
(2006) 07 AHC CK 0093

In the Allahabad High Court

Case No : Income-tax Reference No. 42 of 1990

Commissioner of Income Tax

APPELLANT

Vs

Ganesh and Co.

RESPONDENT

Date of Decision : 31-07-2006

Acts Referred:

Income Tax Act, 1961 — Section 256(1), 271(1), 274(2)

Citation : (2006) 286 ITR 580

Hon'ble Judges : Vikram Nath, J; R.K. Agrawal, J

Bench : Division Bench

Advocate : Shambhoo Chopra, for the Appellant;

Judgement

1. The Income Tax Appellate Tribunal, Allahabad, has referred the following question of law u/s 256(1) of the Income Tax Act, 1961 (hereinafter referred to as "the Act"), for the opinion to this court:

Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the Income Tax Officer did not have jurisdiction to impose penalty u/s 271(1)(c) without obtaining the prior consent of the Inspecting Assistant Commissioner in terms of Clause (iii) of Sub-section (1) of Section 271 of the Income Tax Act, 1961 ?

2. The reference relates to the years 1974-75 and 1975-76.

3. Briefly stated the facts giving rise to the present reference are as follows:

4. The assessee is a firm carrying on business in grains, oils, etc., on own accounts as well as on "arhat". Its accounting year, for the assessment year 1974-75 ended on March 31, 1974. In respect of the said accounting year, the assessee earned arhat at the rate of 3 per cent, but in its accounts, it credited arhat at the rate of 2 per cent, only, reducing thereby the arhat income by Rs. 9,956. It was explained by the assessee that as there was dispute with regard to the charging of the arhat at a higher rate, the matter was referred for arbitration

and in the next year when the arbitrator decided the issue in favour of the assessee, it accounted for the sum of Rs. 9,956 in its accounts in the next year. On verification the Income Tax Officer found that the above explanation was not correct and that the assessee had not disclosed the income of Rs. 9,956 in respect of the assessment year 1975-76 also. Accordingly, he made the impugned addition of Rs. 9,956 to the assessee's arhat account in respect of the assessment year 1974-75. The said addition was confirmed in appeal by the Tribunal vide its order in I.T.A. Nos. 2016, 2017 and 2818 (Alld) of 1979 dated March 18, 1981. While holding as above, the Tribunal made the following observations:

8. In our opinion, there is merit in the departmental stand. There is no evidence to show that there was any kind of dispute between the assessee and its clients. Admittedly, the assessee had charged arhat at increased rates during this year and the receipts in question came to him as pure commercial receipts. The assessee should, therefore, have declared them in this return for the year under consideration. The Income Tax Officer, in our opinion, was justified in adding it to the assessee's total income. We accordingly confirm the order of the learned Commissioner of Income Tax (Appeals) on this point. 5. The following further additions were made by the Income Tax Officer to the assessee's income in respect of the assessment year 1974-75:

1. Rs. 1,000 on account of business in the name of Sri Ram Samujh Yadav.
2. Rs. 4,500 in the name of Sri Mohd. Haneef.
3. Rs. 6,500 credited in the name of Sri Rajendra Kumar.

In the context of the first addition of Rs. 1,000 in the name of Sri Ram Samujh Yadav, the Income Tax Officer has pointed out "No evidence has been led to prove that Sri Ram Samujh Yadav was a genuine person and that the business in his name was actually his own. The Income Tax Officer has given detailed reason and the addition has been confirmed by the Commissioner of Income Tax (Appeals), in para. 9 of the appellate order. On this basis of the appellate order, the concealment to this extent is established.

6. Regarding the other two items, the finding of the Income Tax Officer is that no evidence has been led in support of the deposits made in the names of the aforesaid two persons, nor has it been shown that two persons were having sufficient financial resources to make the deposits. The aforesaid additions were confirmed in appeal by the Income Tax Appellate Tribunal also.

7. In respect of them, the Income Tax Officer imposed penalty u/s 271(1)(c), as in his opinion, there was no satisfactory explanation for not including the said income in the assessee's total income, in the return filed by the assessee for the assessment year 1974-75.

8. On appeal the learned Appellate Assistant Commissioner deleted the penalty in question by observing that the order had not placed any material on record in

penalty proceedings in respect of the charge of concealment of income.

9. The Revenue filed an appeal against the aforesaid order of the Tribunal and submitted that the penalty ought to have been sustained by the learned Appellate Assistant Commissioner in view of the finding of the Tribunal in the quantum appeal.

10. On behalf of the assessee, it was pointed out that the penalty order passed by the Income Tax Officer was void ab initio as the Income Tax Officer had not taken advance permission from the Inspecting Assistant Commissioner before he passed the impugned order and that the concealment with reference to which penalty proceedings were initiated, exceeded Rs. 25,000 and, therefore, the imposition of penalty without the consent of the Inspecting Assistant Commissioner was wrong in view of the proviso to Clause (iii) of Sub-section (1) of Section 271 of the Income Tax Act, 1961.

11. In respect of the assessment year 1975-76, the Income Tax Officer imposed penalty with respect to concealment of income of Rs. 23,927. In respect of this year also, the learned Appellate Assistant Commissioner deleted the penalty for the reasons given for the assessment year 1974-75. The Departmental contention for this year is the same as for the assessment year 1974-75. The assessee's objection to the imposition of penalty is similar to that raised in respect of the assessment year 1974-75, viz., since the additions made, in respect of which the penalty notice was issued, exceeded Rs. 1 lakh which was higher than the statutory figure of Rs. 25,000 the Income Tax Officer should have obtained the prior consent of the Inspecting Assistant Commissioner before imposing the impugned penalty, and inasmuch as he did not do so his order was bad in law. Reference is made in this regard to Commissioner of Income Tax Vs. India Hotel,

12. After examining the facts of the case, the Tribunal held that the Appellate Assistant Commissioner's order could not be sustained on the merits but the objection based on law as contained in the proviso to Clause (iii) of Sub-section (1) of Section 271 was justified and so the assessee's point of view must prevail and the appeal of the Revenue should be dismissed. While taking the above view, the Tribunal went into the legislative history of the provisions in question and so took note of the ratio of the decision of the Allahabad High Court in Commissioner of Income Tax Vs. India Hotel, and observed, inter alia, as below:

The above enunciation of the scope of Section 274(2) provides, in our opinion, sufficient guidelines to interpret the language of the proviso to Clause (iii) to Sub-section (1) of Section 271 of the Income Tax Act, 1961, for it is in pari materia with the language of Section 274(2) and, therefore, the meaning which was assignable to it in the context of Section 274(2), would also be assignable to it in the context of Clause (iii) of Sub-section (1) of Section 271. Section 274(2) has, in a way, been relocated by the amendment of 1975 in the proviso to Section 271(1)(iii). Earlier also, Section 271(1)(iii) has to be given effect to subject to

the provisions of Section 274(2). The Legislature by the amendment Act has brought in the said two limbs together by inserting the proviso to Section 271(1)(iii) and bringing in it the language of Section 274(2), as far as possible, and deleting simultaneously Section 274(2) from the Act. The original purpose of Section 274(2), is, thus, now achieved by the proviso to Section 271(1)(iii). The said purpose was to demarcate the cases in which the Income Tax Officer could impose the penalty by himself from those in which he could not act himself, but he had to refer the matter to the Inspecting Assistant Commissioner. The only difference in the two situations (i.e., one before amendment and the other after amendment) is that whereas earlier it was the Inspecting Assistant Commissioner who was to impose the penalty himself in those cases where the income concealed was more than Rs. 25,000 as determined by the Income Tax Officer. On assessment, now it is his prior approval that is needed for imposing the penalty. This change, be it noted, does not affect the jurisdiction of the Income Tax Officer to impose penalty on his own without reference/approval of the Inspecting Assistant Commissioner. It continues to be the same as earlier, i.e., in all cases where the amount of income as determined by the Income Tax Officer on assessment, in respect of which particulars have been concealed or inaccurate particulars have been furnished, does not exceed a sum of Rs. 25,000. The key to determine the jurisdiction of the Income Tax Officer u/s 274(2), as noted earlier, was provided by the parenthetical clause within brackets, namely, the amount of income as determined by the Income Tax Officer on assessment in respect of which the particulars had been concealed, etc. This income is relevant only at the point of initiation of the penalty proceedings. The amount as determined by the Income Tax Officer may undergo change as a result of appeal process and, therefore, at the time of imposition of penalty, the figure which will have to be taken into account is not that as determined by the Income Tax Officer, but that as finally determined by the appeal process. This being so, the argument of the learned Departmental Representative that the jurisdiction of the Income Tax Officer should be determined with reference to the amount of income in respect of which the particulars have been concealed or inaccurate particulars have been furnished as finally determined by the Income Tax Officer after hearing the assessee, cannot be accepted.

13. We have heard Sri Shambhu Chopra, learned Counsel for the Revenue and learned Counsel for the assessee.

14. We find that the question raised in this reference is squarely covered by the decision of the apex court in the case of Commissioner of Income Tax, Orissa Vs. Dhadi Sahu, . The apex court has held that the jurisdiction of the Income Tax Commissioner to impose penalty u/s 271(1)(c) without obtaining prior consent of the Inspecting Assistant Commissioner did not cease.

15. In this view of the matter we answer the question in the negative, i.e, in favour of the Department and against the assessee. No orders as to costs.