

CASE NO.:
Appeal (civil) 6465 of 2000

PETITIONER:
M/S. K.P. MADHUSUDHANAN

Vs.

RESPONDENT:
COMMISSIONER OF INCOME TAX, COCHIN

DATE OF JUDGMENT: 21/08/2001

BENCH:
S.P. Bharucha, Y..K. Sabharwal & Brijesh Kumar

JUDGMENT:

Bharucha, J.

The High Court answered in the negative and in favour of the Revenue the following questions :

1. Whether, on the facts and in the circumstances of the case, the Tribunal is right in law and fact, in deleting the penalty levied under Section 271(1)(c) of the I.T. Act?
2. Whether, on the facts and in the circumstances of the case, the Tribunal is right in law and fact, in holding that this is an agreed assessment on the basis of which penalty is not leviable?
3. Whether, on the facts and in the circumstances of the case, the Tribunal is right in law and facts, in holding that penalty cannot be levied as the assessing officer in the proposal under Section 271(1)(c) had not referred to Explanation (1B) to Section 271(1)(c)?

The assessee is in appeal by special leave. For the assessment year 1986-87 the assessee, which is a partnership firm, filed a return of income which stated that its total income was Rs.6,76,890/-. The assessment was completed determining the total income of the assessee at Rs.7,90,170/-. This included a sum of Rs.93,000/- assessed as income from other sources.

The assessee purchased rice from suppliers in Andhra Pradesh. The rice was some times sent directly and payment therefor was made by demand draft or telegraphic transfer. During the course of the assessment proceedings the Assessing Officer noticed that a demand draft and a telegraphic transfer were not entered by the assessee in its cash book on the dates on which the same were purchased and made, respectively. A demand draft of Rs.50,000/- had been purchased on 27th January, 1986 in favour of M/s. Sree Jayalaxmi Enterprises, Byravapatnam, Andhra Pradesh, but, in the assessee's accounts,

this amount was entered only on 4th February, 1986. The assessee had made a telegraphic transfer through the Andhra Bank, Calicut on 24th March, 1986 to Madavenkataratanam & Others, Bhimavaram, Andhra Pradesh; this transaction again was entered only on 24th April, 1986, when these were pointed out to the assessee, it submitted a letter dated 28th August, 1989 stating that as sufficient cash balance was not available to it on the dates of the transactions, it had obtained hand loans from friends and, as it expected to repay such loans within a short time, no entries were made in the books of accounts in respect thereof. The letter also stated that since it was unable to furnish evidence for such loans, it offered the amount of Rs.93,000/- as additional income. The assessment was accordingly made treating the sum of Rs.93,000/- as unexplained investment.

Penalty proceedings were then initiated against the assessee under Section 271(1)(c) of the Income Tax Act, 1961. The Assessing Officer found the assessee's explanation in regard to the loans to be unacceptable and noted that it had itself offered the addition of Rs.93,000/-. Applying Explanation (1B) of Section 271(1)(c), the Assessing Officer imposed upon the assessee the penalty of Rs.37,975/-.

The appeal filed by the assessee was dismissed. The assessee then preferred an appeal to the Income Tax Tribunal. The Tribunal allowed the appeal. Arising out of the order of the Tribunal the questions noted above were placed for the consideration of the High Court. The High Court was not persuaded to agree with the view that had been taken by the High Court at Bombay in Commissioner of Income-Tax vs. P.M. Shah (203 ITR 792) in regard to the Explanation to Section 271(1)(c), and that this is the principal question that we are called upon to consider.

The relevant portion of Section 271 reads thus :
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

(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,-.

(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, but which shall not exceed twice, the amount of tax sought to be evaded by reason of the concealment of particulars of his income or the furnishing of inaccurate particulars of such income :

Provided that, if in a case falling under clause (c), the amount of income (as determined by the Income Tax Officer on assessment) in respect of which the particulars have been concealed or inaccurate particulars have been furnished exceeds a sum of twenty-five thousand rupees, the Income Tax Officer shall not issue any direction for payment by way of penalty without the previous approval of the Inspecting Assistant Commissioner.

Explanation 1. - Where in respect of any facts material to the computation of the total income of any person under this Act, -

(A) such person fails to offer an explanation or offers an explanation which is found by the Income Tax Officer or the Appellate Assistant Commissioner to be false, or

(B) such person offers an explanation which he is not able to substantiate,

then, the amount added or disallowed in computing the total income of such person as a result thereof shall, for the purposes of clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed :

Provided that nothing contained in this Explanation shall apply to a case referred to in clause (B) in respect of any amount added or disallowed as a result of the rejection of any explanation offered by such person, if such explanation is bonafide and all the facts relating to the same and material to the computation of his total income have been disclosed by him.

In Commissioner of Income-Tax Vs. P.M. Shah (203 ITR 792) the High Court at Bombay observed that the Explanation to Section 271(1)(c) created a legal fiction. It was that the assessee would be deemed to have concealed the particulars of his income or furnished inaccurate particulars thereof in the circumstances set out in the Explanation. But for such legal fiction, it could never have been said that there was any concealment or furnishing of inaccurate particulars of income simply because the returned income was less than 80 per cent of the assessed income. The Explanation shifted the burden of proof on the assessee. Therefore, it said, when the Explanation is being resorted to by the Income-tax Officer or by the Inspecting Assistant Commissioner in penalty proceedings, it is essential that the assessee must be informed that penalty proceedings against him are being commenced under the Explanation to Section 271(1)(c). It added, The Inspecting Assistant Commissioner could not have proceeded to levy the penalty under the Explanation to Section 271(1)(c) in the absence of any initiation of penalty proceedings under the Explanation to Section 271(1)(c). These are penalty proceedings and the section must be strictly construed. The assessee, in our view, had no opportunity of meeting the case under the Explanation to Section 271(1)(c).

The Bench of the High Court at Bombay that delivered the judgment in the case of P.M. Shah followed it in the case of Commissioner of Income-Tax Vs. Dharamchand L. Shah (204 ITR 462). It said, . in the absence of invoking the Explanation specifically, the burden would remain on the Revenue to bring the assessee's case within the mischief of the main provisions of Section 271(1)(c) of the Act.

We find it difficult to accept as correct the two judgments aforementioned. The Explanation to Section 271(1)(c) is a part of Section 271. When the Income-tax Officer or the Appellate Assistant Commissioner issues to an assessee a notice under Section 271, he makes the assessee aware that the provisions

thereof are to be used against him. These provisions include the Explanation. By reason of the Explanation, where the total income returned by the assessee is less than 80 per cent of the total income assessed under Sections 143 or 144 or 147, reduced to the extent therein provided, the assessee is deemed to have concealed the particulars of his income or furnished inaccurate particulars thereof, unless he proves that the failure to return the correct income did not arise from any fraud or neglect on his part. The assessee is, therefore, by virtue of the notice under Section 271 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 provided by that Section. No express invocation of the Explanation to Section 271 in the notice under Section 271 is, in our view, necessary before the provisions of the Explanation therein are applied. The High Court at Bombay was, therefore, in error in the view that it took and the Division Bench in the impugned judgment was right.

Learned counsel for the assessee then drew our attention to the judgment of this Court in *Sir Shadilal Sugar and General Mills Ltd. & Anr. Vs. Commissioner of Income-Tax, Delhi* (168 ITR 705). He submitted that the assessee had agreed to the additions to his income referred to hereinabove to buy peace and it did not follow therefrom that the amount that was agreed to be added was concealed income. That it did not follow that the amount agreed to be added was concealed income is undoubtedly what was laid down by this Court in the case of *Sir Shadilal Sugar and General Mills Ltd.* and that, therefore, the Revenue was required to prove the mens rea of a quasi-criminal offence. But it was because of the view taken in this and other judgments that the Explanation to Section 271 was added. By reason of the addition of that Explanation, the view taken in this case can no longer be said to be applicable.

The appeal is, therefore, dismissed with costs.

..J.
(S.P. Bharucha)

..J.
(Y.K. Sabharwal)

..J.
(Brijesh Kumar)

August 21, 2001