(1993) 03 BOM CK 0098

In the Bombay High Court

Case No : IT Ref. No. 223 of 1979

Commissioner of Income Tax APPELLANT

Vs

S.K. Agarwal RESPONDENT

Date of Decision : 04-03-1993

Acts Referred:
Income Tax Act, 1961 — Section 143, 143(3), 144, 147, 256(2)

Citation : (1994) 208 ITR 668

Hon'ble Judges : U.T. Shah, J;Sujata V. Manohar, J

Bench : Division Bench

Advocate : Deokinandan, K.M.L. Majele, for the Appellant;

Judgement

U.T. Shah, J.—As the Revenue was aggrieved by the order of the Tribunal cancelling the penalty imposed under s. 271(1)(c) IT Act, 1961 (the Act) as well as rejection of the application made by it under s. 256(1) of the Act, the Revenue filed an application under s. 256(2) of the Act before this Court. Vide their judgment/order dt. 15th December, 1976, in IT Ref. No. 116 of 1976, this Court directed the Tribunal to draw a Statement of the Case and refer the following question for its opinion :

"Whether, on the facts and in the circumstances of the case and having regard to the fact that the presumption arising under the Expln. to s. 271(1)(c) of the IT Act 1961, arose against the assessee, the Tribunal was justified in cancelling the penalty imposed upon the assessee for the asst. yr. 1968-69 ?"

2. The assessee is an individual and is a partner in two firms M/s. Agarwal Fabrications and M/s. K. C. Agarwal & Sons. The assessment year is 1968-69 and the relevant previous year is the calendar year 1967.

3. In his return originally filed on 25th April, 1969, the assessee had declared total income of Rs. 8,479. Subsequently, he filed a revised return on 28th July, 1969 declaring a total income of Rs. 24,292. It may be mentioned that in the order of IAC, he has mentioned that Rs. 24,292 shown by the assessee for the

revised return was a loss return.

4. During the course of the assessment proceedings, the ITO inquired of the assessee to explain the nature and source of certain loans shown in his capital account in the books of M/s. Agarwal Fabrications. The ITO was not fully satisfied about the assessee''s explanation regarding the nature and source of the entire amount of loan alleged to have been taken by the assessee. He, therefore, made an addition of Rs. 56,200 while framing the assessment under s. 143(3) of the Act. Simultaneously, he initiated proceedings under s. 271(1)(c) of the Act. The assessee preferred an appeal to the AAC who after hearing the assessee''s submissions regarding addition of Rs. 56,200 reduced the addition to Rs. 30,500. In further appeal to the Tribunal, the Tribunal reduced it to Rs. 26,050.

5. As the total income of the assessee exceeded Rs. 25,000 the ITO referred the matter to the IAC. Thereafter, the IAC issued a notice on the assessee under s. 271(1)(c) of the Act calling upon the assessee to show cause why penalty should not be imposed in respect of the addition of Rs. 26,050 made in the assessment proceedings. The assessee resisted the action of the IAC vide his letter dt. 27th February, 1974 of his Chartered Accountants M/s. Khandelwal Jain & Co. Overruling the objections raised by the assessee and keeping in view the fact that there was an amendment in s. 271(1)(c) of the Act w.e.f. 1st April, 1964, the IAC imposed penalty of Rs. 26,050 vide his order dt. 5th March, 1974.

6. Thereafter the assessee preferred an appeal before the Tribunal and argued that on the proper appreciation of the facts and circumstances obtaining in his case, the IAC was not justified in imposing penalty under s. 271(1)(c) of the Act. The assessee had also taken up a point that the IAC had invoked the provisions of the Explanation to s. 271(1)(c) of the Act which ITO had not invoked while initiating the proceedings under that section. The Revenue, on the other hand, submitted that in view of the difference of income returned and that assessed the provisions of the Explanation to s. 271(1)(c) of the Act were clearly attracted and it was for the assessee to show as to why penalty cannot be imposed under s. 271(1)(c) of the Act.

7. In its order under reference, the Tribunal referred to the decision of the Kerala High Court in the case of Commissioner of Income Tax Vs. Gujarat Travancore Agency, and that of the Supreme Court in the case of Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, , and cancelled the penalty in the following manner :

"We have read and re-read the order of the IAC and we do not find anything in the said order which would point to any finding by the Department that there was no attempt to conceal by the assessee. Even the findings of the Tribunal, while upholding the addition of Rs. 26,050 may not help, as the Department has merely proceeded on the basis that the explanation advanced by the assessee was not satisfactory and inference could be drawn that the amount was assessee''s income from undisclosed sources. On the facts and circumstances of the case, therefore, we are satisfied that this is not a fit case for levy of penalty under s. 271(1)(c). We would accordingly quash the order of the IAC and direct the ITO to refund the amount of penalty, if any, collected from the assessee. In the result, the appeal succeeds and is allowed."

8. In its application made under s. 256(1) of the Act, the Revenue requested the Tribunal to draw up a statement of the case and refer the following question to this Court :

"Whether, on the facts and the circumstances of the case and having regard to the fact that the presumption arising under the Explanation to s. 271(1)(c) of the IT Act, 1961, arose against the assessees and remained unrebutted, the Tribunal was justified in cancelling the penalty imposed upon the assessee for the asst. yr. 1968-69 ?"

As already noted above, the Tribunal rejected the said application vide its order dt. 17th November, 1975.

9. The learned Counsel for the Revenue submitted that the question referred to the Court should be answered in favour of the Revenue as it is not in dispute that the provisions of the Explanation to s. 271(1)(c) of the Act are attracted in the instant case. Thereafter, he strongly argued that the Tribunal was not justified in following the ratio laid down in the case of Anwar Ali (supra), without taking into consideration the fact that there was an amendment in s. 271(1)(c) of the Act, w.e.f. 1st April, 1964 by way of Explanation (1). He referred to the decisions of the Supreme Court in the cases of Commissioner of Income Tax Vs. Mussadilal Ram Bharose, and Commissioner of Income Tax, Madras Vs. K.R. Sadayappan, and pointed out that in both these cases the Supreme Court has elaborately discussed the effect of the Explanation inserted in s. 271(1)(c) of the Act w.e.f. 1st April, 1964. According to the learned counsel for the Revenue, the Tribunal has totally missed this aspect of the matter and cancelled the penalty in the manner set out above. He also made a reference to the decision of the Allahabad High Court in the case of Commissioner of Income Tax Vs. Radhey Shyam Shyam Sunder Jaiswal, , wherein also the Court had an occasion to deal with a case after insertion of the Explanation to s. 271(1)(c) of the Act. He pointed out that in the said decision, the Court has observed that the Tribunal had wrongly followed the ratio laid down in the case of Anwar Ali (supra) instead of the ratio laid down by the Supreme Court in its subsequent decisions noted above. However, it may be mentioned that the Court had also observed that the Tribunal did not have the benefit of these subsequent decisions of the Supreme Court. In this view of the matter, the learned Counsel for the Revenue submitted that the Tribunal ought to have confirmed the penalty imposed by the IAC.

10. The learned counsel for the assessee vehemently argued that we should decide the reference in favour of the assessee. According to him, since the IAC had not indicated that he was going to invoke the provisions of the Explanation to s. 271(1)(c) of the Act, the Tribunal was fully justified in cancelling the penalty

in the manner it did. He further submitted that even assuming for the sake of arguments that the provisions of the Explanation to s. 271(1)(c) of the Act could be invoked, it is submitted that that can be invoked only if the main provisions of s. 271(1)(c) of the Act are attracted. However, since in the instant case, the Tribunal has clearly held that the provisions of main section to s. 271(1)(c) of the Act are not attracted, the penalty imposed by the IAC cannot be supported by referring to the Explanation to s. 271(1)(c) of the Act. He fervently argued that if need be the question may be reframed as the question as it stands is loaded in favour of the Revenue. In this connection he placed before us a decision of this Court in the case of CIT vs. P. M. Shah in IT Ref. No. 237 of 1977 dt. 9th November, 1992 to which both of us were parties and pointed out that in the said decision the Court was pleased to hold that the IAC cannot impose penalty on a ground different than the one by which the ITO had initiated proceedings unders. 271(1)(c) of the Act. He, therefore, strongly urged that in the interest of justice, if need be, the question may be reframed.

11. On due consideration of the submissions of the parties and the material available on record, we do not find any merit in the stand taken on behalf of the assessee. It is pertinent to note that when the Revenue made an application under s. 256(1) of the Act before the Tribunal, raising a question, no objections appear to have been taken by the assessee or perhaps the Tribunal might have indicated that they are going to reject the application. However, when the matter came up before this Court under s. 256(2) of the Act and when this Court after hearing both the parties had directed the Tribunal to draw up a statement of the case and refer the question framed by the Court, it appears that no objection was taken by the assessee. Under these circumstances, it is too late in the day to modify or amend the question as was urged on behalf of the assessee. We, therefore, proceed to give our opinion on the basis of the question referred to us.

12. Section 271(1)(c) of the Act, as it stood at the relevant time, reads as under :

"Sec. 271(1). If the ITO or the AAC, in the course of any proceedings under the Act, is satisfied that any person -

(c) has concealed the particulars of his income or finished inaccurate particulars of such income, he may direct that such person shall pay by way of penalty, -

(i) ....

(ii) ....

(iii) in the cases referred to in cl. (c), in addition to any tax payable by him, a sum which shall not be less than twenty per cent, but which shall not exceed one and half times the amount of the tax, if any, which would have been avoided if the income as returned by such person had been accepted as the correct income." The section further provides that if the concealment exceeds Rs. 25,000, the ITO cannot issue any notice without the prior permission or approval of the IAC. 13. Explanation to s. 271(1)(c) of the Act, which was inserted by the

Finance Act, 1964 w.e.f. 1st April, 1964 reads as under :

"Explanation - Where the total income returned by any person is less than eighty per cent of the total income (hereinafter in this Explanation referred to as the correct income) as assessed under s. 143 or s. 144 or s. 147 (reduced by the expenditure incurred bona fide by him for the purpose of making or earning any income included in the total income but which has been disallowed as a deduction), 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 cl. (c) of this sub-section."

14. On the proper reading of the aforesaid provisions in the light of the aforesaid two decisions of the Supreme Court reported in 165 ITR and 185 ITR (supra), it is quite apparent that the assessee was liable to penalty under s. 271(1)(c) of the Act. We are not inclined to accept the submissions made on behalf of the assessee that when main provisions of S. 271(1)(c) of the Act are not attracted, the Explanation to the said section cannot apply. On the contrary, on the plain reading of the Explanation, it is quite apparent that it extends the provisions contained under a S. 271(1)(c) of the Act in view of the language used therein viz. "be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income for the purposes of cl. (c) of this sub-section" In this view of the matter and the manner in which the question has been referred to us, we are of the view that the Tribunal was clearly wrong in cancelling the penalty imposed under S. 271(1)(c) of the Act. Before we part with this judgment, we would mention that the decision in the case of P. M. Shah given by this Court on 9th November, 1992 would have no application in view of the fact that the question referred thereto was in the following manner :

"Whether, on the facts and in the circumstances of the case and in law, the Tribunal was justified in holding that the IAC was not competent to call in aid the Expln. to s. 271(1)(c) and levy penalty when the ITO while initiating the proceedings had not done so ?"

15. In our advisory jurisdiction, we cannot go beyond the question referred to us for the opinion. The wordings of the question in the present reference are quite different than the one in the case of P. M. Shah. In this view of the matter, we fail to appreciate how the decision in that case would be of any help to the assessee.

16. In view of the aforesaid discussion, we answer the question in the negative i.e. in favour of the Revenue and against the assessee.

No order as to costs.

