
(1974) 02 AHC CK 0032

In the Allahabad High Court

Case No : Income-tax Reference No. 629 of 1972

Commissioner of Income Tax

APPELLANT

Vs

Faizuddin

RESPONDENT

Date of Decision : 16-02-1974

Acts Referred:

Income Tax Act, 1961 — Section 271(1)

Citation : (1977) 108 ITR 395

Hon'ble Judges : R.L. Gulati, J;H.N. Seth, J

Bench : Division Bench

Advocate : Deokinandan, for the Appellant; R.R. Agarwal, for the Respondent

Final Decision : Dismissed

Judgement

R.L. Gulati, J.—At the instance of the Commissioner of Income Tax, U. P., Lucknow, the Income Tax Appellate Tribunal, Delhi Bench "A", has submitted the following question of law, u/s 256(1) of the Income Tax Act, 1961, for the opinion of this court :

"Whether, on the facts and in the circumstances of the case, the Tribunal was legally correct in cancelling the penalty of Rs. 12,000 levied u/s 271(1)(c)/274(2) of the Income Tax Act, 1961.

2. The assessee is an individual and derives income from various sources, including the running of motor workshop, contract business, truck plying on hire and truck financing. For the assessment year 1966-67, the assessee filed a return showing an income of Rs 7,587. Later on, he filed a revised return showing an income of Rs. 22,630. The Income Tax Officer, however, determined the income at Rs. 45,758. In the assessment was included a sum of Rs. 16,000 being an unexplained cash credit. The Income Tax Officer also initiated proceeding for levy of penalty u/s 271(1)(c) of the Income Tax Act, 1961. As the minimum penalty imposable was more than Rs. 1,000, the Income Tax Officer transferred the proceedings to the Inspecting Assistant Commissioner of Income

Tax. The Inspecting Assistant Commissioner levied a penalty of Rs. 12,000. In the meantime, the assessee's appeal against the assessment was partly allowed. In the appeal against the penalty the Tribunal held that mere addition of an item of cash credit in the assessee's income does not itself justify the imposition of penalty on the ground of concealment of income and, as such, the penalty order was set aside. The Commissioner is aggrieved and at his instance the Tribunal referred the question of law mentioned above for the opinion of this court.

3. Now, the view taken by the Tribunal that mere addition of an item of unexplained cash credit to the income is not enough to attract penalty but there must be some independent proof of the fact that what was added was really the income of the assessee which he had deliberately concealed, is supported by a decision of the Supreme Court in the case of Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, .

4. Mr. Deokinandan, the learned counsel for the department, argues that in this case the Explanation to Section 271(1)(c) is applicable and the penalty should have been upheld on that ground. According to the Explanation added in 1964, an assessee shall be deemed to have concealed his income or furnished inaccurate particulars thereof if the income returned by him turns out to be less than 80 per cent. of the income assessed minus the addition to the income on account of deductions claimed and disallowed by the Income Tax Officer, provided he proved that the failure to return the correct income was not due to any fraud or gross or wilful neglect on his part. The Inspecting Assistant Commissioner of Income Tax, no doubt, at one place has remarked that the assessee had not proved that the failure to return the correct income was not due to fraud or wilful neglect on his part but he has not recorded a finding that the income returned by the assessee was less than 80 per cent. of the income as finally assessed by the Income Tax Officer less the deductions claimed and disallowed by him. However, before the Tribunal the point that the assessee was liable to penalty because of the Explanation does not appear to have been raised at all. Had such a point been raised the Income Tax Appellate Tribunal would have given a finding that the income finally assessed after the reduction in appeal and as reduced by the deductions claimed by the assessee and disallowed by the Income Tax Officer was more than 80 per cent. of the income returned by the assessee. In the absence of such a finding the Explanation cannot be pressed into aid. We in our advisory jurisdiction u/s 256(1) of the Income Tax Act cannot record such a finding and in the absence of such a finding the question as to whether the Explanation is applicable or not cannot be answered. In its application u/s 256(2) of the Income Tax Act also the department has not asserted that the point with regard to the applicability of the Explanation to Section 271(1)(c) was raised before the Tribunal and it had failed to deal with it nor indeed any such point is included in the question which had been referred to us. In the circumstances we are unable to hold that the question sought to be answered arises out of the order of the Tribunal.

5. The case of the Kerala High Court in Commissioner of Income Tax Vs. Gates Foam and Rubber Company, has no application to the facts of the present case. There it was found as a fact that the assessee had set up a bogus firm the income of which was included in the assessee's total income. The High Court found that this is was a fraud committed by the assessee and, therefore, the case was covered by the Explanation to Section 271(1)(c). It is clear that the question of applicability of the Explanation was raised and considered by the Tribunal and, as such, the question did arise out of the order of the Tribunal and the High Court considered its applicability. Such is not the case here.

6. We, accordingly, answer the question in the affirmative, in favour of the assessee and against the department. The assessee is entitled to costs which we assess at Rs. 200.