

**(1974) 08 AHC CK 0014**

**Allahabad High Court**

**Case No:** Income-tax Reference No. 437 of 1972

Commissioner of Income Tax

APPELLANT

Vs

Kedar Nath Ram Nath

RESPONDENT

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**Date of Decision:** Aug. 19, 1974

**Acts Referred:**

- Income Tax Act, 1961 - Section 144, 271(1)

**Citation:** (1977) 106 ITR 172

**Hon'ble Judges:** Satish Chandra, J; H.N. Seth, J

**Bench:** Division Bench

**Advocate:** R.R. Misra, for the Appellant; M.C. Agarwal, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

H.N. Seth, J.

The assessee in this case is a registered firm which derives income from publication of books and sale of paper. The assessee disclosed that in the accounting year relevant to the assessment year 1966-67, it sold books worth Rs. 6,77,500 and paper worth Rs. 28,108. These transactions resulted in gross profits of Rs. 1,03,746 and net taxable profit of Rs. 54,628. On scrutiny the Income Tax Officer found the following defects in the account books maintained by the assessee:

1. It could not be ascertained how much paper was consumed as there is no day to day stock register.
  2. Quantitative detail of sale of books has not been furnished.
  3. The wholesale and retail sales could not be bifurcated and gross profit rate could not be worked out separately.
2. He, accordingly, rejected the book version of the assessee and as the gross profit shown in the books appeared to be on the lower side, estimated the sales of books and paper effected by the assessee at Rs. 6,90,000 and Rs. 35,000, respectively. He

applied a gross profit rate of 18% in respect of the sale of books and 7 1/2 per cent, in respect of sale of paper and calculated that the gross profit earned by the assessee in two counts was Rs. 1,24,200 and Rs. 2,625, respectively (total Rs. 1,26,625). Accordingly, he added a sum of Rs. 23,079 as extra profits to the net profit of Rs. 54,623 disclosed by the assessee. He also added back a sum of Rs. 2,566 on account of certain expenses claimed and disallowed and assessed the total taxable income of the assessee at Rs. 80,263. As the assessee's returned income was less than 80% of its assessed income, the Income Tax Officer issued a notice u/s 274/271(1)(c) of the Income Tax Act, and as the minimum amount of penalty imposable was to exceed Rs. 1,000 he referred the matter to the Inspecting Assistant Commissioner of Income Tax, Meerut. However, subsequently, in appeal the gross profit on account of sale of books and paper estimated by the Income Tax Officer was reduced by a sum of Rs. 2,175 only and the returned income continued to be less than 80% of the income ultimately assessed.

3. Before the Inspecting Assistant Commissioner, the assessee pleaded that the difference between the assessed income and the returned income arose because the Income Tax Officer did not accept his books, even though he had maintained them regularly. The Income Tax Officer had not found any new source of income or pinpointed any definite concealment. In the circumstances, there was no fraud or gross or wilful neglect on his part.

4. The Inspecting Assistant Commissioner rejected the explanation offered by the assessee and pointed out that the assessee who was a leading publisher of text books at Meerut had not been maintaining proper record about the consumption of paper in his publication business. Even the analysis of the wholesale and retail sale was not made available to the Income Tax Officer, the record showed that the account books had always been rejected and very minor relief was granted in appeals. For the year 1964-65 a penalty of Rs. 8,000 in terms of Section 271(1)(c) had been imposed upon the assessee. In spite of this, there was no improvement in accounts. In the year in question also it had been found that after taking into account the reduction made by the appellate court the assessee had made extra profit amounting to Rs. 21,904. These facts disclosed that the assessee had been delinquent in maintaining his books in a manner so as not to reflect the correct quantum of his income and thus he was guilty of gross and wilful neglect in the maintenance of accounts and that the case squarely fell within the ambit of the Explanation to Section 271(1)(c). Accordingly, the Inspecting Assistant Commissioner made an order imposing a penalty of Rs. 6,000 upon the assessee.

5. In appeal, the Income Tax Appellate Tribunal referred to its earlier decisions wherein it had been observed as follows :

"Though for want of proper verification the book version has been held to be not proved, there is no material whatsoever on record to support the finding that there is any fraud or gross or wilful neglect on the part of the assessee. All that has

happened is that since the book results were held by the revenue authorities to be low and not amenable to verification, the revenue authorities have determined the profit by making their own estimates of the turnover and the rate of profit. But the mere fact that the book version had not been accepted would not lead to any finding to the effect that there was any fraud or gross or wilful neglect on the part of the assessee. Since no good ground has been made out for holding that there was any fraud, gross or wilful neglect on the part of the assessee, the mere fact that the income returned is less than eighty per cent, of the income as finally assessed would not justify for the findings that there was concealment of income." and observed that "in the instant case the assessee had returned its income on the basis of the accounts maintained by it. The Income Tax Officer did not record any finding that the assessee had suppressed its sales or purchases. Mere rejection of accounts and estimation of income at a higher figure by itself could not mean that there was either fraud or gross or wilful neglect on the part of the assessee in returning its aggregate income. In cases where accounts had been maintained and the income returned was based on such accounts, the assessee would be considered to have discharged the onus so far as correctness of income returned is concerned. The department had not brought on the record any material or evidence from which it could be reasonably or positively inferred that the assessee's books and returns were not correct and complete. In the circumstances, it is not possible to sustain the penalty. In the result, I allow the appeal and set aside the penalty order".

6. At the instance of the Commissioner of Income Tax the Tribunal has stated the case and referred the following question for the opinion of this court ;

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in cancelling the order of penalty passed by the Inspecting Assistant Commissioner of Income Tax ?"

7. Relevant portion of Section 271 of the Income Tax Act, which is relevant for the purposes of this case, reads thus :

"(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,--

(i) In the cases referred to in Clause (a).....

(ii) In the cases referred to in Clause (b).....

(iii) In the cases referred to in Clause (c).....

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 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 purposes of Clause (c) of this sub-section."

8. It is true that normally when the department charges an assessee with concealment or furnishing inaccurate particulars of his income u/s 271(1)(c) and wants to proceed to penalise him, it is for the department to indicate the facts and material appearing on the record for which such a charge can be made out; but if the case is of the type enumerated in the Explanation it will be deemed that the assessee has concealed or furnished inaccurate particulars of his income unless he proves that failure to return the aggregate income did not arise from any fraud or gross or wilful neglect on his part. The order passed by the Inspecting Assistant Commissioner clearly indicates that he proceeded to impose the penalty as in his opinion the income of Rs. 54,623 returned by the assessee was less than 80% of Rs. 80,263, the total income assessed, and that the circumstances of the case clearly indicate that the assessee had been delinquent in maintaining his books in a manner so as not to reflect the correct quantum of his income and was thus guilty of gross and wilful neglect in the maintenance of accounts and the Explanation to Section 271(1)(c) was clearly attracted. A plain reading of Section 271(1)(c) read along with the Explanation thereto shows that the presumption stated therein, viz., that the assessee will be deemed to have concealed the particulars of his income, can arise only when the returned income falls short of 80% of the income assessed as reduced by the bona fide expenditure incurred by the assessee for the purposes of making or earning any income included in the total income, but which had been disallowed as deduction. It is significant to note that while imposing the penalty u/s 271(1)(c) and raising the presumption under the Explanation the Inspecting Assistant Commissioner did not apply his mind to the question whether the income ultimately assessed included any bona fide expenditure which had been incurred by the assessee for the purposes of earning any part of the income included in its total income, which expenditure had been disallowed as deduction. Instead, he compared the income returned by the assessee with the income ultimately assessed and finding that the income returned was below 80% of the income assessed he raised the presumption mentioned in the Explanation.

9. In appeal, the Income Tax Appellate Tribunal appears to have taken the view that in cases where book results are held by the revenue authorities to be low and not amenable to verification and a best judgment assessment is made after estimating the turnover and profit rate, no inference that the assessee had been guilty of fraud or gross or wilful neglect could be drawn. As in the instant case there was no finding that the assessee had suppressed its sales or purchases and had returned its income on the basis of its account books, mere rejection of accounts and estimation

of income at a higher figure, could not by itself mean that there was fraud or gross or wilful neglect on the part of the assessee resulting in concealment or furnishing of inaccurate particulars by the assessee. In its opinion, where accounts have been maintained, and the income returned is based on such account, the assessee would be considered to have discharged the onus so far as incorrectness of income returned is concerned and if the department fails to bring on record material or evidence from which any one could reasonably or positively come to a conclusion that the assessee's books were not correct, an order imposing penalty u/s 271(1)(c) cannot be made. Consequence of accepting the views expressed by the Tribunal would be that in a case where a best judgment assessment, in accordance with the provisions of Section 144 of the Income Tax Act, 1961, is made after rejecting the assessee's books it would not be possible to apply the provisions of the Explanation to Section 271(1)(c), unless the department is able to bring material on the record from which an inference that the assessee was guilty of fraud or gross or wilful neglect could be drawn. This would mean that prima facie the burden is on the department to show that the assessee was guilty of fraud or wilful neglect.

10. In our opinion, the Tribunal has misconceived the real position. The Explanation very clearly covers a case where best judgment assessment is made u/s 144 of the Income Tax Act and it is found that the income returned by the assessee falls short of 80% of the income so assessed as reduced by bona fide expenditure incurred by the assessee for the purpose of earning any income included in the assessee's total income. The Explanation clearly provides that in such a case unless the assessee proves that failure to return the aggregate income did not arise from any fraud or gross or wilful neglect on his part it will be deemed that he has concealed the particulars of his income. The burden of showing that failure to return the aggregate income correctly did not arise from any fraud or gross or wilful neglect is upon the assessee. Accordingly, in a case where the income returned by the assessee was less than 80% of the income assessed as reduced in the manner specified in the Explanation to Section 271(1)(c) of the Act, law would deem it that the assessee had concealed or furnished inaccurate particulars unless the assessee is able to bring something on record to show that failure on its part to return the correct income was not on account of its fraud, etc. The type of material to be indicated by the assessee for discharging the burden placed upon him will depend upon the facts and circumstances of each case. In our opinion, in this case, the Tribunal acted wrongly in cancelling the penalty order without going into the question as to whether the income returned by the assessee was less than eighty per cent, of its correct income as reduced by the expenditure bona fide incurred by it for earning the same but which expenditure had been disallowed as an expenditure, and in wrongly placing the burden on the department to show that while returning incorrect income, the assessee was guilty of fraud or gross or wilful neglect. Before cancelling the penalty imposed by the Inspecting Assistant Commissioner, the Tribunal should have gone into the question whether or not the

assessment order involved the disallowance of any expenditure claimed by the assessee, and whether the assessee had discharged the burden of showing that in returning inaccurate particulars of its income, it was not guilty of any fraud or of gross or wilful neglect.

11. On behalf of the assessee, reference was made to the case of [Commissioner of Income Tax Vs. Nav Bharat Automobiles](#), and [Commissioner of Income Tax Vs. Nadir Ali and Company](#), . In the first of the aforementioned two cases, it has merely been laid down that in order to apply the Explanation to Section 271(1)(c), it had to be determined whether the income returned by the assessee is less than 80% of the assessed income as reduced by any expenditure disallowed as a deduction but which was bona fide incurred for the purposes of making or earning any part of the assessee's income included in its total income. The question with regard to the burden of proof and the manner in which such burden can be discharged has not been discussed. In the second case, the Explanation to Section 271(1)(c) had been applied in a case where the total receipts of the assessee were not disputed but in the opinion of the Income Tax Officer the profit rate disclosed was on the lower side. Accordingly, after estimating the profit rate the assessee was assessed to tax on a higher amount. This court while considering the question whether failure on the part of the assessee to return its correct income was due to gross or wilful neglect on its part observed that essentially this is a question of fact which had to be decided on relevant considerations pointed out therein. It then pointed out that in that case there were circumstances which indicated that the Income tax Tribunal having regard to the facts of the case came to the conclusion that the assessee had sufficiently discharged that burden. Neither of the two cases cited by the learned counsel, therefore, help the case of the assessee.

12. In the result we answer the question in the negative and in favour of the department. In the circumstances, we direct the parties to bear their own costs of this reference.