Commissioner of Income Tax

Vs

M/S. Mussadilal Ram Bharose

Civil Appeal No. 2083 of 1972

(Sabyasachi Mukharji, S. Natarajan JJ)

28.01.1987

JUDGMENT

SABYASACHI MUKHARJI, J. -

1. This appeal arises out of the decision of the Allahabad High Court dated September 24, 1971. The High Court by the order impugned dismissed an application under Section 256(2) of the Income Tax Act, 1961 (hereinafter called the 'Act'). The assessee, a firm of two partners was at the relevant time a licensed vendor of country liquor. For the assessment year 1965-66, the Income Tax Officer rejected its account books on the ground that sales and expenses were not verified and the margin of profit shown was low. It may not be inappropriate in view of the contentions urged before us, to refer to the order of the Inspecting Assistant Commissioner for the assessment year 1965-66 under Section 271(1)(c) read with Section 274(2) of the Act.

2. For the assessment year 1965-66, the Income Tax Officer, as noted by the Inspecting Assistant Commissioner, rejected the book result showing sales of country liquor at Rs. 5,82,234 and the profit margin at 4 per cent for lack of verifiability of sales and expenses and low margin of profit. The Income Tax Officer estimated the sales at Rs. 7,60,000 being Rs. 6,50,000 in Lakhibagh shop and Rs. 1,10,000 in Magra shop, and adopted the net profit rate at 8 per cent thereby computing the profit at Rs. 60,800 and the total income was computed at Rs. 60,936 after addition of Rs. 136 for interest receipts. On appeal, the Appellate Assistant Commissioner confirmed the order of the Income Tax Officer. As the total income returned was less than 80 per cent of the correct income computed, the case fell within the ambit of the Explanation to Section 271(1) of the Act.

3. In pursuance of the notice under Section 274 read with Section 271 of the Act for default under Section 271(1)(c), the assessee showed cause. It was urged on behalf of the assessee before the Inspecting Assistant Commissioner that the returned income was based on the books of accounts and excise registers maintained by the assessee firm and the income was estimated. It was further urged that the failure to return the correct income, if any, did not arise from any fraud or gross or wilful neglect on the part of the assessee firm. The Inspecting Assistant Commissioner, however, held that by producing what the Inspecting Assistant Commissioner termed to be defective account books, it could be said that the assessee had shown correct income. The Inspecting Assistant Commissioner further noted that the sales and expenses were unverifiable. The Inspecting Assistant Commissioner was further of the opinion that the addition made by the Income Tax Officer was due to non-production of material data which the assessee firm ought to have produced for proper determination of its income. In arriving at the net profit @ 8 per cent, the Income Tax Officer had made the allowance for expenses and purchases at 92 per cent of the sales at Rs. 7,60,000, i.e. at Rs. 6,99,200 which covered all the expenses and purchases found reasonable. The Inspecting Assistant

Commissioner was, therefore, of the opinion that the assessee firm was grossly negligent and had not discharged the onus of proving that the said difference between the income returned and the correct income did not arise from any gross or wilful neglect on the part of the assessee and as such, in view of the Explanation to Section 271(1), the provisions of Section 271(1)(c) were clearly attracted. On this basis the Inspecting Assistant Commissioner levied a penalty of Rs. 8,300 under Section 271(1)(c) read with Section 274(2) of the Act.

4. The assessee went up in appeal before the Tribunal. The Tribunal noted the facts. It may be noted that subsequent to the order of the Inspecting Assistant Commissioner, that is to say on September 26, 1968, the quantum appeal was heard and partly allowed by the Appellate Tribunal. By its order dated September 26, 1968, the Tribunal held that when viewed in the light of the licence fee paid by the assessee, estimates of the turnover were on the high side, that the lower rates of profit were placed in cases of other liquor contractors and that in the circumstances, the rate of net profit for both the shops should be 7 per cent on estimated sales of Rs. 6,25,000 for Lakhi Bagh shop and of Rs. 1,00,000 for the Magra shop. In view of this order, the income finally determined for the assessment year was Rs. 50,750.

5. It is the case of the appellant that 80 per cent of the income finally assessed is Rs. 40,600 which is much higher than the income returned at Rs. 30,138. However, on behalf of the assessee, it was contended that the assessee did not conceal the particulars of income nor furnish inaccurate particulars thereof, that the income returned was based on the books of account maintained in the regular course of business, that the assessee could only declare the income as reflected in the books of account, that the difference between the returned income and the assessed income did not arise from any fraud or gross or wilful neglect on the part of the assessee and that it could not be considered in the circumstances that the assessee came within the mischief of Explanation to Section 271(1)(c) of the Act.

6. After reviewing certain other cases, the Tribunal was of the view that like the cases referred to by the Tribunal's order, the assessee had maintained certain types of books of account and it had appeared that it had honestly believed that the same were sufficient for the true ascertainment of his profits and from the facts he disclosed it could not be said that he had been grossly or wilfully negligent in filing such a return of income as it did and as such there was no fraud. In conformity with the other orders referred to by the Tribunal in the impugned order, it was held by the Tribunal that in the instant case, the Inspecting Assistant Commissioner had erred in his finding and therefore, the penalty order was cancelled. From this decision of the Tribunal under Section 256(1), a reference was sought to the High Court on the following question :

> Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was justified in cancelling the penalty imposed under section 271(1)(c) ?

7. The Tribunal found that it was clear from a perusal of the order passed by the Tribunal that it was not in doubt that the assessee returned the income on the books of account maintained in the regular course of business and that the difference between the income returned and the income assessed arose mainly on account of excess profit, in view of the various defects in the account books and the application of a higher net profit rate on estimated turnover. Following the earlier orders of the Tribunal in similar cases, the Tribunal held that if the assessee maintained certain types of books of account and honestly believed the same to be sufficient for the true ascertainment of his profits, it could be considered as making an estimate of income on a proper basis and it could not be said that in filing the return of income as reflected in the books of account, the assessee was grossly or

wilfully negligent, much less fraudulent. The penalty order was vacated on this bases. The Tribunal was of the opinion that on this finding no question of law arose and as such there was no scope for reference of the said question to the High Court. The application under Section 256(1) was, therefore, rejected.

8. The revenue went up before the High Court under Section 256(2) of the Act seeking a reference on the question mentioned hereinbefore. The High Court by the judgment under appeal after referring to the facts mentioned hereinbefore was of the view that no question of law arose in this case. The High Court opined in the impugned judgment that the finding of the Tribunal that the assessee acted honestly notwithstanding the defective nature of the account books maintained by him was a finding of fact. In the premises, the reference application was dismissed. As mentioned hereinbefore, this appeal arises from the said decision of the High Court.

9. After amendment by the Finance Act, 1964, Section 271 of the Act alongwith the Explanation reads as follows :

> 271. Failure to furnish returns, comply with notices, concealment of income, etc. - (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
>
> #(a) * * *(b) * * *##
>
> (c) has concealed the particulars of his income or furnished inaccurate particulars of such income,
>
> he may direct that such person shall pay by way of penalty, -
>
> #(i) * * *(ii) * * *##
>
> (iii) in the cases referred to in clause (c), in addition to any tax payable by him, a sum which shall not be less than 20 per cent but which shall not exceed one and a half times the amount of the tax, if any, which would have been avoided if the income as returned by such person had been accepted as the correct income.

Explanation. - Where the total income returned by any person is less than 80 per cent of the total income (hereinafter in this Explanation referred to as the correct income) as assessed under Section 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 wilful neglect on his part, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income for the purpose of clause (c) of this sub-section.

10. It is clear that if the Income Tax Officer and the Appellate Assistant Commissioner were satisfied that the assessee had concealed the particulars of his income or furnished inaccurate particulars of such income, he can direct that such person should pay by a penalty the amount indicated in sub-clause (ii) of clause (c) of Section 271(1) of the Act. Before the amendment, difficulty arose and it is not necessary to trace the history, under the law as stood prior to the amendment of 1964, the onus was on the revenue to prove that the assessee had furnished inaccurate particulars or had concealed the income. Difficulties were found to prove the positive element

required for concealment under the law prior to amendment; this positive element had to be established by the revenue. To obviate that difficulty the Explanation was added. The effect of the Explanation was that where the total income returned by any person was less than 80 per cent of the total income assessed, the onus was on such person to prove that the failure to file the correct income did not arise from any fraud or any gross or wilful neglect on his part and unless he did so, he should be deemed to have concealed the particulars of his income or furnished inaccurate particulars, for the purpose of Section 271(1). The position is that the moment the stipulated difference was there, the onus that it was not the failure of the assessee or fraud of the assess or neglect of the assessee that caused the difference shifted on the assessee but it has to be borne in mind that though the onus shifted, the onus that was shifted was rebuttable. If in an appropriate case the Tribunal or the fact-finding body was satisfied by the evidence on the record and inference drawn from the record that the assessee was not guilty of fraud or any gross or wilful neglect and if the revenue had not adduced any further evidence then in such a case the assessee cannot come within the mischief of the section and suffer the imposition of penalty. That is the effect of the provision.

11. Our attention was drawn to several decisions to which, out of deference to Shri Manchanda who argued before us on behalf of the revenue, we shall refer. Vishwakarma Industries v. CIT ((1982) 135 ITR 652 (P&H)) is a decision of the Full Bench of the Punjab and Haryana High Court where Sandhawalia, C.J., speaking for the Full Bench observed that the object and intent of the legislature in omitting the word "deliberately" from clause (c) of Section 271(1) of the Income Tax Act, 1961 and adding an Explanation thereto by the Finance Act, 1964, was to bring about a change in the existing law regarding the levy of penalty so as to shift the burden of proof from the department on to the assessee in the class of cases where the returned income of the assessee was less than 80 per cent of the assessed income. The learned Chief Justice noted that the significant thing about the change made in clause (c) of Section 271(1) was the designed omission of the word "deliberately" therefrom, whereby the requirement of a designed furnishing of inaccurate particulars of income was obliterated. According to the learned Chief Justice, the language of the Explanation indicated that for the purposes of levying penalty the legislature had made two clear-cut divisions. This had been done by providing a strictly objective and an almost mathematical test. According to the Chief Justice the touchstone therefor was the income returned by the assessee as against the income assessed by the department which was designated as "the correct income". The case where the returned income was less than 80 per cent of the assessed income can be squarely placed into one category. Where, however, such a variation is below 20 per cent that would fall into the other category. To the first category, where there is a larger concealment of income, the provisions of the Explanation become at once applicable with the resultant attraction of the presumptions against such an assessee. Once the Explanation is held to be applicable to the case of an assessee, it straightway raises three legal presumptions, viz., (i) that the amount of the assessed income is the correct income and it is in fact the income of the assessee himself; (ii) that the failure of the assessee to return the correct assessed income was due to fraud; or (iii) that the failure of the assessee to return the correct assessed income was due to gross or wilful neglect on his part. But it must be emphasised that these are presumptions and become rule of evidence but the presumptions raised are not conclusive presumptions and are rebuttable.

12. We are of the opinion that the view of the Full Bench of the Punjab and Haryana High Court is a correct view when it states that it only makes a presumption but the presumption is a rebuttable one and if the fact-finding body on relevant and cogent materials comes to the conclusion that in spite of the presumption the assessee was not guilty, such conclusion does not raise any question of law.

13. Our attention was drawn to the decision of the Division Bench of the Allahabad High Court in Addl. CIT v. Lakshmi Industries and Cold Storage Co. Ltd. ((1984) 146 ITR 492 (All) There the High Court found that the assessee had not given any explanation. So, on the facts found, the inference of the Tribunal that the amounts had been added and the evidence had been found unsatisfactory was not correct. Penalty was exigible in that case and the High Court found that the Tribunal was wrong in cancelling the penalty.

14. As mentioned hereinbefore, it depends upon the facts and circumstances of each case. If a party comes within the mischief of the Explanation then there is a presumption against him and the onus to discharge the presumption lies on the assessee but being a presumption it is a rebuttable one and if on appropriate materials, the Tribunal has rebutted that presumption, no question of law can be said to arise.

15. The Full Bench of the Andhra Pradesh High Court in CIT v. H. Abdul Bakhsi & Bros. (160 ITR 94 (AP)(FB)) again reiterated that the presumption spelt out becomes a rule of evidence. Presumptions raised by the Explanation to Section 271(1)(c) are rebuttable presumptions. The initial burden of discharging the onus of rebuttal is on the assessee. Once that initial burden is discharged, the assessee would be out of the mischief unless further evidence was adduced. Here there was none.

16. Similarly, the Full Bench of the Patna High Court in the case of CIT v. Nathulal Agarwala and Sons, ((1985) 153 ITR 292 (Pat) had occasion to consider this. The High Court reiterated that the onus to discharge the presumption raised by the Explanation was on the assessee and it was for him to prove that the difference did not arise from any fraud or wilful neglect on his part. The court should come to a clear conclusion whether the assessee had discharged the onus or rebutted the presumptions against him. The Patna High Court emphasised that as to the nature of the explanation to be rendered by the assessee, it was plain on principle that it was not the law that the moment any fantastic or unacceptable explanation was given, the burden placed upon him would be discharged and the presumption rebutted. We agree. We further agree that it is not the law that any and every explanation by the assessee must be accepted. It must be acceptable explanation, acceptable to a fact-finding body.

17. Mrs. Gupta, appearing for the assessee, drew our attention to the observations of the Division Bench of the Gauhati High Court in CIT v. Chhaganlal Shankarlal ((1975) 100 ITR 464 (Guw). Our attention was also drawn on behalf of the assessee to the decision of the Division Bench of the Allahabad High Court in CIT v. Nadir Ali and Company ((1977) 106 ITR 151 (All). There the court observed that under Section 271(1)(c) read with the Explanation, a penalty could be imposed if the income returned was less than 80 per cent if the assessee did not prove that the disparity between the income assessed and the income returned by him was not due to gross neglect or fraud. The fact that the assessee was not maintaining his books of account in a particular way did not show that he was guilty of gross neglect. The Income Tax Act did not prescribe the manner in which the account books should be maintained. When the assessee filed his return on the basis of accounts which were maintained in the regular course of business it could not be said that he was guilty of gross negligence. It could not be expected from the assessee to file a return showing a higher income than what was worked out merely because the department had applied a higher rate of profit in the earlier years. It was held by the Allahabad High Court that on the facts, the assessee had sufficiently discharged the burden.

18. The position in law is therefore clear. If the returned income is less than 80 per cent of the

assessed income, the presumption is raised against the assessee that the assessee is guilty of wilful neglect or of fraud or gross or wilful neglect as a result of which he has concealed the income but this presumption can be rebutted. The rebuttal must be on materials relevant and cogent. It is for the fact-finding body to judge the relevancy and sufficiency of the materials. If such a fact-finding body bearing the aforesaid principles in mind comes to the conclusion that the assessee has discharged the onus, it becomes a conclusion of fact. No question of law arises. In this case the Tribunal has borne in mind the relevant principles of law and has also judged the facts on record. It is not a case that there was no evidence or there was such evidence on which no reasonable man could have accepted the explanation of the assessee. In that view of the matter, in our opinion, the Tribunal rightly rejected the claim for reference under Section 256(1) and the High Court correctly did not entertain the application for reference under Section 256(2) of the Act. The appeal, therefore, fails and is accordingly dismissed with costs.

</html