

(1980) 07 CAL CK 0018

In the Calcutta High Court

Case No : Income-tax Reference No. 453 of 1975

Monoranjan Mukherjee

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 30-07-1980

Acts Referred:

Income Tax Act, 1961 — Section 271(1)

Citation : (1980) 19 CTR 74 : (1981) 132 ITR 712

Hon'ble Judges : Sudhindra Mohan Guha, J;Sabyasachi Mukharji, J

Bench : Division Bench

Advocate : Nirmal Mukherjee, for the Appellant;A.K. Sengupta and Sunil Mukherjee, for the Respondent

Judgement

Sudhindra Mohan Guha, J.—This reference u/s 256(1) of the I.T. 1961, is at the instance of the assessee.

2. The assessee filed a return on February 16, 1968, for the assessment year 1966-67, showing an income of Rs. 15,944. The ITO completed the assessment on December 31, 1970, on a total income of Rs. 68,525 which was inclusive of Rs. 38,464 added as income from undisclosed sources. The addition of Rs. 38,464 was made on the basis that the sum of Rs. 38,464 credited in the assessee's books of account as proceeds realised by the sale of goods, in fact, represented the assessee's income from undisclosed sources. With reference to the above addition and some other additions made in the assessment, the ITO initiated penalty proceedings against the assessee and referred the matter to the IAC for further action. In the appeal preferred by the assessee, the AAC reduced the aforementioned addition of Rs. 38,464 to Rs. 31,464. The impugned order of penalty was passed by the IAC after the disposal of the appeal against the order of assessment by the AAC.

3. Rejecting the explanation offered by the assessee, the IAC held that the ITO examined the accounts thoroughly and could discover the suppression of opening stock and of the purchases made during the year and was able to detect

concealment in the real sense. Thus, holding that the assessee had concealed the particulars of his income, for which penalty was leviable u/s 271(1)(c), the IAC imposed a penalty of Rs. 10,000.

4. The assessee came in appeal before the Tribunal against the order of the AAC. The Tribunal confirmed the addition of Rs. 31,464 sustained by the AAC, but it held that the amount represented the assessee's income from the sale of timber and, therefore, it should be charged to tax under the head "Business", and not under the head "Other sources " as was done by the ITO.

5. In appeal, before the Tribunal against the order of penalty, the assessee merely raised certain legal issues regarding the validity of the penalty order. The assessee argued that the penalty was levied on the basis that the assessee had concealed his income assessable under the head " Other sources ", whereas the Tribunal held in the quantum appeal that the income which the assessee failed to disclose was income assessable under the head " Business " and as such on such finding by the Tribunal the basis of the penalty order ceased to exist and the penalty order became unsustainable.

6. The Tribunal could not accept the contention advanced by the learned counsel for the assessee on the ground that merely because the Tribunal found, on the same facts, that the amount in question should be assessed under a different head, the basis of the penalty order ceased to exist. According to the Tribunal, it was of no importance whether the amount in question was assessable to tax under one head or the other, but the broad fact remained that the assessee had concealed the particulars of his income. It was also observed by the Tribunal that the decision by the Gujarat High Court in Commissioner of Income Tax, Gujarat I Vs. Lakhdhir Lalji, , on which the assessee had placed reliance, was on facts which were entirely different. In that case, according to the Tribunal, the penalty proceedings were initiated on the footing that the assessee had suppressed sales of garlic, whereas in the appeal the AAC found that there was no suppression of sale of garlic, but there was an under-estimation of the stock of garlic. The Tribunal distinguished that case on the footing that in the case in hand the facts found by the Tribunal were in no way different from the facts found by the ITO on which the penalty proceedings had been initiated. The penalty order was, therefore, according to the Tribunal, not liable to be challenged on the ground that the basis of the penalty order had ceased to exist with the finding of the Tribunal that the amount in question should be assessed to tax as business income and not as income from undisclosed sources. In the above facts and circumstances, the following questions were referred by the Tribunal to this court:

"1. Whether the Tribunal was justified in rejecting the contention that the basis of the penalty order had ceased to exist and the penalty order had become unsustainable with the finding of the Tribunal in the quantum appeal that the sum of Rs. 31,464 was liable to be assessed to tax under the head " Business " but not under the head " Other sources" ?

2. Whether the Tribunal was correct in holding that section 6 of the General Clauses Act, 1897, had no application to this case and this case was governed by the amended Section 275 of the Income Tax Act, 1961, even though it was the unamended Section 275 that was in force at the time of initiation of the penalty proceedings ?

3. Whether the Tribunal was correct in holding that the penalty order in the instant case was not barred by limitation, having been passed within the period of limitation specified in the amended Section 275 of the Income Tax Act, 1961, which came into force before the said order was passed ? "

7. Mr. Nirmal Mukherjee, the learned advocate appearing for the assessee, makes it clear at the outset that he does not press questions Nos. 2 and 3 before us. In this view of the matter, we feel that we need not answer those two questions.

8. In dealing with question No. 1, it is contended by Mr. Mukherjee that concealment of particulars of income or furnishing of inaccurate particulars of income charged at the initiation of the penalty proceedings upon the finding of the cash introduction in the books of account and considered as assessable under the head "Other sources" and the penalty imposed on that basis completely fell through, when such a finding was reversed by the Tribunal substituting that the inaccurate particulars were due to understatement of opening stock representing sale of timber assessable under the head " Business ". In support of his arguments, he refers to Section 4 of the IT. Act, 1961, which deals with sales chargeable to tax. He also refers to Section 14 of the Act which deals with heads of income. According to him, profits and gains of business or profession were distinct from income from other sources. Thereafter, he refers to Section 271 which lays down in what circumstances the ITO or the AAC in the case of any proceeding under this Act, on being satisfied that a person who fails to furnish a return completely disclosing his income or had concealed his income, could start proceedings for penalty.

9. According to Mr. Mukherjee, understatement of opening stock does not attract concealment of income.

10. It would transpire from the order passed by the Tribunal in the appeal against the quantum of assessment at p. 25 of the paper book that it was found by the Tribunal that for the entire sales the benefit of revenue paid up to September 24, 1964, only could be given because the next payment was on October 8, 1964, and sales were effected before that date. The total of revenue paid at Rs. 20,154.60 and adding 11/2 times the amount came to Rs. 30,246.90. Adding thereto the value of previous stock of Rs. 10,338.76, the total came to Rs. 40,585.66 and the sales were worth Rs. 72,468.55. The balance was unexplained and it came to Rs. 31,882. The ITO had added Rs. 38,464 and the AAC had sustained Rs. 31,464. The Tribunal, without reducing any further amount, confirmed the addition made by the AAC. But, at the same time, the

Tribunal observed that the income should be taxed under the head " Business", because it was earned from the sale of timber only. The ITO was directed to tax it under the head "Business ".

11. In the appeal before the Tribunal against the order imposing penalty, it was contended on behalf of the assessee that the penalty proceedings were initiated by the ITO and the penalty was levied by the IAC on the footing that the assessee had concealed an income derived from undisclosed sources and introduced the same into the accounts in the form of sale of goods and that the very basis of the penalty order ceased to exist, when the Tribunal found that the amount in question represented income from business, but not income from undisclosed sources.

12. Here, before us, Mr. Mukherjee on behalf of the assessee reiterates the very same arguments. According to him, the basis for the penalty proceedings having been altered, the Tribunal was not justified in upholding the order of penalty. In support of his arguments, he refers to the decision of this court in the case of Commissioner of Income Tax Vs. Ananda Bazar Patrika P. Ltd., . There, their Lordships, while disposing of the reference, relied on the decisions of several other High Courts to which we will make reference just now.

13. Mr. A. K. Serj gupta, appearing on behalf of the revenue, points out that the facts of that case were quite distinct and as such could be distinguished. He also points out that in that case the question which came up for answer before their Lordships was as follows:

" Whether the Tribunal was right in holding that the ITO could not initiate or levy penalty in respect of the enhancement made by the AAC ? "

14. In that case, again the ITO completed the taxable income as follows : Loss of Rs. 4,951 under the head " Business ", income of Rs. 31,335 under the head " Income from property " and an income of Rs. 1,85,963 under the head "Other sources ". This last item was arrived at by including the sum of Rs. 1,63,000 from a credit of Rs. 2,50,000 standing in the account of Saralabala Sarkar, grandmother of the managing director of the assessee. Thus, the ITO treated that this was the assessee's income from undisclosed sources.

15. On appeal, the AAC, on the basis of certain data relating to circulation figures of the publication of the assessee as applied to the Audit Bureau of Circulation, held that the business income of Rs. 6,92,771 had not been accounted for in the books of the assessee. He held further that the said sum of Rs. 1,63,000 added as income from undisclosed sources was a part of- the said unaccounted business income. The AAC enhanced the assessment by Rs. 5,29,771.

16. In that context of the matter, it could be held that the basis for the initiation of the penalty proceedings had altogether been altered. As stated earlier while disposing of the case their Lordships made a reference to the decision of the Allahabad High Court in the case of Commissioner of Income Tax Vs. Shadiram

Balmukand, . In this case also the AAC deleted further cash credits in the assessee's account books and, after issuing a notice of enhancement, he included a sum of Rs. 46,601 as income from undisclosed sources. Thereafter, the ITO made an order imposing a penalty of Rs. 10,000 u/s 28(1)(c) of the Indian I.T. Act, 1922, taking into account the income discovered by the AAC as undisclosed income.

17. In the second appeal from the order imposing the penalty the Appellate Tribunal opined that the ITO did not have the jurisdiction when imposing penalty to take into account the amount added by the AAC. The entire penalty order could not be treated as severable. While upholding the order the High Court, held, on a reference, that the authority imposing the penalty could do so only on being satisfied in the course of the proceedings before it that a person had concealed the particulars of his income or furnished inaccurate particulars of his income. As regards the enhanced amount it was observed by the High Court, that if the penalty could be imposed in respect of that amount, it lay within the jurisdiction of the AAC, because the amounts were discovered in the course of the appellate proceedings before him. It was for him then to impose the penalty if he was satisfied that the assessee had concealed the particulars of his income and had deliberately furnished inaccurate particulars of his income. The ITO was seized of the assessment proceedings and it was not during the assessment proceedings that the sum of Rs. 46,601 was discovered.

18. Next case relates to the decision of the Allahabad High Court in the case of Commissioner of Income Tax Vs. Dwarka Prasad Subhash Chandra, . The same principle was also enunciated in this very case.

19. Lastly, reference was made to the decision of the Gujarat High Court in the case of Commissioner of Income Tax, Gujarat I Vs. Lakhdhir Lalji, . This case was distinguished from the earlier one. In this case, the IAC proceeded on the footing that the assessee had furnished inaccurate particulars of his income as distinguished from the concealment of the particulars of the income. The notice issued by the ITO on the strength of which the proceedings which ultimately were disposed of by the IAC were commenced, started on the footing that there was concealment of income by suppression of sale of certain bags of garlic. Thus, though the charge was in regard to the concealment of particulars of the income, the ultimate conclusion was based on the footing of furnishing inaccurate particulars of his income by the assessee.

20. In the case before us, the charge before the ITO was with regard to the concealment of particulars of income and that had been upheld by the appellate court, as the income from different sources. Thus, the initiation of proceedings was made on the satisfaction of the ITO as to the concealment of income. The charge of concealment of income was there, though it was found by the Tribunal that the said income had not come from other sources but on business account from sale of timber. In this view of the matter, we cannot be in agreement with Mr. Mukherjee that the very basis of the initiation of the proceedings had been

altered by the subsequent finding of the Tribunal as to the head of income.

21. Lastly, Mr. Mukherjee also argues that the assessee had not got reasonable opportunity of being heard as envisaged in Section 274(1) of the Act. This argument cannot hold good because of the fact that in the cases referred to above there were certain additions by the AAC and as such in such cases there was necessity for the assessee of being heard afresh but in the present case there was no addition of income but only the source of such income had been altered. In this view of the matter, no exception could be taken to the fact that after the disposal of the appeal the assessee was not given a further opportunity of being heard as envisaged in Section 274(1) of the Act. Thus, all the arguments advanced by Mr. Mukherjee cannot be sustained.

22. Thus, on the basis of the findings of the Tribunal and on the principles of law discussed above, we answer the question No. 1 in the affirmative and in favour of the revenue.

23. There will, however, be no order as to costs.

24. Questions Nos. 2 and 3 are not pressed and as such we decline to answer them.

Sabyasachi Mukharji, J.

25. I agree.