
(1978) 09 CAL CK 0032

In the Calcutta High Court

Case No : Income-tax Reference No. 451 of 1971

Commissioner of Income Tax

APPELLANT

Vs

Jagadish Prasad Agarwalla

RESPONDENT

Date of Decision : 22-09-1978

Acts Referred:

Income Tax Act, 1961 — Section 271(1)

Citation : (1980) 126 ITR 726 : (1979) 1 TAXMAN 444

Hon'ble Judges : Sudhindra Mohan Guha, J;Dipak Kumar Sen, J

Bench : Division Bench

Advocate : B.L. Pal and P. Majumdar, for the Appellant;D. Pal and R.N. Dutt, for the Respondent

Judgement

Sen, J.—Jagadish Prasad Agarwalla of Nadia, the assessee in the instant case, filed a return of his income for the assessment year 1964-65, the relevant previous year having ended on 1370 B. S. Ratha Jatra, i.e., being the period from the 14th July, 1962, to the 3rd July, 1963, according to the English calendar. During the, assessment, a cash credit of Rs. 15,000 was discovered in his books in the name of one Kedar Nath Agarwalla. Summons u/s 131 of the I.T. Act, 1961, issued to the said Kedar Nath Agarwalla at the address of the latter as furnished by the assessee, by registered post, came back unserved with the postal remark " not known " The assessee's explanation was that Kedar Nath was a citizen of Pakistan, that he was then in Pakistan and had no source of income in India.

2. The ITO held that the source and nature of the said cash credit had not been proved and, accordingly, he treated the same as the assessee's income from undisclosed source and included the same in the assessment of the assessee's income. The said addition of Rs. 15,000 was confirmed by the AAC and the Income Tax Appellate Tribunal.

3. The ITO also initiated proceedings for imposition of penalty u/s 271(1)(c) of the I.T. Act, 1961, and as it appeared to him that the minimum penalty

impossible would be over Rs. 1,000 he referred the case to the IAC. It was discovered by the IAC in the proceedings before him that the credit in the name of Kedar Nath Agarwalla stood at Rs. 20,000 and not Rs. 15,000. He referred the matter back to the ITO who reopened the assessment u/s 147 of the Act, and added the enhanced amount as the assessee's income from undisclosed sources.

4. In the subsequent proceedings before the IAC, it was contended on behalf of the assessee, inter alia, that the creditor had admitted the advance and that it was not necessary for the assessee to explain further the circumstances of the loan. In any event, mere rejection of the assessee's explanation could not lead to an imposition of penalty. The onus was on the revenue to prove concealment of income. The IAC found that the loan was not a genuine one. Only after the summons came back unserved, the assessee had raised the plea that the creditor was a Pakistani citizen and was residing at Pakistan. The creditor was never produced before the revenue authorities and his letters relied on by the assessee were not acceptable. Even the identity of the creditor was not proved therefrom. The IAC held the amount to be the concealed income of the assessee and imposed a penalty.

5. Being aggrieved by the order of the IAC, the assessee preferred an appeal to the Tribunal. It was contended before the Tribunal that apart from disbelieving the explanation of the assessee the revenue had failed to discharge the onus of proving that the said cash credit appearing in his accounts represented nothing but the concealed income of the assessee and, therefore, the penalty proceedings were not sustainable. The decision of the Supreme Court in Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, was cited and relied on.

6. It was contended on behalf of the revenue, inter alia, that the assessee had furnished no evidence to prove the nature of the credit and that the letters written by one Kedar Nath Huzarilal from Kusthia, in Pakistan, did not state that any amount was at all lent to the assessee. Even the identity of the alleged creditor remained unproved. It was also contended that there was justification for making an addition in kerosene drum account for under-valuation of closing stock which was an instance of manipulation of accounts and furnishing of inaccurate particulars of income and, therefore, the penalty could be sustained irrespective of the cash credit.

7. It was also contended that under the Explanation to Section 271(1) of the Act of 1961, introduced with effect from the 1st April, 1964, the assessee would be caught within its mischief in respect of the proceedings in issue.

8. The Tribunal held that as the IAC in his order had not mentioned anything about the Explanation to Section 271(1) and as there was nothing on record to show that the shortfall in the returned income had been attributed to any gross or wilful negligence or fraud on the part of the assessee, it could not be held that the assessee fell within the mischief of the Explanation to the said section. The

Tribunal applied the principles laid down by the Supreme Court in Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, to the facts and held that mere rejection of the explanation of the assessee did not constitute either material or evidence to prove the real nature of the credit or that the amount represented nothing but the concealed income of the assessee. The estimated addition in the kerosene account and in the value of the closing stock of drums were found to have been made because of defective accounting and it could not be said that the same represented the concealed income of the assessee. Accordingly, the Tribunal set aside the order of the IAC imposing penalty and allowed the appeal.

9. On an application of the Commissioner, West Bengal III, Calcutta, u/s 256(2) of the I.T. Act, 1961, this court directed the Tribunal to draw up a statement of case and refer the following questions for the opinion of this court as questions of law arising from the order of the Tribunal :

" Whether, on the facts and in the circumstance of the case and in view of the Explanation to Section 271(1) of the Income Tax Act, 1961, the Tribunal was right in cancelling the order imposing penalty ? "

10. To appreciate the controversy in the instant case it is necessary to refer to the Explanation to Section 271(1)(c) inserted by the Finance Act, 1964, with effect from the 1st April, 1964. The said Explanation is as follows :

" 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 sub-section."

11. It appears that the Explanation can be brought to the aid of the revenue when certain conditions are found to exist, namely, that the correct income of the assessee consisting of his total income as assessed as reduced by the expenditure incurred bona fide by him for the purpose of making or earning the income, but included in the total income for taxation, is found to be more than eighty per cent. of the total income as returned by the assessee. In such a case, the assessee has to prove that the failure to return the correct income did not arise from any fraud or any gross or wilful neglect on his part. On the failure of the assessee to prove the aforesaid, it can be deemed that he has concealed the particulars of his income and/or furnished inaccurate particulars thereof.

12. Learned counsel for the revenue contended that, in the instant case, it will be apparent from the order of assessment itself that the income which was returned

by the assessee was less than 80% of the income on which he was taxed. Learned counsel, however, could not enlighten us from the records if the correct income of the assessee within the meaning of the said Explanation was determined and compared with the income as returned and if it was also determined whether the income as returned was less than eighty per cent. of the correct income. Learned counsel could not state if the assessee was called upon to prove or failed to prove, when so called upon to do, that he was not guilty of fraud or negligence. Accordingly, learned counsel for the revenue submitted that the matter should be remanded for such further enquiry.

13. From the records of the proceedings it appears to us that the IAC, the authority who levied penalty, completely overlooked the Explanation and imposed the penalty on the sole ground that the explanation of the assessee in respect of the single item of cash credit had been rejected. Before the Tribunal, one of the contentions of the revenue, and a half-hearted one, was that the Explanation did apply in the instant case. The revenue did not establish nor attempted to establish that the conditions for the application of the said Explanation had been determined or found. The revenue also did not ask the Tribunal to conduct any further enquiry so that necessary facts or conditions could be determined and the Explanation could be applied. The Tribunal found, and rightly, that the shortfall in the returned income had not been attributed to any gross or wilful negligence or fraud on the part of the assessee by presumption or otherwise. The Tribunal also found that the estimate of the value of the closing stock of drums or the addition in the kerosene account made by the ITO resulting in the enhanced assessment was not the result of any mala fides on the part of the assessee.

14. It cannot be said that the Tribunal did not consider the Explanation to Section 271(i)(c). It also appears from its order that the Tribunal duly considered the facts and circumstances to ascertain whether the Explanation could apply in the instant case and came to the conclusion that the Explanation could not be so applied.

15. It remains to be decided whether the Tribunal should be directed to initiate a further enquiry on the basis of the Explanation to Section 271(1)(c). Normally, the jurisdiction of the High Court in a reference is merely advisory. If any material fact on record necessary to answer the question returned has not been included in the statement of the case the High Court may call for a supplementary statement : Vide *Rajkumar Mills Ltd. Vs. Commissioner of Income Tax, Bombay*, , *The Keshav Mills Co. Ltd. Vs. Commissioner of Income Tax, Bombay North*, and *C.P. Sarathy Mudaliar Vs. Commissioner of Income Tax, Andhra Pradesh*, .

16. However, in certain cases, the Supreme Court has directed the Tribunal to re-hear the matter after indicating the principles of law to be followed. In most of the said cases, the Supreme Court declined to answer the question referred, vide *Commissioner of Income Tax, West Bengal and Another Vs. George Henderson and Co. Ltd.*, and *Commissioner of Income Tax, Bombay City I Vs. Greaves*

Cotton and Co. Ltd., . COMMISSIONER OF Income Tax, WEST BENGAL I Vs. INDIAN MOLASSES CO. P. LTD., . In Raghunath Prasad Poddar, etc. Vs. Commissioner of Income Tax, Calcutta, , the Supreme Court, however, answered the question and also directed an enquiry.

17. This court has followed the Supreme Court and in certain cases has directed the Tribunal to make a further enquiry on fresh evidence to determine the controversy. This cannot be done in each and every case. Such course was adopted by the Supreme Court in the following cases : (a) where the language used by the Tribunal in recording its finding was obscure and its meaning could not be determined ; (b) where the Tribunal failed to consider and decide the applicability of the provisions of a statute ; (c) where the Tribunal had completely misdirected themselves on a question of fact ; (d) where the Tribunal had overlooked any significant material on record or failed to consider any relevant material or evidence ; (e) where the Tribunal had failed to draw necessary conclusions from the primary facts as found.

18. In the instant case, it cannot be said that the order of the Tribunal suffers from any of the defects enumerated above. The Tribunal has considered the relevant statutory provisions and the materials on record. The revenue did not adduce any further evidence before the Tribunal nor did it call upon the Tribunal to conduct any further enquiry to determine the applicability of the Explanation., It was not established before the Tribunal that all facts necessary for the applicability of the said Explanation were on record.

19. Learned counsel for the revenue has drawn our attention to a decision of this court in Commissioner of Income Tax Vs. W.J. Walker and Company, and contended that, in identical circumstances, the court in that case declined to answer the question and directed the Tribunal to determine the question in accordance with law. In our view, the said decision can be distinguished from the/ instant case on facts. In that case, the Tribunal considered the computation of the income as returned and also that of the income as assessed and concluded that the said Explanation to Section 271(1)(c) was applicable but held that it was not possible for the assessee to prove a negative and, therefore, the principles laid down in the case of Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, was applicable. In the instant case, the positive finding of the Tribunal is that the said Explanation does not apply and that the assessee had not been found guilty of fraud or negligence by implication or presumption or otherwise. This finding is not challenged.

20. For the above reasons, we are not inclined to direct a fresh enquiry into the matter. We answer the questions in the affirmative and in favour of the assessee. There will be no order as to costs.

Sudhindra Mohan Guha, J.

21. I agree.