
(1986) 01 P&H CK 0057

In the Punjab And Haryana At Chandigarh

Case No : Income-tax Reference No. 36 of 1978

Commissioner of Income Tax

APPELLANT

Vs

Surinder Singh

RESPONDENT

Date of Decision : 22-01-1986

Acts Referred:

Finance Act, 1964 — Section 271(1)

Income Tax Act, 1961 — Section 139(2), 256(2), 271(1)

Citation : (1986) 57 CTR 212 : (1986) 2 ILR (P&H) 398 : (1986) 160 ITR 456

Hon'ble Judges : S.P. Goyal, J; Gokal Chand Mital, J

Bench : Division Bench

Advocate : Ashok Bhan and Ajay Mittal, for the Appellant; G.C. Sharma and S.S. Mahajan, for the Respondent

Judgement

Gokal Chand Mital, J.—On a mandamus issued by this court in ITC No. 109 of 1976 by the judgment dated August 22, 1977, the Income Tax Appellate Tribunal, Amritsar, has referred the following question for the opinion of this court :

" Whether, on the facts and in the circumstances of the case, the Tribunal Is correct in cancelling the penalty of Rs. 1,76,000 levied u/s 271(1)(c) of the Income Tax Act, 1961 ? "

2. Surinder Singh (hereinafter called " the assessee "), held a British passport. On March 17, 1971, the Enforcement Directorate searched his residential house at 14-B Model Town, Jullundur, under the provisions of the Foreign Exchange Regulation Act, 1947, and recovered a suit case containing Indian currency notes of Rs. 6,00,000 from his bedroom. When the Income Tax Officer came to know of the search and recovery of the amount, he initiated assessment proceedings for the assessment year 1971-72 and served a notice u/s 139(2) of the Income Tax Act, 1961 (for short " the Act "), on the assessee on April 2, 1971. On June 21, 1971, the assessee filed a return declaring an income of Rs. 3,850 with certain remarks in Part IV of the return. In the remarks, he stated as follows :

" 1. Since the status of the assessee is resident but not ordinarily resident, no outside income has been shown as not derived from business controlled in India.

2. A sum of Rs. 6,04,500 seized by the Enforcement Officer on March 17, 1971, does not belong to the assessee and, at any rate, it is not income of the assessee.

3. Income from agricultural land is exempt from tax."

3. Thereafter, he filed a revised return on July 5, 1971, declaring an income of Rs. 8,350 as he had also capital gain of Rs. 4,500 from sale of a shop.

4. During the assessment proceedings, the assessee gave an explanation in regard to the amount of Rs. 6,00,000 recovered in search by saying that he wanted to purchase shares of M/s. Kartar Bus Service Limited, Jullundur, and for that purpose, he collected money from persons of his group and this formed part of Rs. 6,00,000 recovered from his residence. The matter was thoroughly considered by the Income Tax Officer and he concluded that the agreement for the purchase of shares of M/s. Kartar Bus Service was not genuine and the explanation about the collection of money from persons of his group was also not genuine. Accordingly, he treated the sum of Rs. 6,00,000 as the assessee's income from undisclosed sources. Simultaneously, he initiated penalty proceedings u/s 271(1)(c) of the Act. Against the assessment of the Income Tax Officer in the assessment proceedings, the assessee took the matter in appeal and the Appellate Assistant Commissioner, on an examination of the evidence, held that 12 items were found to be genuine advances/loans obtained by the assessee from certain parties but found that the following three items were not proved to be genuine :

Rs.

i) Shri Lembar Singh

25,000

ii) Shri Rachpal Singh

50,000

iii) Shri Harcharan Singh

13,000

5. The total of the aforesaid items is Rs. 88,000 and by amending the order of the Income Tax Officer, addition of Rs. 88,000 towards the total income of the assessee was made.

6. Both sides went up in separate appeals before the Tribunal and both the appeals were dismissed and the addition of Rs. 88,000 in the income of the assessee was sustained. This chapter stood closed thus.

7. In the penalty proceedings, the Inspecting Assistant Commissioner of Income

Tax imposed a maximum penalty of Rs. 1,76,000 u/s 271(1)(c) of the Act. The Inspecting Assistant Commissioner had made further enquiries in the penalty proceedings and came to the conclusion that the evidence in respect of these loans was cooked up. Against the aforesaid order, the assessee took the matter in appeal before the Tribunal and the Tribunal cancelled the penalty for the reasons which are contained in paras 11 to 13 of its order. The Department sought a reference to this court, which was initially declined by the Tribunal on the ground that no question of law was involved and the matter was decided on facts but on application filed in this court u/s 256(2), mandamus was issued and that is how the question of law has been referred to this court.

8. The Tribunal had relied on *The Commissioner of Income Tax Madras Vs. Khoday Eswarsa and Sons*, and *Commissioner of Income Tax Vs. Meghraj Ramchandra*, and came to the conclusion that penalty proceedings were penal in character and it was for the Revenue to establish that the receipt of the amount in dispute constituted income of the assessee. It also proceeded to hold in view of the aforesaid decisions that apart from the falsity of the explanation given by the assessee, the Department must have before it, before levying of penalty, cogent material or evidence from which it could be inferred that the assessee had consciously concealed the particulars of its income or had deliberately furnished inaccurate particulars in respect of the same and that the disputed amount is a revenue receipt. Both the aforesaid decided cases relate to the law as it prevailed before the amendment made by the Finance Act 5 of 1964 which was materially different after the aforesaid amendment. The aforesaid decisions were based on the Supreme Court judgment in *Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali*, which also related to the provisions of law, as it stood before the aforesaid amendment. This court in *Additional Commissioner of Income Tax Vs. Karnail Singh V. Kaleran*, had taken the view that in spite of the aforesaid amendment, no change was brought out and the onus was still on the Department and in penalty proceedings, the Department had to prove from independent evidence the guilty intention of the assessee as also that the disputed amount represented the income of the assessee. The same view was followed by the Income Tax Tribunal. The view taken in *Additional Commissioner of Income Tax Vs. Karnail Singh V. Kaleran*, was doubted and the matter was referred to the Full Bench. The Full Bench of this court in *Vishwakarma Industries Vs. Commissioner of Income Tax*, overruled *Additional Commissioner of Income Tax Vs. Karnail Singh V. Kaleran*, and held that *Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali*, and other cases decided in view of the law as it stood before the amendment of 1964 were not applicable to the case and the following rule was laid down keeping in view the amended provisions (at pp. 663 and 664) :

" It would necessarily follow from the above that in order to determine the applicability of the Explanation, the first exercise is to see as to in which of the two categories the assessee would fall. As noticed earlier, the criterion here is purely arithmetical. If the difference between the returned income and the

assessed income varies between 20% or more, then the assessee straightaway falls within the net of the newly added Explanation. Once this is so, the Explanation is attracted at once and what remains thereafter is to determine the consequences of its application.

A close reading of the latter part of the Explanation would indicate that once it is held to be applicable to the case of an assessee, it straightaway raises three legal presumptions against him. For clarity's sake, these may be formulated as under :

- (i) that the amount of the assessed income is the correct income and it is in fact the income of the assessee himself;
- (ii) that the failure of the assessee to return the aforesaid correct assessed income was due to fraud; or
- (iii) that the failure of the assessee to return the aforesaid correct assessed income was due to gross or wilful neglect on his part.

Now, it would follow from the above and the factum of the presumptions spelled out therein that, in essence, the Explanation is a rule of evidence. This indeed appears to be well established both on the language and the principle of the Explanation as also by a plethora of precedents holding to the same effect. Further, it must at once be pointed out that the presumptions raised by the Explanation are not conclusive presumptions. These are only rebuttable presumptions. As is the rule under the civil law, the initial burden of discharging the onus of rebuttal is on the assessee. However, once he does so, he would be out of the mischief of the Explanation until and unless the Department is able to establish afresh that the assessee in fact had concealed the particulars of the income or furnished inaccurate particulars thereof. The nature of the initial onus placed on the assessee herein under the Explanation is not unlike the ordinary burden of proof placed on either party in judicial proceedings. The basic rule of evidence is that if the person on whom the onus to prove lies is unable to discharge the same, his cause would fail. It must, however, be reiterated that the presumption raised herein is only an initial presumption which is rebuttable. The burden of discharging an onus to prove thereunder would again be like the one in ordinary civil proceedings, i.e., it can be so discharged by preponderance of evidence. Again, it must not be insisted upon that there is any necessary or mandatory requirement of leading evidence by any one of the parties. Such a burden can be discharged by existing material on the record in a specific case. As was pointed out earlier, the assessment proceedings and the penalty proceedings are distinct and separate. It would be permissible for an assessee under the penalty proceedings to show and prove that on the existing material itself the presumption raised by the Explanation would stand rebutted. "

9. A reading of the aforesaid quotation clearly shows that it has to be presumed (i) that the assessed income is the income of the assessee; (ii) his failure to return the correct income is due to fraud; and (iii) his failure to return the correct income was due to gross or wilful neglect on his part. However, these

presumptions are rebuttable. Therefore, the law after the amendment of 1964 is totally different from the law which prevailed before that amendment and the Tribunal decided on the basis of law which was applicable before the aforesaid amendment. In any case, it decided on the basis of the law laid down in Additional Commissioner of Income Tax Vs. Karnail Singh V. Kaleran, which stands overruled by the Full Bench and, therefore, it is a fit case in which the matter deserves to be re-decided by the Tribunal keeping in view the Full Bench decision of this court in Vishwakarma Industries Vs. Commissioner of Income Tax, . ;

10. When the proceedings were being taken before the Inspecting Assistant Commissioner and the Tribunal, the decision of this court in Additional Commissioner of Income Tax Vs. Karnail Singh V. Kaleran, prevailed, on the basis of which the initial onus was on the Department which could be rebutted by the assessee. Now, after the Full Bench decision in Vishwakarma Industries Vs. Commissioner of Income Tax, presumptions have to be raised against the assessee, which he can rebut. Even the Department can lead more evidence if it likes to prove the falsity of the material which the assessee may like to produce now. Therefore, it is not possible for us to answer the question and the matter deserves to be remitted to the Income Tax Appellate Tribunal to decide the matter afresh after affording an opportunity to the parties in the wake of the Full Bench judgment in Vishwakarma Industries Vs. Commissioner of Income Tax, .

11. On behalf of the assessee, it was argued by Shri G. C. Sharrna, senior advocate, that the Tribunal and the Inspecting Assistant Commissioner had proceeded to decide on the basis of Section 271(1)(c) of the Act and the question referred to this court is also on the basis of Section 271(1)(c) of the Act and, therefore, neither the amended provision can be seen nor the Explanation added to it can be seen. We find no merit whatsoever in this argument. It cannot be denied that the matter has to be decided on the basis of the law which would be applicable to given facts. Even remotely, we do not find that the Inspecting Assistant Commissioner or the Tribunal was not aware that Section 271(1)(c) stood amended in the year 1964. Moreover, even in the question which came up for consideration before the Full Bench of this court, only Section 271(1)(c) was mentioned and there was no mention of either the amended Act or of the Explanation added. When for the year 1971-72 with which we are concerned in this case, Section 271(1)(c) of the Act has to be seen, it will be seen in the light of the law as would be applicable to that year. It is not disputed before us that for the assessment year 1971-72, the amendment made by the Finance Act No. 5 of 1964 would be applicable.

12. It was then urged on behalf of the assessee that the Tribunal has rendered its decision on facts as well and has accepted the explanation of the assessee. The entire reasoning of the Tribunal was by putting the onus on the Department and once that view of law is found to be incorrect, the entire complexion for decision would change and a fair decision will have to be rendered keeping in

view the dictum of the Full Bench. That is why, in fairness the assessee, will have full opportunity to rebut the presumptions which arise against him in view of the Explanation with liberty to the Department to disprove the evidence led by the assessee.

13. For the reasons recorded above, we decline to answer the referred question. However, the order of the Tribunal dated February 27, 1976, is hereby set aside and the matter is remitted to it to re-decide the appeal afresh keeping in view the judgment of the Full Bench of this court in Vishwakarma Industries Vs. Commissioner of Income Tax, and the directions given above. The parties are left to bear their own costs.