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In the Calcutta High Court

Case No : Income-tax Reference No. 333 of 1969

Commissioner of Income Tax APPELLANT

Vs

Lalit Mohan Deb RESPONDENT

Date of Decision : 10-07-1975

Acts Referred:
Income Tax Act, 1922 — Section 34

Citation : (1977) 107 ITR 84

Hon'ble Judges : Dipak Kumar Sen, J;Deb, J

Bench : Division Bench

Advocate : B.L. Pal and N.L. Pal, for the Appellant;J.C. Pal and M. Banerjee, for the Respondent

Judgement

Dipak Kumar Sen, J.—This reference arises out of an assessment on one Lalit Mohan Deb for the assessment year 1955-56. The facts as appearing from the statement of the case and the annexures thereto can be shortly stated as follows :

Assessment for the assessment year 1955-56 was made u/s 23(3) of the Indian Income Tax Act, 1922. Thereafter, it came to the knowledge of the Income Tax Officer that the assessee had invested a sum of Rs. 39, 102 for construction of a house. The assessee contended that the said sum was received by way of loans, particulars whereof are as follows :

Rs.

(a) Loan from Dhirendra Chandra Majumdar ... 13,151

(b) Loan from Chintabaran Lodh ... 12,151

(c) Loan from Harendra Chandra Das ... 14,000

39,302

2. The Income Tax Officer found that none of the said creditors could have been

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in a position to advance the amounts and that none of them were assessed to Income Tax. He started proceedings u/s 34 of the Indian Income Tax Act, 1922, in the course of which the three creditors appeared before him and were examined. They admitted having advanced the moneys to the assessee. They, however, did not produce any books of account to support the advances claimed to have been made by them as loans.

3. The Income Tax Officer did not accept the explanation of the assessee or the evidence of the creditors and treated the said amount of Rs. 39,302 as the assessee''s income from undisclosed sources.

4. The Income Tax Officer also started proceedings for imposition of penalty u/s 28(1)(c) of the Indian Income Tax Act, 1922, and imposed a penalty of Rs. 15,000. He relied on the fact that in the assessment proceedings the Appellate Assistant Commissioner had confirmed the findings of the Income Tax Officer that the cash credits were not genuine and the amount represented the assessee''s income from sources not disclosed.

5. Against this order of penalty the assessee appealed before the Appellate Assistant Commissioner. The Appellate Assistant Commissioner again relied on the assessment order as also the orders of the Income Tax Appellate Tribunal in the appeal from the assessment order. From such records the Appellate Assistant Commissioner found that the falsity of the explanation furnished by the assessee had been established. On such basis the Appellate Assistant Commissioner came to the conclusion that the appellant had gone to the extent of creating evidence in respect of his false explanation which had been rejected. He also relied on the fact that such falsity has been conclusively proved in the course of the assessment proceedings. The Appellate Assistant Commissioner followed the decision of the Allahabad High Court in the case of LAL CHAND GOPAL DAS Vs. COMMISSIONER OF Income Tax, U.P. AND V.P., and overruled the order of the Income Tax Officer. The assessee had relied on the decision of the Patna High Court in the case of COMMISSIONER OF Income Tax, BIHAR and ORISSA Vs. MOHAN MALLAH., and the decision of the Bombay High Court in the case of Commissioner of Income Tax, Ahmedabad Vs. Gokuldas Harivallabhdas, . The Appellate Assistant Commissioner followed the Allahabad decision in preference to the others.

6. The assessee came up in further appeal before the Appellate Tribunal. The Tribunal has held as follows :

"We find ourselves unable to support the order of the Appellate Assistant Commissioner. Before a penalty may be imposed u/s 28(1)(c) the Income Tax Officer has to be satisfied that the assessee concealed particulars of his income or deliberately furnished inaccurate particulars of such income. It is for the department to establish that what is considered as concealed is actually the assessee''s income. The assessee had claimed that the three persons had advanced loans to him and those persons also confirmed this. The Income Tax

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Officer was not satisfied with the explanation and held that those persons could not have advanced the loans as claimed. This might have justified his action in including the amount in the assessment treating the same as the assessee''s income. It does not, however, mean that the amount is established to be actually the assessee''s income. The department has not found any materials to hold that the amount represented the assessee''s income. Only because the explanation was not found satisfactory the amount was presumed to be the assessee''s income. When the amount is not proved to be the assessee''s income there is no question of the assessee having concealed particulars of his income and there can be no justification for imposition of penalty u/s 28(1)(c) in the circumstances. We hold that the imposition of penalty was not justified in this case. We rely on the judgment of the Calcutta High Court in Commissioner of Income Tax (Central), Calcutta Vs. Anwar Ali, which has been followed by the same High Court in COMMISSIONER OF Income Tax, WEST BENGAL II Vs. SATISH CHURN LAW., .

7. The Tribunal allowed the appeal of the assessee.

8. From this order of'' the Tribunal the following questions have been referred to us u/s 66(2) of the Indian Income Tax Act, 1922 :

"1. Whether, on the facts and in the circumstances of the case, after the order in the assessment proceedings regarding addition to income from undisclosed sources had been upheld the entire onus in penalty proceedings still lay on the Income Tax department to prove that the assessee had concealed particulars of his income ?

2. Whether, on the facts and in the circumstances of the case, there was any evidence before the Tribunal to disprove the finding of the Income Tax authorities that the amounts represented the assessee''s income or that the assessee had concealed particulars of his income ?

3. Whether, on the facts and in the circumstances of the case, the Tribunal was correct in holding that the evidence regarding failure on the part of the assessee to explain the source of the disputed receipt was not sufficient to uphold the imposition of penalty on the assessee ?

4. Whether, on the facts and in the circumstances of the case, the Tribunal was correct in law in holding that the imposition of penalty was not justified ?"

9. Mr. B. L. Pal, learned counsel appearing on behalf of the revenue, contended that in the instant case the Income Tax authorities were entitled to rely on the evidence in the assessment proceedings and if the entirety of the facts and circumstances of the case were taken into account it could be stated that there was sufficient material to establish that the said amounts of Rs. 39,302 was hot only the income of the assessee but that the assessee had deliberately concealed and/or furnished inaccurate particulars relating to the same. Mr. Pal sought to support the findings of the Appellate Assistant Commissioner on the basis of the

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decision of Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, . He contended that the Supreme Court had laid down in this case that the findings given in the assessment proceedings could be taken into account as a piece of good evidence and on the basis of such evidence and in the entirety of circumstances, the conclusion should to be sought to be drawn whether the loans represented the income of the assessee. He sought to contend that the Income Tax authorities, namely, the Income Tax Officer and the Appellate Assistant Commissioner had proceeded on such basis, whereas the Tribunal had not done so,

10. The contentions of Mr. Pal strictly cannot be said to arise in the facts of this case. We find from the order of the Tribunal that the Tribunal has held and has found as a fact that : "The department has not found any materials to hold that the amount represented the assessee''s income." This finding of fact has not been challenged in any of the questions raised on behalf of the revenue. On this short point, the contentions raised by Mr. Pal can be answered. In any event, the facts and circumstances of the instant case are more or less in pari materia with the facts and circumstances of Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, . In both cases the explanation furnished by the assessee was disbelieved in the assessment proceedings. The only difference is that in the instant case not only the explanation of the assessee has been disbelieved, but the evidence produced by the assessee has been rejected. This may be a distinction. But this is a distinction without a difference. The fact remains that in the penalty proceedings no further material was produced or considered by the revenue except what was found in the records of the assessment proceedings.

11. The Supreme Court has specifically laid down in Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, as follows :

"As has been rightly observed by Chagla C.J. in Commissioner of Income Tax, Ahmedabad Vs. Gokuldas Harivallabhdas, , the gist of the offence u/s 28(1)(c) is that the assessee Has concealed the particulars of his income or deliberately furnished inaccurate particulars of such income and, therefore, the department must establish that the receipt of the amount in dispute constitutes income of the assessee. If there is no evidence on the record except the explanation given by the assessee, which explanation has been found to be false, it does not follow that the receipt constitutes his taxable income."

12. The Supreme Court further goes on to observe that before penalty can be imposed the entirety of circumstances must reasonably point to the conclusion that the disputed amount represented income and that the assessee had consciously concealed the particulars of his income or had deliberately furnished inaccurate particulars.

13. "In the present case it was neither suggested before the High Court nor has it been contended before us that, apart from the falsity of the explanation given by the assessee, there was cogent material or evidence from which it could be

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inferred that the assessee had concealed the particulars of his income or had deliberately furnished inaccurate particulars in respect of the same and that the disputed amount was a revenue receipt."

14. It appears to us that the above quoted observation of the Supreme Court covers the question before us.

15. Mr. J. C. Pal, appearing on behalf of the assessee, relied on a subsequent decision of the Supreme Court in the case of The Commissioner of Income Tax Madras Vs. Khoday Eswarsa and Sons, . In this case additions were made to the income of the assessee by the Income Tax Officer on the ground that some of his bills were forged and some of the purchasers of his materials were fictitious persons and no satisfactory evidence was produced to support the transactions of the assessee. A penalty was also imposed u/s 28(1)(c) of the Indian Income Tax Act, 1922. The Appellate Tribunal on the final appeal against the order of penalty held that the department had failed to establish that the respondent had not manufactured the materials or had carried on transactions in the manner as alleged by the department. The Tribunal held that though there could have been justification for making additions in the original assessment order, the additions by themselves could not lead to the conclusion that the assessee had concealed his income or had furnished deliberately inaccurate particulars. The High Court of Mysore rejected the application of the revenue u/s 66(2) of the Indian Income Tax Act, 1922. From such order of rejection the matter came up on special leave before the Supreme Court. The Supreme Court held and laid down as follows :

"That the conclusions drawn by the Appellate Tribunal were all on findings of fact recorded against the department and on those findings no question of law arose for reference.

Penalty proceedings being penal in character, the department must establish that the receipt of the amount in dispute constitutes income of the assessee. Apart from the falsity of the explanation given by the assessee, the department must have before it before levying penalty cogent material or evidence from which it could be inferred that the assessee has consciously concealed the particulars of his income or had deliberately furnished inaccurate particulars in respect of the same and that the disputed amount is a revenue receipt. No doubt, the original assessment proceedings for computing the tax may be a good item of evidence in the penalty proceedings but penalty cannot be levied solely on the basis of the reasons given in the original order of assessment."

and confirmed the decision of the Mysore High Court.

16. Mr. J. C. Pal also cited another Supreme Court decision in the case of Commissioner of Income Tax, Kerala Vs. N.A. Mohamed Haneef, . This decision of the Supreme Court does not take the matter any further and the facts and circumstances in that case appear to be of rather special character.

17. On the basis of the arguments made, it appears to us that questions Nos. 1

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and 3 are entirely covered by the decisions of the Supreme Court discussed above and the said questions, namely, question Nos. 1 and 3, must both be answered in the affirmative and in favour of the assessee.

18. So far as question No. 2 is concerned, it is not very clear to us what dispute is being sought to be resolved by means of this question. This question seems to proceed on the basis that once the Appellate Assistant Commissioner had found against the assessee, the assessee had to produce before the Tribunal some evidence either already on record or fresh, to disprove such findings. In the instant case we find whatever evidence had been produced and considered by either side was at the assessment stage before the Income Tax Officer and thereafter no evidence has been produced on either side. The evidence before the Tribunal was, therefore, the original evidence before the Income Tax Officer in the assessment proceedings which consisted of the explanation of the assessee and the depositions of three creditors which were disbelieved. If that be the case, this question has to be answered also in the affirmative and in favour of the assessee. But, be that as it may, even if the question is answered in the negative, in our opinion, it would not make any difference to the main question whether penalty is imposable or not. This question appears to us to be of an academic nature.

19. Coming to question No. 4, in view of the specific findings of the Tribunal that there was no material to hold that the amount in dispute represented the assessee''s income, which finding has not been challenged in any of these questions, the answer necessarily follows that the Tribunal was correct in drawing its conclusion as it did. Even otherwise, in view of the law laid down by the Supreme Court, we have to hold that the Tribunal was correct in its conclusion in allowing the appeal of the assessee. Therefore, this question is also answered in the affirmative and in favour of the assessee.

20. In the facts and circumstances of this case, there will be no order as to costs.

Deb, J.

21. I agree.

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