

(2003) 04 MP CK 0012

In the Madhya Pradesh High Court

Case No : MCC No. 609 of 1992 17 April 2003 & Miscellaneous Civil Case No. 609 of 1992

Rukmini Bai

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 17-04-2003

Acts Referred:

Income Tax Act, 1961 — Section 148, 271, 69A

Citation : (2004) 140 TAXMAN 289

Hon'ble Judges : Dipak Misra, J; Bench Dipak Misra, J; A.K. Shrivastava, J

Bench : Full Bench

Advocate : H.S. Shrivastava, for the Assessee and Rohit Arya, for the Revenue, for the Appellant;

Judgement

Dipak Misra, J.

This is an application u/s 256(2) of the Income Tax Act, 1961 (hereinafter referred to as the Act) for calling for the statement of case from the Income Tax Appellate Tribunal (for short the Tribunal).

2. It is relevant to state here that in this case the controversy is relatable to two assessment years i.e., 1976-76 and 1976-77. The questions which are proposed for both the years are as under :

"Assessment year 1975-76

(i) Whether there was evidence to hold that the assessee concealed the particulars of income, so as to attract penalty u/s 271(1)(c) of the Income Tax Act, 1961 ?

(ii) Whether the order of the Tribunal upholding the levy of penalty without a clear finding about facts and omitting material facts from consideration is vitiated in law ?

(iii) Whether the Tribunal was right in law in upholding the levy of penalty u/s

271(1)(c) for addition of Rs. 15,000 as unexplained investment that is deemed income u/s 69A of the Income Tax Act, 1961, and particularly in view of the Explanation 1 read with proviso thereto to section 271(1)(c) ?

(iv) Whether on the facts and in the circumstances of the case, that the assessee's husband was having substantial income from grains business upto the time of her death in August 1974 and the assessee herself had agricultural income of about Rs. 10,000 yearly from 1969, is the finding of the Tribunal unreasonable and perverse that the investment did not come out of the savings from such income, but was unexplained investment, so as to attract penalty u/s 271(1)(c) ?

Assessment year 1976-77

(i) Whether there was evidence to hold that the assessee concealed the particulars of income, so as to attract penalty u/s 271(1)(c) of the Income Tax Act, 1961 ?

(ii) Whether the order of the Tribunal upholding the levy of penalty without a clear finding about facts and omitting material facts from consideration is vitiated in law ?

(iii) Whether the Tribunal was right in law in upholding levy of penalty u/s 271(1)(c) for addition of income u/s 69A of the Income Tax Act, 1961, and particularly in view of the Explanation 1 read with proviso (to section 271(1)(c) ?

(iv) Whether the finding of the I.T.A.T. that the payment of balance consideration of Rs. 30,000 on 20-8-1975 was unreasonable and perverse, as no reasonable man would come to, when the assessee had a substantial source of income by way of agricultural income of about Rs. 10,000 per year from 1969 and was being maintained by her husband out of his grains business income till his death in August, 1974 ?"

3. Though many questions have been proposed, Mr. H.S. Shrivastava, learned counsel for the applicant, submitted that the real crux of the matter pertains to imposition of penalty u/s 271(1)(c) of the Act in question. It is pertinent to mention here that as there was late filing of return the assessment proceedings u/s 148 of the Act was initiated against the assessee in which the assessing officer did not accept the explanations and added a sum of Rs. 25,000 for the assessment year 1975-76 and Rs. 30,000 for the next assessment year in exercise of powers conferred u/s 69A of the Act. Appeals were filed assailing the aforesaid orders which entailed in dismissal. Second appeals were preferred which also did not meet with complete success but some relief was granted as Tribunal reduced the quantum.

4. After first appeal was disposed of, before the assessing officer the assessee submitted as the quantum of appeals were pending before the Tribunal the assessing officer should stay his hands. As there was no say the assessing officer imposed penalty u/s 271(1)(c) of the Act. The said imposition was challenged in

two appeals as it pertained to two years but the Commissioner (Appeals) dismissed the same on the ground that the assessee was unable to explain the investment made by her and, therefore, the penalty for concealment of income in respect of unexplained income was rightly levied. On an appeal being preferred the Tribunal in paragraph 7 of its order expressed the view as under :

"7. As regards the assessment year 1976-77, the Tribunal has given further relief and restricted the addition to the tune of Rs. 30,000 holding that this investment was made from undisclosed sources. The Tribunal has disbelieved the theory of assessee regarding investment made by her in this regard. The assessee has neither produced any additional evidence or additional circumstances in the penalty matter and the explanation given in the quantum matter was also not sufficient to hold that the explanation of the assessee was bona fide or she has discharged the onus, which lay on her u/s 271(1)(c). The finding of the Commissioner (Appeals) is based on the sound reasoning that the assessee has concealed the income and thereby guilty of levy of penalty u/s 271(1)(c). The finding of the Commissioner (Appeals) for both the assessment years is, therefore, upheld. The assessing officer will work-out the penalty as per the direction of the Commissioner (Appeals) in the impugned orders."

5. Thereafter, an application u/s 256(1) of the Income Tax Act was filed for referring the proposed questions to this court but the Tribunal negatived the prayer as it was of the view that the questions were in the realm of the facts more so, when no material was brought on record by way of explanation by the assessee.

6. Assailing the aforesaid order and in support of this application it is submitted by Mr. H.S. Shrivastava, learned counsel for the applicant, that the Tribunal has erred in law by not referring the questions and that the explanation offered by the assessee was acceptable as there was no concealment. It is urged by him that the Tribunal has erred in law by giving emphasis on concealment, though facts clearly exposit that there was no concealment. On the contrary, the explanation was given during process of assessment. Learned counsel has also submitted that though the assessee has not given explanation during the proceeding u/s 271(1)(c), yet it was obligatory on the part of the assessing officer to scrutinize the proceedings. It is also urged by him that some material is taken into consideration which was not to be taken into consideration and without looking into the said spectrum the Tribunal dismissed the application though questions of law were involved and it was incumbent on the Tribunal to refer the same to this Court.

7. Mr. Rohit Arya, learned counsel for the revenue has submitted that when the assessment orders have been passed rejecting the explanation of the assessee that cannot be taken into consideration per se unless additional material is brought on record to escape from the penalty clause of the Act. It is urged by him that no explanation was given additionally and, therefore, the explanation which was in existence cannot be taken aid of to convert a question of fact to a

question of law. It is highlighted by him that when the assessing officer refused to stay its hands it was absolutely imperative on the part of the assessee to file the explanation and not to place reliance on the explanation originally provided during the assessment proceeding.

8. To appreciate the rival submissions it is, apposite to refer to section 271(1)(c) of the Act. It deals with failure to furnish returns, comply with notices, concealment of income, etc. Section 271(1)(c) which is relevant for our purpose reads as under :

"271(1)(c) has concealed the particulars of his income or furnished inaccurate particulars of such income,"

As Explanation 1 is relevant for the present purpose we think it appropriate to reproduce the same.

"Explanation 1. Where in respect of any facts material to the computation of the total income of any person under this Act,

(A) such person fails to offer an explanation or offers an explanation which is found by the assessing officer or the Commissioner (Appeals) or the Commissioner to be false, or

(B) such person offers an explanation which he is not able to substantiate and fails to prove that such explanation is bona fide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him, then, the amount added or disallowed in computing the total income of such person as a result thereof shall, for the purpose of clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed."

It is pertinent to state that the aforesaid provision has been amended many times but the quoted provision was applicable when the controversy was in issue.

9. Mr. Shrivastava, learned counsel, has submitted that in the case of CIT v. Ganesh Prasad Badriprasad & Co. (1997) 140 CTR (MP) 548 this court had dealt with the concept of Explanation and in that context held as under :

"As per Explanation 1 to section 271(1)(c), if the assessing authority or the concerned authority, on the material before it, finds that the explanation offered by the assessee is false, then penalty can be levied on the amount which is found to be concealed. Therefore, the whole idea behind the Explanation 1 is that the assessing authority has to first record reasons for arriving at a conclusion that there is failure on the part of the assessee. Hence, after seeking explanation if the authority comes to a conclusion that it is false, then the authority can proceed to levy penalty. Therefore, this Explanation which has been inserted by the amending Act of 1975 with effect from 1-4-1976, has cast a duty on the assessing officer that he should first record reasons that there has been concealment of income and then the explanation is sought. These are the basic

requirements for natural justice desired by the legislature for providing this Explanation. Therefore, the initial burden is on the department to prima facie record that there was concealment and thereafter the explanation is to be sought and in case the explanation is found to be false, then to the extent the income is found to have been concealed and the explanation is found to be false then the authority can proceed against the assessee. Therefore, this Explanation does not change the position and absolve the department just to issue notice for giving false explanation and proceeding against him. Before this, much has to be done by the department under this Explanation." (p. 548)

10. Learned counsel has also drawn inspiration from the decision rendered in the case of CIT v. Daulatram Bhomraj Rajnandgaon (Misc. Civil Case No. 169 of 1974) wherein the Division Bench of this court while dealing with a reference made u/s 256(1) of the Act held as under :

"But even under the Explanation although initially the presumption arises in favour of the department, the weight of the presumption is nullified from the fact that the amount of Rs. 7,500 was deemed to be income because of the fiction contained in section 69A. There was nothing whatsoever to show that really the assessee had earned any such income during the relevant previous year. There was also nothing to show that the assessee's statement that the gold and gold ornaments belonged to his deceased father and were not connected with his income was in any way false. In this view of the matter, we are of the opinion that the Tribunal was justified in deleting the penalty."

In that background after so holding the Division answered the reference, as far as this aspect is concerned, in the following terms :

"... assessee had not concealed the particulars of income or furnished inaccurate particulars of such income within the meaning of section 271(1)(c) and was not liable to penalty."

11. Submission of Mr. Shrivastava is that onus is on the department while taking recourse to Explanation and that is what has been held in the aforesaid judgments. Learned counsel has also commended us to the decision rendered in the case of The Commissioner of Income Tax, Bihar and Orissa, Patna Vs. S.P. Jain, . In the aforesaid case the Apex Court dealt with what is basically the question of jurisdiction of High Court or Supreme Court while dealing with the matters of this nature. We profitably quote their Lordships :

"The High Court and the Supreme Court have always the jurisdiction to interfere with the findings of the Appellate Tribunal 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 of it, 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. In all such cases the findings arrived at are vitiated." (p. 372)

12. Learned counsel has also drawn our attention to the decision rendered in the case of *Anantharam Veerasinghaiah and Co. Vs. Commissioner of Income Tax , Andhra Pradesh*, to bolster his point that the explanation given during the assessment proceeding is also to be taken into consideration by the assessing officer for the proceeding for imposition of penalty u/s 271(1)(c) of the Act.

13. The question that falls for adjudication is whether in the present case a substantial question of law arises for calling for statement of case from the Tribunal. It is not disputed before us that the assessee did not file any explanation when the penalty proceeding was initiated. In the case of *Anantharam Veerasinghaiah & Co. (supra)* the Apex Court observed that the burden of proof in a penalty proceedings varies from that involved in an assessment proceeding. It is sated by their Lordships that in the penalty proceeding the taxing authority is bound to consider the matter afresh on the material before it and, in the light of the burden to prove resting on the revenue to ascertain whether a particular amount is revenue receipt. Their Lordships further expressed the view that before penalty could be imposed the entirety of the circumstances shall be taken into consideration that the disputed amount represents income and that the assessee has consciously concealed particulars of income or deliberately furnished inaccurate particulars. We have carefully gone through the facts of the said case. Their Lordships referred to the earlier decision rendered in the case of *Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali*, and reiterated the principle laid down in the case of *The Commissioner of Income Tax Madras Vs. Khoday Eswarsa and Sons, .* What is discernible from the aforesaid case is that the assessee reiterated the explanation which it offered in the assessment proceeding and in that context the Supreme Court had observed what we have indicated earlier. Mr. Shrivastava has heavily relied on the dictum of the aforesaid decision and pyramided his submission on the fact that the explanation which was offered by the assessee during the assessment proceeding should have been taken into consideration and had it been taken into consideration it would have been vividly clear that there had been no concealment of particulars of income in whatsoever manner or the assessee had deliberately furnished inaccurate particulars. Though, we have appreciated the submissions raised by Mr. Shrivastava, we are afraid that the same cannot be adverted to in the present case. If we apply the ratio laid down in the case of *S.P. Jain (supra)* we cannot arrive at the conclusion that the finding is inconsistent with the material brought on record or contradictory to it. We say so inasmuch as the assessee had not filed the explanation before the Assessing Officer in the penalty proceeding. True, it is, the explanation can be the same what had been given before the assessing officer and if that would have been so the same is to be looked into in the penalty proceeding but when no explanation was filed the same cannot be taken into consideration. It cannot be raised for the

first time before this court while canvassing the contention that interference is warranted in the facts and circumstances of the case.

14. In view of the aforesaid we are of the considered view that calling for the statement of case in the present case is not warranted inasmuch as the Tribunal has rightly recorded that the imposition of penalty u/s 271(1)(c) in the case at hand was just and proper.

15. Resultantly, the M.C.C. stands rejected.