

[1979] 119 ITR 36 (Bombay), [1979] 12 CTR 33 (Bombay)

HIGH COURT OF BOMBAY

Commissioner of Income-tax

v.

Balraj Sahani

M.N. CHANDURKAR AND S.K. DESAI, JJ.

IT REF. NO. 52 OF 1970

FEBRUARY 26, 1979

R.J. Joshi, V.J. Pandit and Miss S.G. Shah *for the Applicant*. S.E. Dastur *for the Respondent*.

JUDGMENT

Chandurkar, J. : This reference at the instance of the Revenue made under section 256(2) of the Income-tax Act, 1961, arises out of assessment proceedings in respect of the assessment year 1960-61. The original assessee, who is now represented by his legal representatives, was a well-known film artist, who declared his total receipts at Rs. 1,07,002 from nine different pictures in the return of income filed by him on 27th July, 1960 for the accounting year ending 31st March, 1960. The total income returned included a sum of Rs. 14,000 in respect of a picture by name 'Chand' produced by Tasviristan, which was a proprietary concern of one Kuldip Saigal referred to by the Tribunal as 'Kuldip'. The written contract in respect of the picture 'Chand' between the assessee and Kuldip was executed on 5th April, 1958, showing that Kuldip was to pay to the assessee a sum of Rs. 25,000 for his role in the picture. Rs. 1,000 was paid on that day and the balance of Rs. 24,000 was payable before the completion of the assessee's work in the picture. The shooting of the picture commenced in November 1958. It continued till middle of June 1959. The picture itself was released for exhibition in September 1959. Out of the amount of Rs. 25,000 agreed to be paid to the assessee, the assessee had received Rs. 11,000 in the earlier accounting year ending 31st March, 1959 and the balance of Rs. 14,000 is said to have been received by the assessee in the accounting year ending 31st March, 1960.

2. The ITO while making an enquiry as to the genuineness of the amount received by the assessee in respect of picture 'Chand' recorded the statement of the producer Kuldip, who stated before the ITO that the agreement between him and the assessee was that the assessee was to be paid Rs. 51,000 and not Rs. 25,000 and that the producer paid Rs. 26,000 in cash to the assessee. The three items in dispute were as follows :

<i>Mode of Payment</i>	<i>Date</i>	<i>Amount paid(Rupees)</i>
Cash	13-6-1959	5,000

Cash	15-6-1959	15,000	
Cash	28-6-1959	6,000	
			26,000

The assessee denied that he had received Rs. 26,000 as stated by Kuldip. Kuldip was called for cross-examination. He did not produce his account books. Though he was cross-examined on 17th June, 1961, the cross-examination was not complete. Kuldip could not be further cross-examined for one reason or the other. Eventually Kuldip died on 6th October, 1962. The assessee stuck to his stand that he had received only Rs. 25,000. The ITO, however, relying on the evidence of Kuldip found that the assessee had received over and above the admitted receipts a sum of Rs. 26,000 in respect of the picture 'Chand'. An addition of Rs. 26,000 was, therefore, made to the total income of the assessee.

3. In appeal filed by the assessee, the AAC took the view that no value could be attached to the account books maintained by Kuldip because it was not shown to the assessee. He further took the view that the statement of Kuldip that Rs. 26,000 were paid in cash could not be accepted because there were no vouchers evidencing those payments, though the earlier payments were evidenced by receipts. The AAC also considered the fact that for almost a period of 10 months Kuldip had not demanded any receipt for Rs. 26,000. It may be stated at this stage that it was only by a letter, dated 12th May, 1960 that Kuldip had written to the assessee that he had not sent a receipt for Rs. 26,000, though his secretary Mr. Bhatia had promised to give a receipt. The assessee's case was that Kuldip wanted to coerce him into acting in his film by name 'Jawahar'. The AAC, therefore, accepted the case of the assessee that he had not received anything more than Rs. 25,000 for the picture 'Chand' and accordingly deleted the addition.

4. The ITO filed an appeal against this order of the AAC. The Tribunal after having doubted the genuineness of the statement of Kuldip with regard to the payment of Rs. 6,000 said to have been made on 28th June, 1959 restored the addition of only Rs. 20,000 as against Rs. 26,000 made by the ITO. The order of the Tribunal which is Annexure D to the statement of the case shows that this addition was made after drawing adverse inference against the assessee for not producing the record of his professional engagements and receipts. The Tribunal led itself to believe that the assessee had some record of his professional engagements and receipts because in the absence of any written record, it would not have been possible for the assessee to admit some cash payments and to give the dates of the receipts. The possession of the record by the assessee was, therefore, inferred by the Tribunal. Referring to the payment of Rs. 6,000 on 28th June, 1959, the Tribunal observed : "We are inclined to hold the last payment of Rs. 6,000 only as doubtful on the above evidence".

5. In view of the addition of Rs. 20,000 and another amount of Rs. 10,000 for unexplained Hundis, which was, however, later deleted by the Tribunal, the ITO initiated penalty proceedings against the assessee by issuing a notice under section

271(1)(c) of the Income-tax Act, 1961. Since the minimum penalty leviable exceeded Rs. 1,000, the matter was referred to the IAC under section 274, who imposed a penalty of Rs. 30,000 upon the assessee for concealment of particulars of income. The assessee then filed an appeal against the order of the IAC before the ITAT. The Tribunal on a re-appreciation of the circumstances which were apparent from the facts of the case of the assessee as well as the correspondence between the assessee and Kuldip held that the cash book maintained by Kuldip was not a genuine one and there was no material to show that the accounts of Kuldip were kept in the regular course of business and no opportunity was given to the assessee to cross-examine the witness Kuldip with reference to the entries contained in his cash book. The Tribunal took the view that Kuldip's accounts remained unproved and it was, therefore, unjust in the circumstances of the case to fasten a liability on the assessee on the basis of unproved accounts for examining which the assessee had no opportunity. With regard to the adverse inference which was originally drawn by the Tribunal while dealing with the quantum appeal of the assessee, the Tribunal took the view that unless there was *prima facie* acceptable evidence as regards payments to the assessee, no inference could be drawn against the assessee merely upon non-production of the records of his professional engagements. The Tribunal, therefore, set aside the penalty levied on the assessee. Out of this order of the Tribunal, the following question has now been referred to this Court under section 256(2) of the Income-tax Act, 1961 :

"Whether on the facts and in the circumstances of the case and having regard to the finding of the Tribunal in the quantum appeal that the receipt of Rs. 20,000 (Rupees twenty thousand) as professional income by the assessee in June 1959 was proved. The Tribunal's conclusion that there was no concealment of income to the extent of Rs. 20,000 (Rupees twenty thousand) and no penalty was leviable, is correct in law ?"

6. Mr. Joshi appearing on behalf of the Revenue has contended that this was not a case in which the assessee had offered any explanation and that explanation was rejected but that finding was recorded by the Tribunal in the quantum appeal after consideration of the entire evidence and having regard to the manner in which the question raised has been framed. Since in the quantum appeal it has been held that it was proved that the assessee had received Rs. 20,000 as professional income which was not disclosed by him in the return, the order of penalty should have been sustained by the Tribunal.

7. The proceedings for penalty against the assessee were taken under section 271(1)(c) of the Income-tax Act, 1961. Under that provision, before the ITO can exercise his jurisdiction to make an order by way of penalty, he has to be satisfied that the assessee has concealed the particulars of his income or furnished inaccurate particulars of such income. The gravamen of the charge against the assessee was that he had concealed the receipt of Rs. 20,000, which he had received from Kuldip in connection with the picture 'Chand'. It is no doubt true that in the quantum appeal the Tribunal had come to a conclusion that the assessee had received a sum of Rs. 20,000 which was paid to him by Kuldip. The finding in those proceedings, however, is not binding in the proceedings relating to penalty. When in the penalty proceedings the ITO has to be satisfied that the assessee has concealed the particulars of his income, it must at the outset be established by the

Revenue that the amount which is said to have been concealed and not disclosed by the assessee in his return of income constituted income of the assessee. It is only then that the further question as to whether the income has been concealed and whether the assessee can give a satisfactory explanation as to why he has not disclosed a particular amount which was his income, will arise.

8. The scope of penalty proceedings was considered by this Court in *CIT v. Gokuldas Harivallabhdas* [1958] [34 ITR 98](#) (Bom.), where it was pointed out that the proceedings under section 28(1)(c) of the Indian Income-tax Act, 1922, in their very nature are penal proceedings and the gist of the offence under section 28(1)(c) is that the assessee concealed the particulars of his income or deliberately furnished inaccurate particulars of such income. Therefore, the Department must establish that the receipt which is said to have been concealed constitutes income of the assessee. It was held in that case that it is perfectly open to the ITO in the penalty proceedings to consider his own finding that the receipt constituted an income for the assessment year, but he is not bound by that finding. It was then observed :

"If for instance, any other evidence was produced in the penalty proceedings, it would be open to him to come to a different conclusion. If it was open to the Income-tax Officer to come to a different conclusion, clearly equally it was open to the Tribunal to come to a different conclusion on this point."

These observations have been approved by the Supreme Court in *CIT v. Anwar Ali* [1970] [76 ITR 696](#).

9. It was, therefore, perfectly open to the Appellate Tribunal when the matter was taken to it in an appeal from the order of the IAC levying the penalty to go into the question as to whether the assessee had in fact received Rs. 20,000 from Kuldip. While dealing with that question the Tribunal has exhaustively dealt with the evidence and has found that Kuldip was an unreliable witness. The Tribunal has also taken into consideration the fact that no finding against the assessee could be reached on the basis of account books which the assessee did not have any opportunity to see or study and in respect of which the assessee did not have any opportunity of cross-examining Kuldip. As already stated, when Kuldip gave his statement before the ITO, he was partly cross-examined ; thereafter he did not appear at all. No steps seem to have been taken by the ITO to secure his presence again. Later, however, he died. Even the account books, on the basis of which the Tribunal in the quantum appeal had come to the conclusion that Rs. 20,000 were proved to have been paid by the assessee, were not produced at any stage. The Tribunal in the penalty appeal, therefore, in our view, rightly came to the conclusion that the account books were unproved and they could not be relied upon in order to fasten a liability on the assessee. It is also difficult to find any infirmity in the view taken by the Tribunal that there was no question of drawing any adverse inference against the assessee for the non-production of the record showing the business engagements of the assessee. In the penalty proceedings, the burden was on the Revenue to *prima facie* show that the assessee had received Rs. 20,000. This evidence consisted of Kuldip's statement and the so-called entries in his account books, Kuldip has been found to be an unreliable witness whose relations with the assessee were strained. The original cash book or account books were not anywhere to be seen. Not only did they remain unproved, but they were in fact not

produced at all. If this was the only material to show that the assessee had received Rs. 20,000 and the material was found to be wholly unreliable, no burden shifted to the assessee which he was called upon to discharge. There was, therefore, no question of drawing any adverse inference because his case throughout had been that he had not received Rs. 20,000. The assessee could not really be asked to prove the negative.

10. Mr. Joshi's contention that penalty order should have been sustained by the Tribunal is mainly based on the footing that the question is so framed that it contemplates a proposition that where the addition of Rs. 20,000 is proved, it would necessarily lead to an inference of concealment. We are not able to read the question in the manner in which Mr. Joshi wants us to read. All that the question seems to suggest is that the receipt of Rs. 20,000 was proved in the quantum appeal. But the question raised in effect is whether the penalty in the instant case could be sustained. It is well-known that in proceedings for penalty for concealment of income, the burden was always on the Revenue to prove concealment and that a finding reached in the quantum appeal that a particular amount was liable to be added as income of the assessee did not automatically result in an order of penalty. With this well established position of law, it is difficult for us to accept the argument that the question referred by the Tribunal was intended to put in issue a contrary proposition. In our view, the Tribunal has found as a fact that the assessee did not receive Rs. 20,000 at all. On that finding, no charge of concealment could possibly arise. The Tribunal was, therefore, justified in setting aside the order of penalty.

11. The question referred to us must, therefore, be answered in the affirmative and in favour of the assessee. The Revenue to pay the costs of this reference.