
(1980) 04 RAJ CK 0023
In the Rajasthan High Court
Case No : IT Reference No. 52 of 1978

Commissioner of Income Tax

APPELLANT

Vs

Dr. A.M. Simlot

RESPONDENT

Date of Decision : 10-04-1980

Acts Referred:

Income Tax Act, 1961 — Section 143, 144, 147, 256, 256(1)

Citation : (1980) 4 TAXMAN 338

Hon'ble Judges : Mahendra Bhushan, J;M.L. Shrimal, J

Bench : Division Bench

Advocate : S.M. Mehta, for the Appellant; S.K. Jindal and N.K. Jain, for the Respondent

Final Decision : Allowed

Judgement

Mahendra Bhushan, J.—This is an application moved by the Commissioner of income tax, Jaipur, u/s 256(2) of the income tax Act, 1961 (Act No. 43 of 1961) (hereinafter referred to as "the Act"), requiring the income tax Appellate Tribunal, Jaipur Bench, Jaipur, to state the case and to refer the following point of law allegedly arising out of the order of the Tribunal to this court, for our opinion : 2. Whether, in the facts and circumstances of the case, the Tribunal was justified in cancelling the penalty of Rs. 85,000 imposed by the Inspecting Assistant Commissioner u/s 271(1)(c) of the income tax Act, 1961?

Briefly stated, the facts of the case, out of which this application arises, are these:

One Dr. L. M. Simlot (since dead), now represented by his two sons and widow (hereinafter referred to as "the assessee"), was an individual medical practitioner and in the relevant assessment year 1966-67 was in the employment of the Government of Rajasthan at Moti Katla Dispensary, Jaipur, and apart from the salary income, he had also income from private practice. The said assessee was not keeping accounts of his private practice for the relevant assessment year

1966-67. The assessee filed several returns declaring his income from profession, which varied from Rs. 50,000 to Rs. 25,000 but finally the assessee declared his income from profession at Rs. 48,802 in his return dated April 12, 1968. According to the assessee, gross professional receipt was Rs. 93,302, but he had actually realised Rs. 50,802. A deduction of Rs. 2,000 towards expenses was claimed to arrive at the net figure of Rs. 48,802 in the return of income. Information was gathered by the ITO to the effect that the assessee had issued essentiality certificates to the employees of the postal department, and gross receipts were Rs. 1,09,489. The assessee was confronted with these figures on October 6, 1967, and was allowed to rebut the figures, but he simply replied that he got only the amount shown by him in his final return, and the same was recorded in his registers. The ITO relying on the amount of fees received by the assessee, as shown in the registers of postal department, on the basis of essentiality certificates issued by the assessee, held that the assessee received from the postal department an amount of Rs. 1,09,489. The assessee was assessed accordingly.

2. The assessee filed an appeal before the AAC, C-Range, Jaipur, who confirmed the assessment made by the ITO and dismissed the appeal of the assessee. Thereafter, an appeal was preferred by the assessee in the income tax Appellate Tribunal, Jaipur Bench, Jaipur, and the Tribunal partly accepted it and held that it will be fair and just and well meet the ends of justice, if the Tribunal estimated non-recovery as Rs. 2,489. It was, therefore, held that the real income which the assessee earned during the relevant year from private practice would be Rs. 1,05,000.

3. It appears that penalty proceedings u/s 271(1)(c) of the Act on the ground that the assessee had concealed particulars of his income, or furnished inaccurate particulars of such income, were initiated by the ITO against the assessee, and as the minimum penalty leviable exceeded Rs. 1,000, he referred the same to the IAC, Jaipur Range-I, Jaipur, who, vide his order dated October 6, 1972, imposed a penalty of Rs. 85,000 on the assessee.

4. The petitioner preferred an appeal to the income tax Appellate Tribunal, Jaipur Bench, Jaipur, which, vide its order dated May 31, 1976, accepted the same and the order of the IAC imposing a penalty on the assessee was set aside.

5. An application u/s 256(1) of the Act by the Commissioner, Rajasthan (II), Jaipur, was filed before the Appellate Tribunal to refer for the opinion of this court the question of law, referred to above. The Tribunal, vide its order dated December 17, 1976, refused to make a reference to this court on the ground that the question suggested for reference is purely a question of fact. As already observed above, the Commissioner has moved this court u/s 256(2) of the Act.

6. The contention of Mr. Mehta, the learned advocate for the Revenue, is that the question sought to be referred to this court is a question of law, inasmuch as the finding of fact arrived at by the Tribunal is merely based on conjectures and

surmises, and is perverse. In support of his contention, that if the finding of fact arrived at by the Tribunal is perverse, then it is a question of law, which should be referred for opinion to this court, the learned advocate has placed reliance on *Oriental Investment Co. (P) Ltd. Vs. Commissioner of Income Tax, Bombay*, *Commissioner of Income Tax (Central), Calcutta Vs. Daulat Ram Rawatmull*, *G. Venkataswami Naidu and Co. Vs. The Commissioner of Income Tax*, and *CIT v. Dr. A. K. Sharma* (Certified copy of the judgment (order) dated July 31, 1979, in D.B. income tax Ref. Case No. 64 of 1978) (see p. 23 infra). On the contrary, the learned advocate for the assessee contends that whether or not the assessee had concealed the particulars of income is purely a question of fact, which does not call for any reference. In support of his contention, the learned advocate has placed reliance on *Commissioner of Income Tax, Ahmedabad Vs. Gokuldas Harivallabhdas*, *Addl. Commissioner of Income Tax Vs. Gem Palace*, *ADDITIONAL COMMISSIONER OF Income Tax, RAJASTHAN Vs. NOOR MOHD and CO. AND OTHERS.*, and *Commissioner of Income Tax Vs. Goswami Smt. Chandralata Bahuji*,

7. It may be stated at the very outset that the jurisdiction conferred on this court in dealing with a reference application u/s 256(1) or (2) of the Act is a very limited one, and before the same can be invoked or exercised, it must involve a question of law. The finding of fact recorded by the Tribunal has to be taken as conclusive, unless the same is unsupported by evidence, or is unreasonable and perverse in nature. Therefore, though the finding, whether or not the assessee had concealed the particulars of his income is purely a question of fact, but if there is no evidence to support it, or if it is perverse, then it is open to attack as erroneous in law.

8. An Explanation to section 271 was inserted by the Finance Act, 1964, with effect from April 1, 1964, to the following effect:

Explanation. -Where the total income returned by any person is less than 80 percent, 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 reduction), 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.

9. The present is a case where the total income returned by the assessee is less than 80 percent, of the total income assessed, and, therefore, the Explanation to section 271(1)(c) is attracted. Therefore, there is a presumption, though rebuttable, that the assessee concealed the particulars of his income or furnished inaccurate particulars of income for the purpose of clause (c) of sub-section (1) of section 271 of the Act. Though the Tribunal has not referred to the Explanation

referred to above, yet as the proceedings were initiated u/s 271(1)(c) of the Act and the IAC, Jaipur Range, Jaipur, in his order dated October 6, 1972, imposing the penalty amounting to Rs. 85,000 has referred to the Explanation to section 271(1) (c) and observed that the assessee failed to discharge the onus cast on him under that provision, it may be said that the Tribunal also must have considered the Explanation while accepting the appeal of the assessee, against imposition of penalty on him. The law is settled that though the findings given in assessment proceedings are relevant and admissible materials 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. The Tribunal in its order dated May 31, 1976, out of which, according to the Revenue, the point of law arises, has observed that they have already observed while disposing of the appeal of the assessee in the quantum matter, "it accords with human experience and probabilities that the assessee might not have realised his fees in entirety from all the patients before signing the essentiality certificates". The essentiality certificates issued by the assessee to the employees of the postal department were on record in quantum proceedings and similarly the register of the postal department also contained entries of disbursement of Rs. 1,09,000 to the employees on the basis of essentiality certificates. The case of the assessee also was that he issued essentiality certificates for the entire sum, but pleaded that he only received 50 percent, of the amount and he did not examine any of the employees to prove that against the essentiality certificates issued to them by the assessee, they only paid 50 percent, of the amount. This assertion was not based on any evidence, and in the presence of overwhelming evidence and on the finding of the Tribunal in the quantum matter, only on the affidavit and statement of the assessee, it was, therefore, not rationally possible for the Tribunal to hold that the presumption under the Explanation to section 271(1)(c) of the Act stood rebutted. The material on which the finding of the Tribunal that the assessee did not conceal the particulars of his income is based was not such on which any reasonable man can come to the conclusion to which the Tribunal has come. The finding of fact recorded by the Tribunal, therefore, is perverse, and as such the Tribunal committed a clear error in holding that no question of law arises for making a reference to this court u/s 256 of the Act.

10. We may also like to mention here that during the course of arguments, the learned advocate for the assessee also argued that controversy is also involved as to whether the penalty should be imposed on the assessee by computing on the basis of law as prevalent on the date of the assessment order, or on the basis of law as prevalent on the date of furnishing of the return, and as such, a question relating to that controversy be also framed and a reference called for. This court in *Educational and Civil List Reserve Fund No. I, Udaipur and Others Vs. Commissioner of Income Tax, Delhi and Rajasthan, New Delhi*, has held that if a reference is made both the parties are entitled to suggest questions for reference, provided the same arises out of the order of the Tribunal. We

respectfully agree with that view. But, we may observe that even by the consent of the parties, this court cannot direct the Tribunal to refer a point of law to this court for opinion unless the same arises out of the order of the Appellate Tribunal. In the instant case, a perusal of the judgment of the Appellate Tribunal will show that a controversy was never raised before it, as to whether the penalty should be imposed on the assessee by computing on the basis of law as prevalent on the date of the assessment order or on the basis of law, as prevalent on the date of furnishing of the return. Therefore, we are of the view that this point of law does not arise out of the order of the Appellate Tribunal, and as such notwithstanding the agreement of the learned counsel, we are unable to frame a point of law on that controversy, and call for a reference.

11. Thus, the only following point of law arises out of the order of the Appellate Tribunal, which needs reference to this court: Whether, on the facts and in the circumstances of the case, the Tribunal was justified in cancelling the penalty of Rs. 85,000 imposed by the Inspecting Assistant Commissioner u/s 271 (1)(c) of the income tax Act, 1961?

In the result, the reference application is allowed, and the income tax Appellate Tribunal, Jaipur Bench, Jaipur is directed to state a case and make a reference of the above point within a period of three months from the date of this order for being decided by this court. In the facts and circumstances of this case, the parties are left to bear their own costs of this reference.