
(1987) 01 BOM CK 0035
In the Bombay High Court
Case No : Income Tax Ref. No. 155 of 1975

Jainarayan Babulal

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 15-01-1987

Acts Referred:

Income Tax Act, 1922 — Section 28(1), 66(1)

Citation : (1988) 69 CTR 201 : (1988) 170 ITR 399

Hon'ble Judges : V.A. Mohta, J; S.P. Bharucha, J

Bench : Division Bench

Judgement

S.P. Bharucha, J.—This reference under s. 66(1) of the Indian IT Act, 1922, is made at the instance of the assessee. The question that is referred reads thus :

"Whether, on the facts and in the circumstances of the case, the order dated 18th November, 1963, imposing penalty of Rs. 5,000 under s. 28(1)(c) of the Indian IT Act, 1922 is sustainable in law ?"

2. The assessment year we are concerned with is the asst. yr. 1950-51. The previous year for this assessment year is the Samvat year ending Diwali, 1949. The assessee is an HUF which derives income from business in cotton, cotton seeds, oilcakes and grains and a business called "Goenka Cotton Company". In the personal account of one Babulal, Karta of the HUF, in the books of Goenka Cotton Company, three cash credit entries appeared thus :

Rs. 17,000 on 9th November, 1948 " 5,000 on 12th November, 1948 " 2,600 on 15th November, 1948 ----- 24,600 -----

In regard to these three entries, a statement was made before the ITO by Babulal. It stated that "the money of Rs. 24,600 which came ultimately in the books of account of Goenka Cotton Company in the form of cash credit in my own account actually was lying with me in Tijori and was earned in Saudas whose sales and purchase and profits were all ignored in the books of account." He stated that in his opinion "the profits relate to five years or so". The ITO

noted the entries and the statement and added the aggregate amount of Rs. 24,600, to the total income of the assessee. Upon the said amount of Rs. 24,600, the ITO did not give to the assessee relief for earned income. In this behalf, he stated that "income from undisclosed sources has not been considered for earned income relief." The AAC confirmed the inclusion of, inter alia, the said amount of Rs. 24,600 as being added "from undisclosed sources". When the matter went up to the Income Tax Appellate Tribunal (hereinafter referred to as "the Tribunal"), a contention was taken in regard to the said amount of Rs. 24,600 and another sum of Rs. 10,000 treated as the assessee's income from undisclosed sources. The contention was that these should not be added on to the assessee's total income. The contention was rejected by the Tribunal and it said that it was "unable to interfere with the addition made."

3. The ITO issued a notice to the assessee to show cause why it should not be subjected to a penalty under s. 28(1)(c) of the Indian IT Act, 1922, for, inter alia, non-disclosure of the said amount of Rs. 24,600. By his order dated 13th April, 1960, the ITO levied a penalty of Rs. 6,850 on the assessee for failure to disclose the said amount of Rs. 24,600 and the other amount of Rs. 10,000. In the appeal to the AAC, the penalty order was confirmed. The assessee appealed to the Tribunal. The appeal was allowed by the Tribunal, basing itself upon a judgment of the Calcutta High Court which stated that the ITO could not pass an order imposing penalty on the basis of arguments advanced before his predecessor. The Tribunal noted in paragraph 3 thus :

"3. Some other contentions were raised on behalf of the assessee. It was submitted that the addition itself is unsustainable as these credits appear in November, 1948, while the proper previous year for the income assessable under "undisclosed sources" with reference to this assessment year will be the year ended on 31st March, 1950, so that the date of credit fell outside the relevant previous year. It was submitted on the authority of the decision in Commissioner of Income Tax, Ahmedabad Vs. Gokuldas Harivallabhdas, , that this question as to the relevant previous year could be agitated in the course of these penalty proceedings. We consider that there is substance in this contention of the assessee. As we have already held that the penalty proceedings are invalid, it is unnecessary to discuss the other contentions of the assessee."

4. A fresh notice was then issued by the ITO to the assessee to show cause why it should not be subjected to a penalty under s. 28(1)(c) of the Indian IT Act, 1922, in regard to, inter alia, the non-disclosure of the said amount of Rs. 24,600. In its reply, the assessee contended its that appeal to the Tribunal having been allowed, it was not competent to the ITO to issue the fresh notice. It was also contended that the addition of the said amount of Rs. 24,600 to its total income was unsustainable as the credits that aggregated thereto appeared in November, 1948, and the appropriate previous year for this income, assessed as being from undisclosed sources, was the financial year ending 31st March, 1950. The ITO passed an order imposing a penalty of Rs. 5,000 in regard to the non-

disclosure of the said amount of Rs. 24,600. He accepted the assessee's contention in regard to the other amount of Rs. 10,000.

On appeal, the AAC upheld the penalty.

The assessee then appealed to the Tribunal. The Tribunal found that at the earlier stage the order imposing the penalty had been set aside by the Tribunal only because a proper opportunity of being heard was not given to the assessee as contemplated under the law. The Tribunal considered the other objection "that the addition itself (of the said amount of Rs. 24,600) was not sustainable as the credits appeared in November, 1948, while the proper previous year for the income assessable under "undisclosed sources" with reference to the asst. yr. 1950-51 will be the financial year beginning on 1st April, 1949, and ending on 31st March, 1950. The assessee's case is that since credits of Rs. 24,600 are outside the financial year 1949-50, the sum of Rs. 24,600 cannot be treated as the assessee's income for the previous year". The Tribunal noted that at the earlier stages, the only case of the assessee was that the said amount of Rs. 24,600 represented the profits of five years or so. The exact point of time when the profit from speculative transactions was earned was within the special knowledge of the assessee. If the profits were not earned during the previous year, but in any preceding year, the assessee should have substantiated its stand by the production of proper evidence. But the assessee had refrained from doing so. The Tribunal said that "..... it is not in dispute that speculative transactions were not a part of the business of the assessee. Since, for the business of the assessee, the accounting period was the year ending on Diwali, 1949, and since the profit of Rs. 24,600 was derived from speculative transactions which in the circumstances of the case were indisputably of the nature of business, the proper previous year for this source of income, viz., speculation business is the Samvat year ending on Diwali 1949. The sum of Rs. 24,600 was, therefore, rightly treated as the income of the previous year assessable for the asst. yr. 1950-51"

5. It is out of this order of the Tribunal that the question posed to us arises. Mr. Dewani, learned advocate for the assessee, submitted that there was no justification for the issuance of a fresh notice to show cause why penalty should not be levied upon the assessee when the Tribunal had at the earlier stage allowed the assessee's appeal against the imposition of penalty. In his submission, it was clear from paragraph 3 of the Tribunal's order made at that stage that it had considered the contention on behalf of the assessee that the addition of the said amount of Rs. 24,600 to the total income of the assessee was unsustainable as the credits appeared in November, 1948, while the proper previous year for the income assessable under "undisclosed sources" with reference to this assessment year would be the financial year ended on 31st March, 1950, and that the dates of the credits fell outside the relevant previous year.

6. Undoubtedly, the Tribunal has said that it considered that "there is substance

this contention of the assessee", but it does not appear to us that it came to a finding on this point. It was expressing only a prima facie view. Prior to paragraph 3, the Tribunal had already held that the levy of penalty upon the assessee was invalid because it had not been given an opportunity of being heard by the ITO who had passed the penalty order.

7. This brings us to the next point urged by Mr. Dewani. He submitted that the said amount of Rs. 24,600 had been added to the assessee's total income as income from undisclosed sources. The proper previous year for income from undisclosed sources is the financial year. In this case, it was the financial year. In this case, it was the financial year 1948-49, that is to say, the year that ended on 31st March, 1949, and the relevant assessment year was the asst. yr. 1949-50. The said amount of Rs. 24,600 fell, therefore, outside the scope of the assessment year with which we are here concerned, namely, the asst. yr. 1950-51.

8. Upon a query as to whether this question could go into in penalty proceedings when the said amount of Rs. 24,600 had been added on to the assessee's total income for the asst. yr. 1950-51, Mr. Dewani based his answer in the affirmative upon the judgment of this court in Commissioner of Income Tax, Ahmedabad Vs. Gokuldas Harivallabhdas, and the judgment of the Supreme Court which approved it in Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, .

9. In Gokuldas Harivallabhdas" case Chagla C.J., speaking for the Bench, observed that "the proceedings under s. 28(1)(c), in their very nature, are penal proceedings, and the elementary principles of criminal jurisprudence must apply to these proceedings, and nothing is more elementary, at least in this country in criminal jurisprudence, than the principle that the burden of proving that the accused is guilty is always upon the prosecution".

Assessment proceedings are taxing proceedings and penalty proceedings are criminal proceedings in their very nature. A decision given in an assessment proceeding cannot possibly be binding upon the authority who tries the assessee for an offence. Therefore, it was open to the ITO in the penalty proceedings to consider his earlier finding that a particular receipt constituted income for a particular assessment year, but he was not bound by that finding. If any other evidence was produced in penalty proceedings, it was open to the ITO to come to a different conclusion.

10. In Anwar Ali's case (supra), the Supreme Court confirmed what had been held in Gokuldas Harivallabhdas" case (supra). The proceedings under s. 28(1)(c) are penal in character. It could not be said that a finding given in the assessment proceedings for determining or computing the tax was conclusive. It was, however, good evidence. Before penalty could be imposed, the entirety of the circumstances must reasonably point to the conclusion that the disputed amount represented income and that the assessee had consciously concealed the

particulars of his income or had deliberately furnished inaccurate particulars.

Having regard to these authorities, we must go into the contention raised by Mr. Dewani.

11. From the assessment order passed by the ITO, the order of the AAC in appeal therefrom and the order of the Tribunal in further appeal which we have referred to above, there can be little doubt that the said amount of Rs. 24,600 was added to the assessee's total income for the asst. yr. 1950-51, with which we are here concerned, as income from undisclosed sources.

We are not impressed by Mr. Jetly's reliance upon the last of the Tribunal's orders, wherein it has been stated that the said amount of Rs. 24,600 was derived from speculation business, for the Tribunal itself has therein stated that "it is not in dispute that the speculative transactions were not a part of the business of the assessee." The terms of all the earlier orders unmistakably point to the conclusion that the said amount of Rs. 24,600 was income from undisclosed sources.

12. Upon this basis, we turn to the judgment of the Supreme Court in *Baladin Ram Vs. Commissioner of Income Tax, Uttar Pradesh*, . The Supreme Court there ruled that the only way in which income from an undisclosed sources could be assessed was to make the assessment on the basis that the previous year for such income was the financial year. The Supreme Court referred in this behalf to the judgment of the Patna High Court in *CIT vs. P. Darolia & Sons (1935) 27 ITR 515* . We refer to that judgment because, in addition, it was said that it was a well established principle that in respects of the amount of cash received during the accounting year, the burden of proof was upon the assessee to show positively the source and nature of the receipt. In the absence of an adequate explanation, the taxing authorities were entitled to draw the inference that the receipts were in the nature of income and liable to be taxed. But, and this is of importance, there was no presumption in such cases that the cash was the income of the same business for which the assessee had kept regular accounts.

13. The entires aggregating to the said amount of Rs. 24,600 were made during the course of the financial year that began on 1st April, 1948, and ended on 31st March, 1949. The relevant assessment year for that financial year was the asst. yr. 1949-50. The assessment of the said amount of Rs. 24,600 as income from undisclosed sources for the asst. yr. 1950-51 would, therefore, appear to have been made in error. At any rate, no penalty can be imposed for non-disclosure of that income for the asst. yr. 1950-51.

14. Needless to say, this position obtains because the provisions of the 1922 Act are applicable. The position would be different under the 1961 Act.

15. In the result, the question is answered in the negative and in favour of the assessee. There shall be no order as to costs.