M/S. Anantharam Veerasinghaiah and Co.

Vs

C. I. T., Andhra Pradesh

Civil Appeal No. 2592 Of 1972

(N. L. Untwali, E. S. Venkataramiah, R. S. Pathak JJ)

15.04.1980

JUDGMENT

PATHAK, J. –

1. This appeal, by special leave, is directed against the judgment of the Andhra Pradesh High Court, concerning the scope of Section 271(1)(c) of the Income Tax Act, 1961.

2. The assessee is an Abkari contractor. He filed a return of his income for the assessment year 1959-60, disclosing a total turnover of Rs. 10,92,132 and an income of Rs. 7,704. The Income Tax Officer did not accept the correctness of the return. He found that on December 12, 1957 and January 16, 1958 the excess of expenditure over the disclosed available cash was Rs. 17,720 and Rs. 65,066 respectively. He also noticed several deposits, totalling Rs. 28,200, entered in the names of certain Sendhi shopkeepers. The assessee's explanation that the excess expenditure was met from amounts deposited with him by some shopkeepers but not entered in his books was not accepted. The alternative explanation that expenditure incurred earlier had possibly been recorded later was also rejected. In regard to the cash deposits of Rs. 28,200 the assessee explained that they represented amounts deposited with it as security. That explanation was rejected insofar as deposits totalling Rs. 21,000 were concerned. The Income Tax Officer rejected the account books of the assessee and estimated the assessee's income on an overall figure of Rs. 5,00,018. In appeal before the Appellate Assistant Commissioner and thereafter before the Income Tax Appellate Tribunal, the assessee succeeded in getting the assessed income reduced to Rs. 1,30,000 in addition to the books profits. Penalty proceedings were taken against the assessee and the case was referred to the Inspecting Assistant Commissioner. The assessee reiterated the explanation which it had offered in the assessment proceedings. Predictably, the Inspecting Assistant Commissioner rejected the explanation and held that the items of cash deficit and cash deposits represented concealed income resulting from the suppressed yield and low selling rates mentioned in the books. He observed that the assessee had concealed the particulars of his income and furnished inaccurate particulars of it, and, therefore he imposed a penalty of Rs. 75,000 under Section 27(1)(c) of the Income Tax Act, 1961. On appeal by the assessee, the Appellate Tribunal held that there was no positive material to establish that the cash deposits represented concealed income. In regard to the cash deficits, the Appellate Tribunal noticed that for the assessment year 1957-58 an addition of Rs. 2,00,000 had been made to the book profits, and it observed that some part of that amount could have been ploughed back into the business. It held that an amount of Rs. 90,000 representing un-ledgerised cash credits of that year could be said to have been introduced in this year. Allowing the appeal, the Appellate Tribunal set aside the penalty order made by the Inspecting Assistant Commissioner.

3. At the instance of the Commissioner of Income Tax, the following question was referred to the

High Court :

> Whether on the facts and in the circumstances of the case, the tribunal is justified in holding that no penalty is leviable ?

4. The High Court held that the Appellate Tribunal was not justified in holding that no penalty was leviable.

5. In this appeal, it is urged by learned counsel for the assessee that the High Court erred in interfering with a finding of fact, that the penalty proceedings being quasi-criminal the burden of proof lay on the Revenue to establish that a penalty was attracted and that the intangible addition of Rs. 2,00,000 represented real income and the Appellate Tribunal was right in considering that an amount of Rs. 90,000 was available to cover the cash deficits.

6. Section 271(1)(c) of the Income Tax Act, 1961 provides :

> 271. (1) If the Income Tax Officer or the Appellate Assistant Commissioner in the course of any proceedings under this Act is satisfied that any person -
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> (c) has concealed the particulars of his income or deliberately furnished inaccurate particulars of such income,
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> he may direct that such person shall pay by way of penalty, -
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> # .....##
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> This is the provision as it stood at the relevant time. It is now settled law that an order imposing a penalty is the result of quasi-criminal proceedings and that the burden lies on the Revenue to establish that the disputed amount represents income and that the assessee has consciously concealed the particulars of his income or has deliberately furnished inaccurate particulars (C.I.T v. Anwar Ali ((1970) 76 ITR 696 : (1970) 2 SCC 185 : (1971) 1 SCR 446)). It is for the Revenue to prove those ingredients before a penalty can be imposed. Since the burden of proof in a penalty proceeding varies from that involved in an assessment proceeding, a finding in an assessment proceeding that a particular receipt is income cannot automatically be adopted as a finding to that effect in the penalty proceeding. 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 a revenue receipt. No doubt, the fact that the assessment order contains a finding that the disputed amount represents income constitutes good evidence in the penalty proceeding but the finding in the assessment proceeding cannot be regarded as conclusive for the purposes of the penalty proceeding. That is how the law has been understood by this Court in Anwar Ali ((1970) 76 ITR 696 : (1970) 2 SCC 185 : (1971) 1 SCR 446), and we believe that to be the law still. It was also laid down that before a penalty can be imposed the entirely of the circumstances must be taken into account and must point to the conclusion that the disputed amount represents income and that the assessee has consciously concealed particulars of his income or deliberately furnished inaccurate particulars. The mere falsity of the explanation given by the assessee, it was observed, was insufficient without there being in addition cogent material or

evidence from which the necessary conclusion attracting a penalty could be drawn. These principles were reiterated by this Court in C.I.T. v. Khoday Eswarsa and Sons ((1972) 83 ITR 369 : (1971) 3 SCC 555).

7. In the present case, the Appellate Tribunal has relied entirely on the basis that an intangible addition of Rs. 2,00,000 had been made to the book profits of the assessee for the assessment year 1957-58 and it inferred that an amount of Rs. 90,000 was available for being put to use in the year with which we are concerned. Now it can hardly be denied 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. In Lagadapati Subba Ramaiah v. C.I.T. ((1956) 30 ITR 593 : AIR 1957 AP 844 : 1956 ALI 950 : 1956 An WR 705), the Andhra Pradesh High Court adverted to this aspect of secret profits and their actual availability for application by the assessee. That view was affirmed by the Madras High Court in S. Kuppuswami Mudaliar v. C.I.T. ((1964) 51 ITR 757 (Mad)).

8. There can be no escape from the proposition that the secret profits or undisclosed income of an assessee earned in an earlier assessment year may constitute a fund, even though concealed, from which the assessee may draw subsequently for meeting expenditure or introducing amounts in his account books. But it is quite another thing to say that any part of that fund must necessarily be regarded as the source of unexplained expenditure incurred or of cash credits recorded during a subsequent assessment year. The mere availability of such a fund cannot, in all cases, imply that the assessee has not earned further secret profits during the relevant assessment year. Neither law nor human experience guarantees that an assessee who has been dishonest in one assessment year is bound to be honest in a subsequent assessment year. It is a matter for consideration by the taxing authority in each case whether the unexplained cash deficits and the cash credits can be reasonably attributed to a pre-existing fund of concealed profits or they are reasonably explained by reference to concealed income earned in that very year. In each case the true nature of the cash deficit and the cash credit must be ascertained from an overall consideration of the particular facts and circumstances of the case. Evidence may exist to show that reliance cannot be placed completely on the availability of a previously earned undisclosed income. A number of circumstances of vital significance may point to the conclusion that the cash deficit or cash credit cannot reasonably be related to the amount covered by the intangible addition but must be regarded as pointing to the receipt of undisclosed income earned during the assessment year under consideration. It is open to the Revenue to rely on all the circumstances pointing to that conclusion. What those several circumstances can be is difficult to enumerate and indeed, from the nature of the enquiry, it is almost impossible to do so. In the end, they must be such as can lead to the firm conclusion that the assessee has concealed the particulars of his income or has deliberately furnished inaccurate particulars. It is needless to reiterate that in a penalty proceeding the burden remains on the Revenue of proving the existence of material leading to that conclusion.

9. The Appellate Tribunal erred in law in confining itself to the fact that an intangible addition had been added to the assessee's book profits two years before and that a part of that amount remained available to the assessee thereafter. The High Court is right in departing from that limited approach and in insisting on a consideration of all the relevant facts and circumstances of the case relied on by the Revenue for the purpose of determining whether the Revenue has succeeded in discharging its burden.

10. But while considering the legal principles involved in the application of Section 271(1)(c) the High Court, in our opinion, has erred in entering into the facts of the case and determining in point of fact that the assessee earned income during the relevant previous year and that he was guilty of concealing such income or furnishing inaccurate particulars of it. Having found that the legal basis underlying the order of the Appellate Tribunal was not sustainable, the High Court should have limited itself to answering the question raised by the reference in the negative, leaving it to the Appellate Tribunal to take up the appeal again and redetermine it in the light of the law laid down by the High Court. It is the Appellate Tribunal which has been entrusted with the authority to find facts. A High Court is confined to deciding the question of law referred to it on facts found by the Appellate Tribunal. That is the kind of order we now propose to make.

11. Because the finding of the Appellate Tribunal that no penalty was leviable rests on an erroneous legal basis, we endorse the opinion of the High Court that the question referred must be answered in the negative. But as the High Court should not have rendered findings of fact, we vacate the findings of fact reached by the High Court, without expressing any opinion on their correctness, leaving it to the Appellate Tribunal in exercise of its duty under Section 260(1) of the Income Tax Act to take up the appeal and to redetermine it conformably to this judgment and in the light of the principles laid down in it.

12. The appeal is disposed of accordingly. There is no order as to costs.

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