

(1975) 09 OHC CK 0004

In the Orissa High Court

Case No : S.J.C. No"s. 202 to 206 of 1971 & Special Jurisdiction Case No"s. 202 to 206 of 1971

Commissioner of Income Tax

APPELLANT

Vs

Prafulla Kumar Mallik

RESPONDENT

Date of Decision : 10-09-1975

Acts Referred:

Income Tax Act, 1961 — Section 147, 271(1)

Citation : (1976) 104 ITR 648

Hon'ble Judges : R.N. Misra, J;N.K. Das, J

Bench : Division Bench

Advocate : S.C. Ray, for the Respondent

Judgement

R.N. Misra, J.—On the application of the revenue u/s 256(2) of the Income Tax Act (hereinafter referred to as "the Act"), this court required the Tribunal to state a case and refer the following question for opinion of the court:

"Whether the decision of the Appellate Tribunal that no penalty was to be levied is in accordance with law as indicated in the Explanation to Section 271(1)(c) of the Income Tax Act, brought into the statute book with effect from April 1, 1964 ?"

2. The Tribunal has accordingly stated a case.

3. The relevant assessment years are 1958-59, 1959-60, 1960-61, 1961-62 and 1962-63. For these years, reassessments were made u/s 147 of the Act on the footing that certain cash credits which were not genuine had not been taxed. During the reassessment proceedings, the assessee by a letter dated December 6, 1966, intimated the Income Tax Officer thus:

".....That, on the facts and in the circumstances of the case, it can be appreciated that the transactions relate to a period which is as old as six years and after lapse of such a long time, it will not be possible for me to produce the predators (i.e., the vendors) before you by now, as on enquiry, I came to know

that none of the creditors are living at their old addresses. Further, despite my best efforts, I have failed to trace them out.....

In order to maintain good relationship with the department and to have an amicable settlement in the matter, I am agreeable to be assessed at the peak credit of these loans during the year under review. In this connection it is earnestly prayed that in view of my benevolent gesture, I may be exonerated from any penal action and from imposition of any penal interest."

4. On the basis of the said letter, cash credits were treated as income and proceedings u/s 271(1)(c) of the Act were initiated. The Inspecting Assistant Commissioner did not accept the explanation of the assessee and imposed penalties.

5. Assessee. in appeals before the Appellate Tribunal contended that there was no admission of concealment, and that the materials on record indicated the bona fides of the assessee which would clearly negative any scope for a finding that there was any fraud or gross or wilful negligence on the part of the assessee. The Appellate Tribunal examined the various contentions of the assessee at some length and came to find :

".....We find as a fact that the petition dated May 2, 1967, purported to offer the impugned hundi amounts for settlement and confessed the acceptance of those amounts as self-money introduced in the guise of fictitious credits. Even if we, for the sake of argument only, agree with the departmental representative that the incidence of concealment was reflected in those years by the assessee's counsel's petition dated February 17, 1968, the Inspecting Assistant Commissioner did not use this material for the levy of penalty and so if we sustain the penalty on this material which has not been processed through or the assessee was called upon to explain it would be flagrant violation of law. It will not be a case if the material is used against the assessee, of shift of stand but an entirely new case will be substituted instead.....

From this petition (dated December 6, 1966) it cannot be spelt out that the factum of introduction of self-money in the name of different fictitious creditors had been accepted by the assessee. Even otherwise, the contention of the assessee cannot be assailed as to the disclosure of the impugned amount for inclusion in the respective years. In obedience of the notice issued u/s 148, the assessee filed return disclosing the original income in the respective years. The petition for the inclusion of the hundi Joans in the respective years was before the Income Tax Officer and, therefore, it cannot be said that the Income Tax Officer by exercise of his diligence or acumen or from his source of information discovered the impugned hundi loans as the concealed income of the assessee....."

6. The Tribunal found fault with the Inspecting Assistant Commissioner for having proceeded on the footing that the assessee had confessed that the hundi loans appearing in the names of different creditors were his own. Similarly, in regard to

the stand that a part of the interest has been re-introduced, the Tribunal stated:

".....In the absence of any finding recorded by the Appellate Tribunal (sic) as to the true character of the impugned interest coupled with the failure of the revenue to prove the interest as the concealed income of the assessee, the penalty cannot survive....."

7. Examining the facts and circumstances of the case, the Tribunal was prepared to extend the principle indicated by the Supreme Court in the case of Hindustan Steel Ltd. Vs. State of Orissa, where it was observed :

"An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute."

8. The penalties were accordingly set aside.

9. On behalf of the revenue, learned standing counsel has taken the stand that the Tribunal examined the contentions in appeal overlooking the proviso which was added to the Act with effect from April 1, 1964. There is no controversy before us in regard to the applicability of the proviso to the impugned proceedings, but Mr. Ray for the assessee disputes the contention of learned standing counsel that the Tribunal lost sight of the Explanation while dealing with the matter. Assessee's counsel takes the stand that the entire facts and circumstances of the case have been reviewed at considerable length by the Tribunal and taking an overall picture of the matter, the Tribunal has recorded a finding of fact that there has been no concealment or gross or wilful neglect on the part of the assessee. These are terms which appear in the Explanation and from the tenor of the decision of the Appellate Tribunal and the use of these phrases in the appellate decision, it is clear beyond doubt that the Tribunal was very much conscious of the Explanation and its effect. It is contended that a finding against concealment or one of fraud or gross or wilful neglect is one of fact. In support of such a contention reliance has been placed on The Commissioner of Income Tax, Andhra Pradesh, Hyderabad Vs. Rayalaseema Oil Mills, Tadiparti, , Commissioner of Income Tax Vs. Punjabhai Shah, and Commissioner of Income Tax v. Khoday Eswarsa and Sons [1972] 89 ITR 369.

10. In the Andhra Pradesh case, it was observed :

"Whether the assessee has concealed particulars of his income or has deliberately furnished inaccurate particulars of such income is always a question of fact."

11. In the Madhya Pradesh case, Dixit C.J. stated the position thus:

"Here, as neither the Inspecting Assistant Commissioner nor the Tribunal found that the assessee's explanation was false and as there was no other material from which an inference of concealment of income could be drawn, no penalty could be imposed on the assessee. When the Tribunal has only held that the assessee's explanation with regard to the payment of Rs. 10,000 stands disproved and that in regard to the payment of the balance, "the position is slightly more in favour of the assessee", this court cannot in this reference hold that the assessee's explanation was false, and that a penalty should have been imposed on him. So to do would be to evaluate the explanation and decide a question of fact, namely, whether the assessee did or did not deliberately conceal his income."

12. In the Supreme Court decision, it has been observed:

"After a very fair and full consideration of the material circumstances the Appellate Tribunal has set aside the order levying penalty. As rightly pointed out by the High Court, the conclusions drawn by the Appellate Tribunal are all on findings of fact recorded against the department. On those findings of fact, there was no question of law arising for reference being made to the High Court."

13. To the examination of the facts of the case by the Tribunal in the case before us, the statement of the Supreme Court has full application.

14. It has been observed by a Bench of this court in the case of Commissioner of Income Tax Vs. K.C. Behera and Others, that the object of the Explanation is to create a presumption in favour of the revenue in a certain contingency and the presumption is a rebuttable one.

15. In the case of Commissioner of Income Tax v. Ketini Krishnamurty [1976] 109 ITR 487 this court has said :

"It would be sufficient to say that this court laid down in unmistakable terms that the onus was under the Act on the assessee to establish that the suppression was not deliberate. This onus, doubtless, is not, as in a criminal case, to be established beyond reasonable doubt, but is to be in accordance with the preponderance of probabilities as applicable to a civil suit." Same is the view expressed by a Bench of Rajasthan High Court in the case of Addl. Commissioner of Income Tax Vs. Gem Palace, . After discussing the law at some length, the following conclusion has been indicated :

"In this view of the matter, the Explanation only gives rise to a rebuttable presumption and has the effect of placing the burden of proof on . the assessee which formerly, before the Explanation was introduced, was on the department.

We are, therefore, unable to accept the contention of the learned counsel for the revenue that the Explanation gives rise to a legal fiction."

16. The court further observed:

"We are further of the opinion that the Tribunal was right in holding that the question whether there was any concealment of income and whether there was any fraud or gross or wilful neglect in the filing of the proper return of its income on the part of the assessee is essentially a question of fact and from the finding of the Tribunal, set out above, it cannot be said that the Tribunal was not mindful of the Explanation to Section 271(1)(c) of the Act."

17. The Rajasthan High Court in an earlier Bench decision, ADDITIONAL COMMISSIONER OF Income Tax, RAJASTHAN Vs. NOOR MOHD and CO. AND OTHERS., referring to a Privy Council decision in AIR 1930 91 (Privy Council) came to hold that the question as to whether a statutory presumption raised in the Explanation has been rebutted or not was essentially a question of fact as it is the totality of the facts and circumstances of each case that would answer the question.

18. In our view, the Tribunal has taken the totality of the facts and circumstances of the case into consideration in reaching its conclusion as to whether the imposition of penalty was justified.

19. A Bench decision of the Delhi High Court in Commissioner of Income Tax Vs. Narang and Company, on almost similar facts as in this case has also been relied upon by assessee's counsel. At page 466, it has been stated :

"It would, thus, be observed that Sub-section (1) of Section 271 is not only penal or quasi-criminal in nature, but departs from the normal well-established Rule which would throw the burden of proof on the revenue to establish that the assessee had consciously concealed the particulars of his income or deliberately furnished inaccurate particulars in respect thereof The onus of proof, on the other hand, has been placed on the assessee, who is required to prove the negative, that is, the absence of fraud or gross or wilful neglect on his part. The assessee is to be afforded an opportunity to furnish this proof. He would, in these peculiar circumstances, be taken to have discharged the onus, if he, in the absence of any proof to the contrary can raise probabilities in his favour or point out circumstances which can create doubts, the benefit of which can be given to him."

20. We are of the view that the examination of the matter by the Tribunal has been by keeping such standards before it. The assessee relied upon a set of circumstances on accepting which the Tribunal came to hold that the assessee had not concealed the particulars of his income nor had acted in a fraudulent manner or with gross or wilful neglect.

21. Mr. Ray for the assessee further contended that the power to impose a penalty is discretionary. The power of the Income Tax Tribunal is co-extensive with that of the Income Tax Officer. Imposition of penalty is conditioned upon

satisfaction of the Income Tax Officer that penalty should be imposed. Whether in a given set of facts such satisfaction can be reached is not only to be examined by the Income Tax Officer but is a matter which is open to examination both in first appeal as also in second appeal. Reviewing the entire facts, it is open to the appellate authority to vacate the finding of satisfaction and thereby rule out the foundation for imposition of penalty. Prima facie, the argument seems to be acceptable, but we do not express any final view on such a contention. It is sufficient for disposal of these reference applications to say that the finding of the Tribunal on the question of leviability of penalty is one of fact and gives rise to no question of law.

22. Our answer to the question referred, therefore, is :

The decision of the Appellate Tribunal that no penalty was to be levied is in accordance with law as indicated in the Explanation to Section 271(1)(c) of the Income Tax Act.

23. We make no direction as to costs.

Das, J.

24. I agree.