Karnataka High Court Commissioner Of Income-Tax vs Sudharshan Silks And Sarees on 6 October, 2001 Equivalent citations: (2001) 171 CTR Kar 256, ILR 2002 KAR 82, 2002 253 ITR 145 KAR, 2002 253 ITR 145 Karn, 2002 120 TAXMAN 152 Kar Author: T S Thakur Bench: T S Thakur, D S Kumar JUDGMENT Tirath Singh Thakur, J. 1. The Income-tax Appellate Tribunal, Bangalore, has referred to this court under Section 256 of the Income-tax Act, 1961, the following common question of law that arises for consideration in all these references : "Whether, on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal is right in law in upholding the orders of the Commissioner of Income-tax (Appeals) cancelling the penalty levied under Section 271(1)(c) ?" 2. The references relate to different assessment years of the two assessees carrying on business in the name and style of Sudarshan Silk and Sarees and Sudarshan Silks. Assessments for Sudarshan Silk and Sarees were completed for the assessment years 1984-85, 1985-86 and 1986-87 on different dates, on the basis of the returns filed by the said assessee. The assessment of Sudarshan Silks was similarly completed for the assessment year 1986-87. Some time thereafter search and seizure proceedings in terms of Section 132 of the Income-tax Act were conducted on the common business premises of the two assessees on October 14/15, 1987. During the course of search, certain goods arid papers containing details of sales as well as purchases not otherwise accounted for in the books maintained by the assessees were discovered. A statement made by G.S. Ramesh, one of the partners, made a clean breast of the modus operandi adopted by the assessees in concealing the true turnover of the assessees for the relevant period. He admitted that only a part of the sales and purchases were recorded in the account books of the concerns during the assessment years referred to above. Based on the incriminating documents containing the details of the sales and purchases, the assessees were asked to explain the position with respect to earlier years. The assessees filed revised returns for the years under consideration on the basis whereof reassessment proceedings were completed accepting the figures disclosed in such returns. 3. With the completion of the reassessment proceedings notices under Section 271(1)(c) were issued to the assessees calling upon them to show cause why an appropriate penalty should not be levied on account of the concealment of the turnover and the assessees failure to disclose correct particulars of their income. The assessees demurred. They filed written explanations in which it was, inter alia) alleged that an agreement had been reached between Shri J.S. Ramesh, representing the assessees and the Deputy Director of Intelligence, according to which, while the assessees could file the revised returns showing extra income, the authorities would not levy any penalty or institute any prosecution proceedings against them. It was alleged that the revised returns disclosing higher turnover and taxable income having been filed pursuant to the said assurance, the assessees were not liable to suffer any penalty as proposed in the notices. The Assistant Commissioner of Income-tax did not however find favour with the explanation offered by the assessees. He was of the opinion that the records maintained by the Department, bore no evidence of any assurance having been extended to the assessees as alleged. He was also of the view that there was no evidence of the fact that

the assessees had been persuaded to file revised returns admitting additional income. The filing of a revised return could not according to the Assistant Commissioner absolve the assessees of their liability to suffer penalty in the light of the disclosures made during the course of the search and the statement of Shri J.S. Ramesh, explaining the modus operandi adopted by the assessees. The Assistant Commissioner repelled the contention that the assessees' cases fell under Explanation 5 to Section 271(1)(c). Being of the opinion that the assessees had deliberately concealed the particulars of their income and furnished inaccurate particulars thereof, the Assistant Commissioner levied the maximum permissible penalty under the provisions referred to above. 4. Aggrieved by the aforementioned orders, the assessees filed appeals before the Commissioner of Income-tax (Appeals). The Commissioner (Appeals) affirmed the finding returned by the Assistant Commissioner in so far as the immunity claimed by the assessees under Explanation 5 to Section 271(1)(c) was concerned. The Commissioner (Appeals) held that the said Explanation did not apply to the cases at hand, inter alia, for the reason that the assessees had not maintained the books of account as they ought to have in order to entitle them to the immunity under the said provision. On the merits of the controversy, the Commissioner (Appeals) opined "that the facts and circumstances indicated that an inducement had been offered to the assessees to declare higher turnovers which the assessees accepted in order to buy peace with the Department". The search had not according to the Commissioner (Appeals) yielded any material suggesting suppression of sales for the assessment years in question, apart from a general inference that the assessees may have followed the same method of suppression as was followed by them for the assessment year 1988-89. Relying upon the decision of the Supreme Court in Sir Shadilal Sugar and General Mills Ltd. v. CIT , the Commissioner (Appeals) cancelled the orders imposing the penalties. 5. The correctness of the orders passed by the Commissioner (Appeals) was questioned by the Revenue in appeal before the Income-tax Appellate Tribunal, Bangalore, who dismissed the same upholding the order made by the Commissioner (Appeals). The Tribunal, inter alia, held that although incriminating material had been found during the search, the same was not used by the Departmental authorities in making the assessments while making a revised assessment. Such assessments were made totally on the basis of estimation of income as disclosed in such returns, which implied that the same had been filed in good faith. The Tribunal was of the view that the levy of penalty could be justified only if stronger evidence than a mere declaration of higher income in the revised returns was available. It was also of the opinion that although there was nothing on record to suggest that any assurance had been extended to the assessees yet the facts suggested that an inducement "must have been" given to the assessees. The Tribunal has thereafter referred the question extracted earlier to this court in each one of these references, at the instance of the Revenue. 6. We have heard learned counsel for the parties and perused the record. 7. The respondent-assessees have not pursued before us their claim of immunity from levy of penalty in terms of Explanation 5 to Section 271 of the Income-tax Act. That leaves us with three distinct aspects of the question

referred for our opinion. The first out of these is whether or not any assurance was extended to the assessees that in case they fife revised returns regarding the earlier years no penalty would be levied upon them. The second is whether any such assurance could be lawfully extended or enforced if proceedings for levy of penalty were in fact initiated by the Revenue. The third and the only other aspect that falls for consideration is whether in the absence of an assurance as claimed by the assessee, the filing of a revised return declaring a higher turnover in the facts and circumstances of the case and in particular the modus operandi which the assessees had adopted in avoiding disclosure of the actual turnover, a case for levy of penalty was made out. 8. The assurance which the assessees claim was extended to them is not borne out by the record. No documentary or other evidence is available to support the plea that any such assurance was extended by the authority conducting the search and seizure operations. The Appellate Tribunal has also recorded a specific finding to the effect that there was nothing on record to show that any assurance like the one set up by the assessees was extended to them. All the same, the Tribunal has held that such an assurance must have been extended. It has in this regard observed as under : "Although there is nothing on record to show that he was given an assurance that no penalty would be levied, the facts, however, clearly suggest that such an inducement must have been given by the searching party." 9. We have found it difficult to subscribe to the above line of reasoning. If there is nothing on record to support the plea of the assessees, that no penalty would be levied upon them, the conclusion of the Tribunal that such an inducement in the facts of the case been given by the search party becomes purely conjectural. The authorities invested with the power to determine the facts and record the findings have to go by what is available on record and not by what they think or assume must have happened. The assumption that an inducement must have been given by the search party is all told on a mere assumption unsupported by any material whatsoever on record. Such an assumption could not provide a sound basis for determining the rights and obligation of the parties locked in a legal battle. Even otherwise the reasons that have prevailed with the Tribunal in holding that such an inducement must have been made all tend to fathom the working of the assessees' mind. We are afraid such an exercise is hazardous keeping in view the complexities which beset the working of a human mind or any attempt to unravel the same. The authorities exercising quasi-judicial functions would therefore do well to go by what is available on record in the form of admissible material instead of proceeding on surmises that do not stand closer scrutiny. That findings of fact recorded by the Tribunal which are based on conjectures, surmises or suspicion or which are recorded on the basis of irrelevant material or material that was partly relevant and partly irrelevant, do not bind this court is fairly well settled. We need in this regard refer only to the following passage appearing in the decision of the Supreme Court in CIT v. S.P. Jain (headnote) : "The High Court and the Supreme Court have always the jurisdiction to interfere with the findings of the Appellate Tribunal if it appears that either the Tribunal has misunderstood the statutory language, because the proper construction of the statutory language is a matter of law,

or it has arrived at a finding based on no evidence or where the finding is inconsistent with the evidence or contradictory of it, or it has acted on material partly relevant and partly irrelevant or where the Tribunal draws upon its own imagination and imports facts and circumstances not apparent from the record or bases its conclusions on mere conjectures or surmises or where no person judicially acting and properly instructed as to the relevant law could have come to the determination reached. In all such cases the findings arrived at are vitiated." 10. It was argued on behalf of the assessees that in order that a finding of fact recorded by the Tribunal may be ignored it was necessary that the correctness of such a finding must itself have been referred as a question to this court. Reliance in support was placed on the decision of CIT v. Greaves Cotton and Co. Ltd. ; K. Ravindranathan Nair v. CIT [2001] 247 ITR 178 (SC). It was argued that since the correctness or otherwise of the finding had not been referred as a question the finding recorded by the Tribunal could not be gone into nor could the same be ignored while answering the question referred for the opinion of this court. 11. A finding of fact may be recorded by the Tribunal on the basis of what it considers to be admissible material. Any challenge to such a finding on the ground that the material is inadmissible or irrelevant would require the party disputing the correctness of such a finding to raise a question to that effect and have the same referred for opinion under Section 256 of the Income-tax Act. The court may in any such case examines whether the finding is vitiated by any fatal defect, in that the same is recorded without any evidence, or is otherwise perverse or is supported by the evidence which is partly admissible and partly inadmissible. We are however dealing with a case where the Tribunal has come to the conclusion that there is nothing to support the plea advanced by the assessees. The absence of any material or evidence to support the alleged assurance to the assessees is not in dispute. No forensic exercise is, therefore, required to determine whether a finding which is based on no supportive evidence on the record can at all be sustained or considered binding upon the reference court. That apart, the question referred to this court is in our opinion wide enough to include within its scope the tenability of any finding of fact recorded by the Tribunal. Suffice it to say that the finding of the Tribunal that an assurance like the one alleged by the assessees must have been extended to them even in the absence of material on record to support the same is unsustainable being purely conjectural in nature. In that view, therefore, it is unnecessary for us to examine whether any assurance like the one set up by the assessees "could have been" extended to the assessee or could be relied upon in proceedings for levy of penalty against them. 12. That leaves us with the question whether the filing of the revised returns disclosing turnovers which had not been disclosed at the time of the finalisation of the assessment proceedings earlier would amount to concealment to warrant levy of penalty. We may at the threshold observe that the filing of a revised return by the assessee does not in itself either establish his bona fides nor does it necessarily imply that he had concealed his income. The circumstances in which the revised return is filed are what really matter. In Sir Shadilal Sugar and General Mills Ltd. v. CIT , the Supreme Court held that there could be a hundred and one reasons for an

assessee to agree to additions and that concurrence to any such additions would not imply that the amount agreed to be added was concealed income. The court observed (page 713) : "We find that the assessee admitted that these were the incomes of the assessee but that was not an admission that there was deliberate concealment. From agreeing to additions, it does not follow that the amount agreed to be added was concealed income. There may be a hundred and one reasons for such admission, i.e., when the assessee realises the true position, it does not dispute certain disallowances but that does not absolve the Revenue from proving the mens rea of a quasi-criminal offence." 13. The present is not however a case where the assessee has agreed to additions being made to his income in the course of the assessment proceedings nor is it a case where the assessee is sought to be penalised on account of any disallowances made by the assessing authority. The revised returns filed by the assessees came in circumstances and in a background that cannot be divorced from the question of bona fides of the assessee. These returns were filed after the search and seizure operations were carried out on the common business premises of the assessees in which the party conducting the search had come across material showing large scale concealment of the true turnover. Super added to the said seizures was the statement of Shri J.S. Ramesh, representing the assessees in which the modus operand! adopted by the assessees for concealing the true turnover of the assessees was divulged. In his deposition, Shri Ramesh answered some of the questions put to him thus : "Question No. 32.–For the purpose of sale on each day, how many bill books you use for each of the firms ? Answer.–One bill book for the accounted sales and the one for unaccounted sales. .... Question No. 50.– Under whose instructions the salesmen write the bills ? And how will they know as to which particular bill book has to be used for the sale of a particular saree ? Answer.–The procedure is the sale bills will be issued in respect of all the sale either accounted or unaccounted. After the morning hours, sales bills in respect of accounted sarees sold will be drawn afresh and only these sales will be entered in the daily sales ledger. This procedure is being adopted under my instructions." 14. The substance of what was stated by Shri Ramesh, was that the assessees were entering only some of the bills in the sales register and destroying the remaining thereby actively concealing their actual business turnover. The assessing authority has referred to the statement made by Shri Ramesh, in the order of assessment passed on the basis of the revised returns. We do not wish to burden this judgment by referring to the questions and the answers given to the same. What is important is that the entire process of concealment of the turnover and the modus operandi adopted by the assessees having been discovered on account of search proceedings and the statement made by Shri Ramesh, the filing of a revised return even for the previous years in regard to which the books of account and other documentary evidence had been destroyed by the assessees could not be said to be aimed at correcting any bona fide error in the disclosure of the particulars of their income. The filing of the returns was under the compulsion of the circumstances that had come to light in which it would have become difficult for the assessees to avoid reopening of the assessments made for previous years especially when it was not the case

of the assessees that the procedure described by Shri Ramesh, in his statement was a new innovation not followed in the earlier years. 15. Even assuming that the submission of the revised returns was not under the compulsion of the search and seizure, yet the same would not by itself lead to the conclusion that there was no intention on the part of the assessees to conceal their income when they filed their original return. The question whether there was any such intention would depend upon the facts and circumstances of each case that throw light on the mental process of the assessee at the relevant time. Subsequent conduct may be one of the factors which can be taken note of but mere filing of a revised return may not be sufficient to exonerate the assessee. Even if the Department had not come across any tangible evidence in regard to the concealment for the previous assessment years, yet so long as the question whether there was any such concealment was open before the Department, and the latter had the option to initiate appropriate proceedings, the submission of revised returns by the assessee cannot be viewed in isolation. 16. In CIT v. K. Mahim , the assessment of the assessee for the relevant assessment year was reopened and detailed enquiries pursued in respect of the same. The assessee, however, filed a revised return voluntarily on the basis whereof the Income-tax Officer completed the reassessment proceedings. A notice was thereafter issued to the assessee under Section 271(1)(c) of the Income-tax Act, 1961, for concealment. The assessee contended that inasmuch as he had filed the revised return voluntarily and that the assessment had been completed on the basis of the same, the levy of penalty would be invalid as no concealment could be established with reference to the revised return. The Inspecting Assistant Commissioner rejected that contention, but the Tribunal cancelled the penalty holding that so long as the assessment proceedings were pending and investigations were being conducted by the Department, an assessee could rectify the return by filing a revised return under Section 139(5) before the Department became aware of the particular activity in respect of which the income was concealed. On a reference a Division Bench of the High Court of Kerala held that the filing of a revised return voluntarily by the assessee when he knew that the Department was conducting investigations against him would not exonerate the assessee from the liability to penalty under Section 271(1)(c) of the Act. The court observed (head-note) : "However, mere filing of a revised return by the assessee at any time prior to the Department cornering the assessee in relation to a particular concealed income, would not be sufficient to exonerate the assessee from the penal consequences. The mere fact that investigation by the Department is afoot, though nothing tangible had come into the possession of the Department at any particular point of time, may induce a dishonest assessee to submit a revised return. Such an exercise will not absolve him of the consequences flowing from an act which on his part had already been completed, namely, the concealment of income or the particulars thereof." 17. To the same effect is a judgment of the said court in Indian Cloth Depot. v. CIT , where also the premises of the assessee were searched and several books and documents seized from the same which related to the assessment year 1974-75. Revised returns were however filed for the earlier years also. The assessing authority had on the basis of the seizures made concluded that the

similar duplicate books of account were maintained even for the previous years which had been destroyed and levied a penalty. The plea of the assessee that the revised returns were voluntary which could not be made a basis for levy of penalty was rejected by the Inspecting Assistant Commissioner, the Tribunal and even the High Court on reference. 18. In the instant case also the argument advanced by the assessee is that although seizures made in the course of search proceedings showed concealment for the accounting period during which the search was conducted yet, the said seizures did not disclose anything incriminating against the assessees for the previous periods. Revised returns filed for the previous periods were according to the assessees voluntary and faithful disclosures. That submission cannot in our opinion be accepted. Mere filing of a revised return is not enough. The background and the circumstances in which such returns are filed hold the key to the answer whether such returns are bona fide. What the revised returns in the present cases meant was to pre-empt any action on the part of the Department for reopening of the earlier assessments on the basis of seizures and disclosures made in the course of the search proceedings. Our answer to the question referred by the Tribunal is therefore in the negative. The Income-tax Appellate Tribunal was not in our view justified in cancelling the penalty levied upon the petitioners under Section 271(1)(c). The references disposed of accordingly.