(1981) 03 CAL CK 0026

Calcutta High Court

Case No: Income Tax Ref. No. 108 of 1974

COMMISSIONER OF INCOME TAX	APPELLANT
Vs	
DARSANANAND LTD.	RESPONDENT

Date of Decision: March 5, 1981

Citation: (1982) 26 CTR 57

Hon'ble Judges: Sudhindra Mohan Guha, J; Sabyasachi Mukharji, J

Bench: Full Bench

Judgement

Sabyasachi Mukharji, J. - In this reference u/s 256 (1) of the IT Act, 1961, the following question has been referred to this Court :

"Whether, on the facts and in the circumstances of the case, and on a proper interpretation of the Expln. to s. 271(1)(c) he Tribunal is right in cancelling the penalty of Rs. 10,500 levied on the assessee for the asst. yr. 1964-65 ?"

2. The assessee is a company. Its main source of income is from house property and to a certain extent from the letting out of land, the asst. yr. 1964-65. The relevant accounting year is the financial year ending on 31-3-1964. During the course of the assessment proceedings, the ITO inquired of the assessee about the source of cash credits amounting to Rs. 35,000. It was stated by the assessee that the assessee was negotiating to purchase the plot of land through its Solicitor and the said sum of Rs. 35,000 was taken on loan from one Kalulal Mulchand. Sri Mulchand Chhabra, proprietor of M/s. Kalulal Mulchand appeared before the ITO in response to the summons issued u/s 131 of the IT Act, 1961 and denied that he had advanced any amount to the assessee. The ITO had also asked the assessee to remain present on the date of examination of Sri Mulchand Chhabra but unfortunately there was no response from the assessee. After taking the statement of Mulchand Chhabra, the ITO forwarded the contents of the same to the assessee with a view to giving an opportunity to the assessee to cross-examine Sri Mulchand Chhabra. In this connection, a date was given to the assessee but on the appointed date data of hearing the assessee did not attend and send instead of a letter dt. 19-2-1968 to the

ITO disputing various allegations made by Sri Mulchand Chhabra. In this context, the ITO treated the said amount of Rs. 35,000 as well as, Rs. 875 being the interest there on as the assessees income from undisclosed sources.

3. In appeals before the AAC as well as the IT Appl. Tribunal against the order of the ITO the assessee failed to get any relief in this respect. In the course of the assessment proceeding, the ITO initiated the penalty proceedings u/s 271 (1)(c) of the IT Act, 1961 and as the minimum penalty imposable exceeded Rs. 1,000 be referred the matter to the IAC, Range XII, Calcutta. The IAC in this order dt. 8-6-1970 held that after the amendment made in s. 271(1) of the Act, 1961 by the Finance Act, 1964, the decision of the Supreme Court in Anwar Alis case relied by the assessee was no longer of any help to the assessee in view of the Expln. to s. 271(1)(c) as inserted by the Finance Act of 1964. Accordingly, he levied a penalty of Rs. 10,500 on the assessee.

4. Being aggrieved by the order of the IAC, the assessee preferred an appeal to the IT Appl. Tribunal and submitted that though the credit was in cash repayments on principal and interest by account payee cheque and that in view of the Supreme Court decision in Anwar Alis case mentioned hereinbefore no penalty u/s 271(1)(c) of that Act would be exigible unless the taxing authorities could establish that there was gross or wilful neglect on the part of the assessee as contemplated u/s 271(1)(c) of the 1961 Act. Ld. Rep. of the Department contended that in view of the Expln. to s. 271(1)(c) the IAC was justified. The Tribunal after considering the rival contentions found that the repayments were made by cheques in deciding the quantum appeal but the addition was upheld looking to the aspect that the receipt was in cash and the statement of Mulchand Chhabra dt. 7-8-1967 denying the advance did not stand controverted. The assessee had pleaded before the Tribunal in the course of the quantum proceedings that the representative of the assessee was present on the date when Chhabra was examined by the ITO but that he had gone out in search of the creditor and was thus not present at the time of the examination of the creditor. This aspect was examined in para 5 of the order of the Tribunal and the Tribunal came to the conclusion that on the state of evidence on record they had to hold that the assessees ascertain that its representative attended on 7-8-1967 was not established. The Tribunal then set out the statement of Chhabra and held that it was clear from the answers given that the amount advanced by Chhabra was not his own money but represented the assessees money. The Tribunal then discussed the plea of the assessee that further opportunity should have been given by the ITO to summon Chhabra and Chhabra could not be cross-examined. According to the Tribunal, merely because the ITO chose to allow, if possible, a further opportunity to the assessee to cross-examine Chhabra it could not be concluded that the evidence recorded earlier on 7-8-1967 had to be ignored because the assessee had not availed of the earlier opportunity and it was not non availability of the same because of sufficient case. In the above background the question of the penalty whether leviable fell for consideration. According to the Tribunal, the ratio of the principle of

Anwar Alis case applied and the department had not established that the receipt of Rs. 35,000 was of an income of revenue nature. In that view of the matter, the Tribunal was unable to uphold the order of the penalty.

5. In this case the addition undoubtedly has been made in the assessment order and it has been upheld in the quantum appeal. The amount of addition made and the return filed, the difference between the two amounts comes within the mischief of Expln. to s. 271(1)(c) of the IT Act, 1961. Now, the question, is whether the introduction of the Explanation has in any way affected the applicability of the principles enunciated in Anwar Alis case. These principles have been discussed in several decisions and we recently reviewed most of these authorities in our decision in the case of Commissioner of Income Tax Vs. Rupabani Theatres P. Ltd., where we held, inter alia, that the introduction of the Explanation did not affect the principle enunciated by the Supreme Court in Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, and that was still a good law. We had also discussed the principle which should guide the applicability of fiction introduced by the Explanation. We, further, held that the evidence adduced in he assessment proceedings, though not conclusive in penalty proceedings but could be relevant as evidence and each case must be decided in the facts and circumstances of the particular case. Now, the nature of evidence adduced in the assessment proceedings and the rejection thereof in the assessment proceedings might lead, in certain circumstances, to the fact that any expenditure found entered or credited in the assessees book should be treated as the income of the particular year of the assessee and in certain other circumstances it has to be proved aliunde and once that is proved the onus is on the assessee to disprove that the failure to show or furnishing of inaccurate particulars of income, was not due to gross or wilful neglect on the part of the assessee. That the income of the assessee had been concealed has to be established first and for establishing that though the evidence in the assessment proceedings would be good evidence but the same is not a conclusive evidence. But it should depend on the nature of evidence. We have set out the evidence adduced in this case in the quantum proceedings. The Tribunal has discussed the evidence in detail and has taken and considered the evidence and if in consideration of that evidence the Tribunal has come to a conclusion that the Revenue has failed to prove that there were concealment of income or that itself represented by the assessee was the assessees income and the returned income represented the receipt of the assessee for the particular year which was of a revenue nature then such a finding of the Tribunal, in our opinion, cannot be said to be either erroneous in law or perverse in law. In that view of the matter, we would answer the question in the facts and circumstances of this case in the affirmative and in favour of the assessee. We will however, say that the effect of introduction of the Expln. to s. 271(1)(c) has been clearly explained in our decision in the case of Commissioner of Income Tax Vs. Rupabani Theatres P. Ltd., judgment delivered on 18-9-1980) and we do not propose to add anything on the legal aspect of what we

have said there.

The parties will pay and bear their own costs.

Sudhindra Mohan Guha, J. - I agree.