

(1992) 12 RAJ CK 0030

In the Rajasthan High Court

Case No : Incime-Tax Reference No. 54 of 1981 & Income Tax Reference No. 54 of 1981

Commissioner of Income Tax

APPELLANT

Vs

Dr. A.K. Sharma

RESPONDENT

Date of Decision : 17-12-1992

Acts Referred:

Income Tax Act, 1961 — Section 147, 148, 271(1)

Citation : (1993) 204 ITR 62

Hon'ble Judges : K.C. Agarwal, C.J;V.K. Singhal, J

Bench : Division Bench

Advocate : G.S. Bapna, for the Appellant; N.M. Ranka and J.K. Ranka, for the Respondent

Judgement

V.K. Singhal, J.—In pursuance of the order given by this court u/s 256(2) of the Income Tax Act, 1961, the Income Tax Appellate Tribunal, Jaipur Bench, Jaipur, has referred the following questions of law arising out of the order of the Tribunal dated April 14, 1976, for the assessment year 1966-67 :

"1. Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal misdirected itself in computing the amount of concealed income at Rs. 5,000 as against Rs. 25,071 computed by the Inspecting Assistant Commissioner and thus in reducing the penalty imposed u/s 271(1)(c) of the Income Tax Act, 1961, to a sum of Rs. 7,500 ?

2. Whether the learned Income Tax Appellate Tribunal was correct in law in holding that the penalty should be imposed on the assessee by computing on the basis of the law as obtained on the date of the assessment order and not on the basis of the law as obtained on the date of furnishing of return, i.e., May 21, 1966 ?"

2. The brief facts of the case are that the assessee is a medical practitioner in the Government service. The return of income was filed on May 21, 1966,

showing a total income as Rs. 21,736 which included Rs. 18,000 as income from private practice. The assessment was completed on June 17, 1968, and the income from private practice was increased from Rs. 18,000 to Rs. 25,000 on the ground that the assessee has not maintained any account with regard to his private practice. Subsequently, information came to the knowledge of the Income Tax Officer that the assessee has not disclosed his true income in respect of consultation fees received from the Central Government employees and accordingly proceedings u/s 147 were initiated. It was found that a sum of Rs. 60,571 has been received by the assessee as consultation and injection charges from the employees of the Posts and Telegraphs Department but the same had not been disclosed in the return submitted. The assessee admitted that he must not have received more than Rs. 40,000 from the employees of the Posts and Telegraphs Department and Rs. 2,000 to Rs. 3,000 from other Central Government employees. The Income Tax Officer estimated the income at a figure of Rs. 65,571 as receipts from the employees of the Posts and Telegraphs Department and other Central Government employees. A sum of Rs. 6,000 was allowed in respect of expenses.

3. Against the above order, the matter was challenged before the Appellate Assistant Commissioner who has confirmed so far as gross receipts were concerned but allowed the deduction of Rs. 12,000 instead of Rs. 6,000 in respect of expenses. This order of assessment was confirmed by the Income Tax Appellate Tribunal.

4. Penalty proceedings were initiated by the Inspecting Assistant Commissioner when the assessee was confronted with the two returns filed on May 21, 1966, and July 22, 1970, where the income of Rs. 18,000 and Rs. 25,000 have been shown as his correct income. The statements were recorded on July 27, 1970, wherein it was stated that the major part of the income has been received from the employees of the Posts and Telegraphs and Accountant-General's Office, Food Corporation, Income Tax, All-India Radio and Salt Commissioner's office and that he has kept a register which has since been lost. A letter was written by the Post-Master General, Jaipur, to the Superintendent of Police (S. P. E.) as under :

"Sub : Ways to prevent abuse of medical reimbursement facilities granted to Government employees.

The authorised medical attendants who have received consultation and injection fees of the total income above Rs. 1,000 from the Posts and Telegraphs employees from 1965-66 are detailed in annexure-"A"-

Annexure-"A"-

1. Dr. A.K. Sharma Rs. 60,561."

A true copy of the aforementioned letter was received by the Income Tax Department.

5. When the matter with regard to quantum appeal was considered by the Tribunal, it was observed as under :

"From his statement dated July 27, 1970, and also from the findings of the authorities below, it is clear that the assessee was having good income from private practice in the assessment year under consideration. Whatever information was gathered by the Income Tax Officer was brought to the notice of the assessee specifically. From the statement of the assessee it is clear that, before he verified the bills of the employees of the Posts and Telegraphs Department and other departments, he received the money from them. The Income Tax Department, in pursuance of the aforesaid letter, gathered information regarding the receipt from the Posts and Telegraphs Department, by the assessee in the assessment year under consideration. The details of the said information are on record. Before us, on behalf of the assessee, an argument was advanced that the assessee was not given opportunity to see the information which was collected by the Income Tax Department. The Income Tax Officer, in the assessment order, has clearly stated that the assessee was given full opportunity to meet the information which he gathered from the said department. The assessee never informed the Income Tax Officer that he would file correct information regarding his receipts from the said Department before him. Looking to the assessment order and the material on record, it could not be said that the assessee was able to show that the information collected by the Income Tax Department regarding receipts by the assessee in the year of account was an imaginary figure. As a matter of fact, the information gathered by the Income Tax Department could very easily be rebutted by the assessee by producing some official from the said Department before the Income Tax authorities. This was not done by the assessee. The assessee only took the plea before the Income Tax Officer that the said amount was excessive."

6. The Inspecting Assistant Commissioner came to the conclusion that the Posts and Telegraphs Department has written in their letter dated January 4, 1967, that the payment of Rs. 60,571 has been received by the assessee and it was relied upon by the Income Tax Appellate Tribunal as well. It was further mentioned that the assessee has not produced any record and, in accordance with his statement dated July 27, 1970, a register was kept by him in which the names of the patients were mentioned who have claimed reimbursement from the Government but the said register was not produced by the assessee for reasons best known to him. A sum of Rs. 25,071 was considered as the concealed income after taking into consideration the income from the Posts and Telegraphs Department of Rs. 60,571 and income from other departments at Rs. 2,500 and allowing the expenditure at a figure of Rs. 20,000 (instead of Rs. 12,000 allowed by the Tribunal) and reducing the professional income declared as Rs. 18,000 by the assessee in the return.

7. The Inspecting Assistant Commissioner has taken up the matter with the Posts and Telegraphs Department to obtain the details of the figure of Rs. 60,571 and

it was informed that the said bills have been weeded out/destroyed.

8. The assessee has challenged this matter before the Income Tax Appellate Tribunal and there it was submitted that the burden was on the Department to prove that the assessee has concealed the particulars of income and since the original bills which were the primary evidence were weeded out, it could not be said that the assessee has concealed the particulars of his income. It was also submitted that the law as on the date of filing of the original return is applicable in respect of an offence for concealment. The Income Tax Appellate Tribunal came to the conclusion that there is positive evidence with regard to the quantum of concealment to the extent of Rs. 5,000 and since the assessee has not accepted the income at a figure of Rs. 60,571 to have been received from the Posts and Telegraphs Department, the benefit of the doubt was given. The penalty was reduced to a figure of Rs. 7,500.

9. The submission of learned counsel for the Revenue is that there was an amendment by Act 75 of 1964 in Section 271(1)(c) and an Explanation was inserted according to which, where the total income returned by any person is less than 80 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 sub-section. It has further been submitted that the finding which has been given in the assessment proceedings is a finding of fact which remains unchanged and simply because the original vouchers in respect of the receipt of income by the assessee were not produced by the Posts and Telegraphs Department in the penalty proceedings, an adverse inference could not be drawn. The Tribunal has completely ignored the effect of the Explanation and, therefore, the reduction of penalty is not justified.

10. The submission of learned counsel for the assessee, Mr. N.M. Ranka, is that the decision can be given by this court on the basis of the finding of fact as found by the Tribunal. He has placed reliance on the decisions of the apex court given in the cases of *Karnani Properties Ltd. Vs. The Commissioner of Income Tax, West Bengal*, and *Aluminium Corporation of India Ltd. Vs. Commissioner of Income Tax, West Bengal*, . According to the submission of learned counsel for the assessee, when the original evidence with regard to receipt of income was not available either with the Posts and Telegraphs Department or with the Income Tax Department, no adverse inference could be taken against him. It has further been submitted that the proceedings are quasi-criminal in nature and reliance has been placed on the decisions of *Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali*, , *Anantharam Veerasinghaiah and Co. Vs.*

Commissioner of Income Tax , Andhra Pradesh, and Commissioner of Income Tax Vs. Goswami Smt. Chandralata Bahuji, this court held that though the findings given in the assessment proceeding would be relevant and admissible material in penalty proceedings, those findings cannot operate as res judicata because the considerations that arise in penalty proceedings are different from those in assessment proceedings. It was held that the circumstances of the case must be such as to lead to the reasonable and positive conclusion that the amount represents the assessee's income. After considering the facts of the case and more particularly the fact that the Tribunal has held on the totality of the evidence that there was nothing to come to a firm conclusion that the amounts added bona fide represented the income of the assessee and that too the income of the respective years. The question was considered as to whether a question of law arises or not and it was held that no question of law arises from the order of the Tribunal and the reference application submitted u/s 256(2) was dismissed. It has further been submitted by learned counsel for the assessee that the Tribunal has power to redetermine the quantum of penalty on the basis of the concealed income as may be determined afresh on the basis of the evidence before it and reliance has been placed for this on the decision of Commissioner of Income Tax Vs. Devkinandan Bhandari,

11. It has further been submitted that the law as was prevailing on the date of filing of the first return with regard to the quantum of penalty alone shall be applicable and reliance in this respect has been placed on the decisions in Commissioner of Income Tax, Lucknow Vs. M/s. Onkar Saran and Sons, and Commissioner of Income Tax Vs. Kanhaiyalal Ghatiwala,

12. We have considered the arguments of both learned counsel in accordance with the amendment made in 1964. The following changes were brought in the provisions of Section 271(1)(c) :

(1) From the expression "deliberately furnishing inaccurate particulars of such income", the word "deliberately" was omitted and thus "furnishing of inaccurate particulars of the income" itself was made punishable ;

(2) An Explanation was inserted where the income returned by any person was less than 80 per cent. of the amount on which the assessment was made, the burden was on that person to prove that the failure to return the amount of assessed income did not arise from any fraud or any gross or wilful neglect on his part.

13. The effect of the change made in 1964 thus was that the burden which was earlier on the Revenue to prove the offence was shifted on the assessee. This shifting of the burden was of ambulatory character. If the initial burden in the context of the Explanation was discharged by the assessee, then it was for the Department to prove the offence. This Explanation shall not be applicable where the difference between the returned income and the assessed income is less than 20 per cent. and in that case the burden will be on the Department.

14. The finding given in the assessment proceedings are not conclusive but are relevant. The assessee is only required to establish by material evidence the preponderance of probabilities that the failure to return the correct income did not arise from any fraud and/or gross or wilful neglect. It is open to the Tribunal to determine independently in the penalty proceedings the extent of the concealment but that has to be determined on the relevant material available.

15. In the present case, the proceedings u/s 147 of the Income Tax Act, 1961, were initiated and it was found that the assessee had received a sum of Rs. 60,571 as consultation and injection charges from the employees of the Posts and Telegraphs Department but the same had not been disclosed to the Department while filing the return originally. The quantum of income so evaded was confirmed by the Income Tax Appellate Tribunal in the quantum appeal. The finding given in the assessment proceedings may not be binding but it has to be seen as to whether the burden which was on the assessee in view of the Explanation has been discharged by him or not.

16. In the order of the Income Tax Appellate Tribunal, it was found that there is nothing on record to show that the Income Tax Officer who made the original assessment had information in his possession as contained in the letter of the Post-Master General dated January 4, 1971. It was found that the Inspecting Assistant Commissioner of Income Tax has given a categorical finding in his order that the said letter is not traceable on record and that its whereabouts are not known. Firstly, when a letter has been sent by a Government Department to the Income Tax Department which has been taken into consideration while finalising the assessment, non-availability of the said letter could be only an act in which the assessee or the Department may be involved. It is for the Department to arrange its affairs in such a manner so that it may not be an easy game for the assessee or official of the Department to get the relevant papers removed from the file in order to escape the liability. Action should have been taken against the concerned person who was responsible for it. In the order of the Inspecting Assistant Commissioner, the copy of the letter dated January 4, 1967, has been reproduced in which it has been shown that the assessee had received the income of Rs. 60,571 from the Posts and Telegraphs Department itself. It has not been alleged that there was any prejudice of the said Department against the assessee. The Inspecting Assistant Commissioner, in the penalty proceedings, has, while reproducing the order of the Tribunal, mentioned that "whatever information was gathered by the Income Tax Officer was brought to the notice of the assessee specifically. From the statement of the assessee, it is clear that, before verifying the bills of the employees of the Posts and Telegraphs Department and other departments, he received the money from them. The Income Tax Department, in pursuance of the aforesaid letter, gathered information regarding the receipts from the Posts and Telegraphs Department, by the assessee in the assessment year under consideration. The details of the said information are on the record. Before us, on behalf of the assessee, an argument was advanced that the assessee was not given an opportunity to see the

information which was collected by the Income Tax Department. The Income Tax Officer, in the assessment order, clearly stated that the assessee was given full opportunity to meet the information which he gathered from the said Department. The assessee never informed the Income Tax Officer that he would file correct information regarding his receipts from the said Department before him. Looking to the assessment order and the material on record, it could not be said that the assessee was able to show that the information collected by the Income Tax Department regarding receipts by the assessee in the year of account was an imaginary figure. As a matter of fact, the information gathered by the Income Tax Department could very easily be rebutted by the assessee by producing some official from the said Department before the Income Tax authorities. This was not done by the assessee. The assessee only took the plea before the Income Tax Officer that the said amount was excessive."

17. The finding which has been given by the Tribunal was based on the evidence on record and has been considered in the quantum appeal by the Tribunal. It could have been brushed aside in the penalty proceedings only by some other evidence and not by evaporation of the said evidence. If this is permitted, then it would give the assessee or the interested official of the Department to remove the papers from the file. If evidence which was in existence at the time of assessment, was availed of at the time of assessment and was against the assessee and has also been considered by the Tribunal and on the basis of which the finding of fact has been given, non-availability of the said evidence in the penalty proceedings cannot be of any avail to the assessee. Another important factor which was taken into consideration by the Inspecting Assistant Commissioner was that the assessee had admitted in his statement dated July 27, 1970, that he kept a register for entering the names of the patients who claimed reimbursement from the Government. This register was not produced by the assessee. In view of the amendment in 1964, it was for the assessee to discharge his burden initially.

18. The Tribunal has observed that there is concealment of income by the assessee on the basis of his own admission of the figure of Rs. 40,000 which was even more than the income returned and on that basis the concealment was determined. In the case of penalty proceedings where the highest degree of proof is required than in assessment proceedings, the benefit of doubt can be given to the assessee. But that must be based on some evidence contrary to what is in the possession of the Department. The Department has proceeded in the absence of books of account on best judgment basis as was initially done in this case but, when certain facts and figures were received, it was for the assessee to have rebutted the information available in the possession of the Department. There could be circumstances where, for one reason or another, evidence which was initially with the Department has been lost or destroyed. If the said evidence was considered in the assessment proceedings, then simply because the said evidence was not available at the time of penalty proceedings cannot be a ground for exonerating the assessee when he himself is guilty of non-

production of the documents which were in his possession, namely, the register which was admitted by him in his statement and has not been produced. No positive evidence was brought by the assessee contrary to what the Department had. Even according to the Explanation, it was the duty of the Tribunal to have given a finding as to whether the onus which was on the assessee to prove absence of fraud and gross or wilful neglect has been discharged or not.

19. In *Vishwakarma Industries v. CIT* [1982] 155 ITR 652, the Full Bench of the Punjab and Haryana High Court has held that once the Explanation is held to be applicable to the case of an assessee, three presumptions are raised, 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. It was observed that, in cases of concealment of income and tax evasion, the modus of concealment is obviously within the special knowledge of the assessee. Consequently, in cases of blatant evasion, the Legislature was compelled to take off the impossible burden of establishing facts which are obviously in the special knowledge of the assessee alone. The onus was, therefore, rightly placed on the shoulders of the assessee who alone could reasonably discharge the same. The insertion of the Explanation and the omission of the word "deliberately" was not merely declaratory of the existing law but designed to effect a change in law. This judgment of the Full Bench was approved by the Supreme Court in the case of *Chuharmal Vs. Commissioner of Income Tax, M.P.*,

20. This court in *Commissioner of Income Tax Vs. Chandi Prasad Khaitan*, has held that the assessee's conduct and the reasons as assigned by the Income Tax Officer while imposing the penalty were required to be seen and placing the entire burden of proof on the Revenue was not justified.

21. Regarding the quantum of penalty, the law is settled by the decision of the Supreme Court in *Commissioner of Income Tax, Lucknow Vs. M/s. Onkar Saran and Sons*, wherein it has been held that the law applicable would be the law as it stood at the time when the original return was filed for the assessment year in question and not the law as it stood on the date on which the return was filed in response to the notice u/s 148.

22. From the facts as found above, we are of the opinion that the Income Tax Appellate Tribunal was not justified in placing the burden on the Revenue and reducing the quantum of concealment in the facts and circumstances of this case.

23. The Tribunal has wrongly proceeded on the assumption on the basis of admission of the assessee that the income received from the employees of the Posts and Telegraphs Department was Rs. 40,000. There was no evidence in support of its conclusion and no evidence was brought by the assessee on record to prove that the figures received from the Posts and Telegraphs Department

were incorrect. We are further of the view that the Income Tax Appellate Tribunal misdirected itself in computing the amount of concealed income at Rs. 5,000 as against Rs. 25,071 computed by the Inspecting Assistant Commissioner and thus reducing the penalty imposed u/s 271(i)(c) of the Income Tax Act, 1961, to Rs. 7,500. It is further held that the penalty could be imposed on the basis of the law as was prevalent on the date of furnishing of the original return.

24. The reference is answered accordingly.