

(1984) 02 MP CK 0007

In the Madhya Pradesh High Court

Case No : Miscellaneous Civil Case No. 208 of 1981

Nav Nirman Co.

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 14-02-1984

Acts Referred:

Income Tax Act, 1961 — Section 271(1)

Citation : (1984) 148 ITR 703 : (1984) 19 TAXMAN 547

Hon'ble Judges : K.N. Shukla, J;C.P. Sen, J

Bench : Division Bench

Advocate : Y.S. Dharmadhikari, for the Appellant; B.K. Rawat, for the Respondent

Judgement

K.N. Shukla, J.—In compliance with the direction of this court by order dated December 10, 1980, u/s 256(2) of the I.T. Act, the Income Tax Appellate Tribunal, Nagpur, has referred the following question for opinion :

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in maintaining the penalty of Rs. 75,000 u/s 271(1)(c) of the Income Tax Act, 1961 ?"

2. Facts as found and stated by the Tribunal are as follows : The assessee is a partnership firm carrying on the business of executing civil contracts. It was constituted by a deed of partnership, dated October 22, 1963. The first accounting year of the assessee ended on Diwali, i.e., 4th November, 1964, which was the previous year for the assessment year in question, i.e., 1965-66.

3. In the relevant previous year, the assessee executed certain contracts as a Sub-contractor of M/s. Raipur Provincial Engineering Company (hereafter referred to as the "principal contractors"). Some persons who were partners in the firm, M/s. Raipur Provincial Engineering Company, were also partners of the assessee-firm. The principal contractors had secured contracts from the Madhya Pradesh Electricity Board and these contracts were entrusted for execution to the

assessee-firm under an agreement, dated October 25, 1963. Clause (3) of the said agreement recited that the principal contractors had started the work on August 28, 1963, and had incurred expenditure and the total expenditure incurred by them up to October 18, 1963, had been to the tune of Rs. 1,57,675.21 and that the assessee had agreed to accept the said expenditure and had also accepted the work-in-progress till the date of the agreement. Clause (6) of the agreement provided that the principal contractors would retain 5% of the net payment received from the Madhya Pradesh Electricity Board for execution of the contract and pass on the balance to the assessee.

4. The receipts relating to the work executed up to October 18, 1963, were referable to the cheques in favour of the principal contractors, dated September 6, 1963, and October 12, 1963, and they totalled up to Rs. 3,83,529.

5. The assessee maintained books of account according to the Diwali year, but these were not properly closed and adjusted so as to ascertain profit and loss by drawing up a profit and loss account. An entry was passed in the accounts estimating the profits at 10% in relation to receipts of Rs. 19,16,602 amounting to Rs. 1,91,660. This amount was credited to the partners' account in proportion to their shares by giving a corresponding debit to the expenses account.

6. For the assessment year 1965-66, the assessee filed its return on June 30, 1965, declaring therein income of Rs. 1,91,660. It was indicated in the return that profit on receipts of Rs. 19,16,602 was estimated at 15% i.e., at Rs. 2,87,490, and deducting therefrom a sum equal to 5% of the receipts (Rs. 95,830 under Clause (6) of the agreement) the net profit estimated was Rs. 1,91,660.

7. In the course of the assessment proceedings, the ITO by his letter, dated January 19, 1968, required the assessee to file a certificate showing the amount of gross payments received by it. The assessee did not comply with this direction. The assessee also failed to comply with a notice given to it by the ITO u/s 143(2) of the I.T. Act. The ITO, therefore, made an assessment u/s 144 of the I.T. Act, estimating the income at Rs. 2,50,000. He declined to grant registration to the firm because the notice had not been complied with. These orders were passed on January 2, 1969. The ITO also recorded that action for imposition of penalty u/s 271(1)(c) was being initiated.

8. The assessee applied u/s 146 of the Act for cancelling the ex parte assessment framed u/s 144 and the ITO by order, dated September 25, 1969, cancelled the earlier assessment and the proceedings were reopened. The assessee thereafter filed a revised return on January 19, 1970, and also produced before the ITO particulars from his books of account. The profit and loss account for the period ending on November 4, 1964, was drawn up on the basis of data available from the books of account. It showed total receipts of Rs. 24,50,131 with a net profit of Rs. 2,75,074. It was noteworthy that the estimated profit of Rs. 1,91,660 had been debited to expenses account. Therefore, after adding back this amount to

the net profit, the profit as per books worked out to Rs. 4,66,734 This was the profit declared by the assessee in the revised return.

9. Whereas earlier while estimating the profits in the original return, the assessee had disclosed receipts of Rs. 19,16,602, in the revised return which was compiled on the basis of the books of account, the receipts were of the order of Rs. 24,50/131. The difference was attributable to the omission of two items : one was a sum of Rs. 3,83,529 relating to the receipts for the work executed prior to October 18, 1963 (reference to Clause (3) of the agreement between the assessee and the principal contractors). The other omission was of a sum of Rs. 1,50,000 referable to the security advance.

10. The ITO framed a fresh assessment u/s 143(3) of the Act, by order dated March 7, 1970. The income was determined at Rs. 5,53,546.

11. The ITO recorded that action for imposing penalty was being initiated (order dated March 7, 1970, is annex. A). As the minimum penalty imposable exceeded Rs. 1,000, the ITO referred the case to the AAC.

12. The assessment was reduced in appeal by Rs. 5,000 but the inclusion of receipts of Rs. 3,83,529 and Rs. 1,50,000 in the computation of income became final. In fact, the assessee itself had included these sums in the computation of income declared in the revised return.

13. The IAC found that the assessee had in his original return concealed his income and furnished inaccurate particulars thereof. The revised return was filed, after five years, after a protracted hearing and an ex parte order and that too when the ITO had "smelled the real state of affairs". The IAC found that the assessee was liable to penalty u/s 271(1)(c) of the Act. The minimum penalty according to him worked out to Rs. 5,53,241, but considering certain circumstances and in particular the death of the partners, penalty amounting to Rs. 75,000 was imposed (order dated March 13, 1972, annex. B).

14. The assessee appealed against the order of the IAC before the Tribunal. The Tribunal, after considering the facts and circumstances of the case, agreed with the finding of the IAC in respect of the assessee's liability for penalty u/s 271(1)(c) of the Act as also the quantum thereof (order dated June 25, 1974, is annex. C). On a direction by this court u/s 256(2) of the Act, the Tribunal has referred the aforesaid question for opinion.

15. u/s 256 of the I.T. Act, the Appellate Tribunal has to refer to the High Court any question of law arising out of its order. A question of fact cannot be referred under this provision nor has the High Court jurisdiction in its advisory capacity to offer any opinion on such question. It is not necessary to refer to case law on the point because this is the requirement of the statute itself. In Commissioner of Income Tax, West Bengal, Calcutta Vs. Smt. Anusuya Devi, , the Supreme Court went to the extent of observing that the High Court may decline to answer a question of fact even if the question has been referred at the instance of the High

Court u/s 256(2) of the Act.

16. The order of the Appellate Tribunal (annex. C of the statement) has dealt with the contention of the assessee with respect to imposition of penalty. In para. 15, the Tribunal observed :

"However, from the course of events which we have stated earlier, it is manifest that the assessee, which was clearly aware that the receipts included two sums of Rs. 3,83,529 and Rs. 1,50,000, had omitted to declare any corresponding profit in the estimate of income declared in the original return."

17. Later, in para. 16, the Tribunal considered and rejected the argument advanced by the assessee's counsel that adjustment entries in respect of the aforesaid sums had been passed only at the stage of the filing of the revised return, which was about six years later. The Tribunal found that it was difficult to believe that the assessee, a firm constituted of 13 partners and having common partners in the principal firm, also did not care to pass adjustment entries for the very first year of the business for a period which was longer than five years. Again, in paras. 21 and 22 of the appellate order, the Tribunal took into consideration the facts and circumstances obtaining in the case of the assessee and observed as follows :

"Having regard to the above facts and all the circumstances and further remembering that the receipts and profits determined in the assessment are on the basis of books of account of the assessee itself, we find that it has been established that in omitting to declare the profits in relation to the full amount of receipt in its original return the assessee had concealed income or furnished inaccurate particulars of income. Therefore, we hold that a penalty is exigible."

18. The High Court has jurisdiction to interfere with the finding of fact recorded by the Appellate Tribunal only within the well-defined limits. In *The Commissioner of Income Tax, Bihar and Orissa, Patna Vs. S.P. Jain*, , the Supreme Court observed that the High Court can interfere with such a finding if it appears that either the Tribunal has misunderstood the statutory language, because the proper construction of the statutory language is a matter of law, or it has arrived at a finding based on no evidence or where the finding is inconsistent with the evidence or contradictory, or it has acted on material partly relevant and partly irrelevant or where the Tribunal draws upon its own imagination and imports facts and circumstances not apparent from the record or bases its conclusions on mere conjectures or surmises or where no person judicially acting and properly instructed as to the relevant law could have come to the determination reached.

19. Applying these guidelines to the order passed by the Tribunal, it becomes clear that none of the aforesaid infirmities can be detected in the Tribunal's order, which may give rise to this court's advisory jurisdiction on a question of law u/s 256(1)(2) of the I.T. Act, and we could have with justification declined to answer the question referred to us. However, since the learned counsel

addressed us in detail on the factual aspect of the case, we are proceeding to deal with the same.

20. At one stage, learned counsel for the assessee tried to suggest that in view of the law as it stood on the day of the alleged concealment, the tax sought to be avoided was only Rs. 13,875 and if 33% of the tax was imposed as penalty as noted by the Tribunal, the amount of penalty should be substantially reduced. This contention is without any basis. For imposition of penalty, the firm had to be treated as an unregistered firm u/s 271(2) of the Act. Calculation of the amount of tax from this angle also was not less than Rs. 53,000 even according to the chart produced in this court by learned counsel for the assessee. The total amount of penalty was thus not in excess of the provision which was in force in the assessment year 1965-66. Besides, this question was never raised before the Tribunal and it does not arise out of its order.

21. Learned counsel then coming to his principal argument submitted that the two items of receipts which were of Rs. 3,83,529 and Rs. 1,50,000 were not received by the firm in the relevant accounting year, but had been received prior to that. It was also submitted that there was no actual receipt but only a transfer by book entries. Therefore, according to him, there was no concealment in the relevant accounting year. The contention was raised before the Tribunal also and rightly rejected. The agreement between the assessee and the principal contractors, dated October 25, 1963, itself shows that some work had been executed by the principal contractors prior to the agreement in question and the assessee was entitled to the receipts which the principal contractors had obtained for the work executed by them up to October 18, 1963. Moreover, the assessee itself admitted these receipts while filing the revised return and, therefore, this glaring inconsistency in the explanation and the conduct could not be solved. The assessee maintained accounts on mercantile system, and profit and loss and taxable income had to be calculated on the basis of accrual. This was not disputed at any stage. The assessment order (annex. A) itself shows that the method of accounting was mercantile and there was never any dispute about it. Therefore, receipt by book entries was as good as cash receipts for the purpose of computation of income. As stated by the Tribunal in its statement of the case, there were common partners in the principal firm and the assessee-firm and they were aware of the state of accounts and their respective liabilities. It was too late in the day to say that the receipts related to the preceding accounting year when the assessee itself showed these receipts in the revised return filed on January 19, 1970, i.e., nearly four and a half years after filing of the original return.

22. This court in *Sulemanji Ganibhai Vs. Commissioner of Income Tax*, held that there is concealment of income only when a return is filed. Even if a revised return was filed later showing part of the concealed income, the subsequent return was of no avail unless it was shown that the revised return fell within the ambit of Section 139(5) of the Act. The question that the revised return had

been filed because the assessee discovered any omission or any wrong statement in the original return was never raised before the Tribunal and it does not arise out of the Tribunal's order. This was purely a question of fact which ought to have been specifically urged before the Tribunal so that a finding thereon could be available for deciding the question whether the assessee had concealed the particulars of its income or had furnished inaccurate particulars thereof.

23. We thus find that the Tribunal was right in law in maintaining the penalty of Rs. 75,000 u/s 271(1)(c) of the I.T. Act, 1961.

24. The question under reference is answered in the affirmative and it is held that the Tribunal rightly maintained the penalty of Rs. 75,000 u/s 271(1)(c) of the Act. There will be no order as to costs.