

INCOME TAX REFERENCE No 42 of 1987

Hon'ble MR.JUSTICE A.R.DAVE Sd/-  
and  
Hon'ble MR.JUSTICE D.A.MEHTA Sd/-

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1. Whether Reporters of Local Papers may be allowed      : NO
   to see the judgements?

2. To be referred to the Reporter or not?                  : NO

3. Whether Their Lordships wish to see the fair copy      : NO
   of the judgement?

4. Whether this case involves a substantial question      : NO
   of law as to the interpretation of the Constitution
   of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the concerned        : NO
   Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?
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Versus

COMMISSIONER OF INCOME-TAX

MR SN DIVATIA for Petitioner No. 1  
MR BB NAYAK FOR MR MANISH R BHATT for Respondent No. 1

Date of decision: 29/08/2002

(Per : MR.JUSTICE D.A.MEHTA)

1 The Income Tax Appellate Tribunal, Ahmedabad  
Bench 'A' has referred the following question :

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in upholding the penalty of Rs.43,000/- under sec.271(1)(c) of the I.T.Act,1961 ?"

for the opinion of this Court under Section 256(1) of the Income Tax Act, 1961 (for short 'the Act').

2 The assessment year is 1975-76 and the relevant accounting period is year ended on 30.6.1974. The applicant assessee is a partnership firm which came into existence with effect from 1.4.1974 under a deed executed on 2.4.1974. The said partnership comprised of one Shri Arvindkumar Babubhai and Smt.Kokilaben Chandravadan. Said Shri Arvindkumar was a student of First year in college.

3 It appears that the assessee applicant made payments on various dates without having sufficient cash balance on the date of payment. The details of such payments are as under :

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Sr. No.	Amount.	Actual dt.	Date on Opening cash
	of Payment	entries	which the balance on
	as confir-	med from	hand as per
	med from	were	assessee's
	the sellers passed in	books on	
	books of	the books date on which	
	accounts.	of the actual	
		assessee payments were	
	firm.	made.	

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1	2	3	4	5
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1.	Rs.10000/-	15/4/74	10/5/74	Rs.32.20
2.	Rs.10980/-	22/4/74	10/5/74	Rs.34.25
3.	Rs.43300/-	10/5/74	13/5/74	Rs.31,467.25

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Rs.64,280/-

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The Income Tax Officer therefore added a sum of Rs.64,280/-, as income from undisclosed sources. The assessee's appeal against the said assessment failed upto the level of Tribunal and thus the addition came to be confirmed. Thereupon, the Income Tax officer took up penalty proceedings under section 27(1)(c) of the Act and by order dated 26.7.1982 levied penalty of

Rs.43,000/-,(the minimum being Rs.42,952/-). The said penalty was confirmed by C.I.T.(Appeals) and also by the Tribunal. It is against the aforesaid order of the Tribunal dated 13.5.1986 that the present reference has been preferred.

4 Mr.S.N.Divetia, learned Advocate appearing on behalf of the applicant assessee submitted that the penalty had been wrongly levied and confirmed by the authorities below. In support of this proposition it was submitted that the assessee had tendered its explanation to the effect that it had borrowed various sums from different parties and instructed the Accountant one Shri Mohanbhai D.Patel at the relevant point of time to pass necessary credit entries in the Books of Account, but the said Accountant had failed to do the needful and the assessee came to know about the same only when its explanation was sought by the Income Tax Officer during the course of assessment proceedings. It was further submitted that at that point of time a period of four years had elapsed and the assessee was not in a position to give the names of the persons from whom the borrowings had been made because the assessee did not remember the names of the said persons. It was further submitted by him that the assessee had placed complete faith on the Accountant and at the relevant point of time when the assessment proceedings were going on the relations with the Accountant had been strained resulting in assessee being unable to substantiate its explanation. In support of the submission that on these set of facts and circumstances no penalty was leviable reliance was placed on the following three decisions of this Court :

[1] National Textiles Vs. C.I.T.  
249 I.T.R.125.

[2] Kantilal Manilal Vs. C.I.T.  
130 I.T.R.411.

[3] C.I.T. vs. Jalaram Oil Mills.  
253 I.T.R.192.

5 An alternative contention was raised by Mr.Divetia to the effect that the authorities below, including Tribunal failed to apply the correct provision of law and hence the matter should be remanded to the Tribunal for applying the correct provision and appreciate the explanation of the assessee in light of the same. It was submitted that Explanation 1 to Section 271(1)(c) of the Act as was applicable from 1.4.1976 had

been applied in case of the assessee instead of the Explanation which was applicable upto 31.3.1976. It was contended that the scope of both the Explanations, i.e. one which existed upto 31.3.1976 and one which was applicable from 1.4.1976, was different and the assessee should not be penalised by invoking an Explanation which was not applicable to the assessment year under consideration. In support of the alternative contention reliance was placed on a decision of this Court in case of C.I.T. vs. Baroda Tin Works, 221 I.T.R. 661.

6. Mr.B.B.Nayak, learned Standing Counsel appearing on behalf of the respondent - revenue submitted that the Tribunal had recorded the findings of fact and it was not shown that the same were in any way incorrect in law and hence it was not permissible for this Court to reappraise the facts and evidence on record. Mr.Nayak accepted the proposition that for the assessment year under consideration Explanation which existed upto 31.3.1976 was applicable , but went on to contend that even if the said Explanation was invoked the principles laid down by the Supreme Court in the following cases had to be applied to the facts found.

[1] C.I.T. vs. Mussadilal Ram Bharose.  
165 I.T.R. 14.

[2] C.I.T. vs. K.R.Sadayappan.  
185 I.T.R. 49.

7 He also contended that as required by the said provision the assessee had failed to discharge the burden which lay upon the assessee and further that explanation tendered by an assessee had to be real and plausible and which was supported by some cogent material evidence. It was therefore contended that no case was made out to interfere with the order of the Tribunal in any view of the matter.

8 There is no dispute between the parties that the Explanation as was existing upto 31.3.1976 was applicable in case of the assessee for the assessment year under consideration. We would have accepted the plea for remanding the matter to the Tribunal for applying the said Explanation, but for the fact that the assessee has not been able to show, even prima facie, that on the facts which have already come on record it would be in a position to tender any explanation which would enable the assessee to discharge the rebuttable presumption which would arise by virtue of the statutory Explanation under section 271(1)(c) of the Act.

9 The facts which have come on record and which are not disputed, show that assessee had made payment on certain dates when no sufficient cash was available with the assessee. The factum of payment on that particular day has been established from the contra accounts of the parties from whom the assessee had purchased goods, thus leaving no scope for disputing the factum of payment on a particular day. The explanation of the assessee that it had borrowed certain funds and instructed Accountant to pass the necessary credit entries in its Books of Account remains a bald averment in absence of the details regarding the names of the persons, the amount advanced or even the dates when the borrowings were made or repaid, whether with or without interest. Furthermore, the assessee has chosen to keep the Accountant away from the scrutiny during course of inquiry. It was submitted that Accountant could not be produced as the relations were strained. Nothing has been brought on record to show that the assessee made any endeavour in the direction of producing Accountant during the course of assessment proceedings like asking the Income Tax Officer to send a letter to the Accountant seeking clarification or getting summons issued asking the Accountant to confirm the averment made by the assessee. In light of these facts if the authorities, including the Tribunal, have come to the conclusion that the assessee has failed to discharge the onus which lay on it no infirmity can be found. The Supreme Court in the case of Mussadilal Ram Bharose (supra) has specifically laid down the scope of Explanation in the following words :

"The position, therefore, in law is clear. If the returned income is less than 80% of the assessed income, the presumption is raised against the assessee that the assessee is guilty of fraud or gross or wilful neglect as a result of which he has concealed the income but this presumption can be rebutted. The rebuttal must be on materials relevant and cogent".

As to what could be the explanation by which the assessee can rebut the presumption raised against it, is stated by the Apex Court in the same decision in the following words while confirming the view expressed by Full Bench of Patna High Court in the case of C.I.T. vs. Agarwala and Sons :

"The Patna High Court emphasised that as to the

nature of the explanation to be rendered by the assessee, it was plain on principle that it was not the law that the moment any fantastic or unacceptable explanation was given, the burden placed upon him would be discharged and the presumption rebutted. We agree. We further agree that it is not the law that any and every explanation by the assessee must be accepted. It must be an acceptable explanation, acceptable to a fact-finding body."

10. We are aware that it would not be possible for the High Court to enter into a fact finding exercise or reappreciate the evidence and we do not propose to do so. However, at the same time, it is apparent that the burden which is cast on the assessee remains undischarged when one applies the principles laid down by the Apex Court. As observed, the explanation has to be one which is not fantastic or unacceptable. It is not the law that any and every explanation by the assessee must be accepted. The facts which have come on record go to show that the assessee was not in a position to tender names of its lenders at a period of four years from the date of payment during the accounting period, the assessee was not in a position to establish that it had issued any direction to its Accountant. If this was the situation at a length of period of four years, in the normal course of conduct of human affairs it is not believable that the assessee would be in a position to give names of its lenders or establish that it had issued any instructions to its Accountant after a period of 27 years or more.

11 In these circumstances, we do not find this to be a fit case whereby the applicant assessee must be granted a second innings. As laid down by this Court in the case of Commissioner of Income Tax vs. Harikishan Jethalal Patel, 168 I.T.R.472, it is necessary that foundational facts exist so as to raise even a remote doubt which would permit a party to seek second innings as otherwise it would result in a situation whereby the case which is covered by a decision of the Apex Court would require to be reopened at any length of time. As already seen hereinbefore, there are no facts which would prima facie go to show that the assessee deserves second innings.

12 In light of what is stated hereinbefore the question referred to this Court is answered in the affirmative i.e. against the assessee and in favour of the revenue. There shall be no order as to costs.

Sd/- Sd/-

(A.R.Dave, J) (D.A.Mehta,J)

m.m.bhatt