

**(1982) 03 BOM CK 0075**

**Bombay High Court**

**Case No:** Income-tax Reference No.252 of 1973

Commissioner of Income Tax,  
Poona

APPELLANT

Vs

B.S. Badve and another

RESPONDENT

**Date of Decision:** March 13, 1982

**Acts Referred:**

- Income Tax Act, 1961 - Section 143, 144, 147, 256(2), 271(1)

**Citation:** (1983) 33 CTR 150 : (1982) 138 ITR 682 : (1983) 12 TAXMAN 350

**Hon'ble Judges:** M.N. Chandurkar, J; Kania, J

**Bench:** Division Bench

### **Judgement**

Kania, J.

This is a reference under s. 66(2) of the Indian I.T. Act, 1922, and s. 256(2) of the I.T. Act, 1961. The assessment years with which we are concerned are assessment years 1955-56 to 1957-58 and 1960-61 to 1965-66.

2. The relevant facts giving rise to this reference are as follows :

B. S. Badve, the karta of the HUF of S. T. Badve of Malegaon, derived income in the previous years relevant to the aforesaid assessment years from the exhibition of films in two theatres, from running a flour mill and also from the weaving of cloth on 15 power looms. The assessee claimed to have maintained an account till March 21, 1959, when there was a fire in the premises where the books were kept and all the account books were destroyed by the fire. Thereafter, the assessee did not write account books. The returns in respect of the income of the aforesaid assessment years were filed on the basis of estimates. In the case of the cinema theatres, the assessee showed the receipts which were verified. According to the assessee's estimate, the net income from the cinema business was 9% of the receipts. In the case of power looms, the assessee showed the income at Rs. 800 per power loom. Similarly, the income from the flour mill was based on an estimate by the assessee.

The ITO, while making the assessments, rejected the estimate of income given by the assessee in respect of the income from the cinema business and the power looms. In respect of the cinema business, the ITO estimated the income at 15% of the net receipts in respect of the years and 13% of the net receipts in respect of some other years against the estimate of 9% given by the assessee. In the case of power looms, the ITO raised the estimate of income to Rs. 1,000 per power loom as against Rs. 800 shown by the assessee. So far as the flour mill is concerned, the estimate given by the assessee was not disturbed. In respect of assessment years 1956-57 and 1957-58, the ITO added Rs. 15,000 to the income of each of the assessment years as income from undisclosed source, but these additions were disallowed by the Tribunal. On the facts, the IAC levied varying amounts of penalty on the assessee on the footing that the assessee had concealed the particulars of its income within the meaning of s. 271(1)(c) of the I.T. Act, 1961. The IAC took support from the Explanation to s. 271(1) added by the Finance Act, 1964. The assessee came in appeal before the Tribunal objecting to the levy of penalties. The Tribunal held that on merits there was no case for levying penalty for concealment and that the IAC was not right in relying on the Explanation to s. 271(1) of the I.T. Act, 1961, in support of the levy of penalty for the years other than 1964-65. The Tribunal held that, on the facts of the present case, no concealment was established either in the ordinary sense or in the technical sense as envisaged in the Explanation. In its order, the Tribunal pointed out that the assessee did not produce its books of account. It accepted the explanation given by the assessee that the said books up to March 21, 1959, were burnt in fire as claimed by the assessee. The Tribunal held that there was no concealment of income which merited penalty under s. 271(1)(c). The Tribunal rejected the contention of the Revenue that the assessee had maintained books of account in respect of all material years, but had deliberately failed to produce these books of account. It is from this decision of the Tribunal that the following questions have been referred to us for our determination :

"(1) Whether the Tribunal erred in law in holding that the Explanation to section 271(1)(c) of the Income Tax Act, 1961, was applicable only to assessment years 1964-65 onwards ?

(2) Whether, on the facts and in the circumstances of the case, the penalties imposed by the Inspecting Assistant Commissioner u/s 271(1)(c) of the Act were valid ?"

3. In our view, the reference can be disposed of merely on the basis of question No. (2) because if that question is decided in favour of the assessee and against the Revenue, then it becomes wholly unnecessary to dispose of question No. (1).

4. Before going into the arguments advanced, we may set out the Explanation to s. 271(1)(c) as it stood at the relevant time. The said Explanation ran thus :

"Where the total income returned by any person is less than 80 per cent. 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."

5. It may be mentioned that s. 271(1)(c) of the I.T. Act, 1961, deals with the levy of penalty for concealing particulars of income or furnishing inaccurate particulars thereof.

6. Coming to the present case, we find that the assessee filed his returns in respect of the aforesaid assessment years merely on the basis of estimates of income. It has been accepted by the Tribunal that the assessee did have any books of account which he deliberately failed to produce. All that the ITO did in making the assessment was to raise the estimates of income given by the assessee in respect of the income from the cinema business and from the running of the power looms. There is nothing in the order of the ITO to show that he found the estimates given by the assessee to be fraudulent or that the ITO came to the conclusion that the assessee had made any deliberate false estimate of his income. In these circumstances, even if the Explanation is taken into account, we fail to see how it could ever be said that there was any deliberate concealment of income by the assessee, and hence, in our view, no penalty was liable to be imposed on the assessee.

7. Mr. Sajnani referred us to some cases in order to show that courts have taken the view that it is not, as if, in all cases where taxation authorities estimated the income at a higher figure than what was estimated by the assessee, no penalty was leviable and that where the estimate made by the assessee was proved to be a deliberate under-estimate, an inference of concealment of income could certainly be drawn. In our view, it is wholly unnecessary to refer to these cases because, as we have already pointed out, in this case it is not possible to say that there was any deliberate under-estimation of his income by the assessee. Even the additions made by the ITO in the estimates of income made by the assessee are so modest, that merely from those additions it cannot be said that the assessee has made any deliberate under-estimation of his income.

8. In the result, question No. (2) is answered in the negative and in favour of the assessee. It is not necessary to answer question No. (1), because our answer to question No. (2) disposes of the entire reference. Commissioner to pay costs of the reference to the assessee.