

(1982) 03 BOM CK 0029

In the Bombay High Court

Case No : Income Tax Ref. No. 11 of 1974

Commissioner of Income Tax

APPELLANT

Vs

Khimji Bhanjee and Co.

RESPONDENT

Date of Decision : 28-03-1982

Acts Referred:

Income Tax Act, 1961 — Section 271(1)

Citation : (1983) 32 CTR 296

Hon'ble Judges : M.N. Chandurkar, J;Kania, J

Bench : Division Bench

Judgement

Kania, J.—This is a reference on a case stated u/s 256(1) of the IT Act, 1961. The assessment year with which we are concerned is the asst. yr. 1968-69. The assessee is a registered firm carrying on business of grains, kirana, oil and so on. During the course of the assessment proceedings in respect of the aforesaid assessment year, the ITO, while scrutinising the books of accounts, noticed certain cash credits in various accounts. The assessee was asked to prove the genuineness of the cash credit entries. The assessee stated that it was not in a position to produce the persons concerned to prove the genuineness of the credits. The ITO worked out the amount of such peak credits and assessed Rs. 10,590 as the assessee's income from undisclosed sources. The assessee did not prefer any appeal against this assessment. This assessment was followed by penalty proceedings u/s 271(1)(c) of the IT Act, 1961. Notice was issued for levying by the IAC. Before the IAC, the assessee submitted that it was always short of funds and it was at the mercy of creditors and the creditors could not be compelled to come to the office of the ITO and give statements. In order to save itself from further botheration, the assessee preferred to accept the addition made to its income by the ITO. The order of the ITO shows that what transpired before him was that when the assessee was asked to explain the above credits, which were made in favour of named parties with adequate evidence and to produce the persons concerned for cross-examination, the assessee expressed its inability to produce the persons and prove the credits. On this, the ITO took

the view that the assessee had failed to discharge the burden of proof and brought to tax amount of Rs. 10,590 as the income of the assessee from undisclosed sources. The IAC proceeded to levy penalty of Rs. 10,590 under the amended s. 271(1)(c) of the said Act. On an appeal preferred by the assessee to the IT Appellate Tribunal, the Tribunal allowed the same taking the view that the assessee had not admitted the concealment of income and that merely because the amount of Rs. 10,590 was surrendered for taxation by the assessee this did not ipso facto raise an inference that the assessee admitted that it was his concealed income. From the aforesaid decision of the Tribunal, the following question has been referred to us for our determination :

"Whether, on the facts and in the circumstances of the case, the Tribunal has erred in law in holding that the penalty levied on the assessee u/s 271(1)(c) of the Act for the asst. yr. 1968-60 was not sustainable ?"

2. The submission of Mr. Sajnani, the Id. counsel for the Revenue, is that the assessee had in fact, admitted the concealment of income and hence it was not necessary for the Revenue to prove the same. It was submitted by him that, in view of this, the burden was on the assessee to show that there was no concealment and the conclusion arrived at by the Tribunal was erroneous. He placed strong reliance on the decision of a Division Bench of this Court in *Western Automobiles (India) Vs. Commissioner of Income Tax, Bombay City-I, Bombay*, . In our view, it is not possible to accept the submission of Mr. Sajnani. The facts which we have narrated earlier, clearly show that the assessee nowhere admitted that it had concealed any income. All that the assessee did was to admit that there were certain cash credits in its books of account in favour of named parties and that the assessee was unable to produce evidence to show that these cash credits were genuine, as the assessee was not in a position to call the parties in whose favour the cash credits appear, the reason given by the assessee being that it was always heavily indebted and unable to trouble its creditors to give evidence. The aforesaid stand by the assessee can, in our view, never be considered as an admission by the assessee that it has concealed any income. As far as the decision in *Western Automobiles (India) (supra)* is concerned, facts of that case are altogether different from the facts of the case before us. In that case, when the ITO discovered in the account book of the assessee loans to the tune of Rs. 90,000, he came to the prima facie conclusion that these represented concealed income. The assessee firm agreed to the addition of the aforesaid amount of Rs. 90,000 as its business income for that year and the addition was made by the ITO as the assessee's concealed income from business and not as income from undisclosed sources. In the present case, the assessee has nowhere admitted that it has concealed its income and even the ITO has not added the said amount of Rs. 10,590 as concealed income from business but as from undisclosed sources. In view of this, the said decision in the case of *Western Automobiles (India) Vs. Commissioner of Income Tax, Bombay City-I, Bombay*, is clearly inapplicable to the present case.

3. In the result, the question referred to us is answered in the negative and in favour of the assessee. The Commr. to pay the costs.