

(1995) 11 GUJ CK 0022
In the Gujarat High Court
Case No : IT Ref. No. 63 of 1982

Commissioner of Income Tax

APPELLANT

Vs

Subhash Trading Co.

RESPONDENT

Date of Decision : 08-11-1995

Acts Referred:

Income Tax Act, 1961 — Section 271(1)

Citation : (1996) 131 CTR 121 : (1996) 221 ITR 110 : (1996) 86 TAXMAN 30

Hon'ble Judges : S.K. Keshote, J;Rajesh Balia, J

Bench : Division Bench

Advocate : B.J. Shelat, for M.R. Bhatt and Co, for the Appellant; D.A. Mehta for R.K. Patel, for the Respondent

Judgement

R. Balia, J.—In compliance with the directions issued by this Court in IT Ref. No. 102 of 1981 decided on 30th April, 1981, the Tribunal, Ahmedabad Bench "B" had submitted statement of case and referred the following two questions of law arising out of the Tribunal's order in ITA No. 1047/Ahd/78-79 relating to asst. yr. 1973-74 :

1. "Whether, on the facts and in the circumstances of the case, the Tribunal has been right in law in holding that the penalty of Rs. 92,894 imposed by the IAC under s. 271(1)(c) could not be justified ?
2. Whether the finding of the Tribunal that though book result of the assessee was rejected, since there was no evidence to conclude a positive finding that there was concealment, penalty cannot be sustained under s. 271(1)(c) of the IT Act, 1961 is correct in law ?" We have heard learned counsel for the parties.
2. The facts as appearing from the statement of case are that, during the course of assessment, the ITO rejected the books of account maintained by the assessee as, according to him, it was not possible to arrive at correct result of the business from the books of account maintained by the assessee, and assessed the income of the assessee by estimating gross profit at the rate of

15% on estimated sales of Rs. 8,75,000 and made additions of Rs. 93,000. The contentions (additions) were sustained by the AAC. However, the Tribunal while sustaining the order rejecting the books of account modified the assessment order by reducing the gross profit rate from 15% to 12% and reducing estimated sales to Rs. 8,00,000 from Rs. 8,75,000 and reduced the total additions from Rs. 93,000 to Rs. 57,644.

3. During the course of assessment proceedings, the ITO has also initiated penalty proceedings under s. 271(1)(c) of the IT Act, 1961. The assessee raised contention that there was no gross or wilful neglect on his part in submitting the return of income. However, the IAC relying on the Explanation, as was then in existence, appended to s. 271(1)(c) of the Act, which permitted AO to raise presumption that an assessee has concealed particulars of income where the total income returned was less than 80% of the total income assessed and imposed penalty of Rs. 92,894.

4. Before the Tribunal in appeal, the assessee raised the same contentions about invalidity of penalty. The contention of the assessee and the conclusion recorded by the Tribunal are reproduced below :

"14. In our view imposition of penalty is not at all called for; the assessee's book result is, no doubt, rejected because the onus is on the assessee to show that correct profits are disclosed. On the other hand, before the penalty could be imposed, the Revenue has to show that the assessee has concealed some income. The Expln. to s. 271(1)(c), no doubt, justified a certain presumption and the onus is on the assessee in certain circumstances, but here also some evidence has to be brought to conclude a positive finding that there is some concealment. Here there is no evidence to come in such a conclusion. We, therefore, delete the penalty imposed under s. 271(1)(c)."

5. It was contended by the learned counsel for the Revenue that, in absence of any specific finding of the Tribunal that failure to return the correct income did not arise from any fraud or any gross or wilful neglect on his part, the assessee must be deemed to have concealed the particulars of income or furnished inaccurate particulars of such income for the purpose of imposing penalty under s. 271(1)(c) and the Tribunal, therefore, erred in setting aside the order of penalty. On the other hand, it was contended by the learned counsel for the assessee that, in the facts and circumstances of the present case, the finding about absence of fraud or gross or wilful neglect on the part of the assessee is inherent in the finding recorded by the Tribunal and no other view was otherwise possible in the facts and circumstances of the present case.

6. Having carefully considered the rival contentions we are of the opinion that Question No. 1 referred to us need to be answered in affirmative. It is true that the Explanation referred to above which was inserted by the Finance Act, 1964 provides that where the total income returned is less than 80% of the total income assessed, the assessee shall, unless it proves that 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 that income or furnished inaccurate particulars of such income within the meaning of s. 271(1)(c) of the Act. The Explanation provides for raising a rebuttable presumption in favour of the Revenue and is merely a rule of evidence. It is also true that the burden is on the assessee to prove that there has been no such gross or wilful neglect on his part in furnishing the correct income. It is equally true that this burden cast on the assessee is not of the same nature which rests on the prosecution in a criminal case for proving the guilt of the accused, but is a burden akin to that in civil litigation where it depends upon preponderance of probabilities. It is also not necessary that any positive evidence be produced by the assessee before he could contend that failure to return the total assessed income has not arisen on account of any fraud or any gross or wilful neglect on the part of the assessee. It can even be pointed out from the material on record, and if he does so by which the presumption raised in favour of the Revenue is rebutted, the position revert to as if there was no Explanation giving rise to a legal fiction. If it can be said on preponderance of probabilities that failure to return the total assessed income has not arisen on account of any fraud or any gross or wilful neglect on the part of the assessee from the material on record, the presumption raised in favour of the Revenue can be rebutted and the Revenue must fail in its attempt to impose penalty on that basis.

7. We are fortified in our aforesaid conclusion by the Division Bench decision of this Court in the case of Commissioner of Income Tax, Gujarat I Vs. S.P. Bhatt, . P. N. Bhagwati, C.J., as he then was, while speaking for the Court said :

"The Explanation raises a legal fiction and the assessee is straightaway brought within the ambit of s. 271(1)(c). It is then not necessary for the Revenue to show affirmatively by producing the material that the assessee has in fact concealed the particulars of his income or furnished inaccurate particulars of such income. The fact of the total returned income being less than eight per cent of the total income assessed is sufficient to bring the assessee within the penal provision enacted in s. 271(1)(c). That is achieved by the legal fiction enacted in the Explanation. But, this legal fiction can be displaced if the assessee proves that the failure to return the correct income, that is the total income assessed, did not arise from any fraud or gross or wilful neglect on his part. If the assessee wants to repel the legal fiction and throw the burden of bringing the case within s. 271(1)(c) again on the Revenue, as it would be in the absence of the Explanation, the assessee has to show - and this burden is upon him - that his failure to return the correct income did not arise from any fraud or gross or wilful neglect on his part. Now, this burden is not of the same nature as the burden which rests on the prosecution in a criminal case where the prosecution has to establish the guilt of the accused beyond reasonable doubt nor is it of the same nature as the burden which lies upon the Revenue in establishing that the assessee has concealed the particulars of his income or furnished inaccurate particulars of such income. It is a burden akin to that in a civil case where the

determination is made on preponderance of probabilities. It is also not necessary that any positive material should be produced by the assessee in order to discharge this burden which rests upon him. The assessee may claim to have discharged the burden by relying on the material which is on record in the penalty proceedings, irrespective of whether it is produced by him or by the Revenue. The only question to which the IT authority has to address itself is, whether on the material on record in the penalty proceedings, can it be said on a preponderance of probabilities that the failure to return the total assessed income has not arisen on account of any fraud or any gross or wilful neglect on the part of the assessee. If the answer to the question is in the affirmative, the legal fiction enacted in the Explanation cannot arise and the Revenue must fail in its attempt to impose penalty on the assessee."

8. The aforesaid view was reiterated by this Court again in IT Ref. No. 351 of 1982 decided on 7th Nov., 1995. From the aforesaid it is apparent that the question in this case which calls for consideration is whether on the material on record in the penalty proceedings, can it be said on preponderance of probabilities that the failure to return the total assessed income has not arisen on account of any fraud or any gross or wilful neglect on the part of the assessee.

9. The facts of the present case, as noticed by us, amply demonstrate that this was a case in which a best judgment assessment has been made by rejecting the results disclosed by books of account maintained by the assessee and the figure of assessable income has been arrived at by applying an estimated gross profit rate on estimated sales, viz. both the figures are adopted by the Revenue authorities on certain assumptions but are not the actual figures of sales or gross profit earned by the assessee. There is bound to be a guess-work and application of rule of thumb to some extent in such matters. Facts reflect that, while the assessee in its books of account disclosed the total sales to be Rs. 7,75,000, the ITO on rejection of books of account estimated the sales to be Rs. 8,75,000 which on appeal before the Tribunal were substituted by Rs. 8,00,000. So also, while the gross profit disclosed by the books of account of the assessee was 5%, the ITO estimated the gross profit rate at 15% which again was reduced by the Tribunal to 12%. In this circumstance, in absence of any other material which might reflect on the conduct of the assessee about deliberate attempt to maintain false books of account, on a preponderance of probabilities, no other conclusion can be reached but that the failure to return the total assessed income was not on account of any fraud or gross or wilful neglect on the part of the assessee. In the present case, the assessee has raised this contention. The material available on record in that regard was before the Revenue authorities and the Tribunal which accepted those contentions of the assessee about invalidity of levy of penalty under s. 271(1)(c) of the Act merely by resorting to its Explanation. In this circumstance, we are unable to sustain the contentions of the learned counsel for the Revenue that merely because the finding recorded by the Tribunal is not happily worded, the order of the Tribunal must be held to be erroneous, particularly when the Tribunal has recorded succinctly the contentions

raised by the assessee in this regard and allowed its appeal. At best, it can be said to be an opinion unhappily worded on this aspect of the matter.

10. In this connection, we may usefully refer to the observations made by P. N. Bhagwati, C.J. in the case of S. P. Bhatt (supra) where in the like circumstance it was said :

"Here it is significant to note that the difference between the returned income and the total assessed income was entirely due to the fact that the ITO estimated the profits supposed to have been earned by the assessee. The ITO found it difficult to accept the figure of profit appearing from the books of account maintained by the assessee because no quantitative stock account was maintained, a majority of sales were not supported by vouchers and the gross profit disclosed in the books of account appeared to him to be low. It was not the case of the ITO that any particular entries in the books of account were false or any particular items of purchase or sale were omitted to be entered in the books of account. It was only because the figures of profit appearing in the books of account could not be verified by him on account of lack of maintenance of proper verificatory records that the ITO estimated the sales and applied a percentage of seven and half per cent to sales to doctors and a rate of twelve-and-half per cent to the other sales. It is quite possible that if proper verificatory records had been maintained by the assessee, the income returned might have been accepted as the correct income by the ITO. These records might have shown that the accounts maintained by the assessee were correct and reflected the correct income. It is difficult to see how in these circumstances where assessment of total income is made on the basis of estimate, it can be said that the failure to return the total assessed income was on account of fraud or gross or wilful neglect on the part of the assessee and, if that be so, it must follow by necessary implication that the failure to return the total assessed income was not on account of any fraud or gross or wilful neglect on the part of the assessee. The burden which lies upon the assessee must be taken in such a case to be discharged so as to repel the applicability of the legal fiction enacted in the Explanation."

11. The facts in the present case are not different and the only conclusion possible in the present circumstance is that necessary implication of the material appearing on the record is that failure to return the total assessed income was not on account of any fraud or gross or (wilful) neglect on the part of the assessee. The burden which lay upon the assessee must be taken in the present case to be discharged so as to repel the applicability of the legal fiction in the Explanation. There being no other ground the Tribunal was right in holding that penalty of Rs. 92,894 imposed by the IAC under s. 271(1)(c) of the Act was not justified. Thus, we answer Question No. 1 in affirmative, that is, in favour of the assessee and against the Revenue.

12. Coming to Question No. 2, it is to be noticed that so long as presumption raised in favour of the Revenue under the Expln. to s. 271(1)(c) stands

unrebutted and is operative the Revenue need not lead any evidence to reach a positive finding that there was concealment of income of the previous year by the assessee but so soon the presumption raised under the Explanation stands rebutted, the Revenue authorities must record a positive finding independent of presumption about concealment of income of the previous year which the assessee has concealed or particulars of which have been inaccurately furnished by him. As in the present case the assessee's burden to rebut the presumption raised by the Revenue stands discharged on the basis of the material available on record, the Tribunal was right to hold that penalty need not be sustained under s. 271(1)(c) of the Act in absence of any evidence to conclude a positive finding that there was concealment of the income. We accordingly answer Question No. 2 also in favour of the assessee and against the Revenue.

13. There shall be no order as to costs.