(1976) 12 BOM CK 0002

Bombay High Court

Case No: Income-tax Reference No. 66 of 1967

Western Automobiles (India)		APPELLANT
	Vs	
Commissioner of Income Tax, Bombay City-I, Bombay		RESPONDENT

Date of Decision: Dec. 17, 1976

Acts Referred:

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

Citation: (1978) 112 ITR 1048

Hon'ble Judges: V.D. Tulzapurkar, J; Desai, J

Bench: Division Bench

Advocate: I.M. Munim, for the Appellant; R.J. Joshi, for the Respondent

Judgement

Desai, J.
By this reference the Income Tax Appellate Tribunal has referred the following question for our consideration :

"Whether, on the facts and in the circumstances of the case, penalty was not imposable on the assessee u/s 271(1)(c) of the Income Tax Act, 1961, for the assessment year 1959-60 ?"

2. As the assessee has taken out a notice of motion for further question, we may briefly refer to the facts and then consider the assessee''s application.

3. As the question referred to us indicates, we are concerned with the assessment year 1959-60. the assessee was a registered firm dealing the motor spare parts and accessories. In the course of assessment proceedings for the assessment year concerned, the Income Tax Officer discovered in the account books of the assessee hundi loans to the tune of Rs. 90,000, which, according to the Income Tax Officer, represented concealed income. When these hundi loans were considered in the assessment, the assessee-firm agreed to the addition of the aforesaid amount, viz.,

Rs. 90,000, as its business income of that year. The assessment was then completed on 26th December, 1963, on that footing. In the order itself there is an indication of contemplated penalty proceedings, which were then initiated by a notice dated 14th October, 1964. Since the minimum penalty leviable exceeded Rs. 1,000, the Income Tax Officer referred the matter to the Inspecting Assistant Commissioner u/s 274(2).

4. The Inspecting Assistant Commissioner then issued another notice u/s 274(1) of the Income Tax Act, 1961, to the assessee-firm. In response to this notice, the assessee-firm filed a letter dated 21st October, 1964, submitting that the penalty proceedings were required to be terminated. The representative of the assessee then appealed before the Appellate Assistant Commissioner. Before The Appellate Assistant Commissioner it was contended on behalf of the assessee that no penalty could be levied because there was an agreement between the assessee-firm and the Income Tax Officer that no penalty would be levied if the assessee-firm immediately accepted the addition of the amount of Rs. 90,000. It was also contended that there was no definite material brought on record to show that the assessee-firm had actually concealed the particulars of its income. Since the assessee had accepted the addition of the amount of Rs. 90,000 and since the record of the Income Tax Officer did not bear out the alleged agreement, the Inspecting Assistant Commissioner rejected the contentions of the assessee and levied a penalty of Rs. 11,200 u/s 271(1)(c) of the Income Tax Act, 1961. It may be stated that this was the minimum penalty (20% of the tax avoided) as provided by the said provision as it then stood. Aggrieved by the order of the Inspecting Assistant Commissioner levying penalty, the assessee filed an appeal to the Income Tax Appellate Tribunal. Before the Tribunal it was urged that the assessee had agreed to the said addition under a tacit understanding and assurance of the Income Tax Officer that he would not impose penalty in respect of the addition. It was also submitted that this was a case where cash credits were added because the assessee did not prove their source and genuieness. It was finally submitted that on the basis of the financial year as the previous year, an amount of Rs. 25,000 only could be added in the assessment year and that the entire amount of Rs. 90,000, which was agreed to be added, could not be regarded as concealed income of the assessee for that year. It was also sought to be urged that section 297(2) of the Income Tax Officer, 1961, was ultra vires of the legislature and no penalty could be levied under that section. As far as last argument was concerned, the Tribunal rejected the assessee''s contention, holding that it was a valid provision and intra vires of the powers of the legislature. The other contentions raised by the assessee were also rejected principally on the ground that the assessee had consented to the addition of the above amount as his income for the assessment year in question and that income had not been shown by the assessee in the return filed by it.

5. By the notice of motion the assessee has sought a direction from us to the Tribunal to raise and refer to this court the following question :

"Whether there is any evidence to support the findings that the applicant had concealed the particulars of its income or deliberately furnished inaccurate particulars thereof so as to attract the penal provisions of the Income Tax Act, 1961 ?"

6. To a considerable extent the question sought to be raised would be an aspect of the argument which could be advanced as regards the question actually submitted to us and arguments in that behalf were in fact advanced before us and which are required to be considered by us. Accordingly, we are the opinion that the Tribunal was not in any error in refusing to refer the question sought by the assessee and accordingly the notice of motion will stand dismissed with costs.

7. This brings us to the consideration of the question referred to us. It is found from the assessment order that the addition of Rs. 90,000 has been made by the Income Tax Officer as the assessee''s concealed income from business (and not as income from undisclosed sources). It has also been observed by the Tribunal that this addition in the assessment was consent. It was further observed by the Tribunal that by reason of such consent to the addition the assessee had prevented the Income Tax Officer from making further investigation and that in these circumstances it did not lie in the mount of the assessee to contend that the department had not proved that the addition was not the income of the assessee for the relevant accounting year.

8. Before us it was urged that the view of the Tribunal was erroneous and that merely because the assessee could be said to have agreed to the addition, it was not equivalent or tantamount to proving that the assessee had consciously concealed the particulars of his income and/or had deliberately furnished inaccurate particulars of such income. A number of authorities were cited at the Bar which are required to be considered. Before, however, doing so, we may set out the relevant statutory provisions as they then stood. Section 271(1)(c)(iii) reads as under :

"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...

(c) has concealed the particulars of his income or deliberately furnished inaccurate particulars of such income.

he may direct that such person shall pay by was 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 twenty per cent. but which shall not exceed one and a half time 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."

9. Before the Tribunal and before us principal reliance was placed by learned counsel for the assessee on the decision of the Supreme Court in Commissioner of

Income Tax, West Bengal I, and Another Vs. Anwar Ali, . In the said case, while making an assessment on the assessee for the assessment year 1947-48, the Income Tax Officer discovered an undisclosed bank account in the assessee''s name in which a cash deposit of Rs. 87,000 had been made. The assessee furnished explanation as regards that amount contending that the same represented diverse amounts entrusted to him by his relative who had got panicky during the communal riots in Bihar, which explanation was rejected by the Income Tax Officer, who brought the sum of Rs. 87,000 to tax as his income from undisclosed sources. Thereafter, a penalty of Rs. 66,000 was imposed on the assessee u/s 28(1)(c) of the Act of 1922 for concealment of particulars of his income. The Income Tax Tribunal quashed the penalty on the ground that the onus lay on the department to show by adequate evidence that the assessee had concealed this income and that the onus was not discharged by showing merely that the assessee''s explanation was found to be unacceptable. It was observed that the Income Tax Officer had to find some material, apart from the falsity of the assessee''s explanation, to support the finding that this was income. The Tribunals view was upheld by the High Court and finally by the Supreme Court. The Supreme Court in the aforesaid decision proceeded upon the footing that the penalty was penal in character. At pages 700 and 701 of the said report it has been observed as follows :

"The next question is that when proceedings u/s 28 are penal in character what would be the nature of the burden upon the department for establishing that the assessee is liable to payment of penalty. As has been rightly observed by Chagla C.J. in Commissioner of Income Tax, Ahmedabad Vs. Gokuldas Harivallabhdas, , the gist of the offence u/s 28(1)(c) is that the assessee has concealed the particulars of his income or deliberately furnished inaccurate particulars of such income and, therefore, the department must establish that the receipt of the amount in dispute constitutes income of the assessee. If there is not evidence on the record except the explanation given by the assessee, which explanation has been found to be false, it does not follow that the receipt constitutes his taxable income."

10. The question, however, to be considered by us is whether the facts before us are similar to those being considered by the Supreme Court in Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, . It was urged by Mr. Joshi on behalf of the Commissioner that the facts were not comparable inasmuch as the addition of Rs. 90,000 as income of the assessee firm was not made merely on rejection of some explanation offered by the assessee but the agreement as found by the Tribunal. It was accordingly submitted that there was evidence on record, viz., this agreement, which was sufficient for the purpose of attracting penalty and sufficient for the purpose of the department to discharge the onus of proof which lay on it and even sufficient to discharge the burden of proof in proceedings which might be regarded as penal in character.

11. This aspect of the matter came to be considered by the Delhi High Court in Durga Timber Works Vs. Commissioner of Income Tax, . In the said case the assessee, a registered firm had filed its return for 1960-61, declaring an income of Rs. 12,225. In the course of the assessment proceedings the Income Tax Officer noticed cash credits to the tune of Rs. 17,500 in certain accounts which were shown as squared up. Likewise, the sum of Rs. 36,900 was shown in the assessee''s books as having been invested in a supposed factory, out of which a sum of Rs. 22,800 was shown as adjusted; for the balance of Rs. 14,100 no explanation was given. When the assessee was asked to adduce evidence to establish these cash credits and to explain the source of investment of Rs. 14,100, the assessee was unable to give the explanation sought for and he surrendered the amounts to be included in his income. According to the High Court, he thus admitted that the amounts in question represented his own income. This was considered by the Delhi High Court as equivalent to an agreement or admission on the part of assessee that the two amounts could be treated as its concealed income and on that footing be included in its total income for that year. In the penalty proceedings which were subsequently taken, it was held that in the circumstances of the case it would amount to laying an impossible burden of proof on the department and making the provisions for imposition of penalty wholly unworkable if, even after the assessee had admitted that the two amounts could be treated as its concealed income, the department had still to prove by independent evidence that the assessee had concealed its income. In the result, the levy of penalty for concealment of income was held justified. The relevant observations in connection with the admission are to be found at pages 70 and 71 of the report. It has been observed at page 71 that even at the stage of penalty proceedings the assessee could have had a second opportunity to adduce evidence (on the case credits or on the investment) or to explain away the earlier admission, which opportunity was not availed of by the assessee. It was held that the decision of the Supreme Court in Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, was not applicable to a case where the addition was not by a mere rejection of the explanation of the assessee but on account of an admission of the assessee that amounts may be added as its income as was the case before the Delhi High Court. In our view, the facts in the case before us are substantially similar to the facts in Durga Timber Works Vs. Commissioner of Income Tax, .

12. The learned counsel for the assessee referred us to a decision of the Punjab High Court in Gumani Ram Siri Ram Vs. Commissioner of Income Tax, That was also a case where in the assessment proceedings when the assessee was asked to prove the genuineness of certain cash credit entries, he had made a statement that he was not in a position to prove the genuineness of those entries and surrendered the amount for being added to his returned income. Great stress was laid by counsel on the observations at page 70 of the report where it is said that there could have been hundreds of reasons for the assessee to surrender the amount irrespective of the

fact whether it was his income or not and that it was incumbent on the Income Tax Officer to lead some further evidence in the penalty proceedings to show that the amount added represented the income of the assessee. It has been observed, however, that it is for the assessee to bring these reasons or other these reasons to be tested and merely because of possibility of the existence of hundreds of reasons it would not be proper to say that the onus would still be on the department to adduce further evidence. It may be possible to visualise a different situation where the assessee offers an explanation or gives some reason as to why he had earlier agreed to the addition. Such a situation cannot be said to exist before us on the findings of the Tribunal

13. The learned counsel for the assessee also relied upon a decision of the Allahabad High Court in Commissioner of Income Tax Vs. Net Ram Ram Swarup, , where the observations of the Supreme Court in Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, had been applied. However, when this decision of the Allahabad High Court is carefully perused, it will be found that in the penalty proceedings the assessee had taken up the stand that the offer for inclusion of certain amounts had been made in the assessment proceedings because it was felt by it that it would be unable to prove its case for want of proper evidence. It appears to us that the decision in Commissioner of Income Tax Vs. Net Ram Ram Swarup, turned principally on this aspect of the matter and it has not been held by the Allahabad High Court that even where there is an addition to the income by express agreement, something further is required to be proved by the department. The position, however can conceivably be different if in the penalty proceedings, the assessee seeks to justify the original entries or seeks to explain away his admission or offers reasons for the same, which is not the case before us.

14. It may be mentioned that in a later decision in the very same volume of the Income Tax Reports such opportunity had been sought by the assessee in a case decided by the Punjab and Haryana High Court, which opportunity was denied to the assessee. Where such opportunity is denied, it is obvious that the levy of penalty cannot be held to be justified. That decision is in Krishan Lal Shiv Chand Rai Vs. Commissioner of Income Tax, In that case, in the course of reassessment proceedings in pursuance of section 143(3)/148 of the Income Tax Act, 1961., the assessee gave a statement surrendering the amounts of certain credits on the basis of hundis shown in the names of third parties. The Income Tax Officer accepted those surrenders and made orders of reassessment. Thereafter, penalty proceedings were started. The assessee contended in those proceedings that the surrendered amounts were in fact credits of genuine parties and wanted an opportunity to prove his case.

15. The Inspecting Assistant Commissioner refused to give such opportunity and levied penalty. The appeals filed by the assessee were dismissed by the Tribunal. It was held by the Punjab and Haryana High Court that in the penalty proceedings it

was incumbent upon the Inspecting Assistant Commissioner to have afforded the assessee full opportunity to prove his assertions and that a party was entitled in such proceedings to show and prove that an admission made by him previously was in fact not correct and true. It was held by the High Court that even treating the surrender as an admission of the concealment of undisclosed income the Inspecting Assistant Commissioner could not deny the assessee its right to prove that the fact of surrender was no such admission or that the so-called admission was in fact wrong and the surrender was made solely to avoid botheration as stated by the assessee. The High Court referred to its earlier decision in Gumani Ram Siri Ram Vs. Commissioner of Income Tax, where it had been observed that there may be hundreds of reasons for the assessee to surrender the amounts and it was open to the assessee in the penalty proceedings to offer these reasons and substantiate them for consideration of the Inspecting Assistant Commissioner in the first instance and the Tribunal subsequently.

16. Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, and Krishan Lal Shiv Chand Rai Vs. Commissioner of Income Tax, came to be considered by the Punjab and Haryana High Court in a still later decision in Mahavir Metal Works Vs. Commissioner of Income Tax, where the requirements of discharging the burden of proof in penalty proceedings were considered by the Punjab High Court. In that case, in the course of assessment proceedings the assessee filed a revised return and owned that the disputed amount was his own income. In the subsequent penalty proceedings it was held that the admission of the assessee was sufficient to discharge the onus on the department in the penalty proceedings. In that situation according to the Punjab High Court, the assessee was put to proof and it was open to the assessee to prove in the penalty proceedings that the admission made by him during the course of the assessment proceedings was wrongly or illegally made or was incorrect; that the assessee could lead evidence during such proceedings to show that he had not concealed by income or furnished inaccurate particulars thereof. According to the Punjab High Court, if the assessee failed to prove this, the Income Tax department would be justified in levying penalty on him u/s 271(1)(c). In our view whether a revised return is filed or an admission is made before the Income Tax Officer in the course of original assessment proceedings would seem to make little difference. The basis in both the cases is the same, viz., that the assessee agreed to accept the amounts as his income from business for the year in question. Once this true position is established, it would appear that it would be sufficient for the department to seek to discharge the onus in the penalty proceedings by relying upon this admission, and at that stage the onus would seem to shift to the assessee to show in the penalty proceedings that the admission made by him was incorrect as a matter of fact or it was wrongly or illegally made or that it was made for a reason which would suggest that it was not really the concealed income of the assessee. If the assessee is prevented from offering this explanation or if he avails of this second opportunity and can be said to have discharged such onus on him

then certainly the penalty proceedings would be bad unless the department offers something more for consideration and the levy of penalty would be required to be quashed. In the case before us, it has not been shown that any such second opportunity was seriously availed of by the assessee or that it had sought for but was denied this opportunity. As a matter of fact it must be observed that even the plea of the so-called agreement has varied at different stages and what was pleaded as a specific agreement originally is the letter of the assessee to the Income Tax Officer changed into a tacit assurance during the course of the arguments before the Tribunal. In our opinion, the plea of any such agreement as was urged by the assessee was rightly rejected by the Tribunal. Further, as the assessee had not contended that the admission was wrongly given or that the agreement to add the amount as its income (which on its part must be held to tantamount to an admission) was wrongly given or illegally taken or given through error, it must be held that the department had discharged the onus which lay on it in the penalty proceedings.

17. Only one further authority requires to be mentioned. That is a later decision of the Delhi High Court in Commissioner of Income Tax Vs. Narang and Company, , where after referring to Durga Timber Works Vs. Commissioner of Income Tax, , the same has been distinguished. On perusing this decision it is found that in the penalty proceedings the assessee had offered an explanation and it had been contended therein that the assessee had not concealed any income but had agreed to the inclusion of Rs. 20,000 as its income in the assessment proceedings, because the assessee was unable to render a proper explanation in 1965, after a lapse of five years. It was observed that it was open to the assessee to offer such explanation in the penalty proceedings, i.e., to have a second innings, and it was open in such proceedings for the Inspecting Assistant Commissioner or the Tribunal in appeal to accept this explanation, not with standing that such explanation had not been accepted in the assessment proceedings. This is not the case before us and, accordingly, this decision can have no application.

18. It was urged by learned counsel for the assessee that, although the assessee had agreed to the inclusion of Rs. 90,000, it would be able to satisfy us that at the highest only an amount of Rs. 25,000 could have been added in the assessment year in question. Mr. Joshi, on behalf of the revenue, then pointed out that this aspect was not of any relevance inasmuch as the minimum penalty as prescribed had been levied and that for the purpose of levy of penalty the amount to be considered is the amount of tax avoided, for which purpose the income as assessee by the Income Tax Officer alone will have to be considered. The position might have been different had the Inspecting Assistant Commissioner and subsequently the Tribunal levied penalty at a higher rate than the minimum against the assessee. In case penalty at a higher rate had been imposed, it might perhaps have been open to the assessee to urge that, in spite of the agreement, the proper amount that could have been properly added in the assessment year was less than the amount actually added by

the Income Tax Officer. As earlier stated, this aspect of the matter might have had a bearing on the quantum of penalty if the penalty had been levied at a higher rate than the minimum. On the facts before us, it is the admitted position that penalty at the Minimum rate, i.e., at the rate of 20% on the tax avoided, had been imposed and, therefore, it is unnecessary to go further into this aspect of the matter.

19. In the result, the question referred to us is answered in the affirmative and in favour of the revenue. The assessee will pay to the Commissioner the costs of this reference.