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**(1982) 01 BOM CK 0020**

**In the Bombay High Court**

**Case No : Income-tax Reference No. 152 of 1972**

Commissioner of Income Tax, Poona

APPELLANT

Vs

Devandas Perumal and Co.

RESPONDENT

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**Date of Decision : 20-01-1982**

**Acts Referred:**

Income Tax Act, 1961 — Section 143, 144, 147, 271(1), 274(2)

**Citation :** (1982) 28 CTR 211 : (1983) 140 ITR 943 : (1982) 10 TAXMAN 104

**Hon'ble Judges :** M.N. Chandurkar, J; M. Jagannatha Rao, J

**Bench :** Division Bench

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## **Judgement**

Chandurkar, J.—The assessee does the business of purchase and sale of fruits. In the assessment year 1964-65 the firm returned a total income of Rs. 35,957. The ITO, however, estimated the profit at 4% of the sales of Rs. 22,00,000 at Rs. 88,800 as against the net profit at Rs. 23,000 on the sales of Rs. 21,94,223 disclosed by the assessee. According to the ITO, proper account books were not maintained by the assessee, as, according to him, there was no check on the expenses and the purchase price paid. This assessment was confirmed by the AAC.

2. Thereafter, invoking the Explanation to s. 271(1)(c) of the I.T. Act, 1961, the case had been referred to the IAC, under s. 274(2). The IAC, holding that the Explanation to s. 271(1)(c) was attracted and the the assessee had not discharged the burden laid on him by the Explanation, imposed a penalty of Rs. 7,164.

3. The assessee appealed against the order of penalty. While allowing the appeal, the Appellate Tribunal recorded a finding that the assessee had maintained the books as it was practicable for it to maintain and that it was not the case of the Revenue that the assessee had suppressed any sales or inflated any purchases. The Tribunal found that the assessee could not be compelled to do something which was manifestly impossible and, therefore, the difference between the returned income and the assessed income could not be said to arise due to gross

or wilful neglect on the part of the assessee. The Tribunal further took the view that merely because the accounts of the assessee did not commend to the ITO and he rejected the books, it would not ipso facto follow that the difference in the returned income arose due to gross or wilful neglect on the part of the assessee.

4. Arising out of this order of the Tribunal, the following two questions have been referred at the instance of the Revenue under s. 256(1) of the I.T. Act, 1961:

"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 1964-65 was not tenable ?"

5. There is some misapprehension about the first question which has been raised and referred by the Tribunal. The question posed for opinion seems to proceed on the footing that the Tribunal Has taken the view that even in the face of the Explanation to s. 271(1)(c), in a case where the income returned is less than 80 per cent. of the total income assessed, the burden is still on the Department to prove that the difference between the returned income and the income assessed had arisen due to fraud or any gross or wilful neglect on the part of the assessee, although the assessee fails to prove that the failure to return that correct income did not arise from any fraud or any gross or wilful neglect on his part. The substantial part of the order of the Tribunal, dealing with the contentions raised on behalf of the Revenue and the assessee, is contained in para. 5 of the order. It is nowhere observed by the Tribunal in its order that even in the case governed by the Explanation the burden is son the Revenue to show that the difference between the returned income and the income assessed had arisen due to fraud or gross or wilful neglect on the part of the assessee, even where the total income returned is less than 80 per cent. of the total income assessed. Mr. Joshi on behalf of the Revenue, has fairly agreed that the first question does not arise out of the order of the Tribunal and, therefore, need not be answered.

6. So far as the second question is concerned, it is contended by Mr. Joshi that the tribunal was not justified in setting aside the order of penalty, because the assessee had failed to rebut the presumption created by the explanation to s. 271(1)(c), as he had failed to show that there was no failure to disclose the correct income or that such failure did not arise from any fraud or any gross or

wilful neglect of his part.

7. The Explanation to s. 271(1)(c), which was added to that effect from April 1, 1964, by the finance Act, 1964, reads as follows:

"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 u/s 143 or section 144 or section 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 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."

8. It can hardly be doubted that by adding the Explanation to s. 271(1)(c), the legislature wanted to lay down an artificial rule of evidence by creating a fiction that where the total income returned by the assessee was less than 80 per cent. of the total 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 would be deemed to have concealed the particulars of his income or furnished in-accurate particulars of such income for the purposes of cl. (c) of s. 271(1). The Explanation placed the burden on the assessee, in such a case, 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. The real question which arises in the present case is whether the assessee can be deemed to have concealed the particulars of his income and whether there was any fraud or any gross or wilful neglect on his part, on account of which he has returned the income less than the assessed income. Now, it is no doubt true that the ITO has declined to accept the income returned by the assessee-firm and has proceeded to estimate the net profit at 4 per cent. of the sales, but as observed by the Tribunal, it was never the case of the Revenue that the assessee had suppressed any sales or inflated any purchases. The Tribunal has further gone on to hold that the assessee had maintained the books in such a manner as it was practicable for it to maintain. Now on the finding that there was no suppression of the figures of the purchases and/or sales and the accounts books have been maintained in 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. Mere fact that the ITO has proceeded to estimate the net profit as a figure higher than what was disclosed by the assessee, the conclusion cannot necessarily follow that there is a failure to return the correct income arising out of fraud or any gross or wilful neglect on the part of the assessee. As a matter of fact, on the facts found, a fraud or gross or wilful neglect on the part of the assessee stands negatived, and the presumption raised by the Explanation must

also stand rebutted.

9. The two decision relied upon by Mr. Joshi before us cannot be of any assistance to the Revenue in the instant case. In *Addl. Commissioner of Income Tax Vs. Quality Sweet House*, , additions of unexplained cash credits were made to the returned income of the assessee, with the result that the assessed income was more than 20 per cent. and penalty was levied and it was held that it was for the assessee to establish that he was not guilty of fraud or gross or wilful neglect in submitting the return. Similarly, in *Kantilal Manilal Vs. Commissioner of Income Tax, Gujarat-II*, the difference between the returned income and the assessed income arose out of the addition of an item of the undisclosed income during the relevant accounting year, and in the penalty proceedings the explanation offered was that there was an arithmetical error in the books, and alternatively the amount in question had been advanced by another person. Both explanations were found to be wholly untrue, and the Tribunal had found that there had been a manipulation of accounts. In that reference, on the question whether the levy of penalty was valid, the Gujarat High Court held that the assessee's explanations had been found to be a wholly untrue, and there was also a positive finding that there had been a manipulation of accounts. Thus, the levy of penalty was held to be valid. The Gujarat High court referred to the Explanation to s. (c) and observed that the Explanation to s. (c) of the I.T. Act, 1961, enacts a rule of evidence and the authority which imposes penalty is competent to invoke its aid in reaching the final conclusion on the question of concealment, although it may not have been resorted to at the stage when the referent was made to the authority imposing the penalty. while we may concur with the view of the Gujarat High Court that the Explanation to s. (c) enacts a rule of evidence, it has to be noted that the decision in *Kantilal Manilal Vs. Commissioner of Income Tax, Gujarat-II*, , sustaining the penalty turned on the fact that there was a finding that there was a manipulation of accounts. The facts in the case before us, as already pointed out, clearly show that there was no manipulation whatsoever, and according to the Tribunal, the accounts have been maintained in such a manner as was possible in the circumstances of the case. In our view, therefore, the Tribunal was right in setting aside the order of penalty, and, consequently, question No. 2 has to be answered in the negative and against the Revenue. There is no appearance on behalf of the assessee.

Therefore, there will be no order as to costs.