

(1981) 11 OHC CK 0007

In the Orissa High Court

Case No : Special Jurisdiction Case No"s. 198 to 202 of 1977

Commissioner of Income Tax

APPELLANT

Vs

Sadananda Sahu

RESPONDENT

Date of Decision : 27-11-1981

Acts Referred:

Income Tax Act, 1961 — Section 256(2), 271(1), 69

Citation : (1982) 136 ITR 726

Hon'ble Judges : R.N. Misra, C.J.;R.C. Patnaik, J

Bench : Division Bench

Advocate : P.K. Misra, B.P. Das and S.P. Choudhury, for the Respondent

Judgement

R.N. Misra, C.J.—These are references made by the Income Tax Appellate Tribunal, Cuttack Bench, u/s 256(2) of the I.T. Act, 1961, in terms of a direction from this court, and the following common question has been referred for the opinion of the court:

"Whether, on the facts and in the circumstances of the case, the Tribunal was justified in deleting the penalty levied u/s 271(1)(c) of the Income Tax Act of 1961 ?"

2. The assessee is an advocate and is being assessed in the status of an individual. The relevant assessment years are 1967-68 and 1971-72. Apart from professional income, the assessee owned a house. In the course of assessment proceedings, the ITO noticed that the assessee was constructing a house. When called upon, the assessee furnished an estimated expenditure of Rs. 35,000 for the construction. The ITO, however, estimated the cost of construction to be Rs. 62,004 and the difference of Rs. 27,004 was taken as unexplained investment, and applying the provisions of Section 69 of the Act, he spread over this amount in five assessment years under the head "Unexplained income from other sources". He also initiated a proceeding u/s 271(1)(c) of the Act, and called upon the assessee to furnish his explanation. On 30th March, 1974, to which date the

proceeding stood posted, the assessee wanted time to produce evidence, but the ITO without granting any adjournment imposed penalties of more than Rs. 25,000 for the five years under consideration. The assessee's appeals against the imposition of penalty were dismissed by the AAC. The Tribunal took the view that the assessee had not been given a reasonable opportunity to explain and adduce evidence in support of his stand. The Tribunal indicated that the crucial question involved was whether there was material to come to the conclusion that the assessee had discharged the negative onus that lay on him under the Explanation to Section 271(1)(c) which came to the statute book with effect from April 1, 1964, and remanded the matters to the AAC for a fresh disposal keeping the legal aspect in view. The AAC re-heard the matter and confirmed the penalties. In further appeals by the assessee it was contended before the Tribunal that the entries made in the order sheet of the ITO did not show the correct state of affairs. The assessee had given an affidavit on August 31, 1975, before the AAC wherein it had been stated that the assessee actually received the notice of hearing fixed for March 30, 1974, on April 10, 1974. When the assessee approached the ITO, he was asked to sign the order sheet of 30th March, 1974, and was also required to sign a petition by back-dating it to 30th March, 1974, as he was told that the penalty proceedings would be dropped. The assessee who was a practising advocate accepted the representation of the ITO and in good faith complied with the direction. The postal cover containing the notice for 30th March, 1974, was produced and it transpired that it had endorsements of April 8, 1974, and April 9, 1974, to the effect that the assessee was absent. Before the Tribunal it was also contended that though the assessee was an advocate he was not conversant with taxation law and in good faith had acceded to the request of the ITO. The assessee had also explained before the Tribunal that an old house had been reconditioned and the entire thing was not a new construction. It was pointed out that the assessee had disclosed a larger area than found by the ITO. Thus there was no contumacy or a deliberate attempt to furnish wrong information. The Tribunal looked into the contentions of the assessee as also those advanced on behalf of the revenue and came to hold that the AAC went wrong in overlooking the evidence available in the shape of the postal envelope and the affidavit of the assessee. The Tribunal also took the view that the discrepancy in the plinth area was marginal and there was no evidence of any contumacy or deliberate attempt on the part of the assessee to misrepresent the relevant facts. It was essentially a case of estimate and merely because the ITO had adopted a higher estimate of the expenditure involved in the construction, a case for the imposition of penalty had not been made out. The Tribunal also indicated that the AAC had not looked at the matter in a judicial way. Taking an overall picture of the matter, the Tribunal held that it was not a fit case which warranted an imposition of penalty.

3. On the facts disclosed above, we must hold that the Tribunal in exercise of its appellate powers came to the conclusion that the material indicated a total absence of any contumacy or deliberate attempt on, the part of the assessee to

mislead the ITO. Facts had been disclosed appropriately, but the ITO had adopted an estimate according to the best of his judgment which led to the variation between the returned and the assessed figures of income. On the facts of the case, it was difficult, as rightly observed by the Tribunal, to hold that the assessee for his conduct should be exposed to the ravages of penalty. We are inclined to agree with the representation of the counsel for the assessee that the matter has been disposed of by an appreciation of facts as disclosed and since on the evidence a factual conclusion has been reached, we do not think we can accept the contention of the revenue that any question of law, much less the question as suggested, arises out of the appellate order of the Tribunal. We would, accordingly, decline to answer the references by saying that the Tribunal had reached a finding of fact and no question of law arises.

4. Parties are directed to bear their own costs of these references.

Patnaik, J.

5. I agree.