

(1992) 03 GUJ CK 0010

In the Gujarat High Court

Case No : Special Civil Application No. 7704 of 1991

Pradip Chandulal Patel

APPELLANT

Vs

P.G. Karode and Another

RESPONDENT

Date of Decision : 17-03-1992

Acts Referred:

Income Tax Act, 1961 — Section 132, 132(11), 132(12), 132(4), 132(5)
Wealth Tax Act, 1957 — Section 18(1)

Citation : (1992) 197 ITR 385

Hon'ble Judges : J.M. Panchal, J;G.T. Nanavati, J

Bench : Division Bench

Advocate : J.M. Thakore, for the Appellant; B.J. Shelat, for the Respondent

Judgement

G.T. Nanavati, J.—In this petition under article 226 of the Constitution, the petitioner wants this court to quash and set aside the order dated August 6, 1990, passed by the Assistant Commissioner of Income Tax u/s 132(5) of the Income Tax Act (hereinafter referred to as "the Act") and also the order dated March 7, 1991, passed by the Commissioner of Income Tax u/s 132(12) of the Act.

2. On April 9, 1990, during combing operations by the police inspector of Ellisbridge Police Station, Ahmedabad, the residential premises of the petitioner were searched. The police found in the house of the petitioner Rs. 41,80,000. The petitioner stated the police that it was his income from satta betting business. The police inspector, therefore, seized the same u/s 102 of the Criminal Procedure Code. Pursuant to the information received, the Director of Income Tax (Investigation) authorised the requisitioning officer to require the police inspector to deliver the seized cash to the requisitioning officer. On April 10, 1990, the Director of Income Tax (Investigation) also issued an authorisation u/s 132 in respect of Locker No. 810 in Panchratna Safe Deposit Vault Private Limited, Ahmedabad, standing in the name of the petitioner. The locker was sealed on that date and, during the search made on April 11, 1990, cash of Rs.

1,01,400 and a diary were found therefrom. They were seized by the authorised officers. The petitioner's statement was also recorded on that day u/s 132(4) of the Act. Thereafter, on April 16, 1990, the petitioner was given a notice u/s 132(5) read with rule 112A for explaining the nature of possession and the source of acquisition of the said cash. During the course of the proceedings u/s 132(5), the petitioner's statement was recorded on July 23, 1990. The Assistant Commissioner of Income Tax, respondent No. 1, then passed an order on August 6, 1990, u/s 132(5), estimating the petitioner's income at Rs. 43,62,705, calculated the tax on that income at Rs. 23,31,664 and determined the amount of penalty imposable u/s 271(1)(c) at Rs. 23,31,664. As the total tax liability of the petitioner exceeded the cash that was seized from the petitioner, the first respondent ordered the seized cash to be retained in his custody. Aggrieved by that order, the petitioner made an application u/s 132(11) to the Commissioner of Income Tax who, by his order dated March 7, 1991, upheld the order of the Assessing Officer and rejected the application. As stated above, the petitioner has filed this petition challenging both the said orders.

3. In this petition, the estimation of the undisclosed income of the petitioner and the amount of tax payable thereon are not challenged. What is challenged by the petitioner is the determination of the amount of penalty, as a result of which the surplus amount of Rs. 19,50,636, which, according to the petitioner, ought to have been released, is retained by the Assessing Officer. The learned Advocate-General, appearing for the petitioner, contended that, as the petitioner had disclosed the income of Rs. 43,62,705 under the provisions of the Explanation to section 271(1)(c) read with section 132(4) of the Act, the petitioner was eligible to the grant of immunity against penalty imposable u/s 271(1)(c) and, in denying that benefit to the petitioner, both the respondents have acted illegally and, therefore, the orders passed by them deserve to be quashed. It was also contended that the action of the respondents in denying the benefit to the petitioner is also contrary to the Instructions given in Circular No. Admn. I/Misc. 130/88-89, dated June 17, 1988, issued by the Chief Commissioner of Income Tax (administration). In the alternative, it was submitted that, if Explanation 5 to section 271 is not attracted in this case, then there is no scope for levy of penalty u/s 271(1)(c), as there was no material before the Assessing Officer to show that the petitioner had concealed particulars of his income or furnished inaccurate particulars of his income. It was submitted that, as the return of income for the assessment year 1991-92 was yet to be filed, it could not have been assumed that the petitioner would not have disclosed such income in his return of income.

4. The relevant sections to be considered in this case are section 132, section 132A and section 271. Section 132 provides for search and seizure. Sub-section (1) confers powers on certain officers to authorise the officers referred to in that sub-section to enter and search premises and search any person and to seize the books of account, other documents, money, bullion, jewellery or other valuable article or thing found as a result of such search and to take necessary incidental

steps. Sub-sections (1A), (2) and (3) are not necessary for our purpose and they need not be referred to. Sub-section (4) empowers the authorised officer to examine on oath any person who is found to be in possession or control of such books or articles during the course of search and seizure. Any statement made by such person during such examination can be used in evidence in any proceeding under the Act. Sub-section (4A) creates a presumption in respect of the books of account, etc., found in the possession or control of any person in the course of a search. The presumptions that may be raised are that such books of account or articles belong to such person, that the contents of such books of account and other documents are true and that the signature and every other part of such books of account or other documents which purport to be in the handwriting of any particular person or which may reasonably be assumed to have been signed by or to be in the handwriting of any particular person, are in that person's handwriting and in the case of a document stamped, executed or attested, that it was duly stamped or executed or attested by the person by whom it purports to have been so executed or attested. Sub-section (5), which is important for our purpose, reads as under :

"(5) Where any money, bullion, jewellery or other valuable article or thing (hereafter in this section and in sections 132A and 132B referred to as the assets) is seized under sub-section (1) or sub-section (1A), the Assessing Officer, after affording a reasonable opportunity to the person concerned of being heard and making such enquiry as may be prescribed, shall, within one hundred and twenty days of the seizure, make an order, with the previous approval of the Deputy Commissioner, -

(i) estimating the undisclosed income (including the income from the undisclosed property) in a summary manner to the best of his judgment on the basis of such materials as are available with him;

(ii) calculating the amount of tax on the income so estimated in accordance with the provisions of the Indian Income Tax Act, 1922 (11 of 1922), or this Act;

(iia) determining the amount of interest payable and the amount of penalty imposable in accordance with the provisions of the Indian Income Tax Act, 1922 (11 of 1922), or this Act, as if the order had been the order of regular assessment;

(iii) specifying the amount that will be required to satisfy any existing liability under this Act and any one or more of the Acts specified in clause (a) if sub-section (1) of section 230A in respect of which such person is in default or is deemed to be in default,

and retain in his custody such assets or part thereof as are in his opinion sufficient to satisfy the aggregate of the amounts referred to in clauses (ii), (iia) and (iii) and forthwith release the remaining portion, if any, of the assets to the person from whose custody they were seized :

Provided that, if after taking into account the materials available with the Assessing Officer is of the view that it is not possible to ascertain to which particular previous year or years such income or any part thereof relates, he may calculate the tax on such income or part, as the case may be, as if such income or part were the total income chargeable to tax at the rates in force in the financial year in which the assets were seized and may also determine the interest or penalty, if any, payable or imposable accordingly :

Provided further that where a person has paid or made satisfactory arrangements for payment of all the amounts referred to in clauses (ii), (iia) and (iii) or any part thereof, the Assessing Officer may, with the previous approval of the Chief Commissioner or Commissioner, release the assets or such part thereof as he may be fit in the circumstances of the case."

5. Sub-sections (6) to (10) are not relevant for our purpose. Sub-section (11) confers a right on the person objecting to an order made under sub-section (5) to make an application to the Chief Commissioner or Commissioner within 30 days of the date of such order, stating therein the reasons for his objection. Sub-section (12) requires the Chief Commissioner or the Commissioner to pass an order thereon, after giving an opportunity of hearing to the applicant.

6. Section 132A confers powers on the officers mentioned therein to authorise the specified officers, who are described as the requisitioning officers, to require the officer or authority referred to in clause (a), (b) or (c) to deliver the books of account, other documents or assets which have been taken by them in custody under any other law in force.

17-3-1992 : Sub-section (3), which is material for our purpose, reads as under :

"132A. (3) Where any books of account, other documents or assets have been delivered to the requisitioning officer, the provisions of sub-sections (4A) to (14) (both inclusive) of section 132 and section 132B shall, so far as may be, apply as if such books of account, other documents or assets had been seized under sub-section (1) of section 132 by the requisitioning officer from the custody of the person referred to in clause (a) or clause (b) or clause (c), as the case may be, of sub-section (1) of this section and as if for the words "the authorised officer" occurring in any of the aforesaid sub-section (4A) to (14), the words "the requisitioning officer" were substituted."

7. Section 271 provides for penalty and that part of the section which is relevant for the purpose of this case reads as under :

"271. (1) If the Assessing Officer or the Deputy Commissioner (Appeals) or the Commissioner (Appeals) in the course of any proceedings under this Act, is satisfied that any person -...

(c) has concealed the particulars of his income or furnished inaccurate particulars of such income,

he may direct that such person shall pay by way of penalty, -...

(ii) in the cases referred to in clause (b), in addition to any tax payable by him, a sum which may extend to twenty-five thousand rupees for each such failure;

(iii) in the cases referred to in clause (c), in addition to any tax payable by him, a sum which shall not be less than, but which shall not exceed three times, the amount of tax sought to be evaded by reason of the concealment of particulars of his income or the furnishing of inaccurate particulars of such income :...

Explanation 5. - Where in the course of a search u/s 132, the assessee is found to be the owner of any money, bullion, jewellery or other valuable article or thing (hereafter in this Explanation referred to as assets) and the assessee claims that such assets have been acquired by him by utilising (wholly or in part) his income, -

(a) for any previous year which has ended before the date of the search, but the return of income for such year has not been furnished before the said date or, where such return has been furnished before the said date, such income has not been declared therein; or

(b) for any previous year which is to end on or after the date of the search,

then, notwithstanding that such income is declared by him in any return of income furnished on or after the date of the search, he shall, for the purposes of imposition of penalty under clause (c) of sub-section (1) of this section, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income,

unless, -

(1) such income is, or the transactions resulting in such income, are recorded, -

(i) in a case falling under clause (a), before the date of the search; and

(ii) in a case falling under clause (b), on or before such date, in the books of account, if any, maintained by him for any source of income or such income is otherwise disclosed to the Chief Commissioner or Commissioner before the said date; or

(2) he, in the course of the search, makes a statement under sub-section (4) of section 132 that any money, bullion, jewellery or other valuable article or thing found in his possession or under his control, has been acquired out of his income which has not been disclosed so far in his return of income to be furnished before the expiry of time specified in sub-section (1) of section 139, and also specifies in the statement the manner in which such income has been derived and pays the tax, together with interest, if any, in respect of such income."

8. What was submitted on behalf of the petitioner was that, during the search made u/s 132, the petitioner had made a statement as he was asked to explain his possession of cash of Rs. 42,82,300. In that statement, pursuant to the

questions put to him, he had explained his possession not only of Rs. 1,01,400, but also his undisclosed income of Rs. 43,62,705 as noted in his diary, which was seized from his locker. Not only that, but the petitioner was also asked whether he desired to take the benefit of section 271(1)(c) read with Explanation 5 and section 18(1)(c) and Explanation 5 of the Wealth-tax Act and the petitioner had, believing that the benefit of Explanation 5 would be available to him, stated that he desired to take the benefit of the section and made a declaration with respect to his total undisclosed income of Rs. 43,62,705. The petitioner had also expressed his desire to pay the tax thereon. Relying upon this statement, it was submitted that Explanation 5 to section 271 was clearly attracted in this case. Though the amount of Rs. 41,80,900 was found before the petitioner's house was searched u/s 132, in view of the diary and the questions put to him, the whole amount can be said to have been found during the search. As all other conditions of Explanation 5 were satisfied, the petitioner was entitled to the benefit of the Explanation. It was also submitted that the Act does not provide that the books of account should be in a particular form and the Income Tax Department has rightly so far not disputed that the said diary cannot be regarded as a book of account. Learned counsel also submitted that the respondents should not now be permitted to contend that the said diary cannot be regarded as a book of account. The said diary contains accounts in respect of total amount of cash found from the petitioner and the source of income is also disclosed therein. Not only that, but the petitioner also made a statement under sub-section (4) of section 132 and explained his possession of Rs. 42,82,300 and, therefore, the petitioner can be said to have discharged the burden imposed by that Explanation for rebutting the presumption that the petitioner had concealed his source of income or furnished inaccurate particulars thereof. It was also submitted in the alternative that, in case it is held that Explanation 5 is not attracted in this case, then there was no other material before the Assessing Officer on the basis of which it can be said that the petitioner had concealed the particulars of his income or furnished inaccurate particulars of such income.

9. A conjoint reading of section 132 and section 132A clearly discloses that the Department may come to know of undisclosed assets, either as a result of search and seizure u/s 132 or as a result of requisition made u/s 132A. In either case, it has to deal with the undisclosed assets in the manner provided under sub-sections (5) to (10) of section 132. Sub-section (5) permits the Assessing Officer to retain in his custody such assets or part thereof as are sufficient to satisfy the amount of tax, interest, penalty and any other existing liability under the Act and in any one or more of the Acts specified in section 230A in respect of which such person is in default. Thus, for the purpose of retaining the amount, the Assessing Officer is required to estimate the undisclosed income though in a summary manner and to the best of his judgment on the basis of such materials as may be available with him. Thereafter, he has to calculate the amount of tax on the income so estimated. He has also to determine the amount of interest payable and the amount of penalty imposable in accordance with the provisions of the

Act. Ordinarily, the Assessing Officer cannot determine the amount of interest payable or the amount of penalty imposable till a regular assessment order is passed. Therefore, in sub-section (5), a provision has been made to determine the amount of interest payable or the amount of penalty imposable even at an earlier stage, proceeding on the basis that the order passed u/s 132(5) is the order of regular assessment. In case the Assessing Officer finds that it is not possible to ascertain to which particular previous year or years such income or any part thereof relates, he has to calculate the tax on such income or part, as if such income or part is the total income chargeable to tax at the rates in force in the financial year in which the assets were seized. Interest or penalty are also to be determined accordingly. If the person from whom undisclosed assets are found, makes satisfactory arrangements for payment of all the amounts referred to in clauses (ii), (iia) and (iii) of sub-section (5), the Assessing Officer is required to release the assets or such part thereof as he may deem fit in the circumstances of the case. The Assessing Officer is under an obligation to return the amount that may be found to be in excess of the aggregate of the amount referred to in clauses (ii), (iia) and (iii). In view of this obligation on the Assessing Officer to return the excess amount, the petitioner has prayed for release of Rs. 19,50,636. As stated earlier, there is no dispute in this case regarding the estimation of the undisclosed income and the amount of tax calculated by the Assessing Officer. The only dispute is with respect to the determination of the amount of penalty. What is submitted on behalf of the petitioner is that, in this case, no penalty was imposable u/s 271(1)(c) and, therefore, the Assessing Officer could not have determined Rs. 19,50,636 as penalty imposable under that section and, thus, retention of much amount by the respondents is clearly illegal and without authority of law.

10. Therefore, the real question which arises for consideration is whether, in view of the facts and circumstances of the case, penalty had become imposable u/s 271. If it is held that Explanation 5 to section 271 is applicable to the facts of the case and that the conditions laid down in the explanation are satisfied, then the only question which will have to be considered is whether the benefit of that explanation would be available for the whole amount seized or only in respect of that income which is found to be the undisclosed income of that year only in which search is made and not for the undisclosed income of earlier years. Whereas it was submitted on behalf of the petitioner that Explanation 5 is attracted in this case, learned counsel for the respondents contended that the said Explanation was applied to the seizure of Rs. 1,01,400 only and though the assessee had not been given the benefit of that explanation with respect to income, the Commissioner has given that benefit to the petitioner and, therefore, the petitioner cannot legitimately ask for the benefit of that Explanation any more.

11. It was submitted on behalf of the petitioner that the purpose of Explanation 5 is also to give benefit to the assessee and, for that reason, as the provision existing before the Taxation Laws (Amendment and Miscellaneous Provisions)

Act, 1986, was found to be not sufficient, it was amended by the said amending Act by providing that, if an assessee makes a statement during the course of the search, admitting that the assets found in his possession or under his control were acquired out of his income which has not been disclosed so far in his return of income to be furnished before the expiry of time prescribed in clause (a) or clause (b) of section 139(1) and specifies in the statement the manner in which such income has been derived and pays the taxes that are due thereon, then, no penalty shall be leviable. It was submitted that Explanation 5 should be so construed as to achieve the object for which the said Explanation was amended by the amending Act. It was submitted that, in this case, the Assessing Officer has accepted the seized cash as the income of the petitioner. No action has been taken by the Assessing Officer against any other person in respect of the seized cash. The material in the possession of the Assessing Officer was the three statements made by the petitioner and the diary which was found from the locker. According to the said statements and the diary, the amount seized was the income which the petitioner earned between April 2, 1990, and April 5, 1990. Particulars of that income are noted in the diary and they were explained by the petitioner in his statement. Even while the statement was recorded on July 23, 1990, during the course of proceedings u/s 132(5), it was not put to the petitioner that what was written in the diary was not correct and was not asked to give the further particulars of the said income. Thus, in the absence of any other material, it was contended that the Assessing Officer ought to have accepted the petitioner's statement that the whole amount represented his income earned between April 2, 1990, and April 5, 1990.

12. In the first statement made before the police inspector on April 9, 1990, what the petitioner has stated is as under :

"... During the course of search at my house on April 9, 1990, in the presence of the witnesses, you have found cash of Rs. 41,80,900 in the drawer of the cot used by me as bed room and the tizori. The cash is in respect of the "ankadas" of the cricket match business. I accept the "ankadas" and also play myself. Besides, I was doing satta betting business out of which the above cash was lying with me."

13. In the statement recorded on April 11, 1990, during the search, he has stated that till that date he had not filed any Income Tax return. When asked about his source of income and that of his family members, he stated as under :

"Ans. : My annual income is approximately Rs. 20,000 to Rs. 25,000. There is no other income of mine or my family members. I carry out betting of matches and "worli matka" and my annual income of Rs. 20,000 to Rs. 25,000 earned is out of this business only. The said business I was doing since last one year on small scale. From the beginning of April, 1990, the said business expanded and presently I am doing on large scale."

14. He was asked as to what was the source of income regarding the amount of

Rs. 43,62,705 written in the diary. He gave the following answer :

"Ans. : The amount shown on the said pages is my profit from betting. The total of all the pages is Rs. 43,62,705 which is my profit from satta betting, out of which the police has seized Rs. 41,80,900 from my house during the combing operation. In addition, the amount of Rs. 1,01,400 kept in my bank locker No. 810 and found out by you during the search is also from the said dealings..."

15. He was also asked the following question :

"Q. 18 : I explain you provisions of section 271(1)(c), Explanation 5 of the Income Tax Act and section 18(1)(c) and Explanation 5 of the Wealth-tax Act according to which whether you desire to disclose the concealed income ? Whether you desire to take the benefit under the said provisions ?"

16. His reply to that question was as under :

"Ans. : Yes, Sir, I followed the above provisions and according to the said provisions, I desire to take the benefit and declare the income of Rs. 43,62,705 of my satta betting stated in reply to question No. 16. I make the declaration under the Income Tax and wealth-tax provisions and I am prepared to pay the tax thereon."

17. In the statement recorded on July 23, 1990, he has stated that he has passed S. S. C. Examination in 1976 and was staying with his father up to June 11, 1986. Till the death of his father on June 11, 1986, he did not do any business. Thereafter, he started the business of betting, for which he had not maintained any record. Earlier, he was doing the betting business on commission basis.

18. After considering these statements of the petitioner, the Assessing Officer was of the view that the explanation of the petitioner that Rs. 43,62,705 was earned by him between April 2, 1990, and April 5, 1990 is "quite fantastic and beyond imagination". "The Assessing Officer has further observed in his order that the assessee could not give the full names and addresses of the persons, for whose names code words are written in the diary. He also observed that it is incredible that the assessee could earn income of Rs. 43,62,705 from the so-called satta betting in four days. He has also observed that a person of the assessee's status could not have earned that much income within such a short time, considering his short experience in this line of business. He has then observed that "as disclosed above, the assessee has not satisfactorily stated the manner in which this income was earned."

19. It was urged that, under sub-section (4A) of section 132, the contents of the books of account and other documents found during the search can be presumed to be true and they can be presumed to be in the handwriting of the person reasonably assumed to have put the signature and, therefore, in the absence of any other material, the Assessing Officer ought to have proceeded on the basis that what was written in the dairy was true and that the said diary was written

by the petitioner. In our opinion, this contention has no merit, because sub-section (4A) merely permits raising of such a presumption. The Assessing Officer may take the help of such presumption for the purpose of taking further steps u/s 132, but he is not bound to do so and it would certainly be open to him to record a finding that the contents of such books of account and other documents are not true. In this case, if the order passed by the Assessing Officer is read as a whole, it can be said without any doubt that he has doubted the correctness of the contents of the diary and also the correctness of the statements made by the assessee. The Assessing Officer has not accepted the statement of the petitioner that the amount of Rs. 43,62,705 represented his income earned between April 2, 1990, and April 5, 1990. Admittedly, the petitioner had not earned any income on and after April 6, 1990. It will, therefore, mean that the Assessing Officer was of the view that the said amount represented not only the income earned during those four days of April, 1990, but it was undisclosed income of the previous years also. Admittedly, the petitioner had not filed any Income Tax return for the previous years. If, under these circumstances, the Assessing Officer came to the conclusion that Rs. 42,82,300 was the concealed income, it cannot be said that the said finding is based on no material and is, therefore, bad in law. No doubt it was wrong in not giving the benefit of Explanation 5 to section 271(1)(c) with respect to the amount of Rs. 1,01,400 seized during the search, but that mistake was corrected by the Commissioner in the order passed u/s 132(12). In our opinion, both the officers were right in coming to the conclusion that, independently of Explanation 5, penalty was imposable u/s 271(1)(c). In the view that we have taken, it is not necessary for us to consider the scope of Explanation 5 and the contentions raised by both the sides in this behalf. As we are of the view that the order passed by the Assessing Officer, as modified by the order of the Commissioner, is quite proper and legal, this petition is dismissed. Rule is discharged with no order as to costs.