COMMISSIONER OF INCOME-TAX, MADRAS

v.

K.R. SADAYAPPAN

JULY 10, 1990

[SABYASACHI MUKHARJI, CJ AND K.N. SAIKIA, J.]

Income Tax Act, 1961: s. 271(1)(c)—Explanation (introduced by Finance Act, 1964)—Deemed concealment of income—Total income returned less than 80 per cent of the total income assessed—Rebuttable presumption raised against the assessee—Validity of.

Under the Explanation added to s. 271(1)(c) of the Income Tax Act 1961 by the Finance Act, 1964, the assessee, in a case where the total income returned was less than 80 per cent of the total income assessed, was to be deemed to have concealed the particulars of his income unless he proved that the failure to return the correct income did not arise from any fraud or gross or wilful neglect on his part.

In his return of income for the assessment year 1966-67 the assessee-respondent declared certain loss. The wealth statements called for did not disclose investment in lands. Later it was found that he had purchased a plot in his son's name. In the assessment it was stated that the total consideration was Rs.80,000 out of which Rs.25,000 was the payment in respect of the portion purchased for his son. The examination of the material and the document revealed that the total consideration was Rs.1,40,000. The on-money payment made by him on behalf of his son was Rs.18,750.

Since the assessee could not adduce evidence to prove the nature and source of investment the ITO treated the sum as the undisclosed income and initiated penalty proceedings under s. 271(1)(c) of the Act for concealment of income and referred the case to IAC. The IAC imposed a penalty equal to the income concealed holding that the assessee had not discharged the burden cast upon him by the Explanation.

In appeal, the Tribunal set aside the penalty on the ground that the assessee had at no time given any false or different particulars about this property in his return of income or at any time during the assessment proceedings and, therefore, there could not be any question of his having filed any incorrect particulars; that since the assessee had not stated in the assessment proceedings that he had purchased the pro-

A perty only for Rs.80,000, and during the examination and accepted that though there were two agreements but the real consideration was Rs.1,40,000, it could not be said that he had been wilfully negligent or fraudulent in this regard; that as regards concealment, his explanation was that there was some cash available for purchase of the plot, and that no doubt the Income Tax Officer might be justified to say that not B only this explanation was not convincing but false the rejection of explanation even on the ground of falsity would not mean that the addition represented the assessee's income and more so of the concealed income. It also refused to refer to the High Court the questions of law preferred by the revenue.

C In the appeal by the Revenue under s. 256(2) of the Act the High Court found that there was no proof to show that the said sum of Rs.18,750 represented the income of the relevant year and accordingly held that no question of law arose.

Allowing the appeal by special leave, the Court,

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HELD: 1. The High Court was in error in not correctly applying the principles of law laid down by this Court in *C.I.T.* v. *Mussadilal Ram Bharose,* 165 ITR 14 to the facts of the case. The decision, therefore, was not sustainable. [262F]

E 2.1. The presumption that could be raised against the assessee under s. 271(1)(c) of the Act, as it stood at the relevant time, that he was guilty of fraud or gross or wilful neglect resulting in concealment of income was a rebuttable presumption and if there was cogent material to rebut the evidence that was acceptable, the said presumption would not stand. [261E; 262B]

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2.2. In the instant case, the falsity of the explanation given by the assessee had been accepted by the Tribunal in as much as it had stated that the Income Tax Officer was justified to say that not only the explanation was not convincing but false because there was no cash available to the assessee for payment of the extra money paid. Therefore, no G explanation was forwarded as to where from the extra money came. If that was the position and the presumption was further that the assessee was guilty of fraud, then the subsequent presumption followed that he had concealed the income. [262B-D]

2.3. The presumption thus raised against the assessee that he was H guilty of fraud or wilful neglect as a result of which he had concealed the

income, would be there. This presumption could have been rebutted by cogent, reliable and relevant materials. No such attempt was made in the case. It could not, therefore, be said that the Tribunal was justified in rejecting the claim. [262E-F]

[Statement of the case to be forwarded by the Tribunal within four months and the High Court to dispose of the reference as quickly as possible.] [262G]

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1248 of 1978.

From the Judgment and Order dated 9.3.1977 of the Madras High Court in T.C. Petition No. 362 of 1975.

B.B. Ahuja and Ms. A. Subhashini for the Appellant.

A.T.M. Sampath and P.N. Ramalingam for the Respondent.

The Judgment of the Court was delivered by

SABYASACHI MUKHARJI, CJ. This is an appeal by special leave from the judgment and order of the Madras High Court dated 9th March, 1977. The appeal involves the assessment of income-tax under the Income Tax Act, 1961 (hereinafter referred to as 'the Act') for the assessment year 1966-67. The assessee is an individual who carried on business in distribution of films for the assessment year 1966-67. The assessee filed a return of income on 12th July, 1968 declaring "No loss". Subsequently, the assessee filed a revised return on 4th January, 1969 declaring a net loss of Rs.9,490. The Income Tax Officer called for wealth statements from the assessee. The wealth statements did not reveal that the assessee had invested any amount in the plot of land in T. Nagar. However, a raid made in the premises of E.V. Saroja and K.R. Sadayappan revealed the information that the assessee along with Smt. P.S.S. Ekammai Achi and A.L.N. Perianna Chettiar had purchased a plot of land in T. Nagar on 13.4.1965 from Smt. K.V. Saroja. The plot was purchased in the name of the assessee's son Sri Ramakrishnan.

In the assessment, it was stated that the total consideration was Rs.80,000 out of which Rs.25,000 was the payment in respect of the portion purchased in the name of Sri Ramakrishnan. The examination of all the materials including the document revealed that the total

consideration was Rs.1,40,000. The on-money payment made by the assessee on behalf of his son was Rs.18,750 for which the assessee could not adduce evidence to prove the nature and source of investment. This sum of Rs.18,750 was treated by the Income Tax Officer as the undisclosed income of the assessee and he initiated penalty proceedings under section 271(1)(c) of the Act for concealment of income and referred the case to the I.A.C. for disposal as the minimum penalty leviable exceeded Rs.1,000. The I.A.C. imposed a penalty of Rs.18,750 being equal to the income concealed holding that the assessee had not discharged the burden cast upon him by the Explanation to section 271(1)(c) of the Act in not adducing any evidence that the plot was purchased by the assessee's son out of his own funds and against the assessee's own statement recorded on 9.10.1972 that the on-money payment was made by him. The assessee filed an appeal to the Tribunal and contended that in case of rejection of assessee's explanation for the source, the addition could not be held to be the concealed income of the assessee, and relied on certain principles laid down by the courts. The Tribunal allowed the appeal. It is necessary to refer to relevant portions of the Tribunal's order in respect of which certain contentions were urged before us. The Tribunal in its order observed, *inter alia,* as follows:

> "We have considered the rival submissions. At first we were impressed by the argument of the Departmental Representative that it is a fit case for the levy of penalty. However, when we find that the assessee had at no time given any false or different particulars about this property in his return of income or at any time during the assessment proceedings, there cannot be any question of his having filed any incorrect particulars and more so of the income. The Departmental Representative was unable to point out any occasion when the assessee has stated before the Income Tax Officer during the assessment proceedings that he had purchased the property only for Rs.80,000. On the other hand, when he was asked to state the consideration of the property during the examination, he accepted that there were two agreements but the real consideration was Rs.1,40,000. That being so, we are unable to accept that the assessee had been wilfully negligent or fraudulent in this regard. Then the question arises as to any concealment in the addition made by the Department as income from undisclosed sources. Here, the assessee's case was that he had prepared a sort of cash statements to show that there

was some cash available for this purpose. The Department's case was that this was only a cash statement and this statement sufferred from certain defects, viz., the absence of drawings for personal expenses and even the so-called surplus followed by utilisation for other expenses. No doubt, the Income Tax Officer may be justified to say that not only the explanation is not convincing but false, because there was no cash available to the assessee for payment towards the extra money paid. However, rejection of explanation even on the ground of falsity will not mean that the addition represented the assessee's income and more so of the concealed income of the assessee. In fact, the assessee has not accepted the addition before the Income Tax Officer though he has not gone on appeal for reasons best known to him. Whatever it is, there was no acceptance that the addition represented the concealed income. Having regard to all these, we are of the view that the assessee's case falls within the ratio of the decisions in *C.I.T.* v. *Anwar Ali,* 76 ITR 696 and *C.I.T.* v. *Khoday Ramarao & Sons,* 83 ITR 369. In view of what we have expressed above, we find no reasons to sustain the penalty. Accordingly, we cancel the penalty."

The penalty was set aside. Aggrieved by the said order the revenue moved the Tribunal under s. 256(1) of the Act to refer the following questions of law to the High Court:

"(i) Whether on the facts and in the circumstances of the case the Appellate Tribunal was right in cancelling the penalty levied u/s 271(i)(c) in the assessee's case?

(ii) Whether having regard to the provisions of Explanation to Section 271(1)(c) the Appellate Tribunal's cancellation of penalty is sustainable in law and on the materials on record?

(iii) Whether the Appellate Tribunal's view that the addition of Rs. 18,750 did not represent the concealed income of the assessee is based on valid and relevant consideration and is reasonable view to take on the facts of this case?"

The Tribunal refused to refer the questions stated hereinbefore. The respondent moved the High Court u/s 256(2) of the Act. The High

Court was of the opinion that no question of law arose and observed, *inter alia,* as follows:

> "It appears that the consideration mentioned in the said deed was Rs.80,000. Finally, as a result of a search conducted in the premises of R.V. Saroja as well as the assessee himself certain documents were seized, which showed that the actual consideration was Rs.1,40,000 and not Rs.80,000. In this regard, it was explained that even if it was considered that the purchase consideration admitted by the assessee was not adequate, surplus cash balance and the additional payment, if any, should be deemed to have been come out of such surplus fund and not out of any undisclosed fund. The Income Tax Officer found himself unable to accept the said explanation for the reason that the statements of receipts and payment filed by the assessee only enabled him to reasonably connect some of the payments, but the said statement could not serve the purpose of a regular cash book disclosing such cash balance, under the assessee's personal expenses were not shown in the statement. If these were taken note of, the surplus, if any, would be wiped off. In the end, he came to the conclusion that the assessee had not accounted for the full consideration for the plot purchased by him in the name of his son and that the balance of the consideration should have been met out of income from undisclosed sources."

According to the High Court, no question of law arose.

Aggrieved thereby, the revenue moved this Court and obtained leave under Article 136 of the Constitution. The short point is: In the facts and circumstances of this case and in the light of law as it stood at the relevant time, has the assessee been able to discharge his onus to prove the question which arose in view of the Explanation introduced by the Finance Act, 1964, section 271 of the Act. The said Explanation provides as follows:

> "Explanation—where the total income returned by any person is less than 80% of the total income (hereinafter in this Explanation referred to as the correct income) as assessed u/s 143 or 144 or s. 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 purposes of cl. (c) of this sub-section."

It was explained by this Court in *CIT* v. *Mussadilal Ram Bharose,* 165 ITR 14 that under the law as it 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. Mr. Ahuja, appearing for the revenue, urged before us that difficulties were found in proving the positive element required for concealment under the law prior to the amendment and this had to be established by the revenue. He drew our attention to the observation of this Court at p. 20 of the report where this Court reiterated that the effect of the Explanation was that where the total income returned by any person was less than 30% 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) of the Act. The position, therefore, is that the moment the stipulated difference was there, the onus to prove that it was not the failure of the assessee or fraud of the assessee or neglect of the assessee that caused the difference shifted to the assessee, but it has to be borne in mind that though the onus shifted, the onus that was shifted was rebuttable. This Court has explained the position at page 22 of the report as follows:

"The position, therefore, in law is clear. If the returned income is less than 80% of the assessed income, the presumption is raised against the assessee that the assessee is guilty 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."

Mr. Ahuja and Mr. Sampath both relied on this decision to contend what was the position in law. Relying on this decision, Mr. Sampath appearing for the assessee sought to urge that in the instant case, the Tribunal had found that there was explanation for the excess and that was the end of the matter. No question of law arose thereafter, according to him. It is true that the presumption that arose was rebuttable presumption that there was concealment of income and if there was cogent material to rebut the evidence that was acceptable then presumption would not stand. In the instant case, the falsity of the explanation given by the assessee has been accepted by the Tribunal. The Tribunal stated that in the instant case no doubt the Income Tax Officer was justified to say that not only the explanation was not convincing, but false because there was no cash available to the assessee for payment of the extra money paid. Therefore, no explanation was forwarded as to wherefrom the extra money came. If that was the position and the presumption was further that the assessee was guilty of fraud, then the subsequent presumption followed that the assessee concealed the income and that can be only rebutted by cogent and reliable evidence. No such attempt in this case was made. In that view of the matter, in our opinion, it cannot be said that in this case the Tribunal was justified in rejecting the claim and penalty may be imposed. The presumption raised as aforesaid, that is to say that the assessee was guilty of fraud or wilful neglect as a result of which the assessee has concealed the income, would be there. This presumption could have been rebutted by cogent, reliable and relevant materials. There was none, at least neither the tribunal nor the High Court has indicated any. If that is the position, the High Court, in our opinion, was in error in not correctly applying the principles laid down by this Court in *C.I.T.* v. *Mussadilal Ram Bharose,* (supra) and the principles of law applicable in a situation of this type to the facts of this case and, therefore, the decision is not sustainable. In the instant case there was no controversy that the amount was not the income of the year in question.

In the aforesaid view of the matter, we set aside the judgment and order of the High Court and direct reference on the aforesaid question of law to the High Court. Let a statement of the case on the aforesaid question be forwarded by the Tribunal within four months from this date, and the High Court dispose of the reference as quickly as possible.

The appeal is allowed and is disposed of in those terms. The cost of this appeal will be the cost in the reference.

P.S.S. Appeal allowed.