

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No.205 of 1995

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA Sd/-

HONOURABLE MR.JUSTICE Z.K.SAIYED Sd/-

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	NO
5	Whether it is to be circulated to the civil judge ?	NO

COMMISSIONER OF INCOME TAX - Applicant(s)

Versus

MAHENDRA C SHAH - Respondent(s)

Appearance :

MR BB NAIK for Applicant(s) : 1,

MR MANISH J SHAH for Respondent(s) : 1,

CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA

and

HONOURABLE MR.JUSTICE Z.K.SAIYED

Date : 05/02/2008

ORAL JUDGMENT

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

(1) The Income-tax Appellate Tribunal, Ahmedabad
Bench 'A' has referred the following question

under Section 256(1) of the Income-tax Act, 1961 (the Act), at the instance of the Commissioner of Income-tax:

“Whether on the facts and in the circumstances of the assessee's case, the Tribunal was right in holding that assessee has fulfilled all the conditions for availing of the benefit of immunity from levy of penalty provided in Explanation 5 to Section 271(1)(c) in relation to the inclusion of income of Rs.5,06,712/- representing the value of diamonds and whether such cancellation of penalty is based on true and correct interpretation of the relevant provisions of law?”

- (2) The Assessment Year is 1988-89. Search operations took place at the premises of one M/s. Dinal Gems, 303, Panchratna, Opera House, Bombay under Section 132 of the Act on 03.07.1987. Admittedly, the respondent-assessee was also present at that point of time at the said premises. A personal search of the assessee was undertaken and diamonds worth Rs.5,06,712/- were found from the person of the assessee and seized. On 25.02.1991

assessment under Section 143(3) of the Act was completed on a total income of Rs.5,77,600/-. The record reveals that a return of income declaring total income of Rs.20,880/- was filed on 17.10.1989. This was followed by a revised return filed on 27.09.1990 declaring total income of Rs.5,27,600/-, including the value of diamonds found from the possession of the assessee i.e. worth Rs.5,06,712/-. The Assessing Officer initiated penalty proceedings under Section 271(1)(c) of the Act and levied a penalty of Rs.5,61,464/-. The penalty levied by the Assessing Officer was confirmed in First Appeal by the Commissioner (Appeals). The assessee carried the matter in Second Appeal before the Tribunal, who has deleted the penalty for the reasons recorded in order dated 24.05.1994. The Tribunal has referred to provisions of Explanation 5 to Section 271(1)(c) of the Act and come to the conclusion that the case of the assessee was covered by the Exception provided in

Explanation 5 and, therefore, in light of the statement recorded at the time of search under Section 132(4) of the Act, no penalty was leviable for concealment.

- (3) Mr.B.B.Naik, learned Standing Counsel for the applicant-revenue, assailed the impugned order of the Tribunal primarily on the ground that the Tribunal had wrongly granted immunity to the assessee considering the peculiar facts of the case and the provisions of Explanation 5 to Section 271(1)(c) of the Act. It was submitted that by mere declaration in the statement recorded under Section 132(4) of the Act the assessee did not derive any immunity if the assessee failed to comply with the further requirement of the provisions, namely, payment of tax and interest at the time of filing of the return of income. That in fact the assessee had not even disclosed the amount declared in the statement in the original return of income filed on 17.10.1989 and had not even paid tax. The value of the diamonds

seized at the time of search had been included in revised return of income for the first time on 27.09.1990 and tax had been paid only at that point of time. In the circumstances, it was contended that a default had already taken place vis-a-vis the original return of income and once income had been concealed at the time of filing of the original return of income, filing of revised income would not absolve the assessee from penal consequence. It was further submitted that once the declared amount had not been disclosed in the return of income originally filed and even payment of tax having not been made the assessee was not entitled to immunity provided by Explanation 5 to Section 271(1)(c) of the Act. It was urged that this was a case where till the point of time the search took place the assessee had not voluntarily come forward to declare the income and in fact as per earlier portion of Explanation 5 there was a deemed concealment. Therefore, the case of the assessee cannot be

treated as case of any other assessee who had not been subjected to search and seizure proceedings and a strict view of the matter was required to be taken; that there could not be same treatment of persons i.e. the assessee, who were not similarly situated. In support of the submissions made reliance has been placed on the Apex Court order in case of G.C. Agarwal Vs. Commissioner of Income-tax, Assam, Nagaland, Etc., (1990) 186 ITR 571.

- (4) Mr.M.J.Shah, learned advocate appearing on behalf of the respondent-assessee, heavily relied on the impugned order of the Tribunal and adopted the reasonings as part of his submissions. It was submitted that in so far as the fulfillment of conditions stipulated by Exception No.2 of Explanation 5 though the law requires the assessee to specify in the statement recorded under Section 132(4) of the Act the manner in which the declared income has been derived, an assessee cannot be denied immunity only because such averment is not

found in the statement made if no question to that effect is put to the assessee by the authorized officer. In support of the submission reliance has been placed on decision of Allahabad High Court in case of Commissioner of Income-tax Vs. Radha Kishan Goel, [2005] 278 ITR 454 (All.). Responding to the submission of the Revenue that tax has to be paid along with the return of income and not thereafter, Mr.Shah submitted that the provisions nowhere stipulate any specific point of time nor do the provisions stipulate any outer limit for payment of tax and, therefore, the assessment is the stage before which the record must reveal payment of tax along with interest, if any, considering the fact that, that is the point of time when the Assessing Officer is required to record satisfaction as to concealment or otherwise. Hence, according to Mr.Shah, even if the language of Exception No.2 of Explanation 5 does not provide for such outer limit it is

necessary to read the said requirement to make the provisions workable. It was, therefore, urged that no interference was warranted in the order of the Tribunal.

- (5) In rejoinder Mr.Naik, apart from reiterating the earlier submissions, stated that payment of tax and interest has to be understood latest at the point of time of filing of return of income considering the scheme of the Act as otherwise the Assessing Officer is entitled to come to the conclusion that not only was there concealment of income but the declaration made in the statement recorded under Section 132(4) of the Act was not bona fide as no tax had been paid at the time of filing of the return of income qua such declaration.
- (6) Explanation 5 operates in relation to the penalty leviable under Section 271(1)(c) of the Act and hence, the relevant extract of the provisions may be usefully reproduced:

“Failure to furnish returns, comply with notices, concealment of income, etc.

271.(1) If the [Assessing] Officer or the [Deputy Commissioner (Appeals)] [or the Commissioner (Appeals)] in the course of any proceedings under this Act, is satisfied that any person--

x x x x x

x x x x x

x x x x x

(c) has concealed the particulars of his income or furnished inaccurate particulars of such income,

he may direct that such person shall pay by way of penalty,--

x x x x x

x x x x x

[(iii)] in the cases referred to in clause (c), in addition to any tax payable by him, a sum which shall not be less than, but which shall not exceed twice, the amount of tax sought to be evaded by reason of the concealment of particulars of his income or the furnishing of inaccurate particulars of such income:

Provided that, if in a case falling under clause (c), the amount of income (as determined by the [Assessing] Officer on assessment) in respect of which the

particulars have been concealed or inaccurate particulars have been furnished exceeds a sum of twenty-five thousand rupees, the [Assessing] Officer shall not issue any direction for payment by way of penalty without the previous approval of the [Deputy] Commissioner.]

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Explanation 5: Where in the course of a search under section 132, the assessee is found to be the owner of any money, bullion, jewellery or other valuable article or thing (hereafter in this Explanation referred to as assets) and the assessee claims that such assets have been acquired by him by utilising (wholly or in part) his income,---

(a) for any previous year which has ended before the date of the search, but the return of income for such year has not been furnished before the said date or, where such return has been furnished before the said date, such income has not been declared therein; or

(b) for any previous year which is to end on or after the date of the search,

then, notwithstanding that such income is declared by him in any return of income furnished on or after the date of the search, he shall, for the purposes of imposition of a

penalty under clause (c) of sub-section (1) of this section, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income, [unless,--

(1) such income is, or the transactions resulting in such income are recorded,--

(i) in a case falling under clause (a), before the date of the search, and

(ii) in a case falling under clause (b), on or before such date,

in the books of account, if any, maintained by him for any source of income or such income is otherwise disclosed to the [Chief Commissioner or Commissioner] before the said date; or

(2) he, in the course of the search, makes a statement under sub-section (4) of section 132 that any money, bullion, jewellery or other valuable article or thing found in his possession or under his control, has been acquired out of his income which has not been disclosed so far in his return of income to be furnished before the expiry of time specified in clause (a) or clause (b) of sub-section (1) of section 139, and also specifies in the statement the manner in which such income has been derived and pays the tax, together with interest, if any, in respect of such income."

(7) On a plain reading of the provision it becomes apparent that penalty for concealment of income is leviable if the Assessing Officer, in the course of any proceedings under this Act, is satisfied that any person has concealed the particulars of his income or furnished inaccurate particulars of his income. The computation of penalty has been provided in Clause (iii) which follows Section 271(1)(c) of the Act wherein one finds reference to the tax payable by the assessee. Thus, the provisions stipulate that in the first instance the Assessing Officer has to record his satisfaction as regards concealment of income in the course of a proceeding under the Act which is before the Assessing Officer i.e. assessment proceedings and then compute the amount of penalty leviable on the basis of the amount of tax sought to be evaded by reason of such concealment, which amount is in addition to the tax payable by the assessee on assessment. It is at that stage that an

Assessing Officer is required to determine the concealed income, the tax sought to be evaded and determine whether penalty is leviable.

- (8) Explanation 5 deals with a particular situation, namely, a case involving search and seizure proceedings. Where during course of a search the assessee is found to be owner of any valuable asset, referred to in the said provision, and the assessee claims that such assets have been acquired by the assessee by utilizing (wholly or in part) his income for any previous year which has ended before the date of search, but for such year return of income has not been furnished before the date of search, or, where such return of income has been furnished before the date of search, and such income represented by such asset has not been declared in the return of income; or for any previous year which is to end on or after the date of the search, then, such income shall be deemed to have been concealed for the

purposes of imposition of penalty under Section 271(1)(c) of the Act regardless of the fact that the assessee declares such income in the return of income filed after the date of search. However, there are two Exceptions carved out in such a situation. The first Exception, broadly speaking, relates to the income being reflected in the books of account maintained by the assessee or having been disclosed before Chief Commissioner of Income-tax before the date of filing the return, but for the present it is not necessary to deal with the requirements of the said Exception as the case of the assessee falls within the second Exception.

- (9) The Second Exception stipulates that where an assessee makes a statement under Section 132(4) of the Act that a valuable asset found in possession of the assessee has been acquired by the assessee out of his income which has not been disclosed till the date of

search in the return of income to be furnished before the expiry of time specified in Section 139(1) of the Act, and also specifies the manner in which such income has been derived, the assessee will get immunity from levy of penalty for concealment provided tax together with interest, if any, is paid in respect of such income which is deemed to have been concealed. Therefore, an assessee who seeks benefit of immunity under Exception No.2, is primarily required to show that there is a declaration as regards income (represented by the asset found from possession of the assessee) and such income has not been disclosed till the date of search in the return of income which has to be furnished before the due date alongwith a further statement as to the manner in which such undisclosed income has been derived, coupled with payment of tax and interest.

(10) The dispute between the parties in the present

case centres round the fact that as to whether the assessee is entitled to immunity by virtue of Exception No.2 in Explanation 5 to Section 271(1)(c) of the Act. According to the Revenue, all the conditions stipulated by the Second Exception have not been complied with by the assessee for becoming entitled to the immunity whereas the case of the assessee, as accepted by the Tribunal, is that all the conditions have been fulfilled and the assessee is entitled to immunity.

- (11) According to the Revenue, the statement made under Section 132(4) of the Act by the assessee, at the time of search, does not contain any averment as to the manner in which such income had been derived by the assessee. Furthermore, there is no payment of tax along with the return of income which was originally filed and payment of last tax has been made only subsequently after disclosing such income in the revised return of income which is not

warranted by the language employed in Exception No.2 so as to be entitled to immunity from penalty for concealment.

- (12) The contentions raised on behalf of the Revenue are not required to be accepted for the simple reason that in the first instance, there is no prescription as to the point of time when the tax has to be paid qua the amount of income declared in the statement made under Section 132(4) of the Act. The Tribunal was justified in holding that there would be sufficient compliance of the provision if tax is shown to have been paid before the assessment was completed. The reasoning which has weighed with the Tribunal is that the search proceedings were conducted on 03.07.1987 when the statement under Section 132(4) of the Act was made. The last date for payment of advance tax qua the last installment of advance tax was 15.12.1987 in such a case, according to the Tribunal, and in the event, the assessee did not pay tax qua

the income declared in the statement made under Section 132(4) of the Act, the assessee became liable to pay interest in accordance with the relevant provisions of the Act because Exception No.2 itself specifies payment of tax, together with interest, if any, indicating that legislature did not stipulate any specified time limit for payment of tax. There is no infirmity in this reasoning.

- (13) However, the outer limit has to be the point of time when the assessment proceedings are undertaken by the Assessing Officer because the opening portion of Section 271(1) of the Act requires the Assessing Officer to record satisfaction in the course of such proceedings, and the satisfaction has to be as regards the concealment of particulars of income or furnishing inaccurate particulars of income. In other words, a satisfaction as to concealment can be arrived at the earliest

point of time only in the course of assessment proceedings and for that purpose the Assessing Officer is required to verify and ascertain whether the income has been declared and tax paid thereon. For the purposes of Explanation 5, which comes into play only in case of search and seizure proceedings, return of income per se would have no relevance if one reads entire Explanation 5, including the two Exceptions. The emphasis on disclosure in the return of income is relevant only for the purposes of avoiding the deeming fiction of concealment in relation to the previous year which has already ended before the date of search but return of income for such year had not been furnished, or where return has been filed such income has not been disclosed. In so far as a previous year which is to end on or after the date of search return of income would have hardly any relevance because the Explanation itself stipulates that regardless of such income having been declared in any

return of income furnished on or after the date of search the assessee would become liable to imposition of penalty, the only exception being a declaration at the time of search. As to what that declaration has to be has already been examined hereinbefore and it is not necessary to repeat the same.

- (14) In the present case, admittedly the Assessment Year being 1988-89 and the search having taken place on 03.07.1987 the return of income was not due before 31.07.1988. Therefore, whether the income represented by the value of the asset was shown in the return of income or not became irrelevant once a declaration had been made about such income having not been disclosed till the date of search in the return of income to be furnished before the time specified in Section 139(1) of the Act as required by the earlier part of Exception No.2. In fact, at the cost of repetition, it is required to be stated that the legislative

intent and the scheme that flows from a plain reading of the provision makes it clear that in relation to search and seizure proceedings, for becoming entitled to immunity from levy of penalty the basic requirement is in case of Exception No.1 relevant entry in the books of account or disclosure before the competent authority, and in relation to Exception No.2 disclosure in the statement made under Section 132(4) of the Act. Disclosure or otherwise in the return of income post the date of search would not absolve an assessee from the deeming provision, namely, 'deemed concealment' once an assessee is found in possession of a valuable asset at the time of search. Hence, the contention raised on behalf of the Revenue that penalty is leviable under the main provision for concealment vis-a-vis the return of income does not merit acceptance.

- (15) In so far as the alleged failure on the part of the assessee to specify in the statement under Section 132(4) of the Act regarding the

manner in which such income has been derived, suffice it to state that when the statement is being recorded by the authorized officer it is incumbent upon the authorized officer to explain the provisions of Explanation 5 in entirety to the assessee concerned and the authorized officer cannot stop short at a particular stage so as to permit the Revenue to take advantage of such a lapse in the statement. The reason is not far to seek. In the first instance, the statement is being recorded in the question and answer form and there would be no occasion for an assessee to state and make averments in the exact format stipulated by the provisions considering the setting in which such statement is being recorded, as noted by Allahabad High Court in case of CIT Vs. Radha Kishan Goel (supra). Secondly, considering the social environment it is not possible to expect from an assessee, whether literate or illiterate, to be specific and to the point regarding the conditions

stipulated by Exception No.2 while making statement under Section 132(4) of the Act. The view taken by the Tribunal as well as Allahabad High Court to the effect that even if the statement does not specify the manner in which the income is derived, if the income is declared and tax thereon paid, there would be substantial compliance not warranting any further denial of the benefit under Exception No.2 in Explanation 5 is commendable.

- (16) Hence, the Tribunal was justified in coming to the conclusion that in so far as the value of diamonds was concerned, the assessee having made a declaration under Section 132(4) of the Act and paid taxes thereon, had fulfilled all the conditions for availing the benefit of immunity from levy of penalty as provided under Explanation 5 to Section 271(1)(c) of the Act. In absence of any infirmity in the order of Tribunal on this count the question referred is answered in the affirmative i.e.

in favour of the assessee and against the Revenue.

(17) The reference stands disposed of accordingly.
There shall be no order as to costs.

Sd/-
[D.A. MEHTA, J]

Sd/-
[Z.K. SAIYED, J]

Bhavesb*

