

(1992) 03 GUJ CK 0020
In the Gujarat High Court

Case No : Income-tax Reference No. 155 of 1978

Commissioner of Income Tax

APPELLANT

Vs

Sharadchandra Harilal

RESPONDENT

Date of Decision : 10-03-1992

Acts Referred:

Income Tax Act, 1961 — Section 271(1)

Citation : (1992) 105 CTR 150 : (1992) 197 ITR 315

Hon'ble Judges : J.M. Panchal, J;G.T. Nanavati, J

Bench : Division Bench

Advocate : B.J. Shelat, for the Appellant; J.P. Shah, for the Respondent

Judgement

G.T. Nanavati, J.—The Income Tax Appellate Tribunal, Ahmedabad, has referred the following questions u/s 256(1) of the Income Tax Act to this court for its opinion :

"(1) Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that penalty for concealment of income was not exigible under the substantive part of section 271(1)(c) of the Income Tax Act independently of the provisions of the Explanation therebelow ?

(2) Whether the finding of the Tribunal that since the total income of the assessee was determined on the basis of estimate made, it cannot be said that failure to return the correct income was on account of any fraud or any gross or wilful neglect on the part of the assessee and the assessee had discharged the burden which lay upon it under the Explanation is correct in law and sustainable from the material on record ?"

2. A few facts necessary for the purpose of disposal of this case are as under :

The assessee is carrying on the business of manufacturing diaries, account books, calendars, invitation cards, etc. For the assessment years 1967-68 and 1968-69, it has filed separate returns of income declaring total income of Rs.

39,167 and Rs. 27,960, respectively. The Income Tax Officer has assessed the total income for the assessment year 1967-68 at Rs. 63,990 and for the assessment year 1968-69 at Rs. 36,000. The Income Tax Officer was of the view that the assessee had either concealed his income or declared inaccurate particulars of his income and therefore, he initiated penalty proceedings u/s 271(1)(c) of the Act. The explanation given by the assessee was that the difference between the returned income and the assessed and the Department for estimating the total income. As against the bona fide estimate made on the basis of sales and expenses and unclosed accounts, the Income Tax Officer had made the estimate on the basis of comparison of wealth of the assessee on the first day of the accounting year with the wealth of the assessee on the last day of the accounting year. The Income Tax Officer did not accept this explanation as, right from assessment year 1965-66, the Department had not accepted the estimates of the assessee made on the same basis on which it was made for the years 1967-68 and 1968-69 and had adopted a more scientific basis of comparing the wealth as on the last day of the accounting year. In spite of knowing this fact, the assessee had not thought it fit to file returns of income showing the correct income arrived at by adopting the manner adopted by the Income Tax Officer. This, according to the Income Tax officer, was a clear indication that the assessee wanted to conceal his real income. Taking this view he held that section 271(1)(c) was clearly attracted in this case and, in view of the Explanation to that section, the assessee must be deemed to have concealed the particulars of his income or furnished particulars of his income.

3. The assessee went in appeal to the Appellate Assistant Commissioner of Income Tax. The appeal for both years were heard together. The assessee urged that the facts for the assessment years 1967-68 and 1968-69 being similar to the facts for the assessment years 1964-65 and 1966-67 and the Tribunal having already held that for the assessment year 1965-66, no penalty was leviable either u/s 271(1)(c) or under the Explanation to the said section the Income Tax Officer was not justified in taking a different view and, accordingly, he allowed the appeal and cancelled the penalties levied by the Income Tax Officer for both the years.

4. The Department, therefore, filed appeals to the Tribunal. The Tribunal held as follows :

"There cannot be any doubt that, in the year under appeal also, the Income Tax Officer had estimated the income of the assessee. It is true that the basis for estimating the income of the assessee was the wealth determined in the wealth-tax proceedings. It was, however, brought to our notice that, in the wealth-tax proceedings also, the assessee's wealth was determined on estimate basis. Having regard to the above facts as held by the Tribunal for the assessment year 1965-66, it is not possible to come to the conclusion that the addition made by the Income Tax Officer really represents the assessee's income earned in the relevant years. Application of the Explanation to section 271(1)(c) will also not

make any difference. It is not disputed that the assessed income exceeds the returned income by more than 20 per cent. Therefore, the Explanation to section 271(1)(c) would be applicable. However as pointed out above, since the total income of the assessee was determined on the basis of estimate made, it cannot be said that failure to return the correct income was no account of any fraud or any gross or wilful neglect on the part of the assessee. In our opinion the assessee had discharged the burden which lay on it under the Explanation. Therefore in any view of the matter, no penalty was leviable."

5. The Tribunal confirmed the order passed by the Appellate Assistant Commissioner and the appeals filed by the Department were dismissed. On being moved by the Department, the Tribunal has referred the two questions which are set out above.

6 . What is urged by learned counsel for the Revenue is that the Tribunal was wrong in holding that since the total income of the assessee was determined on the basis of the estimate made by the Income Tax Officer, it cannot be said that failure to return the correct income was on account of any fraud or any gross or wilful neglect on the part of the assessee. It is submitted that, admittedly, the assessee had concealed his real income by more than 20 per cent. and, therefore, the Explanation to section 271(1)(c) was attracted in this case. It is submitted that the applicability of the Explanation does not depend upon whether the assessed income determined on the basis of estimate or in some other manner. He also submitted that the Tribunal was wrong in holding that, because the assessee's income was determined on estimate basis, he can be said to have discharged the burden of rebutting the presumption arising under the Explanation. In support of his contention that if the difference between the returned income and the assessed income is more than 20 per cent., the Explanation to section 271(1)(c) becomes applicable and, therefore, it is not for the Revenue to show that there was either suppression or omission of any item of purchase or sale by the assessee. Learned counsel has relied upon the decisions in *Additional Commissioner of Income Tax Vs. Chandravilas Hotel*, , *Commissioner of Income Tax Vs. Mussadilal Ram Bharose*, , *Commissioner of Income Tax, Madras Vs. K.R. Sadayappan*, , *Samunder Bhan Sadh Vs. Commissioner of Income Tax*, , *Commissioner of Income Tax Vs. Mahavir Prasad Jawahar Lal*, , *Commissioner of Income Tax Vs. Brindavan Hotel*, , *Commissioner of Income Tax Vs. Vilasben Hasmukhlal Shah*, and *Rajaram and Co. v. CIT* [1992] 193 ITR 614. He also drew out attention to the Full Bench decision in *Vishwakarma Industries Vs. Commissioner of Income Tax*, and the decision on *Commissioner of Income Tax Vs. Nathulal Agarwala and Sons*, . It is not necessary to refer to all the decisions, as the contention raised by the Revenue in support of which all these decisions have been cited is really misconceived. Though the order of the Tribunal is not happily worded, as it is not clearly stated as to how the assessee can be said to have discharged the burden arising out of the Explanation to section 271(1)(c), if the order is read as a whole it becomes clear that the Tribunal was aware of the correct position as indicated by the

decisions cited by learned counsel for the Revenue and did not want to lay down a different proposition of law that, if the total income of the assessee is determined on the basis of estimate made, then, in such a case, it cannot be said the failure to return the correct income is on account of any fraud or any gross or wilful neglect on the part of the assessee. Otherwise, the Tribunal would not have observed that, as the assessed income has exceeded the returned income by more than 20 per cent., the Explanation to section 271(1)(c) was applicable. The Tribunal had noticed that the facts for the assessment year 1967-68 and 1968-69 were similar to the facts for the assessment years 1964-65 and 1966-67. It has also observed that the Department was not able to mention even one instance of either in the assessment order or in the penalty order. It also noticed the fact that, in the wealth-tax proceedings also, the assessee's wealth was determined on estimate basis. It was also brought to the notice of the Tribunal that the assessee had estimated his income on the basis of unclosed accounts of sales and expenses. It was in this context that the Tribunal observed that "since the total income of the assessee was determined on the basis of estimate made, it cannot be said that the failure to return the correct income was on account of any fraud or any gross or wilful neglect on the part of the assessee" and that "the assessee has discharged the burden which lay on it under the Explanation". Thus, on facts, the Tribunal was of the view that the assessee had discharged the burden of rebutting the presumption which arose as a result of application of section 271(1)(c). In short, the Tribunal believed the explanation of the assessee that the estimate made by him of his income was bona fide and that the accounts and particulars of sales and expenses submitted by him were true. It was on the basis of this material that the Tribunal held that the assessee had discharged the burden.

7. In view of the facts and circumstances of the case, it cannot be said that the view taken by the Tribunal is wrong. Therefore, both the question referred to us are answered in the affirmative, i.e., against the Revenue and in favour of the assessee. This reference is disposed of accordingly with no order as to costs.