returned by an assessee is less than 80 per cent. of the correct income as denned in the Explanation minus the deductions bona fide claimed by him but disallowed. The presumption is, however, rebuttable and it can be rebutted by an assessee by showing that the disparity between the income returned and the correct income is not due to fraud or wilful or gross neglect on his part. The first question that falls for consideration is as to whether this amendment was applicable in the instant case.

6. One thing is settled that the Income Tax Act as applicable to a particular assessment year is as it stands on the 1st day of April of that assessment year. See Commissioner of Income Tax, West Bengal Vs. Isthmian Steamship Lines, .. This view has recently been affirmed by the Supreme Court in the case of Karimtharuvi Tea Estate Ltd. Vs. State of Kerala, .:

" Now, it is well-settled that the Income Tax Act, as it stands amended on the first day of April of any financial year, must apply to the assessments of that year. Any amendments in the Act which come into force after the first day of April of a financial year, would not apply to the assessment for that year, even if the assessment is actually made after the amendments come into force."

7. This principle is applicable only to assessment proceedings for a particular year, namely, the proceedings taken for the levy of tax. Penalty proceedings are

of a quasi-criminal nature and cannot be equated with assessment proceedings. Provisions relating to penalty are to be found in Chapter XXI which deals with the penalties imposable and are no longer part of the Chapter dealing with assessment proceedings as was the case under the Indian Income Tax Act, 1922. Because of the observations of the Supreme Court in the case of C.A. Abraham, Uppoottil, Kottayam Vs. The Income Tax Officer, Kottayam and Another, ., to the effect that penalty was an additional tax there was some confusion with regard to the nature of the penalty and the proceedings taken to impose the same but the Supreme Court has now put the matter beyond any doubt in the case of Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, ., where their Lordships have also explained their observations in the case of C.A. Abraham. The relevant dictum is to be found in the following passage:

"One line of argument which has prevailed particularly with the Allahabad High Court in Lal Chand Gopal Das's case, [1963] 48 ITR 325 . is that there was no essential difference between tax and penalty because the liability for payment of both was imposed as a part of the machinery of assessment and the penalty was merely an additional tax imposed in certain circumstances on account of the assessee's conduct. The justification of this view was founded on certain observations in C.A. Abraham v. Income Tax Officer. It is true that penalty proceedings u/s 28 are included in the expression "assessment" and the true nature of penalty has been held to be additional tax. But one of the principal objects in enacting Section 28 is to provide a deterrent against recurrence of default on the part of the assessee. The section is penal in the sense that its consequences are intended to be an effective deterrent which will put a stop to practices which the legislature considered to be against the public interest. It is significant that in C.A. Abraham's case this court was not called upon to determine whether penalty proceedings were penal or of quasi-penal nature and the observations made with regard to penalty being an additional tax were made in a different context and for a different purpose. It appears to have been taken as settled by now in the sales tax law that an order imposing penalty is the result of quasi-criminal proceedings: Hindustan Steel Ltd. Vs. State of Orissa, .. In England also it has never been doubted that such proceedings are penal in character: Fattorini (Thomas) (Lancashire) Ltd. v. Inland Revenue Commissioners, [1943] 11 ITR 50."

8. It is true that penalty is also imposed in respect of a particular assessment year, but penalty proceedings are not part of assessment proceedings, and, therefore, the principle that the law applicable under the Income Tax Act to a particular assessment year is the law prevailing on the 1st day of April of that year does not apply to penalty proceedings. In our opinion, the law which will apply to penalty proceedings will be the law as it stands on the day on which the default is committed. Now, in cases of concealment or of furnish inaccurate particulars the date of such default will be the date on which the return is filed irrespective of the assessment year to which it relates.

9. It could not have been the intention of the legislature that persons who filed incorrect returns within the meaning of the Explanation to Section 271(1)(c) after 1st April, 1964, when the amendment came into force, should be treated differently, depending on the year of assessment to which the returns relate. Such an interpretation might well invalidate the amended provisions in question, being violative of Article 14 of the Constitution. We find no justification for such an interpretation. In our opinion, on a plain reading of the amended provisions, it is clear that any one who files an incorrect return after 1st April, 1964, is liable to be dealt with according to the amended provisions of Section 271(1)(C) regardless of the year to which the return relates.

10. Our attention has been drawn to a decision of this court in the case of Saeed Ahmad Vs. Inspecting Assistant Commissioner of Income Tax, Range II, ., where it has been held that the amendment in Section 271 is of procedural nature and does not affect the substantive right and, as such, it will apply to all pending proceedings. As against this, the learned counsel for the assessee has relied upon the decision of the Kerala High Court in the case of HAJEE K. ASSAINAR Vs. COMMISSIONER OF Income Tax, KERALA., ., where it has been held that the amendment in question is not procedural in nature but affects substantive rights, and as such is not retrospective. This controversy, in our opinion, is not really material, because, as has been pointed out above, the principle that the law applicable to assessments is the law prevailing on the 1st day of the assessment year, is not applicable to penalty proceedings, which are not of the nature of assessment proceedings but are of a criminal nature. The amendment, whether substantive or procedural, will apply to all cases where the default or the offence is committed after April, 1964, irrespective of the assessment year to which it relates. The view that we are taking finds full support from a decision of the Punjab High Court in the case of Commissioner of Income Tax Vs. Bhan Singh Boota Singh, . and of the Gauhati High Court in the case of Rajputana Stores Vs. Inspecting Assistant Commissioner of Income Tax and Others, . We accordingly answer the first question in the negative, in favour of the department and against the assessee.

11. Our answer to the first question, however, does not conclude the matter. It may still be open to the assessee to show that even under the amended provisions no penalty was called for. It may be argued that for the purpose of levy of penalty an assessment order is not conclusive of the fact that a particular income included in the assessment was really the assessee's income. The Supreme Court has laid down this proposition in the case of Commissioner of Income Tax v. Anwar Ali. The question is as to whether that decision of the Supreme Court has been impliedly overruled by the legislature or the principles laid down therein are still applicable. If the principle laid down in Anwar Ali's case is still applicable then the assessee might very well say that the income on which he had been assessed cannot be regarded as his real income which he had omitted to disclose in the return. The income has been estimated because his accounts were not properly maintained. There is no independent proof that the

income assessed was the real income earned by the assessee which he failed to disclose in his return. In the alternative, it may be argued that, even under the amended provisions, a penalty cannot be imposed unless and until the disparity between the income assessed and the income returned is attributable to fraud or gross or wilful neglect on the part of the assessee. It may be open to the assessee to show that there was no fraud or gross or wilful neglect on his part merely because accounts maintained by him were found incomplete or unsatisfactory or as in the instant case he failed to produce the excise register before the Income Tax Officer. Excise register is not a part of the account books and, as such, failure on the part of the assessee to produce such a register may not amount to fraud or gross or wilful neglect on his part. Unfortunately, the Tribunal has not applied its mind to this aspect of the case even though the Inspecting Assistant Commissioner of Income Tax did record a finding on this point. We, therefore, cannot answer the second question unless the Tribunal records its finding first. The Tribunal shall now record the necessary finding on the second question while disposing of the case u/s 260 of the Income Tax Act.

12. In the end while we answer the first question in the negative, in favour of the department and against the assessee, we return no answer to the second question, which shall now be decided by the Tribunal. In the circumstances, we make no order as to costs.