
(1997) 09 AHC CK 0183

In the Allahabad High Court

Case No : Income-tax Reference No. 246 of 1980

Sushil Kumar Sarad Kumar

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 26-09-1997

Acts Referred:

Income Tax Act, 1961 — Section 132, 256, 271(1)

Citation : (1998) 232 ITR 588 : (1998) 100 TAXMAN 140

Hon'ble Judges : R.K. Gulati, J;Om Prakash, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

R.K. Gulati, J.—At the instance of the assessee, the Income Tax Appellate Tribunal, Allahabad Bench, has referred the following two questions of law for the opinion of this court, by its common statement of the case in respect of three consecutive assessment years 1972-73 to 1974-75 :

"1. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in relying upon the statement dated October 18, 1974, of Smt. Joya Varshney for the assessment years 1972-73, 1973-74 and 1974-75 ?

2. Whether; on the facts and in the circumstances of the case, the Tribunal was justified in law in confirming penalties for the assessment years 1972-73, 1973-74 and 1974-75 u/s 271(1)(c) of the Income Tax Act, 1961 ?"

2. Sushil Kumar Sarad Kumar in the years under consideration was a proprietary concern of one Sushil Kumar Varshney (hereinafter referred to as "the assessee") and was assessed to tax in the status of an individual. On October 18, 1974, the business and residential premises of the assessee and that of Smt. Joya Varshney were subjected to search u/s 132 of the Income Tax Act, 1961 (for short "the Act"). It was discovered that the assessee maintained two wives, namely, Smt. Praful Lata Varshney and Smt. Joya Varshney. The first wife was living in an ancestral, house with five children whereas the second wife was living

in a separate house with her two children. In the Income Tax returns, the assessee declared respectively a total income of Rs. 22,790, Rs. 24,095 and Rs. 44,096 for three years under consideration. However, the assessments were completed on the income of Rs. 40,850 for the assessment year 1972-73, Rs. 45,500 for the assessment year 1973-74 and Rs. 63,050 for the assessment year 1974-75. The additions made in each of the three assessment years included an addition under the head income from "undisclosed sources" to cover up the difference for domestic expenses as estimated by the Revenue and that disclosed by the assessee in his account books. It may be observed that the assessee had shown withdrawals of Rs. 6,521, Rs. 8,275 and Rs. 9,043, for domestic and personal expenses for three years and finally, in appeal on the quantum side the Income Tax Appellate Tribunal upheld the estimated domestic expenses at Rs. 15,000 for the assessment year 1972-73, Rs. 18,000 for the assessment year 1973-74 and Rs. 20,000 for the assessment year 1974-75, resulting in final additions on account of domestic expenses of Rs. 8,479, Rs. 9,725 and Rs. 10,987.

3. While completing the assessments, the Income Tax Officer simultaneously initiated penalty proceedings, u/s 271(1)(c) of the Act on being satisfied that the assessee had concealed his income or had furnished inaccurate particulars of income in each of the three years under consideration.

4. Now, Section 271(1)(c) of the Act authorises the relevant Income Tax authority if it is satisfied in the course of any proceedings under the Act, to levy a penalty on the ground, inter alia, that a person has concealed the particulars of his income or furnished inaccurate particulars of such income.

5. In the search and seizure proceedings aforesaid a statement of Smt. Joya Varshney was recorded u/s 132(4) of the Act wherein she, inter alia, stated that she was receiving Rs. 500 per month from her husband for domestic and personal expenses. The impugned penalty orders which were made in due course u/s 271(1)(c) for the three years under consideration recite that in the search operation it transpired that the assessee maintained a good standard of living and had a car and a scooter. The residential premises were found fitted with coolers and refrigerators. The children were studying in public schools ; the assessee was feeding a number of insurance policies and paid insurance premium to the tune of Rs. 11,000 to Rs. 13,000 each year. Further, the withdrawals for household expenses which were to the tune of Rs. 6,521, Rs. 8,375 and Rs. 9,043 respectively, for the three years under consideration recorded in the account books by any stretch of imagination were wholly inadequate considering the size of the family, the standard of living and other factors. Eventually, the Income Tax Officer inflicted varying amounts of penalty upon the assessee for each year u/s 271(1)(c) of the Act with the following remarks :

"It has been established that he deliberately showed nominal withdrawals for meeting domestic expenses while he definitely utilised income from undisclosed sources for meeting the total personal expenditure during the year as

determined by the Appellate Tribunal. In the instant case, it has been proved by the material gathered against the assessee that he was spending much more on domestic and personal expenses than the expenditure reflected from the account books, The provisions of Section 271(1)(c) are, therefore, clearly attracted . . ."

6. The penalty orders were concurrently upheld, first by the Appellate Assistant Commissioner of Income Tax and thereafter in second appeal by the Income Tax Appellate Tribunal.

7. Learned counsel for the assessee contended that merely because certain additions were made to the returned income on account of low withdrawals for domestic expenses, rejecting the explanation of the assessee, it does not follow that any case for penalty u/s 271(1)(c) of the Act was made out unless there was positive material adduced on record by the Revenue on whom the burden lay to show that the additions on account of low withdrawals represented income which was suppressed or the assessee had furnished inaccurate particulars of such income. In support of the submission reliance was placed on the decisions in Commissioner of Income Tax Vs. Baboo Ram Lachman Dass, ; Commissioner of Income Tax Vs. Vrajilal Manilal and Company, and on a decision of the Supreme Court in Anantharam Veerasinghaiah and Co. Vs. Commissioner of Income Tax , Andhra Pradesh, .

8. The next contention was that the statement of Smt. Joya Varshney recorded on October 18, 1974, was not relevant for the assessment years under consideration, in law, it could not have been relied upon to sustain the impugned penalties. In any case, the statement could not have been used against the assessee without providing him an opportunity of cross-examination which was not given to him.

9. Yet another argument was that the validity of the impugned penalties was required to be judged without reference or aid to the provisions contained in the Explanation attached to Section 271(1)(c) of the Act, as it stood at the relevant time, inasmuch as the said Explanation was neither referred to nor relied upon at any stage by the tax authorities including the Income Tax Appellate Tribunal. Learned counsel went on to argue that at the reference stage the Explanation to Section 271(1)(c) cannot be relied upon for the first time before this court. In this connection, reliance was placed on a decision in Commissioner of Income Tax Vs. K.C. Mittal, .

10. Now, it is a settled position in law that levy of penalty is not an automatic concomitant of the assessment. The penalty can be levied if there exists enough material on record and only in appropriate cases. In other words, proceedings for imposition of penalty though emanating from proceedings of assessment, are independent proceedings and are penal in character. There is no rule and none was brought to our notice that the findings in the assessment proceedings would not constitute relevant material upon which the officer may act without considering such findings binding or conclusive in nature. The legal position

stated above, is clearly borne out from the decision of the Supreme Court in *Anantharam Veerasinghaiah and Co. Vs. Commissioner of Income Tax , Andhra Pradesh*, . In that case the Supreme Court was concerned with a case u/s 271(1) (c) before its amendment in 1964 when the Explanation to that provision was added and the word "deliberately" was omitted from those provisions. It was pointed out that an order imposing a penalty is the result of quasi-criminal proceedings. The burden is on the Revenue to establish that the disputed amount represents the income of the assessee and that the assessee had concealed it or furnished inaccurate particulars. Further, the burden of proof in penalty proceedings varies from that in assessment proceedings. The taxing authorities in the penalty proceedings must reconsider the matter afresh on the material before them keeping in view that the burden to prove rested on the Revenue, as to whether a particular amount was a revenue receipt. It was pointed out that the findings recorded in the assessment order constitute good evidence in the penalty proceedings but those findings cannot be regarded as conclusive for the purposes of the penalty proceedings. Whether a penalty can be imposed in a given case, the entirety of the circumstances must be taken into account. All will depend on the circumstances of a case. In stating this legal position, the court referred to its earlier decision in *Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali*, .

11. We have given our anxious consideration to the contentions advanced on behalf of the assessee.

12. We may first consider the contention urged about the statement of Smt. Joya Varshney, the second wife of the assessee. In so far as the complaint about the denial of opportunity for cross-examination is concerned, it is evident that no such plea was ever raised before the Income Tax Appellate Tribunal or for that matter, before any other authority either on the quantum side or in the penalty proceedings. Learned counsel for the assessee was unable to refer us any material or document on record or to any other to show that any such opportunity was demanded and it was refused. The assessee cannot be permitted to set up altogether a new case at this stage in the reference proceedings. The contention has, thus, no merits and is rejected. The further contention that the statement of Smt. Joya Varshney could not be relied upon for the assessment years under consideration is equally without any substance. The argument was that as the statement was recorded on October 18, 1974, it was relevant for the financial year 1974-75 corresponding to the assessment year 1975-76. This very plea was also taken unsuccessfully before the Appellate Assistant Commissioner of Income Tax and then before the Income Tax Appellate Tribunal. The first appellate authority repelled the contention by saying that the statement was given in the normal course and keeping in mind the facts that such receipts were constantly received by her over a long period of time. It was observed that had it been a fact that a sum of Rs. 500 per month was received only from a recent period at the time of giving the statement, the same would have been properly clarified by the lady who was educated. Before the Tribunal it

seems a belated attempt was made to wriggle out of the situation where some letter appears to have been filed stating that "the assessee was providing Rs. 500 in the last year but for the year under consideration he was providing a sum of Rs. 200/Rs. 300 per month while the remaining amount she was having from her parents".

13. The Tribunal after a careful consideration rejected the said letter as an afterthought. The statement of Smt. Joya Varshney dated October 18, 1974, has not been annexed by the Tribunal as a part of the statement of the case submitted to this court. However, a copy of the same has been filed by the assessee in the paper books filed before this court. Truly speaking the said statement cannot be read in these proceedings being not a part of the agreed statement drawn up by the Tribunal and submitted to this court. However, at the instance of learned counsel for the assessee, we have gone through the entire statement of Smt. Joya Varshney. It is manifest from it that the statement was not recorded concerning the affairs of the financial year 1974-75. She was questioned about the assets and household articles found at her residence during the search operations. She stated, inter alia :

"The obscene literature and (pornograph and blue films reels four in numbers was brought to her by Sri Anil Varshney husband's younger brother) some two years ago (from America). The house No. 98, South Malaka, Allahabad, was purchased by me for rupees twenty-four thousand in the year April, 1969. Some renovation has also been made ... I have invested my own money which I had received from my father who died 15 years ago. The refrigerator was purchased by me for Rs. 2,580 some six years ago My husband used to give me Rs. 500 per month for household expenditure. The two dunlop mattresses are four to five years old. They were purchased by me I have not been doing any business, I am not a partner in any firm . . ."

14. It is evident that the said statement was recorded in the normal course as pointed out by the Assistant Commissioner of Income Tax. The lady knew what she was stating. It is difficult to read in that statement that the amount of Rs. 500 per month paid for house expenditure was in reference to the financial year 1974-75 only and not to the other years in the immediate past. The statement has to be read as a whole and not out of context with reference to one word or a sentence. We are unable to draw the inference as learned counsel for the assessee wanted us to draw that the figure of Rs. 500 for domestic expenditure referred to the year in which the statement was recorded. The findings of the Income Tax Appellate Tribunal and those of the Assistant Commissioner are also to similar effect. They are pure findings of fact and have not been challenged by any independent question in these proceedings. The contention is, accordingly, rejected.

15. This brings us to the question whether the impugned penalties in law could be sustained. The attack of the assessee is two-fold. Firstly, that imposition of any penalty for concealment was impermissible on additions to the returned

income, made on estimate by rejecting the version of the assessee. Secondly, the burden to prove that the income so assessed was the concealed income or the assessee had furnished inaccurate particulars of such income was on the revenue which had not been discharged in the instant case. In our opinion, on the facts it is not a case of simple estimation of domestic expenses as was sought to be made out by learned counsel for the assessee. The second wife of the assessee, Smt. Joya Varshney, clearly admitted in unambiguous terms that she was receiving Rs. 500 per month from her husband to meet her expenses and those of her two children. There is no dispute that the first wife was maintaining a separate establishment with her five children. The domestic and other expenses for daily needs of the family of the first wife would Obviously be in the same range if not more because of the bigger size of the family. It follows that the expenses of two establishments put together far exceeded those recorded in the account books which were to the tune of Rs. 6,521, Rs. 8,275 and Rs. 9,043 respectively, for the three years under consideration. It is clear that part of the expenses were being met from the income which had not been disclosed. The findings to this effect have been returned in categorical terms both by the Appellate Assistant Commissioner and the Income Tax Appellate Tribunal.

16. The case of the assessee throughout was that he was paying Rs. 200--250 per month to his second wife, Smt. Joya Varshney and she was also receiving money from her relations. It had never been the case of the assessee that the domestic expenses per month of Smt. Joya Varshney and her two children were less than Rs. 500 per month or Rs. 6,000 per annum. This is also borne out from the letter of Smt. Joya Varshney stated to have been filed before the Tribunal. On the quantum of expenditure no controversy was raised. What was claimed was that part of such expenditure was met by her parents which was rejected as an afterthought, as observed earlier. About the expenditure for the establishment of the first wife and the source from which it was met, no explanation has been given whatsoever. These facts came to light because of search proceedings. This is clearly stated by the Revenue authorities and the Income Tax Appellate Tribunal in their orders. The assessee was confronted with all these materials. In our opinion, the initial burden, if any, that lay on the Revenue to prove that the additions made to the returned income of the assessee represented concealed income, had been sufficiently discharged. On the facts of the case, it was for the assessee to prove in rebuttal that the case with which the Revenue had come forward was untenable. The assessee led no fresh evidence in the penalty proceedings. On the facts found in the assessment proceedings, which were examined and analysed afresh in the penalty proceedings, concealment was patent. There is no reason why the Revenue could not rely on and refer to the evidence and other circumstances which had been brought on record on the quantum side, after giving an opportunity to the assessee to show cause. This is what had been done in this case. The procedure adopted has done no violence either to the nature of the penalty proceedings or the burden arising thereunder,

or to the principle that penalty proceedings being of a character different from that in the assessment proceedings, findings in the latter cannot be conclusive or operate as *res judicata* in the penalty proceedings. It is not the law that any and every explanation must be accepted. It must be an explanation acceptable to the fact-finding authority. It is too good to believe, considering the cost of living in the years under consideration of which judicial notice can be taken that an assessee having a standard of living as it appears from the record of the case, with two wives and seven children studying in public schools, maintaining a car, scooter, telephone, refrigerator, etc., can manage the household affairs with a meagre sum of Rs. 200--250 per month per establishment. There is no scope for any doubt that the account books of the assessee did not depict the true state of affairs at least so far as the domestic expenses were concerned. The Tribunal which is the final fact-finding authority has recorded its findings as under :

"Furthermore, both the wives of the assessee are having seven children and they are studying in public schools. Naturally, the household expenses of the wife having two children will be less than that of the wife having five children so much so that the husband has to reside with both the wives. Naturally the husband in such a situation has to provide more money on every visit to each wife from his own pocket and that cannot be from books of account rather from the undisclosed sources. Therefore, looking to the totality of the facts and circumstances of the case, we conclude that the assessee showed low expenses and in doing so, it was known to him that he was doing so knowingly, and intentionally to conceal his income and this is amply clear from the totality of the facts and circumstances ... we hold that the *mens rea* is proved by the Revenue without doubt and we feel that no fresh evidence was to be collected by the Revenue to prove it because the *mens rea* can be proved on the totality of the facts and circumstances of the case we hold that the expenses shown by the assessee were extremely low and he did so with a *mala fide* intention to conceal the income . . ."

17. There is no substance in the contention that penalty u/s 271(1)(c) of the Act cannot be imposed in all circumstances whenever the income is assessed on estimate rejecting the explanation of the assessee for low domestic withdrawals or for like reasons. In our opinion, there cannot be any such inflexible rule. There may be cases where additions may be made purely on estimate without reference to any evidence/ materials being on record. In such a case, it could be argued with some force that penalty cannot be levied on the figures which are merely based on guess work or estimate. But in a case like the present one, where after a detailed investigation the assessee was confronted with the evidence and materials and he failed to dislodge the factual position on the basis of which additions were made, the case stands on a different footing. In such a case, it is always open to draw an inference of concealment or of furnishing inaccurate particulars of income, resulting from deliberate underestimate of income. In other words, the Income Tax authorities must be satisfied on examination of the cumulative effect or the entirety of the circumstances that the

only reasonable inference from such factors or material that could be drawn was that the disputed amount added as a result of estimate, represented income and that the assessee had concealed particulars of income or had furnished inaccurate particulars thereof.

18. In VIDYA SAGAR OSWAL Vs. COMMISSIONER OF Income Tax, PATIALA., , the facts were that Rs. 2,000 were drawn on account of household expenses and that amount was found debited in the account books. The Income Tax Officer held that the assessee should have spent at least Rs. 500 per month for domestic expenses and consequently added Rs. 4,000 to the assessee's total income for the purpose of assessment. That addition was confirmed on the quantum side. Penalty proceedings u/s 271(1)(c) were also taken and a penalty of Rs. 6,061 was also imposed which was confirmed by the Income Tax Appellate Tribunal on the findings that the withdrawal for household expenses was totally inadequate and the assessee in that case had spent money out of his undisclosed resources. The plea of the assessee that he had received Rs. 1,000 from Smt Mohan Devi which was utilised for household expenses, was proved to be false. The family of the assessee in that case consisted of himself, his wife, four sons and one daughter. Two sons and one daughter were of school going age. None of the family members bore any of the household expenses though he or she was earning separately. On a reference, a Division Bench of the Punjab and Haryana High Court held that the totality of the circumstances unmistakably led to the irresistible conclusion that the assessee had consciously concealed the particulars of his income and had deliberately furnished inaccurate particulars in order to conceal his income. The domestic expenses estimated by the Income Tax Officer were rather ridiculously on the low side. The Tribunal was right in holding that the assessee was liable to pay penalty. In rendering that decision, the court had referred to the decision in Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, and to another decision of the Supreme Court in D.M. Manasvi Vs. Commissioner of Income Tax, Gujarat, II Ahmedabad, .

19. The ratio decidendi of the case in VIDYA SAGAR OSWAL Vs. COMMISSIONER OF Income Tax, PATIALA., , is fully applicable to the facts of the present case. In fact, the Tribunal had also relied upon that decision in reaching its conclusions.

20. So far as the decisions relied upon by the assessee are concerned, they are clearly distinguishable and have no bearing on the facts of the instant case.

21. The Tribunal, in the present case, has recorded a clear and categorical finding of concealment after considering the totality of the circumstances and materials. It is not a case where penalty had been imposed on mere rejection of the explanation. The Revenue has amply discharged its burden in proving that it was a pure and simple case of concealment of income.

22. In view of our above findings it is not necessary to deal with the last limb of the assessee's arguments about the consideration of the case without taking into account the provisions contained in the Explanation to Section 271(1)(c) of the

Act. However, in passing, it may be stated that if we were to come to a different conclusion than what has been stated above, then the case might have required a remand to the Income Tax Appellate Tribunal for fresh consideration about the validity of imposition of penalty with reference to the provisions contained in the Explanation to Section 271(1)(c) of the Act, a course which was adopted in BANARAS TEXTORIUM Vs. COMMISSIONER OF Income Tax., . As we are of the opinion that the impugned penalties are to be upheld even under the main provisions of Section 271(1)(c) without calling in aid the provisions of the Explanation to Section 271(1)(c), it is not necessary to adopt the course.

23. In view of the above discussion, both the questions referred to this court are answered in the affirmative, in favour of the Revenue and against the assessee.