
(1976) 09 GAU CK 0003

In the Gauhati High Court

Case No : Income-tax Reference No. 22 of 1975

Padma Ram Bharali

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 17-09-1976

Acts Referred:

Income Tax Act, 1961 — Section 139(5), 271(1)

Citation : (1977) 110 ITR 54

Hon'ble Judges : M.C. Pathak, C.J.; M. Sadanandaswamy, J

Bench : Division Bench

Advocate : J.P. Bhattacharjee and U. Baruah, for the Appellant; G.K. Talukdar and D.K. Talukdar, for the Respondent

Judgement

M.C. Pathak, C.J.—The Income Tax Appellate Tribunal, Gauhati Bench, has referred the following question of law to the High Court u/s 256(1) of the Income Tax Act, 1961 (hereinafter referred to as "the Act"):

" Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in upholding the penalty imposed by the Inspecting Assistant Commissioner relating to the amount of Rs. 28,742 ? "

The following facts appear from the statement of the case and the Tribunal's order.

2. The assessee which is a Hindu undivided family submitted its return of income on December 13, 1968, for the assessment year 1968-69, showing a total income of Rs. 66,369. On February 2, 1970, a revised return was submitted showing the income of Rs. 1,61,607. Before the Income Tax Officer the following four reasons were submitted by the assessee for submission of the revised return :

(1) Commission of the year under consideration amounting to Rs. 40,588 was credited in the accounts of the following year. This has been the system followed by the assessee so long but it had now been decided that since the assessee is

adopting mercantile method of accounting the system should be changed and commission receivable should be credited in the relevant accounting year,

(2) In purchase account (Union Carbide goods) two invoices amounting to RS. 73,742 were doubly posted,

(3) In purchase account (Hindustan Lever goods) invoices amounting to sum of Rs. 24,591 were also debited twice, and

(4) That these defects were detected when the accounts were audited by the auditors in 1969-70.

3. The Income Tax Officer held that the records and the accounts showed that the concealment in the purchase accounts above, made by the assessee had been detected by the department during the course of examination of accounts and the assessee had been confronted with the same and it was after this that the accounts were given for audit and the auditors in their special report dated January 30, 1970, had considered the amount of Rs. 28,742 as cash defalcation and debited it to the proprietor's Capital account. Under the circumstances the Income Tax Officer initiated proceedings u/s 271(1)(c) of the Act as the concealment had been made at the time the original return was submitted.

4. The Income Tax income tax Officer, after hearing the assessee, assessed the income of the assessee from various sources. The assessee had shown net profit, as per the audited profit and loss account, at Rs. 1,38,438. The Income Tax officer after allowing depreciation assessed the net business income at Rs. 1,32,541. He also assessed the income from house property at Rs. 12,802 and the income from other sources at Rs. 16,579. Thus, the Income Tax Officer assessed the total income at Rs. 1,61,922.

5. As the minimum penalty imposable exceeded the pecuniary jurisdiction of the Income Tax Officer, he referred the matter to the Inspecting Assistant Commissioner as the assessee was found to have concealed its income and furnished inaccurate particulars of such income in view of Section 274(2) of the Act.

6. The Inspecting Assistant Commissioner gave opportunity to the assessee of being heard and found that from the facts available in the records he was satisfied that the assessee understated its income for the assessment year 1968-69, in the return filed on December 13, 1968, by furnishing inaccurate particulars and the discrepancies were detected by the department during the course of examination of the accounts and as such the explanation given by the assessee that the discrepancies were detected by the auditors and that the return was filed without proper knowledge of accounts was untenable. The Inspecting Assistant Commissioner further observed that it was evident from the records that the minimum care was not taken by the assessee in submitting the return of income on December 13, 1968, before the Income Tax Officer. He also held that since the income shown in the return amounted to Rs. 66,369 as

against the assessed income of Rs. 1,61,161, the provisions of Section 271(1)(c) read with the Explanation were clearly attracted.

7. Thus, applying the Explanation to Section 271(1)(c), the Inspecting Assistant Commissioner imposed a penalty of Rs. 94,792 being the difference between the assessed income of Rs. 1,61,161 and the returned income of Rs. 66,369.

8. The assessee then preferred an appeal before the Income Tax Appellate Tribunal against the order of the Inspecting Assistant Commissioner and the appeal was numbered as I.T.A. No. 83 (Gauhati) of 1973-74.

9. The Tribunal heard the parties and found that the concealment of income or furnishing of inaccurate particulars of income had been found out with regard to three items. Considering the materials on record the Tribunal has observed in its order with respect to the amount of Rs. 40,588 as follows:

" The assessee was showing the commission on the basis of actual receipts when according to the mercantile system he should have shown the commission in the year in which it was receivable ; thus it was a defect in the accounting system and so it cannot be said that the assessee had any intention of concealing this income of Rs. 40,588. It was a bona fide mistake of the assessee that the commission of Rs. 40,588 was not shown in the original return for the assessment year 1968-69, as the assessee had bona fide belief that the income can be shown when it is actually received by the assessee. Under the circumstances we hold that the assessee is not guilty of concealment of the amount of Rs. 40,588 relating to the commission nor he can be said to have furnished inaccurate particulars of income relating to this amount. Hence we hold that penalty order of the Inspecting Assistant Commissioner u/s 271(1)(c) of the said Act read with the Explanation relating to this amount of Rs. 40,588 cannot be sustained."

10. The Tribunal then considered the case of concealment relating to the other two amounts, namely, Rs. 24,591 and Rs. 28,742.

11. Regarding the sum of Rs. 24,590.57 (in round figure Rs. 24,591) the Tribunal has found as follows :

" We have already pointed above that as regards adjustment entry relating to the amount of Rs. 24,590.57 the mistake appears to be a bona fide mistake and there appears to be no intention of the assessee for concealment and so no penalty can be levied relating to this amount of Rs. 24,590.57."

12. The Tribunal then considered the case of the assessee relating to the concealment of the amount of Rs. 28,742, and observed in its order as follows :

" The assessee admittedly did not show the income of Rs. 28,742 in the original return and it was detected by the Income Tax Officer on the examination of the account books and then an auditor was appointed to audit the accounts for the purpose of finding out an explanation to get out of this difficulty and then on the

basis of the chartered accountant's report revised return was filed. If the Income Tax Officer had not detected the mistake the amount would have remained concealed. The very circumstance that the assessee agreed to the adjustment in the capital account shows that it was not a case of defalcation by any employee but it was a case of inflation of purchase and the excess amount was carried to the proprietor's account. We agree with the Inspecting Assistant Commissioner that it was a case of concealment of income as the assessee did not show this income in the original return filed by the assessee and it was also a case of furnishing inaccurate particulars of income as the assessee filed the trading and profit and loss account showing inflated purchases to the extent of Rs. 28,742. Hence, a penalty has to be levied relating to this amount of Rs. 28,742."

13. The Tribunal further has observed:

" We may also point out that in this case the Inspecting Assistant Commissioner and the Income Tax Officer have both pointed out that the case of the assessee is covered by the Explanation to Section 271(1)(p) of the said Act. The Explanation to Section 271(1)(c) lays down that where the total income returned by any person is less than 80% of the total income as assessed u/s 143 (reduced by the expenditure incurred bona fide by him for the purpose of making or earning any income included in the total income which has been disallowed as a deduction), such person shall, unless he proved that the failure to return the correct income did not arise from any fraud or any gross or wilful neglect on his part, be deemed to have concealed the particulars of income or furnished inaccurate particulars of such income for the purpose of Clause (c) of this sub-section. In the present case the original returned income as shown by the assessee was only Rs. 66,369 and the finally assessed income is Rs. 1,61,161. Thus, it is evident that the Explanation to Section 271(1)(c) of the said Act is applicable in the case of the assessee and so the onus is on the assessee to prove that there was no fraud or any gross or wilful neglect on the part of the assessee.....

The circumstances show that the assessee was guilty of any fraud or any gross or wilful neglect. Hence, we hold that the assessee has failed to prove that there was no fraud or gross or wilful neglect on the part of the assessee in furnishing the original return. Hence the assessee will be deemed to have concealed the particulars of income or to have furnished inaccurate particulars of such income."

14. The Tribunal finally held :

" In view of our findings above it is evident that the assessee has concealed income to the extent of Rs. 28,742 by furnishing inaccurate particulars of income and so the penalty has to be imposed to the extent of Rs. 28,742. Under the circumstances we restrict the penalty to Rs. 28,742 only."

On the above facts the above-mentioned question of law has been referred.

15. In the instant case, the penalty of Rs. 28,742 has been imposed u/s 271(1)

(c) read with the Explanation. The Explanation to Section 271(1)(c) has been applied and, therefore, it has been held by the Tribunal that the assessee has failed 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 and, therefore, the assessee is deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income for the purpose of Clause (c) of Sub-section (1) of Section 271.

16. Let us first examine whether the Explanation to Clause (c) of Sub-section (1) of Section 271 of the Act is applicable in the instant case.

17. The assessee filed the return of income on December 13, 1968, and showed his total income at Rs. 66,369. Thereafter, a revised return was filed on February 2, 1970, wherein the total income was shown at Rs. 1,61,607. This revised return was filed apparently u/s 139(5) of the Act, which reads as follows :

"139. (5) If any person having furnished a return under Sub-section (1) or Sub-section (2), discovers any omission or any wrong statement therein, he may furnish a revised return at any time before the assessment is made, "

18. In the revised return the assessee included three more items, namely, Rs. 40,588, Rs. 24,591 and Rs. 28,742 which mainly swelled the income of the assessee in the revised return. Of these three items the Tribunal has held, as quoted hereinabove, that the assessee was not guilty of concealment of the amount of Rs. 40,588 relating to the commission nor he could be said to have furnished inaccurate particulars of income relating to this amount and that no penalty could be sustained with respect to this amount of Rs. 40,588.

19. Regarding the item of Rs. 24,590.57, the Tribunal has observed in its order as follows :

" Moreover no cash transaction was involved relating to the amount of Rs. 24,590.57 and a bona fide mistake is possible relating to this adjustment entry of Rs. 24,590.57, The assessee is entitled to file a revised return u/s 139(5) of the said Act which lays down that if any person having furnished a return under Sub-section (1) or Subsection (2), discovers any omission or any wrong statement therein, he may furnish a revised return at any time before the assessment is made. If the assessee on the report of the chartered accountant detected the mistake relating to the amount of Rs. 24,590.57 and filed a revised return it cannot be said that the assessee had intention of concealing this income."

20. Thus, it is found that the two items, namely, Rs. 40,588 and Rs. 24,590.57, could be included by the assessee in the revised return submitted u/s 139(5) of the Act with immunity from Section 271(1)(c) and so far as these two items are concerned the revised return is within the proper scope and ambit of Section 139(5) of the Act. So, there cannot be any question of penalty as has been correctly held by the Tribunal with respect to these two items.

21. This view is supported by the decision of this court in F.C. Agarwal Vs. Commissioner of Income Tax, wherein this court has observed as follows :

" Admittedly, the assessee was a person whose income during the previous years in question exceeded the maximum limit of non-taxable income. He was thus under an obligation to furnish the returns for the relevant assessment years u/s 139(1) and in fact he submitted returns for the relevant assessment years under Sub-section (1). While submitting the returns for the relevant assessment years it was the legal duty of the assessee to disclose the full particulars of his income in the returns submitted by him. It is quite possible and natural that in submitting a return and disclosing the full particulars of income in the return some bona fide omission or some bona fide wrong statement may find place in the return and to obviate this possibility the legislature has provided Sub-section (5) of Section 139 which reads as follows:

"139. (5) If any person having furnished a return under Sub-section (1) or Sub-section (2), discovers any omission or any wrong statement therein, he may furnish a revised return at any time before the assessment is made."

If after having furnished the return the assessee discovers that some omission has taken place or some wrong statement has crept in in the return, he may file a revised return wherein he may correct the omission or the wrong statement made in the original return. Sub-section (5) further provides that in order to enable an assessee to file a revised return as contemplated under Sub-section (5) the omission or wrong statement that might have occurred or crept in in the original return must be discovered by the assessee himself. In other words, if after examining the return and accounts in the proceedings the discovery of the omission or wrong statement is made by the departmental authority and thereafter the revised return purported to be under Sub-section (5) is filed, that will not be considered as a revised return under Sub-section (5), As a proposition of law it may be correct that if a revised return as contemplated under Sub-section (5) is submitted before the assessment is made after the assessee having discovered some omission or some wrong statement in the original return and in the revised return he makes correction of the omission or the wrong statement, a penalty proceeding for concealment of the particulars of income or furnishing inaccurate particulars of such income as contemplated under Clause (c) of Sub-section (1) of Section 271 may not be attracted. But to avoid the penalty proceeding as contemplated u/s 271(1)(c) by reason of submission of revised return, the revised return itself must be within the correct ambit and scope of Sub-section (5) of Section 139 of the Act. If it cannot be said that a revised return in fact does come within the correct ambit and scope of Section 139(5), then immunity from Section 271(1)(c) cannot be availed of by the assessee. "

22. Hence we find that the revised return filed by the assessee in the instant case with respect to the two items, namely, Rs. 40,588 and Rs. 24,591, was within the correct scope and ambit of Section 139(5) of the Act.

23. Therefore, for the purpose of penalty, these two items have to be excluded, or in other words, have to be added to the total income returned in the original return. Thus, the total income validly returned by the assessee comes to Rs. 1,31,548. Since the total income assessed is Rs. 1,61,922, for the purpose of Section 271(1)(c) the Explanation in the instant case is not attracted. But in the Tribunal's order as well as in the order of the Inspecting Assistant Commissioner reliance was placed on the Explanation to Clause (c) of Sub-section (1) of Section 271 and the burden of proof was wrongly shifted on the assessee and it was held that since the assessee has failed to discharge the burden as contemplated under the Explanation, the assessee was deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income for the purpose of Clause (c). Since the Explanation is found not applicable to the instant case, the finding of the Tribunal regarding the penalty is vitiated for wrongly placing the burden of proof on the assessee relying on the Explanation.

24. In the case of F.C. Agarwal Vs. Commissioner of Income Tax, this court has observed, following the decisions of the Supreme Court in Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, , The Commissioner of Income Tax Madras Vs. Khoday Eswarsa and Sons, and a decision of a Full Bench of this court in K.C. Trunk and Bucket Factory Vs. Commissioner of Income Tax and Others, as follows:

" It is now settled law that in order to sustain a penalty u/s 271(1)(c) of the Act the department must establish that the receipt of the amount in dispute constitutes income of the assessee and apart from the falsity of the explanation given by the assessee, the department must have before it cogent material or evidence from which it can be inferred that the assessee has consciously concealed the particulars of his income or has deliberately furnished inaccurate particulars in respect of such income. It is also settled law that the finding given in the assessment proceedings for determining or computing the tax cannot by itself be said to be conclusive in penalty proceedings though it may be good evidence which may be considered along with the other evidence in the penalty proceedings."

25. Since the Explanation in the instant case is not attracted, before a penalty can be legally imposed, the department must fulfil the above-mentioned requirements. In the instant case, however, these requirements are clearly lacking. That being so, on this ground alone the order of the Tribunal regarding the penalty imposed is not sustainable in law.

26. The impugned order of the Tribunal is also not sustainable on another ground. The penalty proceeding was initiated by the Income Tax Officer for concealment of particulars of income and in this connection the following observation of the Income Tax Officer in the assessment order for the assessment year 1968-69 may be considered :

" The records and the accounts, however, show that the concealments in the purchase accounts above made by the assessee had been detected by the department during the course of examination of accounts and the assessee had been confronted with the same. Apparently, after this the accounts were given for auditing. The auditors in their special report dated January 30, 1970, had considered the amount of Rs. 28,742 as cash defalcation and debited it to the proprietor's capital account. In the circumstances of the case, action u/s 271(1) (c) is started. The concealment had already been made at the time the original return was submitted."

27. In his order the Inspecting Assistant Commissioner has observed as follows:

" From the facts available in the records, I am satisfied that the assessee understated its income for the year in the return filed on December 13, 1968, by furnishing inaccurate particulars....."

28. The Inspecting Assistant Commissioner held that the assessee was guilty of furnishing inaccurate particulars.

29. In its order the Tribunal has held, as quoted hereinabove, as follows :

" Hence, the assessee will be deemed to have concealed the particulars of income or to have furnished inaccurate particulars of such income."

30. Thus, it is found that the initiation of the penalty proceeding was for concealment of the particulars of income. But the Tribunal finally held that the assessee would be deemed to have concealed the particulars of income or to have furnished inaccurate particulars of such income.

31. It is thus found that the basis of the initiation of penalty proceeding is not identical with the ground on which the penalty has been imposed and this must have deprived the assessee of reasonable opportunity of showing cause against the penalty proceeding which is after all a quasi-criminal proceeding.

32. It also has to be remembered that Clause (c) of Sub-section (1) of Section 271 deals with two specific offences, that is to say, concealing particulars of income or furnishing inaccurate particulars of income. No doubt, the facts of some cases may attract both the offences and in some cases there may be overlapping of the two offences, but in such cases the initiation of the penalty proceedings also must be for both the offences. But drawing up a penalty proceeding for one offence and finding guilty for another offence or finding guilty for either the one or the other offence, as has been done by the Tribunal in the instant case, cannot be sustained in law.

33. This view is supported by the decision of the Gujarat High Court in Commissioner of Income Tax, Gujarat I Vs. Lakhdhir Lalji,

34. In the result we find that, on the facts and in the circumstances of the case, the Tribunal was not justified in law in upholding the penalty imposed by the Inspecting Assistant Commissioner relating to the amount of Rs. 28,742.

35. The question of law referred is answered in the negative and against the department.

36. The reference is answered accordingly. We, however, make no order as to costs.

M. Sadanandaswamy, J.

37. I agree.