

(1995) 08 AHC CK 0068

In the Allahabad High Court

Case No : Income-tax Reference No. 219 of 1979

Commissioner of Income Tax

APPELLANT

Vs

K.C. Mittal

RESPONDENT

Date of Decision : 31-08-1995

Acts Referred:

Income Tax Act, 1961 — Section 271(1)

Citation : (1996) 132 CTR 371 : (1996) 217 ITR 759 : (1996) 84 TAXMAN 89

Hon'ble Judges : M.C. Agarwal, J;B.M. Lal, J

Bench : Division Bench

Advocate : Shekhar Srivastava, for the Appellant; Sakeel Ahmad, for the Respondent

Judgement

M.C. Agarwal, J.—In pursuance of the directions of this court u/s 256(2) of the Income Tax Act, 1961, the Income Tax Appellate Tribunal (Delhi Bench "D.", Delhi), has referred the following questions for the opinion of this court :

"(i) Whether the assessee can, in law, be said to have discharged its onus under Explanation to Section 271(1)(c) of the Act ?

(ii) Whether, on the facts and in the circumstances of the case, penalty is eligible under the provisions of Section 271(1)(c) of the Income Tax Act, 1961 ?

(iii) Whether the Tribunal is in law justified in deciding the appeal without going into applicability of Explanation to Section 271(1)(c) to the assessee's case ?"

2. We have heard Sri Shekhar Srivastava, learned counsel for the Revenue, and Sri Sakeel Ahmad, learned counsel for the assessee.

3. The proceedings relate to the assessment year 1969-70 for which the assessee filed a return declaring an income of Rs. 18,139. The income finally determined was, however, Rs. 55,767.

4. The Inspecting Assistant Commissioner levied a penalty of Rs. 38,000 calling in aid the Explanation to Section 271(1)(c) of the Act. The assessee appealed to

the Income Tax Appellate Tribunal which allowed the appeal holding that the Revenue had not discharged its onus. The Income Tax Appellate Tribunal observed as follows :

"If the assessee cannot prove his case, the assessment is justified. But in order to impose the penalty, the Revenue authorities cannot merely say that the penalty is attracted because the assessee has not been able to prove its case. On the other hand, the Revenue authorities have to disprove the assessee's case and disproving is not on the mere ipsi dixit of the Revenue authorities but on the basis of the material brought on record. And what is the material on record, the Inspecting Assistant Commissioner's order indicates the unexplained investment as sustained by the Tribunal. That hardly constitutes the material because that amounts to merely relying on the fact that the assessee has not been able to prove its case, while the law enjoins that the Revenue must disprove the assessee's case. The Revenue authorities failed to disprove the assessee's case and establish by material on record that the addition as sustained by the Tribunal is the assessee's income from concealed sources. Therefore, the penalty cannot be imposed by the Revenue because the Revenue has not discharged its onus."

5. Admittedly, in this case, the income returned by the assessee was less than 80 per cent. of the income assessed. The Explanation to Section 271(1)(c) of the Act reads as below ;

"Explanation.--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 willful 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."

6. Learned counsel for the Revenue placed reliance on the judgment of the Supreme Court in Commissioner of Income Tax Vs. Mussadilal Ram Bharose, in which it was held that in a case to which the Explanation aforesaid applies, the burden shifts to the assessee to show that the difference was not owing to fraud or gross or willful neglect on its part. This view was repeated in Commissioner of Income Tax, Madras Vs. K.R. Sadayappan, .

7. This court followed the judgment in Commissioner of Income Tax Vs. Mussadilal Ram Bharose, in BANARAS TEXTORIUM Vs. COMMISSIONER OF Income Tax., . A perusal of the Tribunal's order would show that although the Assessing Officer had referred to the aforesaid Explanation in his order levying the penalty, the Tribunal has nowhere discussed the effect or applicability thereof. The Explanation was prima facie applicable since the income returned

was, admittedly, less than 80 per cent. of the correct income or the income assessed. The Tribunal's order does not explain why in face of the aforesaid Explanation, it placed the burden of proof on the Revenue.

8. Learned counsel for the assessee placed reliance on Commissioner of Income Tax Vs. P.M. Shah, in which it was held that the assessee must be informed that the Explanation to Section 271(1)(c) of the Act is sought to be applied. It was contended that in the penalty notice issued to the assessee, it was not stated that the aforesaid Explanation would be invoked by the Assessing Officer, for supporting the order of penalty and, therefore, the said Explanation could not be invoked. This argument is not tenable at this stage of the proceedings because this does not arise out of the order of the Tribunal.

9. Reliance was also placed on a judgment of the Kerala High Court in CIT v. Saraf Trading Corporation [1987] 167 ITR 909. This authority is of no help in the present case because, in that case, the Tribunal had recorded a finding that the assessee had discharged its burden of proving that there was no concealment of income. In the case before us, there is no such finding recorded by the Income Tax Appellate Tribunal.

10. In view of the above discussion, we find that the Income Tax Appellate Tribunal did not approach the issue correctly and wrongly placed the burden of proof on the Revenue without holding that the Explanation to Section 271(1)(c) of the Act could not be applied to the facts of the case. The Tribunal's order is, therefore, not sustainable and is not legally justified. We, therefore, answer question No. 3 in the negative holding that the Tribunal was not justified in deciding the appeal without going into the applicability of the Explanation to Section 271(1)(c) of the Act to the assessee's case. We, therefore, set aside the Tribunal's order and direct it to redetermine the assessee's appeal in accordance with law.

11. In view of the answer to question No. 3 and our order remitting the matter back to the Income Tax Appellate Tribunal, questions Nos. 1 and 2 have become redundant and it is not necessary to answer them.

12. In the circumstances of the case, the parties will bear their own costs of this reference.