Before S. P. Goyal & G. C. Mital, JJ.

COMMISSIONER OF INCOME-TAX, PATIALA,—*Applicant.*

versus

M/S SARDAR STORE, LUDHIANA,—*Respondent.*

Income-tax Reference No. 15 *of* 1978.

August 29, 1985.

Income-tax Act (XLII of 1961) *as amended by Finance Act,* 1964—*Section* 271(1)(c) *Explanation—Cash credit entry in the books of the assessee disbelieved and the amount added to the income—Returned income much less than the assessed income—Penalty proceedings initiated—Onus of proving that the concealed amount did not represent income—Whether lies on the assessee—Statement of the alleged depositor by itself that the amount was deposited by him—Whether rebuts the presumption raised against the assessee.*

Held, that after considering the scheme of the Income-tax Act, the amendments made from time to time and keeping in view the language of the Explanation added by the Finance Act, 1964, three legal presumptions arise whenever returned income is less than 80 per cent of the assessed income but more than 20 per cent—(i) that the amount of the assessed income is the correct income and it is in fact income of the assessee himself; (ii) that the failure of the assessee to return the correct assessed income was due to fraud; or (iii) that the failure of the assessee to return the correct assessed income was due to gross or wilful neglect on his part. These presumption are not conclusive but rebuttable and it is for the assessee to lead cogent evidence to rebut them.

(Para 4)

Held, that in cases where the Explanation added to section 271(1)(c) of the Act is attracted, the concealed amount has to be considered as the income of the assessee and not of the depositor and, therefore, the statement of the depositor would be no evidence for consideration of discharge of onus which lies on the assessee. Mere consistency of the depositor in his statement is no legal evidence for the purpose of deciding as to whether the assessee has been able to rebut the presumption i.e. failure was not due to fraud or gross or wilful neglect.

(Para 5)

Reference under section 256(2) *of the Income Tax Act,* 1961, *made by the Income-tax Appellate Tribunal (Amritsar Bench) Amritsar for the opinion of this Hon'ble High Court on the following questions arising out of the Tribunal order dated* 14*th July,* 1976

passed in Income Tax Appeal No. 104/1976-1977, *regarding the Assessment Year* : 1971-72, *R.A. No.* 67(*ASR*)/1976-77.

(i) Whether, on the facts and in the circumstances of this *case, the Appellate Tribunal was right in law in holding that the onus placed by the Explanation to section* 271(1) (c) *of the Income Tax Act,* 1961 *was discharged?*

(*ii*) *Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in holding that no penalty was exigible?*

Ashok Bhan Sr. Advocate with Ajay Mittal, Advocate, *for the Petitioner.*

Bhagirath Dass Senior Advocate with S. S. Grewal, Advocate, *for the Respondent.*

JUDGMENT

Gokal Chand Mital, J.

(1) In compliance with the orders of this Court, in Income Tax Case No. 80 of 1977 decided on 25th July, 1977 the Income Tax Appellate Tribunal, Amritsar, has referred the following two questions for opinion of this Court:

(i) Whether, on the facts and in the circumstances of this case, the Appellate Tribunal was right in law in holding that the onus placed by the Explanation to section 271(1)(c) of the Income Tax Act, 1961 was discharged?

(ii) Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in holding that no penalty was exigible?

The aforesaid questions arise from the following facts. M/s. Sardar Store (hereinafter called 'the Assessee), is a registered firm and carries on retail business in cloth. For the period which ended on 31st March, 1971, relevant to the Assessment year 1971-1972, return was filed an 4th October, 1971 declaring the total income of Rs. 54,726. During the assessment proceedings the Income Tax Officer found that cash credit amounting to Rs. 65,000 was shown in the books of account in the name of four different persons and since the assessee

was not able to explain the said amount the same was added as the assessee's income from undisclosed sources. The interest, which was shown to have been paid pertaining to the credits was also disallowed because the genuineness of the credit was not accepted. On assessee's appeal the Appellate Assistant Commissioner allowed a deduction of Rs. 10,000 out of the assessment in respect of the credit shown in the name of one of the persons but confirmed the addition of Rs. 55,000 and held that the credits were not proved to be genuine. The disallowance of the interest was also confirmed. On further appeal by the assessee to the Tribunal, the Tribunal accepted the three cash credits shown in the name of Naginder Singh, Sher Singh and Kartar Singh as genuine and deleted those additions but in regard to the 4th cash credit entry in the name of Karnail Singh for the sum of Rs. 37,500 the deletion of Rs. 10,000 made by the Appellate Assistant Commissioner, was accepted and addition of Rs. 27,500 along with interest of Rs. 1674 was confirmed, after recording a finding that Karnail Singh was not in a position to advance the said loan. In the assessment proceedings it was categorically found by the Tribunal that Karnail Singh owned agricultural land which yielded income of Rs. 12,000 to Rs. 13,000 as stated by him and had seven children and his family expenses were Rs. 13,000 to Rs. 14,000. He was not able to give any other source of income and it was, therefore, concluded that whatever he earned from the agricultural income was spent for house-hold expenses. It was also found that he was not able to tell the rate of interest nor did he remember the details of interest paid to him. Since there was no evidence available on the record except the statement of Karnail Singh it was concluded that he was not in a position to advance loan of Rs. 27,500 to the assessee and for that reason the addition of this amount and interest on that amount amounting to Rs. 1674 was confirmed. That matter became final between the parties.

(2) While completing the assessment, the Income-tax Officer simultaneously initiated the penalty proceedings under section 271(1)(c) of the Income Tax Act and since the concealed income exceeded Rs. 25,000 the case was referred to the Inspecting Assistant Commissioner. In response to the show cause notice the assessee produced an affidavit of Karnail Singh on 23rd January, 1976 and got his statement recorded on 28th February, 1976 and 9th March, 1976. The Inspecting Assistant Commissioner held that the assessee was guilty of concealment of income to the extent of

Rs. 27,500 and claimed false interest in the sum of Rs. 1674. The statements of Karnail Singh were discarded since no other evidence was produced. It was held that the assessee failed to rebut the presumptions arising under the explanation to section 271(1)(c) of the Act and by order dated 17th March, 1976 levied the penalty of Rs. 29,200. The assessee went up in appeal before the Income Tax Appellate Tribunal and the Tribunal by order dated 14th July, 1976 allowed assessee's appeal and cancelled the penalty imposed by the Inspecting Assistant Commissioner after recording findings that the onus lay on the department to prove that the receipt of the amount in dispute constituted the income of the assessee and merely for the falsity of the assessee's explanation, no penalty for cancealment of income could be imposed. In this behalf it relied on *CIT* vs. *Anwar Ali*, (1). It also relied on *C.I.T.* vs. *Khoday Eswarsa and sons*, (2) wherein it was further held that before levying penalty the department must have produced before it cogent evidence to prove that the assessee had conclusively concealed the particulars of his income or had deliberately furnished inaccurate particulars. It also concluded that the original assessment proceedings may be good item of evidence in the penalty proceedings but penalty cannot be levied solely on the basis of the reasons given in the original order of the assessment. It was finally held that the onus that lay on the department was not discharged by it.

(3) The Tribunal then proceeded to consider whether penalty is exigible with reference to the explanation to section 271(1)(c) of the Act. Under this explanation, it was noticed that the onus was on the assessee. It then proceeded to observe that though in the assessment proceedings, the explanation regarding the nature and source of the credit of Rs. 27,500 was not accepted, that does not by itself lead to the inference that the said amount represented the concealed income of the assessee. Since Karnail Singh has been consistent in his statement that he had advanced a sum of Rs. 27,500 to the assessee, under such circumstances the onus that lay on the assessee was considered to have been discharged. For all these reasons, the amount of penalty was cancelled. As already noticed, the Tribunal refused to refer the two questions of law arising in this case but on mandamus the Tribunal had to refer the two questions.

(1) 76 I.T.R. 696.
(2) 83 I.T.R. 369.

(4) The assessment year is 1971-72 and at the relevant time the provisions of section 271(1)(c) with Explanation have to be taken notice of for deciding the two questions. That Explanation was added by the Finance Act 1964 with effect from 1st April, 1964 which was later on substituted by the Taxation Laws (Amendment) Act, 1975 with effect from 1st April, 1976. In this case we are concerned with the Explanation, which was inserted with effect from 1st April, 1964. That provision fell for consideration before the Full Bench of this Court in *Vishwakarma Industries* v. *Commissioner of Income Tax Amritsar*, (3). After considering the scheme of the Act, the amendments made from time to time and keeping in view the language of the explanation, which was added with effect from 1st April, 1964, the following three legal presumptions were said to arise whenever returned income is less than 80 per cent of the assessed income but more than 20 per cent.

> "(i) that the amount of the assessed income is the correct income and it is in fact income of the assessee himself;
>
> (ii) that the failure of the assessee to return the correct assessed income was due to fraud; or
>
> (iii) that the failure of the assessee to return the correct assessed income was due to gross of wilful neglect on his part."

It was then held that the presumptions were not conclusive but rebuttable and in this behalf the following dictum was laid:

> "From the factum of the presumptions spelled out, in essence, the Explanation becomes a rule of evidence. But, the presumptions raised by the Explanation are not conclusive presumptions and they are rebuttable. As is the rule under the civil law, the initial burden of discharging the onus of rebuttal is on the assessee. However, once he does so, he would be out of the mischief of the Explanation until and unless the department is able to establish afresh that the assessee in fact had concealed the particulars of the income or furnished inaccurate particulars thereof."
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> In cases of concealment of income and tax evasion, the modus of concealment is obviously within the special

(3) 135 I.T.R. 652.

knowledge of the assessee. Consequently, in cases of blatant evasion, the legislature was compelled to take off the impossible burden of establishing facts which are obviously in the special knowledge of the assessee alone. The onus was, therefore, rightly placed on the shoulders of the assessee, who alone could reasonably discharge the same. The insertion of the Explanation and the omission of the word "deliberately" from clause(c) of section 271(1) was merely declaratory of the existing law, but designed to effect a change in law. The changes were obviously brought in to remedy a particular mischief. To say that, despite the amendment, no change was brought about in the law would be rendering the whole of the provisions nugatory and would be violating the settled canon of construction that a meaning must be given to every word in a statute.

The intention of the legislature in making the amendments to section 271(1)(c) and in inserting the Explanation thereto was to bring about a change in the existing law. Consequently, the ratio of Anwar Ali's case (1970) 76 ITR (SC) which had considered the earlier provisions of section 28(1)(c) of the 1922 Act is no longer attracted for the construction of section 271(1)(c) as amended".

Keeping the aforesaid dictum in view it is plain that the onus lay on the assessee and the Tribunal was in error in placing onus on the department. The Full Bench distinguished *Anwar Ali's case* (supra) because that case related to the assessment proceedings prior to the amendment which came into force with effect from 1st April, 1964, whereas the instant case is after the amendment had come into force. Hence, the first question has to be decided in favour of the department and against the assessee i.e. in negative.

(5) Adverting to the second question, we find that here again, the Tribunal was in error in holding that the onus which lay on the assessee has been discharged on the facts and circumstances of this case. In view of the first legal presumption raised by the Full Bench in *Vishwakarma Industries's case* (supra) the amount of Rs. 27,500 has to be considered as the income of the assessee in view of the order made in the assessment proceedings. According to the other legal presumptions, which have to be raised according to the Full Bench, it has to be presumed that the failure of the assessee to show in the return the correct income was due to fraud or was due

to gross or wilful neglect on his part. However, he could rebut the presumption. To rebut the presumptions, the assessee did not furnish any material in penalty proceedings, except getting the statement of the alleged depositor recorded besides producing his affidavit which were in tune with the statement which he had made during assessment proceedings. The order passed in the assessment proceedings by the Tribunal is part of the statement of the case, which has already been reproduced in the opening part of the judgment. Definite findings were recorded that whatever income the depositor had was not even sufficient for his house-hold expenses because he had given his annual income as Rs. 12,000 to Rs. 13,000 and his family expenses were Rs. 13,000 to Rs. 14,000. It was also concluded that he did not know as to what was the rate of interest payable to him. Finally, it was concluded on the basis of that material that the depositor was not in a position to advance loan of Rs. 27,500 to the assessee. Mere getting the statement of the depositor recorded in the penalty proceedings or producing his affidavit, did not discharge the burden, which lay on the assessee to rebut the presumptions against him. It was for him to have led some cogent evidence on the basis of which it could be said that the failure of the assessee to return the correct assessed income was not due to fraud or gross or wilful neglect on his part. In this behalf, no evidence, whatsoever was led, and, therefore, the Tribunal was wrong in concluding that the onus stood discharged. The Tribunal did not keep the correct legal principles in view and probabaly because at that time the decision in *Vishwakarma Industries's case* (supra) had not been rendered and the matter was being decided in the light of *Anwar Ali's case* (supra) *and Khoday's case* (supra). It is true that in the last part of the Tribunal's order, reference to explanation added with effect from 1st April, 1964 was made but yet the matter of discharge of onus which lay on the assessee, was considered in the background of the aforesaid two decided cases i.e. *Anwar Ali's case* and *Khoday's case* (supra). Under the rule laid down by the Full Bench a sum of Rs. 27,500 has to be considered as the income of the assessee and not of the depositor, and, therefore, the statement of Karnail Singh would be no evidence for consideration of discharge of onus which lay on the assessee according to the Full Bench in *Vishwakarma Industries's case* (supra). Mere consistency of the depositor in his statement was no legal evidence for the purpose of deciding as to whether the assessee was able to rebut the presumptions i.e. failure was not due to fraud or gross or wilful neglect.

(6) Shri Bhgirath Dass Senior Advocate appearing for the assessee had argued that the questions referred were purely of fact. Firstly, both questions were formulated by this Court while issuing mandamus to the Tribunal for referring the question, and secondly, the very basis of the decision of the Tribunal has been knocked out by Full Bench decision of this Court in *Vishwakarma Industries's case* (supra). Therefore, both the questions have to be decided in the light of the Full Bench judgment. Consequently, we reject the argument.

(7) Then our attention was invited to decision of this Court in Commissioner of *Income Tax Patiala* v. *Sunanda Trading Corporation*, (4) for the proposition that in that case on similar facts the department filed an application under section 256(2) of the Act and this Court declined to issue mandamus after observing that the questions sought to be referred were essentially questions of fact.; whereas in this case, this Court issued mandamus and sought reference of the two questions of law along with statement of the case, and that is how the matter is before us. We have to answer the questions of law on the facts and circumstances of this case keeping in view the Full Bench decision. Hence, the learned counsel cannot seek any assistance from that case.

(8) In view of the above, the answer to question No. 2 has to be that on the facts and circumstances of this case the Tribunal was not right in holding that no penalty was exigible.

(9) For the reasons recorded above, we answer both the questions referred to us in favour of the department-Revenue and against the assessee i.e. in the negative. However, there will be no order as to costs.

N.K.S.

Before J. V. Gupta, J.

KISHAN SINGH,—*Appellant.*

versus

KHARAITI RAM AND OTHERS,—*Respondents.*

Regular Second Appeal No. 2646 of 1983.

August 30, 1985.

Transfer of Property Act (IV of 1882)—Sections 76(a) & 111(c)—East Punjab Urban Rent Restriction Act (III of 1949)—Section 13—Mortgage of a shop with possession—Mortgage deed stipulating that

(4) (1980)122 I.T.R. 514.