

(1999) 11 AHC CK 0011

In the Allahabad High Court

Case No : Income Tax R. Applications No's. 151, 157 and 150 of 1997 5
November 1999

SHANKER TRADERS

APPELLANT

Vs

COMMISSIONER OF INCOME TAX

RESPONDENT

Date of Decision : 05-11-1999

Acts Referred:

Income Tax Act, 1961 — Section 139, 148, 215, 217, 256

Citation : (2000) 248 ITR 691

Hon'ble Judges : S.K. Jain, J;M.C. Agarwal, J

Bench : Full Bench

Advocate : Rajesh Kumar, for the Assessee and A.N. Mahajan, for the Revenue,
for the Appellant;

Judgement

These three applications u/s 256(2) of the Income Tax Act, 1961, have been preferred by an assessee praying that the Income Tax Appellate Tribunal, Allahabad, be directed to state respective cases and refer the following questions stated to be of law and to arise out of the common order dated 22-4-1996, passed in I.T.A Nos. 1306, 1307 and 1308 (Alld.) of 1992, for the assessment years 1981-82, 1982-83 and 1983-84, respectively, for the opinion of this court.

Question in I. T. A. No. 151 :

"Whether, on the facts and in the circumstances of the case, particularly in view of the assessee's letter dated 17-12-1985, relied upon by the Tribunal in I.T.A. No. 525 (Alld.) of 1987, the Appellate Tribunal was right in holding that penalty u/s 271(1)(c) was eligible ?"

Question in I. T. A. No. 157:

"(i) Whether, on the facts and in the circumstances of the case, particularly in view of the assessee's letter dated 17-12-1985, relied upon by the Tribunal in I.T.A. No. 525 (Alld.) of 1987, the Appellate Tribunal was right in holding that penalty u/s 271(1)(c) was eligible ?"

(ii) Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in holding that the loss returned by the assessee should be added to the income finally assessed for the purpose of levy of penalty ?"

Question in I. T. A. No. 150 :

"(i) Whether, on the facts and in the circumstances of the case, particularly in view of the assessee's letter dated 17-12-1985, relied upon by the Tribunal in I.T.A. No. 525 (Alld.) of 1987, the Appellate Tribunal was right in holding that penalty u/s 271(1)(c) was eligible ?

(ii) Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in holding that the loss returned by the assessee should be added to the income finally assessed for the purpose of levy of penalty ?"

We have heard Sri Rajesh Kumar, learned counsel for the assessee and Sri A.N. Mahajan, learned counsel for the Commissioner-respondent.

The assessee is a dealer in medicines. It did not file its returns of income for the years under consideration. A search and seizure operation was conducted against the assessee on 29-6-1993 during which incriminating documents in the form of cash memo, loose papers, etc., were seized. Thereafter, notices u/s 148 were issued and the assessee filed the return of income showing losses of Rs. 30,500, Rs. 88,940 and Rs. 1,42,350, respectively. The assessment, however, was made on an income of Rs. 86,890, Rs. 1,16,310 and Rs. 23,250, respectively. This was done by applying a net rate of 3 per cent. to the sales as disclosed by seized papers. The assessing officer initiated proceedings for the levy of penalty u/s 271(1)(c) for concealment of income but the applicant's contention was that there was no concealment and that through a letter dated 17-12-1985, it had offered to be assessed at a net profit rate of 3 per cent. on the amount of sales subject to the condition that no penalty is levied. This explanation has not been accepted and the penalties have been upheld in the first and second appellate stage also.

The common question that is raised in these petitions is whether the Tribunal was right in upholding the levy of penalty in view of the assessee's letter dated 17-12-1985. The Tribunal has found that the said letter was not the basis of the assessment and the finding in the assessment order about the correct extent of income and in the penalty order about the act of concealment of particulars of income is based on an appreciation of facts of the case and the material on record.

Learned counsel for the assessee contended that the Tribunal's finding about concealment is erroneous and for this purpose he took us through various orders. Firstly no question is raised about the correctness of that finding and in any case that finding being based on the material on record cannot be challenged by seeking a reference u/s 256. As regards the order relied on by the assessee, it states that the assessee agreed to be assessed on a certain amount of income

worked out by a profit rate of 3 per cent. on the total sales of the specified amounts on the express condition precedent that no penalty provisions are initiated and interest sought to be charged under sections 139(8) and 215/217 are either not charged or otherwise waived. But there is no finding that the condition about the non-levy of the interest and penalty were accepted by the assessing officer. That aspect of the matter is not even projected in the proposed question. They do not assert that the assessment was made in pursuance of the acceptance of the offer as contained in the letter and, therefore, the assessing officer was debarred from initiative proceedings for the levy of the penalty.

Learned counsel for the assessee placed reliance on Additional Commissioner of Income Tax Vs. Solar Chemicals (P.) Ltd., ; Sir Shadi Lal Sugar and General Mills Ltd. and Another Vs. Commissioner of Income Tax, Delhi, ; Additional Commissioner of Income Tax Vs. Kishan Singh Chand, and Commissioner of Income Tax Vs. Mansa Ram and Sons, . All these cases relate to the particular facts of the respective cases and there is nothing in their ratio that can be applied to the present case. The Tribunal's finding that the assessee concealed particulars of its income for the three years under consideration is a finding of fact.

As regards the question whether the amount of loss has to be included in the income, particulars of which have been concealed, we are of the opinion that the answer to this question is self-evident by virtue of Explanation 4 to section 271(1) which defines the amount of tax sought to be evaded to mean the tax that would have been chargeable on the income in respect of which particulars have been concealed or inaccurate particulars have been furnished had such income been the total income. When an assessee declares a loss and the assessment is made on a positive income, by adjustment of the income the particulars which were concealed, by virtue of the Explanation the total concealed amount is to be treated as the total income.

For the above reasons these applications are rejected.