
(2004) 12 AHC CK 0084

In the Allahabad High Court

Case No : IT Reference No. 65 of 1985 17 December 2004

Vidya Shankar Dixit

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 17-12-2004

Acts Referred:

Income Tax Act, 1961 — Section 143, 144, 147, 256, 271

Citation : (2005) 144 TAXMAN 909

Hon'ble Judges : R.K. Agarwal, J;Prakash Krishna, J

Bench : Division Bench

Advocate : Vikram Gulati, for the Assessee A.N. Mahajan, for the Revenue, for the Appellant;

Judgement

R.K. Agarwal, J.

The Income Tax Appellate Tribunal has referred the following questions of law u/s 256(1) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") for opinion to this Court:-

"Whether on the facts and in the circumstances of the case, the Tribunal was justified in holding that the penalty for concealment of income was leviable on the assessee ?"

The reference relates to the assessment year 1975-76.

Briefly stated, the facts giving rise to the present reference are as follows:-

2. The Income Tax Officer had imposed penalty amounting to Rs. 79,136 on the applicant on account of concealment of particulars of his income in respect of the following item:-

"Inflation of purchase in Lehi and Tilli account

Rs.

20,000

Unexplained loss and shortage in Tilli account

Rs.

9,568

Shortage in groundnut account

Rs.

10,000

Rs.

39,568

Feeling aggrieved by the said order, the applicant preferred an appeal before the Commissioner (Appeals) who deleted the penalty relying mainly on his own order in quantum appeal where he had granted relief of Rs. 25,700 to the applicant. It may be mentioned here that against the order of the Commissioner (Appeals) in the quantum appeal, the revenue had preferred an appeal before the Tribunal which, vide order dated 16-2-1983, had restored the additions deleted by the Commissioner (Appeals) to the extent of Rs. 23,424. Feeling aggrieved by the order passed by the Commissioner (Appeals) deleting penalty. The revenue preferred an appeal before the Tribunal. The Tribunal has held that the order of the Commissioner (Appeals) was prima facie unsustainable because he had primarily proceeded on the short ground that the addition sustained have been substantially reduced by him and, therefore, the imposition of penalty on the applicant was not justified, which order, however, stood reversed by the Tribunal and, therefore, the basis of the Commissioner (Appeals)'s order had disappeared. It, however, pointed out that one of the findings of the Tribunal in the quantum appeal was that the 6R voucher for the purchases which the applicant as a wholesaler was obliged to maintain under the Krishi Utpadan Mandi Samiti Rules, which were also produced before the Sales Tax Officer, were not produced before the Income Tax Officer on the ground that they had been misplaced and these vouchers were also not produced either before the Commissioner (Appeals) or before the Tribunal. In these circumstances, the applicant's purchases remained unverifiable. In the case of Tilli's account also, the Tribunal has found that both according to the assessee's comparable case and the case cited by the Income Tax Officer, the gross profit rate was higher and when the applicant's purchases were not verifiable and the shortage is not properly explained, there was no justification for the CIT (A) to have interfered with the estimate of gross profit in this connection made by the Income Tax Officer, which works out to a gross profit of only 4.5 per cent which was lower than the comparable case of both the applicant and the Income Tax Officer. The Tribunal was of the view that the aforementioned finding was given in the quantum appeal but they are good findings for penalty proceedings unless the applicant places on record some evidence which would detract from the finality of the above finding and as the applicant has placed no further material on record

in the penalty proceedings before any of the authorities below, the onus which lay on him by virtue of the Explanation to section 271(1)(c) of the Act has not been discharged and the presumption raised against the applicant by the said Explanation would remain, namely, that the difference between the assessed income and the returned income had arisen on account of the fraud or gross or willful neglect of the applicant. This presumption could have been rebutted by the applicant but inasmuch as no evidence has been led by the applicant in these regards, the said presumption remained un rebutted and in that circumstance, the penalty has to be sustained in reference to the items in reference to which addition has been made by the Income Tax Officer and ultimately sustained by the Tribunal.

We have heard Sri Vikram Gulati, learned counsel for the applicant, and Sri A.N. Mahajan, learned Standing counsel appearing for the revenue.

3. Learned counsel for the applicant submitted that no discrepancy whatsoever was found and the sales were duly verified and further 6R vouchers were produced before the Sales Tax Authorities which had been accepted under the Sales Tax Act and, therefore, mere non-production of 6R vouchers before the Income Tax authorities as it had been misplaced. would not entitle the authorities to draw an adverse inference. He further submitted that the applicant had discharged the onus which lay upon him under the Explanation to section 271(1)(c) of the Act and, therefore, the penalty was not leviable at all. According to him, on the quantum side, additions have been made on estimate basis and the findings given on the quantum side are not at all relevant for imposition of penalty u/s 271(1)(c) of the Act in which the matter has to be gone de novo. In support of his aforesaid submissions, he has relied upon the following decisions:-

- (i) Commissioner of Income Tax Vs. Net Ram Ram Swarup,
- (ii) Commissioner of Income Tax Vs. Harnam Singh and Co.,
- (iii) Additional Commissioner of Income Tax Vs. Kishan Singh Chand,
- (iv) Commissioner of Income Tax Vs. K.L. Mangal Sain,
- (v) Commissioner of Income Tax Vs. Nawab and Brothers,
- (vi) Commissioner of Income Tax, Poona Vs. B.S. Badve and another,
- (vii) Addl. Commissioner of Income Tax Vs. Jeewandas Gyanchand
- (viii) Commissioner of Income Tax Vs. Punjab Tyres, and
- (ix) C.M. Shivamallappa Vs. Commissioner of Income Tax, .

4. The learned Standing counsel for the revenue submitted that in the present case as the income returned was less than 80 per cent of the income assessed, the Explanation to section 271(1)(c) of the Act was applicable and as the applicant had not been able to discharge the onus which lay upon him by producing material on record to show that there was neither any fraud or gross

or wilful neglect on his part, the difference has rightly been deemed to be the concealed income of the applicant. In this view of the matter, he submitted that the order of the Tribunal does not suffer from any illegality. In support of his aforesaid submissions, he has relied upon the following decisions:-

(i) Anantharam Veerasinghaiah and Co. Vs. Commissioner of Income Tax , Andhra Pradesh,

(ii) Commissioner of Income Tax (Additional), Lucknow Vs. Jeevan Lal Sah, and

(iii) B.A. Balasubramaniam and Bros. Co. Vs. Commissioner of Income Tax, .

5. Having heard the learned counsel for the parties, we find that in the assessment proceedings the returned income was less than 80 per cent of the income assessed. Thus, the Explanation to section 271(1)(c) of the Act was attracted. The applicant had not produced any material to discharge the onus which lay upon him in order to prove that the failure to return the correct income did not arise from any fraud, or gross or wilful neglect on his part.

6. It may be mentioned here that by section 40 of the Finance Act, 1964 the word "deliberately" occurring in clause (c) of section 271(1) of the Act has been omitted and the following Explanation was inserted at the end of subsection (1): -

"Explanation Where the total income returned by any person is less than eighty per cent of the total income (hereinafter in this Explanation referred to as the correct income) as assessed u/s 143 or section 144 or section 147 (reduced by the expenditure incurred bona fide by him for the purpose of making or earning any income included in the total income but which has been disallowed as a deduction), such person shall, unless he proves that the failure to return the correct income did not arise from any fraud or any gross or will full neglect on his part, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income for the purposes of clause (c) of this sub-section."

Prior to the aforesaid amendment made by the Finance Act, 1964 the Apex Court in the cases of Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, and The Commissioner of Income Tax Madras Vs. Khoday Eswarsa and Sons, has held that the burden is on the department to prove that a particular amount is a revenue receipt. It would be perfectly legitimate to say that the mere fact that the Explanation of the assessee false does not necessarily give rise to the inference that the disputed amount represents income and it cannot be said that the finding in the assessment proceedings for determining or computing the tax is conclusive. It is only a good evidence. Before the penalty can be imposed the entirety of circumstances must reasonable point to the conclusion that the disputed amount represented income and that the assessee had consciously concealed the particulars of his income or had deliberately furnished inaccurate particulars.

7. However, with the incorporation of Explanation to section 271(1) of the Act,

the Apex Court has held in the cases of Commissioner of Income Tax Vs. Mussadilal Ram Bharose, ; Lala Ram Vishan Das Vs. Income Tax Officer, Commissioner of Income Tax (Additional), Lucknow Vs. Jeevan Lal Sah, and B.A. Balasubramaniam and Bros. Co. Vs. Commissioner of Income Tax, that the view which had been taken earlier in Anwar Alis case (supra) no longer holds the field and it is for the assessee to discharge the onus as contemplated in the said Explanation.

8. In the case of M/s. K.P. Madhusudhanan Vs. Commissioner of Income Tax, Cochin, the Apex Court has held that the Explanation to section 271(1)(c) is a part of section 271. When the assessing officer or the Appellate Assistant Commissioner issues a notice u/s 271, he makes the assessee aware that the provisions thereof are to be used against him. These provisions include the Explanation. By virtue of the notice u/s 271 the assessee is put to notice that, if he does not prove, in the circumstances stated in the Explanation that his failure to return his correct income was not due to fraud or neglect, he shall be deemed to have concealed the particulars of his income or furnished inaccurate particulars thereof, and, consequently be liable to the penalty under the section. No express invocation of the Explanation to section 271 in the notice u/s 271 is necessary before the provisions of the Explanation are applied.

9. In the case of Net Ram Ram Swarup (supra), this court has held that mere failure of an assessee to prove the nature and source of an income would not lead to an inference that he is deliberately concealing the income or has furnished inaccurate particulars thereof. The Income Tax Department's burden to establish that the assessee's case falls u/s 28(1)(c) of the Indian Income Tax Act, 1922, would not be discharged in such a case and penalty cannot be imposed. It may be mentioned here that the aforesaid case related to the imposition of penalty for concealment of income under the Indian Income Tax Act, 1922 in which the Explanation, as inserted in the year 1964, was not there. Thus, no benefit or advantage can be obtained from the aforesaid decision.

10. In the case of B.S. Badve (supra), the Bombay High Court has held that the returns which were filed by the assessee, were merely on the basis of estimates of income and what the Income Tax Officer did was to raise the estimates of income given by the assessee in respect of the income from the cinema business and from the running of the power looms. There was nothing in the order of the Income Tax Officer to show that he found the estimates given by the assessee to be fraudulent or that the Income Tax Officer came to the conclusion that the assessee had made any deliberate false estimate of his income. Moreover, even the additions made by the Income Tax Officer in the estimates of income made by the assessee are so modest, that merely from those additions it cannot be said that the assessee has made any deliberate under-estimation of his income and, therefore, the levy of penalty was not valid. In the present case, the applicant had not produced any material or documents to establish that there was no fraud or wilful neglect in respect of non-disclosure of amount in question

and, therefore, this decision is of no help to the applicant.

11. In the case of Jeevandas Gyanchand (supra), the Madhya Pradesh High Court has held that where the assessment was made after rejecting the books of account of the assessee and no particular item in the books was found to be false, nor it had been shown that any specific item of income had not been entered in the books, the assessee has succeeded in rebutting the presumption arising under the Explanation to section 271(1)(c) of the Act. The Madhya Pradesh High Court has held that the presumption is rebuttable which is not present in the case in hand.

12. In the case of Punjab Tyres (supra), the Madhya Pradesh High Court has held that even in cases of agreed addition to the total income on account of unexplained investments, the department had to prove by independent evidence in addition to the evidence already brought on record from various sources during the assessment proceedings that, that amount represented the concealed income of the assessee earned during the relevant accounting year and where the assessee had agreed to the addition to purchase peace with the department and the department was unable to adduce evidence showing that the assessee had consciously concealed the particulars of his income in regard to the unexplained investments, any admission made by the assessee surrendering a particular amount as his income would not by itself justify the imposition of penalty. In the case of C.M. Shivamallappa (supra), the Karnataka High Court has held that as the assessee himself voluntarily disclosed the receipts which became the basis for the reopening of the assessments, there was no concealment of income and the levy of penalty was not valid. The Madhya Pradesh High Court and the Karnataka High Court have not considered the effect of Explanation added by the Finance Act of 1964.

13. In the case of Kishan Singh Chand (supra), this court has held that the Explanation to section 271(1)(c) of the Act does not apply to all the cases of suspected concealment but applies only where the income returned is less than 80 per cent of the income assessed minus the expenses incurred bona fide and disallowed by the Income Tax Officer as a deduction. In the aforesaid case, there was no finding that this requirement was satisfied. In fact, the Inspecting Assistant Commissioner of Income Tax did not rely upon the Explanation and, as such, he did not record a finding that the income returned was less than 80 per cent of the assessed income, attracting the Explanation nor has the Tribunal done so and once the Explanation is out of the way, the case would be governed by the law laid down by the Apex Court in the case of Anwar Ali (supra). The penalty proceedings u/s 271(1)(c) of the Act, are penal in nature and the burden is on the department to establish that the assessee has been guilty of concealment, etc. Such a finding has to be recorded on positive material and cannot be inferred from the fallacy of the assessee's Explanation. The aforesaid decision is of no help to the applicant as in the present case we find that the Explanation is attracted and further in view of the decision of the Apex Court, in

the case of K.P. Madhusudhanan (supra), where the returned income is less than 80 per cent of the assessed income, the Explanation is applicable whether or not it has been specifically invoked by the Assessing Authority in the notice or the order.

14. In the case of K.L. Mangal Sain (supra), this court has held that where the assessee had not maintained the books of account regularly and were rejected and the correct income was estimated by applying a flat rate, it cannot be held that the assessee was guilty of fraud or gross or wilful neglect. In the aforesaid case, the Tribunal had accepted the Explanation given by the assessee and had applied the Explanation to section 271(1)(c) of the Act from a correct view point.

15. In the case of Harnam Singh & Co. (supra) this court has held that where the Tribunal has found that the provisions of section 271(1)(c) of the Act could not attract in the case because the enhancement could not be said to be due to fraud or wilful neglect on the part of the assessee. The said finding is a finding of fact and is based, as it is, on relevant considerations and cannot be said to be vitiated. The Tribunal was justified in canceling the order of penalty u/s 271(1)(c) of the Act. The aforesaid case is not applicable in the present case inasmuch as the Tribunal has held that the enhancement is due to fraud or wilful neglect on the part of" the applicant as the applicant had not been able to discharge the onus or burden which lay upon him.

16. In the case of Nawab & Bros. (supra) this court has held that where the books were rejected for not maintaining day-to-day stock register and correct income was determined by merely applying a flat rate on the returned turnover, it could not be said that the assessee was guilty of either fraud or of wilful neglect in the matter and it had discharged the burden which lay upon him and the Tribunal was justified in law in cancelling the penalty. In the present case, we find that the additions have not been made merely on the estimate basis but on cogent material which the applicant had not been able to rebut in penalty proceeding, by offering reasonable Explanation. Even the applicant has not produced 6R vouchers in the penalty proceeding so as to substantiate the claim that he had disclosed all the purchases and sales in his books of account and has not concealed any particulars.

17. In the case of Anantharam Veerasinghaiah & Co. (supra) the Apex Court has held that when an "intangible" addition is made to the book profits during an assessment proceeding, it is on the basis that the amount represented by that addition constitutes the undisclosed income of the assessee. That income, although commonly described as "intangible", is as much a part of his real income as that disclosed by his account books. It has the same concrete existence. It could be available to the assessee as the book profits could be.

18. It may be mentioned here that the applicant had not produced 6R vouchers on the ground that it has been lost and misplaced and he wanted to take the benefit/ advantage of the fact that the said vouchers had been produced before

the Sales-Tax Authorities who have accepted his books of account. It was incumbent upon the applicant to produce 6R vouchers before the Income Tax Authorities as well if he wanted to show that he had not concealed the particulars of his turnover.

19. A Division Bench of this court in the case of Haji Lal Mohd. Biri Works Vs. Commissioner of Income Tax, has held that where an assessee does not produce the books of account and other documents on the plea that it had been destroyed in fire or riot, the department is free to draw an adverse inference.

20. In view of the foregoing discussions, we are of the considered opinion that the applicant had failed to discharge the onus which lay upon him under the Explanation to section 271(1)(c) of the Act.

21. In this view of the matter. we answer the question referred to us in the affirmative, i.e., in favour of the revenue and against the assessee. There shall be no order as to costs.