
(1983) 08 BOM CK 0057

In the Bombay High Court

Case No : Income-tax Reference No. 62 of 1974

Commissioner of Income Tax, Poona

APPELLANT

Vs

B.D. Ramchandra

RESPONDENT

Date of Decision : 31-08-1983

Acts Referred:

Income Tax Act, 1961 — Section 143, 144, 145, 147, 271

Citation : (1983) 36 CTR 397 : (1984) 150 ITR 242 : (1983) 15 TAXMAN 386

Hon'ble Judges : S.P. Bharucha, J;S.K. Desai, J

Bench : Division Bench

Judgement

Bharucha, J.—Two questions are referred to the High Court Court at the instance of the Revenue in this reference under s. 256(1) of the I.T. Act.

2. The questions arise in respect of the assessment year 1968-69, the previous year being S.Y. 2023. The assessee is a registered firm engaged in the manufacture and purchase and sale of utensils. For the relevant year it filed a return showing an income of Rs. 9,548. The ITO, however, determined the assessee's income for that year at Rs. 75,170. He found upon examination of the accounts that the assessee had made large purchases without a corresponding increase in the turnover. He also found that the accounts were not complete and that though there were wholesale transactions no quantity account was maintained nor were other details available by recourse to which wholesale transactions could be separated from retail transactions. He also found that there was no plausible explanation for the fall in the assessee's gross profit margin. Upon the basis of his determination of the total income at Rs. 75,170, the ITO initiated action for the imposition of a penalty under the provisions of s. 271(1) (c) of the Act and the minimum penalty leviable being in excess of Rs. 1,000, he referred the matter to the IAC.

3. The assessee went in appeal to the AAC in respect of the determination of income. Certain deductions were made. Being still dissatisfied, the assessee appealed, to the Tribunal which directed certain modifications to be made.

4. Before the IAC in the penalty proceedings, the assessee was given an opportunity of hearing. It was submitted on his behalf that there was no concealment of income nor had any inaccurate particulars been furnished. The IAC held that the assessee had furnished inaccurate and incomplete details of income and had wilfully neglected to furnish relevant particulars. He observed that the assessee had not maintained his accounts in a manner it should have done and that his balance-sheet showed discrepancies. He, therefore, imposed upon the assessee a penalty of Rs. 32,140 being the minimum imposable.

5. The assessee appealed to the Tribunal and it was submitted that there had been no gross or wilful neglect on the part of the assessee in nor showing his correct income and as such his case was not covered by the Explanation to s. 271(1)(c) of the Act. The Explanation to s. 271(1)(c) reads as follows :

"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 u/s 143 or section 144 or section 147 (reduced by the expenditure incurred bonafide by him for the purposes of making or earning any income included in the total income but which has been disallowed as a deduction), such person shall, unless he proved 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 clause (c) of this sub-section."

6. The Tribunal observed that what fell for their consideration was whether the difference between the income returned and the income assessed could be said to be due to gross or wilful neglect or fraud on the part of the assessee in terms of the Explanation to s. 271(1)(c). It noted that the Allahabad High Court had held in Saeed Ahmad Vs. Inspecting Assistant Commissioner of Income Tax, Range II, that the Explanation provided nothing more than a rule of evidence relating to the raising of a rebuttable presumption in certain circumstances. It did not created or negative any substantive right. The Tribunal looked at the facts pertaining to the assessee in the light of this principle and observed that it was clear that the assessee was dealing partly in retail and partly in wholesale goods. It was true that the assessee had not maintained quantitative accounts in respect of wholesale and retail sales. So far as retail sales were concerned, in the very nature of things, it was impossible for the assessee to maintain a quantity sock register. The assessee had admittedly maintained a combined account both for wholesale and retail transactions. To insist upon maintenance of stock accounts in such circumstances was to insist upon something which was basically difficult. It was for this reason that the ITO had applied the proviso to s. 145. That part, there was nothing in the Act that case an obligation upon the assessee to maintain a stock register. It was, therefore, difficult to hold that non-maintenance of the stock register could be attributed to gross or wilful neglect. In this view of the matter, the Tribunal held that the order imposing the penalty

could not be sustained.

7. At the instance of the Revenue, the Tribunal has referred to this court the following two questions :

"(1) Whether, on the facts and in the circumstances of the case, the Tribunal erred in holding that even where the Explanation to section 271(1)(c) of the Income Tax Act, 1961, comes to the aid of the Revenue in raising the presumption mentioned therein for the purpose of proving the requirements of clause (c) of section 271(1) *ibid*, the burden still lies on the Revenue to prove that the difference between the "returned income" and the "income-assessed" has arisen due to fraud or gross or wilful neglect on the part of the assessee, although the assessee fails to prove that the failure to return the correct income did not arise from any fraud or any gross or wilful neglect on his part.

(2) Whether, on the facts and in the circumstances of the case, the Tribunal erred in holding that the penalty imposed on the assessee u/s 271(1)(c) of the Income Tax Act, 1961, for the assessment year 1968-69 was not tenable ?"

8. It will be apparent from a perusal of the questions that they are based upon a total misconception of the Tribunal's reasoning. The Tribunal has nowhere held that under the Explanation to s. 271(1)(c), the burden fell on the Revenue to prove fraud or gross or wilful neglect on the part of the assessee. What the Tribunal had held, and quite rightly, is that the Explanation raised a rebuttable presumption. The presumption can be rebutted in certain circumstances. Where the assessee had disclosed all materials, the presumption stood rebutted and it could not be held that because the assessee had failed to maintain a stock register there was gross or wilful neglect on his part. In this view of the matter, we do not answer the first question.

9. It seems to us that the second question is really only a corollary to the first and should meet the same fate. However, we propose to treat it as an independent question. We find that the matter is covered by a judgment of this court in *Commissioner of Income Tax, Poona Vs. Devandas Perumal and Co.*, The first question placed before the court in that reference is verbatim that which is placed before us. There too the court found on the facts that it was based on a misapprehension and declined to answer it. The court observed that on the finding that there was no suppression of the figures of the purchases and/or sales and that the account books had been maintained in a such a manner as was possible in the facts and circumstances of the case, even assuming that the presumption contemplated by the Explanation arose, that presumption stood rebutted by the fact that there was no suppression of any sales or inflation of any purchases. Upon the mere fact that the ITO had proceeded to estimate the net profit at a figure higher than what was disclosed by the assessee, the conclusion could not necessarily follow that there was a failure to return the correct income arising out of fraud or any gross or wilful neglect on the part of the assessee stood negatived and the presumption raised by the Explanation stood rebutted.

This decision was followed by this court in Commissioner of Income Tax, Poona Vs. Mohammed Yakub Mohd. Ibrahim and Co.,

10. Now, Mr. Naik, the learned counsel for the Revenue, argued upon the basis that the first question was justified and he referred to three judgments in that behalf. Before we cite these judgments briefly, it is necessary to mention that no argument was addressed to us as why the real reasoning of the Tribunal was defective. In Vishwakarma Industries Vs. Commissioner of Income Tax, a Full Bench of the Punjab and Haryana High Court observed that the Explanation to s. 271(1)(c) raised rebuttable presumption. The initial burden of discharging the onus of rebuttal was on the assessee. Once he did so, he was out of the mischief of the Explanation until and unless the Department was able to establish afresh that the assessee in fact had concealed particulars of the income or furnished inaccurate particular thereof. The onus could be discharged by preponderance of evidence but it was not to be insisted upon that there was any necessary or mandatory requirement of leading evidence. The burden could be discharged by the existing material on record in a specific case. It was permissible for the assessee under the penalty proceedings to show and prove that on the existing material itself the presumption raised by the Explanation would stand rebutted.

11. It will be evident that the Full Bench decision of the Punjab and Haryana High Court does not assist the Revenue in the instant case rather it endorses to the hilt the reasoning of the Tribunal.

12. In Commissioner of Income Tax Vs. Swarup Cold Storage and General Mills, . the assessee contended that it had not been guilty of any fraud, gross or wilful neglect and that it filed its return on the basis of the regular books of account maintained by it. The books of account, were, however, not produced. The Tribunal found that though the assessee had withheld the account books from scrutiny, since no specific finding of concealment had been made, there was scope for error in good faith. The Allahabad High Court held that the Tribunal was in error, for the assessee did not produce the account books during the assessment proceedings and thus could not justify its assertion that the return was on the basis of the regular books of account. The assessee had, therefore, failed to discharge the onus placed under the Explanation to s. 271(1)(c) and there was no material placed before the Tribunal to justify the deletion of the penalty.

13. In Commissioner of Income Tax Vs. M. Habibullah, the assessee did not produce any evidence in the penalty proceedings. There was, therefore., no rebuttal of the presumption under the Explanation to s. 271(1)(c). The Allahabad High Court, therefore, held that the Tribunal was not justified in canceling the penalty orders. neither of these two decisions of the Allahabad High Court assists the Revenue in this case.

14. In the result, we answer the second question in the negative, i.e., in favour of the assessee.

15. The Revenue shall pay to the assessee the cost of the reference.