

(1984) 11 CAL CK 0017

In the Calcutta High Court

Case No : Income-tax Reference No. 40 of 1978

Commissioner of Income Tax

APPELLANT

Vs

M.B. Engineering Works (P.) Ltd.

RESPONDENT

Date of Decision : 21-11-1984

Acts Referred:

Income Tax Act, 1961 — Section 271(1), 68

Citation : (1986) 57 CTR 307 : (1986) 158 ITR 509 : (1985) 22 TAXMAN 173

Hon'ble Judges : R.N. Pyne, J;Ajit Kumar Sengupta, J

Bench : Division Bench

Advocate : R.C. Kar, for the Appellant; Ramchandra Prosad, for the Respondent

Judgement

Ajit Kumar Sengupta, J.—In this reference u/s 256(2) of the Income Tax Act, 1961, the following two questions of law have been referred by the Tribunal to this court :

"(1) Whether the entirety of the facts and circumstances of the case reasonably led to the conclusion that the assessee had concealed particulars of its income or furnished inaccurate particulars thereof so as to justify imposition of penalty u/s 271(1)(c) of the Income Tax Act, 1961 ?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal is justified in holding that on the evidence on record, no penalty provisions are attracted and, in that view, vacating the order of penalty imposed u/s 271(1)(c) of the Income Tax Act, 1961 ?"

The facts leading to the present reference are briefly stated hereinafter.

2. The assessee, M.B. Engineering Works (P.) Ltd., Howrah, is a private company and the assessment year involved is 1964-65. During the course of the assessment proceeding, the Income Tax Officer found that a sum of Rs. 40,000 in the form of three cash credits represented the assessee's income from undisclosed sources. The assessment was completed on a total income of Rs.

91,647 whereas the income returned was Rs. 18,881. The Income Tax Officer was, therefore, satisfied that the penalty provisions were attracted both under the provisions of Section 271(1)(c) and the Explanation to that section. He, therefore, initiated penalty proceedings against the assessee and as the minimum penalty imposable under the Act would exceed Rs. 1,000, he referred the matter to the Inspecting Assistant Commissioner, who, after taking into consideration the explanation of the assessee held that the latter was guilty of concealment. Having reached this conclusion, a penalty of Rs. 39,293 was imposed. Being aggrieved, the assessee preferred an appeal to the Appellate Tribunal against the imposition of penalty. After hearing both sides, the Tribunal came to the conclusion, on the authority of the Supreme Court in Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, , that the penalty provisions were not attracted in this case. In coming to the above conclusion, the Tribunal found that in respect of the assessment appealed against, the addition of Rs. 40,000 representing loans was reduced to Rs. 10,000. This amount was advanced by Sri Shanti Dutta Gupta. The Tribunal rejected the assessee's version regarding the genuineness of this loan and so also disbelieved the assessee's claim amounting to Rs. 32,802 as an expenditure. The Tribunal was of the opinion that merely because the version of the assessee was rejected, it would not automatically fall within the mischief of Section 271(1)(c) of the Income Tax Act, 1961, and that this circumstance itself would not go to show that the assessee was guilty either of wilful neglect or of fraud. Accordingly, the impugned penalty order was vacated.

3. Mr. Ramchandra Prosad, learned advocate for the Revenue, has submitted that in the present case, the Tribunal did not examine the finding recorded by the Inspecting Assistant Commissioner, nor did the Tribunal consider the effect of the Explanation to Section 271(1)(c) of the Act. There is no evidence to warrant the conclusion that the assessee was not guilty of fraud or gross or wilful neglect. He has also submitted that the assessee cannot take the benefit of the judgment of the Supreme Court in the case of Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, , in view of the Explanation added to Clause (c) of Section 271(1). In support of his contention, he has relied on three decisions--two decisions of the Allahabad High Court and one decision of the Punjab and Haryana High Court.

4. The first decision cited by Mr. Prasad is in the case of Addl. Commissioner of Income Tax Vs. Ram Prakash, . In that case, the assessee returned an income of Rs. 4,000 for the assessment year 1967-68. The Income Tax Officer found that he had made investments to the tune of Rs. 15,000. The explanation offered by the assessee was not found believable and a sum of Rs. 13,000 was added as income from undisclosed sources. Penalty was also imposed on the assessee. The Tribunal did not examine the explanation offered by the assessee or the findings recorded by the Inspecting Assistant Commissioner but allowed the appeal and held that when the explanation offered by the assessee was found unacceptable, it did not conclusively establish that the assessee had committed a fraud in filing

the return of income or was negligent wilfully or grossly. The Allahabad High Court held that the Tribunal had not recorded appropriate or adequate findings. Hence, it was not possible to answer the question whether there was any material to warrant the conclusion that the assessee had established that he was not guilty of fraud or wilful or gross negligence in furnishing the particulars of his income within the meaning of the Explanation to Section 271(1)(c). There, the Chief Justice, speaking for the court, observed thus (p. 562):

"Taking up the last feature first, the position is that Clause (c) to Section 271(1) used the word "deliberate" in connection with the phrase "furnish inaccurate particulars of such income". The word "deliberate" was omitted by the Finance Act of 1964 which came into force on April 1, 1964. Clause (c) as it stood after the amendment provided that the assessee has concealed the particulars of his income or has furnished inaccurate particulars of such income. It is no longer necessary to establish that those actions were deliberate on the part of the assessee. The view that it is necessary to establish that the assessee deliberately acted in defiance of law, etc., is not tenable after April 1, 1964.

The Explanation which was added with effect from April 1, 1964, completely reversed the burden of proof in cases where the returned income was less than 80 per cent, of the assessed income. In this class of cases, the Explanation provided that the assessee shall be deemed to have concealed the particulars of income or furnished inaccurate particulars of such income for the purpose of Clause (c) 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. In other words, the presumption is that the assessee has concealed or furnished inaccurate particulars. This presumption is rebuttable only if the assessee proves affirmatively that the failure to return the correct income was not due to fraud or any gross or wilful neglect on his part. Thus, the burden is squarely on the assessee, not in relation to concealment either of income or of particulars thereof, but in a very distinct matter. The burden of proof on the assessee is that the failure to return the correct income was not due to either of the three things, fraud or gross or wilful neglect. On this aspect, the burden cannot be shifted on to the Department by merely saying that the explanation offered by the assessee that the amount in question was not his income though not believable or acceptable, yet the mere disbelief will not lead to the conclusion that he was guilty of fraud or gross or wilful neglect. By saying so, in substance, the burden is shifted without any material."

Mr. Prosad has particularly relied on the following observation (p. 563):

" The Tribunal relied upon the Supreme Court decision in Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, . That case was rendered under the Indian Income Tax Act, 1922. It had some value prior to the enactment of the Explanation to Clause (c) of Section 271(1). After this, it is hardly of any assistance in either construing the Explanation or in applying it. "

In that case, the Tribunal was, however, directed to rehear the appeal and decide it in accordance with law as the Tribunal did not record appropriate and adequate findings.

5. The next decision cited by Mr. Prasad is in the case of Vishwakarma Industries Vs. Commissioner of Income Tax, , the Full Bench decision of the Punjab and Haryana High Court. There, the court held that the penalty proceedings are separate and distinct from any nuances of criminality and it is, therefore, inapt to use the terminology of criminal law, like an offence, crime, or charge, etc., which should be scrupulously avoided. In cases of concealment of income and tax evasion, the modus of concealment is obviously within the special knowledge of the assessee. Consequently, in cases of blatant evasion, the Legislature was compelled to take off the impossible burden of establishing facts which are obviously in the special knowledge of the assessee alone. The onus was, therefore, rightly placed on the shoulders of the assessee, who alone could reasonably discharge the same. The insertion of the Explanation and the omission of the word "deliberately" from Clause (c) of Section 271(1) was not merely declaratory of the existing law, but designed to effect a change in law. The changes were obviously brought in to remedy a particular mischief. To say that, despite the amendment, no change was brought about in the law would be rendering the whole of the provisions nugatory and would be violating the settled canon of construction that a meaning must be given to every word in a statute. The intention of the Legislature in making the amendments to Section 271(1)(c) and in inserting the Explanation thereto was to bring about a change in the existing law.

6. The next decision cited by Mr. Prasad is of the Allahabad High Court in the case of Addl. Commissioner of Income Tax Vs. Lakshmi Industries and Cold Storage Co. Ltd., . It was held that after the enactment of the Explanation, the burden of proof that the concealed items constituted assessable income of the assessee is no longer on the Department. The burden is on the assessee to prove that the failure to return the correct income was not due to fraud or any gross or wilful neglect on his part. The principle enunciated in Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, is no longer applicable. Even where additions have been made to the returned income on the basis of an estimate, the Explanation is attracted and penalty is leviable. It was further held that the Tribunal had not recorded any finding that the failure on the part of the assessee to return the same was not on account of any fraud or any gross or wilful neglect on his part.

7. On other hand, Mr. R.C. Kar, appearing for the assessee, has relied on the decision of this court in the case of Commissioner of Income Tax Vs. Rupabani Theatres P. Ltd., . In that case, the court, after considering the various decisions of the Supreme Court including the decision in Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, , held thus (pp. 758, 765) : " it is abundantly clear that it could not be said that the Explanation, with which we are

concerned, to Section 271(1)(c) of the Income Tax Act, 1961, was introduced to nullify the effect of the judicial decision in the case of Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, ".

" Change undoubtedly was intended to be effected, not to nullify the observations of the Supreme Court because those observations were made long after the Explanation had come into effect, but to implement the legislative policy which was felt necessary to ensure implementation of these provisions. But the fundamental question is that it is also not necessary, in our opinion, to lay down any positive rule which is applicable to all cases, whether the evidence to be adduced by the assessee should be of a positive nature or of a negative nature ; nor is it theoretically possible or desirable, in our opinion, to lay down any abstract proposition that the nature of the evidence to prove a negative fact would be less than the nature of the evidence to prove a positive fact. In these matters it is, in our opinion, appropriate to decide each question on the facts and circumstances of the case bearing in mind the basic principles and these are that the evidence in the assessment proceedings are not by themselves conclusive, the circumstances under which the fact that certain sums added as the income of the assessee in the assessment proceeding do not ipso facto make the same the income of the assessee in the penalty proceedings but the circumstances under which such assessment has come to be made and the nature of the evidence produced in the assessment proceedings, are material and may provide some good evidence for coming to certain conclusions.

The fact that there has been rejection of the explanation given by the assessee about the source is also not conclusive of the fact either of concealment of income which is a positive act or negative or furnishing inaccurate particulars, which is presumed by the operation of the Explanation to the section which was implied before the introduction of the Explanation and had to be proved before the introduction of the Explanation. It is not conclusive nor ipso facto proof and, hence, the nature of the circumstances are material evidence."

There is, thus, a divergence of judicial opinion on the effect of the judgment of the Supreme Court in Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, after the introduction of the Explanation to Section 271(1)(c). While the Allahabad and the Punjab & Haryana High Courts have taken the view that the Explanation which was added" with effect from April 1, 1964, completely reversed the burden of proof in cases where the returned income was less than 80% of the assessed income and the principles enunciated in Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, would no longer be applicable, this court, on the other hand, in Commissioner of Income Tax Vs. Rupabani Theatres P. Ltd., held that the Explanation "was not introduced to nullify the effect of the judicial decision in the case of CIT v. Anwar Ali ". This court took into consideration a point, which appears to have been overlooked in other cases, that the "Explanation was added with effect from 1964 and the decision of the Supreme Court in the case of Commissioner of Income Tax, West

Bengal I, and Another Vs. Anwar Ali, was rendered in 1970 ". This court also observed that (p. 765) " change undoubtedly was intended to be effected, not to nullify the observations of the Supreme Court because those observations were made long after the Explanation had come into effect, but to implement the legislative policy which was felt necessary to ensure implementation of these provisions ".

8. It cannot be disputed that the Explanation which was introduced with effect from April 1, 1964, brought about a change in the existing law. But different courts have construed the nature and extent of the change and actual effect thereof differently. This court has observed in Commissioner of Income Tax Vs. Rupabani Theatres P. Ltd., as follows (p. 758) ;

" The Explanation introduced in 1964 is a deeming provision. By the said deeming provision, it is provided that in certain contingencies, that is to say, where the total income returned by any person is less than 80% of the total income as assessed, omitting certain other requirements with which we are not concerned, 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 ". Now, the law introduced a certain state of affairs, even though that state of affairs was not the reality. The requirement of Section 271(1)(c) is that the assessee must be guilty of concealment of the particulars of his income or furnishing inaccurate particulars. Previous requirement was that the furnishing of inaccurate particulars should have been deliberate.

The expression " concealment" has to be understood in contradistinction to the expression "failure". Concealment requires a positive act. So, before the amendment in 1964, Section 271(1)(c) required that there should have been a positive or active act on the part of the assessee to conceal particulars of his income or to deliberately furnish inaccurate particulars. But, by virtue of the addition of the Explanation, if the difference between the assessed income and the returned income was of certain magnitude, then unless the assessee proved that such difference was not caused by reason of failure to return the correct income from any fraud or any gross or wilful neglect, he should be deemed to have committed a positive act of concealment or of deliberately furnishing inaccurate particulars. The particulars of income--that is also provided by the Explanation, but means " particulars of such income for the purposes of Clause (c) of this sub-section ", that is to say, inaccurate particulars of income which was required to be furnished and the failure of which has been made penal u/s 271(1)(c) of the Act...(p. 767). We have seen the requirement of the section, as it stood at the relevant time, that is to say, in order to attract Section 271, Sub-section (1)(c), it was necessary for the Income Tax Officer to be satisfied that the assessee has "concealed" the particulars of his income or "furnished inaccurate particulars" and we have also noted that the Explanation enjoined that in case

there was a difference between the total income returned by the assessee and the assessed income, such person shall, unless he proved that the failure to return the correct income did not arise from fraud or gross or wilful neglect on his part, be deemed to have concealed particulars of his income. Therefore, what was necessary for the ITO to be satisfied was that there was either concealment of the particulars of his income or furnishing of inaccurate particulars and in certain cases the assessee would be presumed to have either concealed the particulars of his income or furnished inaccurate particulars. But such presumption would be rebutted if the assessee is able to establish by sufficient evidence that such failure to return the correct income did not arise from " fraud or gross or wilful neglect ", that is to say, if in the conduct of the assessee there was no fraud or gross or wilful neglect of the assessee and the assessee is able to prove that, in such a case, the assessee would not be deemed to have committed the offence and the Revenue would have to prove aliunde that the assessee has committed the fraud or gross or wilful neglect. The expression "concealment" itself conveys a positive act or a mental attitude. Failure is not synonymous with concealment. A man is said to conceal an answer or conceal some money when he positively does something to secrete. It is not mere omission on his part to bring the object into light. There is a mental element, whether it has to be proved by the assessee or the Department or the onus to disprove that is on the assessee or not, makes no difference. Therefore, Section 271(1)(c), even after the introduction of the Explanation in 1964, requires a mental volition or mental attitude of guilt or of mind not to comply with the requirements of law. If that is the position, then the question arises whether mens rea is an integral part of Section 271(1)(c) read with the Explanation. Now, it was contended on behalf of the Revenue that means rea in the cases covered by the Explanation was not the requirement. That is not the position here, for, in the instant provision, no absolute liability has been provided and the conduct contemplated has not been made an offence irrespective of the mental element-- what has been provided for is a particular mode of proving or disproving the mental element. The mental element has not been dispensed with. "

It appears to us that the requirements or ingredients of Section 271(1)(c) have not been materially affected by the introduction of the Explanation. Before a penalty can be imposed, the authorities have to bring on record cogent material or circumstances leading to a reasonable conclusion that the amount added in the assessment represents the assessee's income. Merely because a particular amount has been assessed as income is not enough for the purpose of levying penalty. Even where an addition has been made u/s 68 and unexplained cash credit is charged to Income Tax as the income of the assessee of the concerned previous year, the penalty cannot be imposed on such addition under the Explanation unless it is shown by the Revenue that such amount was the income of the assessee. Under certain circumstances, certain additions may be made or certain expenditure may be disallowed resulting in the income being enhanced. But merely because certain additions or disallowances have been made in the

assessment and by reason of such additions or disallowances, the returned income has been enhanced and assessed at a higher figure will not take the case out of the principles laid down in Anwar Ali's case. The burden still lies on the Revenue to establish that the addition which has been made is the income of the assessee. Where the income returned is less than 80% of the income assessed and the amount assessed is proved by the Department to represent the income of the assessee, the burden will shift to the assessee to show that there was no fraud or gross or wilful neglect on his part in furnishing the correct income. Explanation to Section 271(1)(c) presumes fraud or gross or wilful neglect on the part of the assessee in the circumstances stated therein. The presumption is a rebuttable presumption. The assessee is to discharge the onus. The presumption would be inoperative if it is rebutted by evidence. The onus then shifts to the Department to prove that the assessee has concealed the income or has furnished inaccurate particulars thereof. The assessee has to explain the reasons for the difference in returning the correct income if the income returned is less than 80% of the income assessed. At this stage, the assessee is only required to explain the gap between the income returned and the income assessed. The explanation may be accepted or rejected by the Department. But mere rejection of the explanation even in respect of the gap or difference cannot ipso facto prove that there has been concealment. The circumstances must lead to the only reasonable and positive inference that the explanation of the assessee is false. As a matter of fact, the Explanation to Section 271(1)(c) has a material bearing on the question of mental element or mens rea. The mental element or mens rea is an integral part of Section 271(1)(c) read with the Explanation. The circumstances must show that there was animus. The onus of proof has been shifted in certain contingencies to the assessee by reason of rebuttable presumption introduced by the Explanation. The presence or absence of mental element has to be proved. The shifting of onus under certain circumstances has not materially affected the law even after the introduction of the Explanation.

9. The statutory difference between the returned income and the assessed income may be due to various factors but once there is a difference, the onus lies on the assessee to show that the difference was not attributable to him either on account of any fraud or gross or wilful neglect. The authority cannot proceed solely on the rejection of explanation as regards the difference in the assessed income and the returned income. There must be circumstances leading to the only reasonable and positive inference that the assessee's explanation is false and, in that event, the assessee must be held to have failed to prove that there was no fraud or gross or wilful neglect on his part. The nature and quality of the evidence will vary from case to case. Absence of evidence acceptable to the Revenue cannot be equated with fraud or wilful neglect. We are in respectful agreement with the views expressed by this court in *Commissioner of Income Tax Vs. Rupabani Theatres P. Ltd.*, , that the Explanation does not supersede the ratio of *Commissioner of Income Tax, West Bengal I*, and *Another Vs. Anwar Ali*, .

10. As a matter of fact, neither the Allahabad decision nor the Full Bench

decision of the Punjab and Haryana High Court took into consideration the aspects which Sabyasachi Mukharji J. (as his Lordship then was) considered in Commissioner of Income Tax Vs. Rupabani Theatres P. Ltd., . It is true that the Full Bench decision of the Punjab and Haryana High Court considered the judgment in the case of Commissioner of Income Tax Vs. Rupabani Theatres P. Ltd., . But the Full Bench quoted from the judgment in Rupabani Theatres the view which this court expressed on the effect of the new Explanation which was added with effect from April 1, 1976, by the Taxation Laws (Amendment) Act, 1975. The latter part of the paragraph from the judgment in Rupabani Theatres" case as quoted by the Full Bench in Vishwakarma Industries Vs. Commissioner of Income Tax, , was concerned with the effect of the Explanation introduced with effect from April 1, 1964, on the ratio of Anwar Ali's case. The principles laid down by this court in Rupabani Theatres must govern the instant case.

11. In this case, the penalty proceeding was initiated by the Income Tax Officer in the course of the assessment proceeding on May 22, 1967. The matter was referred to the Inspecting Assistant Commissioner as the minimum penalty imposable exceeded Rs. 1,000. The Explanation to Section 271(1)(c) was not invoked by the Income Tax Officer. The Inspecting Assistant Commissioner, however, referred to the Explanation. It does not appear from the order of the Tribunal, which passed the order on September 15, 1971, that any contention was raised as regards the effect of the introduction of the Explanation to Section 271(1)(c) of the Act. The Tribunal held as follows :

" It further appears that the loans which in all amounted to Rs. 40,000 were claimed by the assessee as genuine, but although the loans have been accepted by us in the appeal referred to above, and we have (sic) accepted the same in respect of the third loan of Rs. 10,000 claimed to have been advanced by Shri Santi Dutta, we have rejected the assessee's version. We have also disbelieved the assessee's claim amounting to Rs. 32,802, but merely because the version of the assessee is rejected, it does not automatically bring the assessee within the mischief of Section 271(1)(c) of the Income Tax Act, as has been held by the latest decision of the Supreme Court in Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, , that in the absence of cogent and convincing evidence to prove that the assessee is guilty of concealment or of furnishing inaccurate particulars of its income, the penalty provisions are not attracted. It will be seen that the assessee has produced its accounts and claimed deduction by way of expenditure. The same has been disbelieved by the authorities below. That circumstance itself will not go to show that the assessee is guilty either of wilful neglect or fraud. We are, therefore, satisfied on the evidence on record before us that no penalty provisions are attracted. We, therefore, vacate the order of penalty and allow the appeal."

Having regard to the facts and circumstances of this case, it cannot be said that the Tribunal wrongly placed the onus on the Department. The Tribunal took into consideration that certain deduction was claimed by the assessee by way of

expenditure which was disallowed. This itself will not go to show that the assessee is guilty of concealment of income or furnishing of any inaccurate particulars of such income. There are no circumstances leading to the reasonable and positive conclusion that the assessee's explanation was false or the cash credits represented the income of the assessee. The Tribunal recorded the finding that the assessee was not guilty of either wilful neglect or fraud. This finding has not been challenged. In any event, the questions referred to this court do not embrace the contention sought to be raised by the Revenue before us. The Tribunal after taking into consideration the entire facts and circumstances of this case has come to the conclusion that the penalty provisions are not attracted. This view taken by the Tribunal cannot be said to be perverse or unreasonable.

12. In the premises, the first question is answered in the negative and the second question in the affirmative, in favour of the assessee and against the Revenue.

13. There will be no order as to costs.

R.N. Pyne, J.

14. I agree.