

(1977) 08 OHC CK 0023

In the Orissa High Court

Case No : Special Jurisdiction Case No. 120 of 1975

Joyanarayan Redarnath

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 18-08-1977

Acts Referred:

Income Tax Act, 1961 — Section 143(3), 271(1), 40

Citation : (1977) 44 CLT 484 : (1980) 122 ITR 619

Hon'ble Judges : R.N. Misra, J;K.B. Panda, J

Bench : Division Bench

Advocate : R.K. Mohapatra and A.K. Ray, for the Appellant; Standing Counsel, for the Respondent

Judgement

R.N. Misra, J.—Upon directions issued by this court on an application u/s 256(2) of the Income Tax Act of 1961 (hereinafter referred to as " the Act "), made by the assessee, the Income tax Appellate Tribunal, Cuttack Bench, has stated a case and referred the following question for the opinion of the court:

" Whether, in the facts and circumstances of the case, the imposition of penalty u/s 271(1)(c) of the Act is sustainable ? "

2. The assessee is a registered firm and the relevant year of assessment is 1970-71. During the assessment year 1969-70, the firm had comprised of five partners, namely, Kedarnath, Rameshlal, Dineshlal, Maheshlal and Sureshlal. The first four partners made gifts of varying amounts to their respective wives on October 19, 1968, appertaining to the assessment year 1969-70 and the alleged gifts were made by book transfers and the respective capital accounts of the partners were debited and consequent credit entries were found in the names of the ladies. Interest was paid to the ladies on the loans. In the assessment year 1970-71, the firm claimed deduction of interest to the tune of Rs. 39,000 said to have been paid to the ladies on their loans. On August 26, 1970, the firm's assessment for the year under dispute was completed u/s 143(3) of the Act and the claim of deduction of interest was allowed in full. The ITO, thereafter,

purporting to act u/s 64(iii) of the Act, included the interest credited to the ladies in the incomes of their respective husbands. When assessment for the year 1971-72 was taken up, the ITO came to hold that the gifts were not genuine. He, therefore, "disallowed the claim of interest and directed assessment for the previous year (1970-71) to be reopened. He reassessed the interest paid by the firm to the donees by adding the same to the firm's income as required u/s 40(b) of the Act. The ITO directed initiation of a proceeding u/s 271(1)(c) of the Act for the assessment year and the IAC ultimately levied a penalty of Rs. 39,000.

3. The assessee appealed and the Tribunal upheld the penalty. The Tribunal observed:

".....Mr. A. K. Ray, however, strongly contended that penalty should not be levied inasmuch as it was ultimately a question of disallowance of interest which, was originally allowed. We think Mr. Ray is oversimplifying the matter. It is not a case of mere disallowance on any interpretation of a provision of law or that there was any bona fide claim for a deduction. This is a case where it was found on a proper investigation, that the assessee adopted a device for reducing the tax liability. A scheme was thought of and the entries were passed to show that certain gifts were made by the partners to their wives, in which case the payment of interest has to be allowed. If the payment of interest is made to the partners, it cannot be allowed by virtue of Section 40(b). It is definitely with a view to get over Section 40(b) that the assessee resorted to the scheme, namely, to show the gifts in favour of the wives of the partners. Therefore, there is no doubt, in our minds that the revenue has established the case against the assessee for concealment of income. At any rate, the assessee is clearly liable for furnishing inaccurate particulars of income..... "

4. Mr. Mohapatra, for the assessee, contends that all primary facts had been placed before the ITO before the original assessment had been completed. The ITO on being satisfied that the gifts were genuine proceeded to make the assessment and allowed deduction of interest as a revenue expense. If the ITO had made adequate enquiries and had come to hold that the gifts were not acceptable, the amount of interest claimed as deduction would have been disallowed and added back to the income returned by the firm. Merely because the assessee has not been able to establish the genuineness of the gifts to the satisfaction of the ITO, it would not follow that there had been a concealment of the particulars of income or that inaccurate particulars of such income had been given. All the items had been disclosed and the entire matter was placed before the ITO for consideration. We are not prepared to accept the stand of the revenue that there was either concealment or furnishing of inaccurate particulars. Learned standing counsel relied upon the finding given by the IAC and more or less repeated by the Tribunal that it was a scheme to reduce tax liability. Law is settled that avoidance of tax is not tax evasion and carries no ignominy with it, for, it is sound law and, certainly, not bad morality, for anybody

to so arrange his affairs as to reduce the brunt of taxation to a minimum. [Latilla v. IRC [1943] (Supp) 2 ITR 78].

5. Some of the partners of the firm had attempted to make gifts of cash amounts to their respective wives and to receive loans from the wives upon condition of paying interest. Failure to establish a genuineness of the gift by itself would not lead to a finding of concealment or furnishing of inaccurate particulars. There would be a presumption under the Explanation to Section 271(1) of the Act which is rebuttable and the IAC as also the Tribunal have not looked at the matter from that angle. There is force in the contention of Mr. Mohapatra that the firm as such is incapable of exhibiting any contumacious conduct and contumacy, if any, must be found in the partners constituting it. The Tribunal vacated the imposition of penalty in the hands of the partners. We do not see any justification in the reasonings advanced by the Tribunal to maintain the penalties in the hands of the firm. It is true that the firm is an independent unit of assessment, but contumacy, if any, which would give the foundation for the imposition of penalty was of the partners. The line drawn by the Tribunal between the partner and the firm in the matter of imposition of penalty is indeed thin. We are of the view that it was not a case where penalty u/s 271(1)(c) of the Act should have been levied.

6. Our answer to the question, therefore, is : On the facts and in the circumstances of the case, imposition of penalty u/s 271(1)(c) of the Act is not sustainable.

7. We make no order for costs.

Panda, J.

8. I agree.