

(1998) 09 MAD CK 0103

In the Madras High Court

Case No : Writ Petition No. 14625 of 1994 and W.M.P. No. 22074 of 1994

C. Christopher

APPELLANT

Vs

Commissioner of Income Tax and Another

RESPONDENT

Date of Decision : 22-09-1998

Acts Referred:

Income Tax Act, 1961 — Section 271, 273A, 273A(1)

Citation : (2004) 268 ITR 511

Hon'ble Judges : R. Jayasimha Babu, J

Bench : Single Bench

Advocate : Arvind P. Datar, for the Appellant; Chitra Venkataraman, for the Respondent

Final Decision : Dismissed

Judgement

R. Jayasimha Babu, J.—On September 17, 1987, a search was conducted in the residential premises, at three business premises situated at Tuticorin and one business premise situated at Pavor Chatram, Tirunelveli District, of the assessee u/s 132 of the Income Tax Act, 1961 (hereinafter referred to as "the Act"). As a result of the search, a quantity of 842 gms. of jewellery valued at Rs. 2,50,000 was recovered from the residence of the assessee, cash of Rs. 30,000 was recovered from the business premise at Pavor Chatram and account books, documents and pronotes were recovered from the residence of the assessee. During the course of the search, the assessee expressed his desire to settle the tax matters with the Department by making disclosure, but no disclosure was made on the day of the search, or before the search was completed. No statement was given by the assessee under oath u/s 132(4) of the Act. Thereafter, the assessee made a disclosure on October 1, 1987, and offered additional income for assessment in the case of the assessee as also in the case of his wife. He disclosed an income of Rs. 13,35,000 in his own case and a sum of Rs. 5,50,000 in the case of his wife. While making disclosure, he showed investments in the residential house purchased in his name and in the name of

his daughter, credits in the name of his staff, amounts outstanding from a textile company, money lent outstanding outside the accounts as also silver jewels. The assessments of the assessee's income for the assessment years 1984-85 to 1988-89 were thereafter revised on the basis of the revised return filed by the assessee on November 25, 1987. On reassessment, the assessee was found to have additional taxable income for all those years and tax was levied accordingly.

2. Penalty proceedings were initiated thereafter and the penalty was levied on March 25, 1991, under Sections 271(1)(c) and 273 of the Act. The assessee filed a petition before the Commissioner of Income Tax on or about April 30, 1991, seeking waiver of the penalty levied. In that he pleaded that he had disclosed the concealed income in his hands as also in the hands of the family members on the understanding that he will not be penalised for the excess income. No other reason was set out in the petition.

3. The Commissioner of Income Tax by his order dated December 10, 1993, which is the order impugned in this writ petition rejected the assessee's petition. In the course of his order he noticed the fact that for these assessment years the revised return showed substantially larger income than that disclosed in the original return, that the assessee had come forward to disclose the income that had been concealed only after the search had taken place on September 17, 1987, that the disclosure therefore was not voluntary and that even the plea put forth by the assessee itself would show that the disclosure was not voluntary, but was activated by the alleged promise of the Deputy Director to waive penalty.

4. Learned counsel for the assessee submitted that under Clause (2) of Explanation 5 to Section 271(1) of the Act, the disclosure made by the assessee on October 1, 1987, had the effect of rendering the income disclosed therein to be income which has not been concealed, as according to counsel, the disclosure had in fact been made even prior to October 1, 1987, during the course of the search itself. Clause (2) of Explanation 5 relied on reads as under :

"(2) he, in the course of the search, makes a statement under subsection (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 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."

5. That Explanation requires that the assessee who had been subjected to search, makes a statement u/s 132(4) of the Act in the course of the search and states therein that the money, bullion, jewellery or other valuable article or thing found in his possession or under his control had been acquired out of his income which had not been disclosed so far in his return of income to be furnished u/s 139(1), specifies in the statement the manner in which such income had been derived and pays the tax together with interest, if any, in respect of such income.

6. The statement referred to in the provision therefore, is a statement made under oath in the course of the search. That statement should not only confirm that the things found in the possession or under the control of the assessee at the time of the search had been acquired out of undisclosed income, but also set out the manner in which the income had been derived. But no such statement had been made by the assessee in this case on the date of the search. The payment of tax together with interest referred to in this clause need not be on the same day of the search as the words "in the course of search" apply to the statement and not to the payment of tax and interest.

7. The expression of desire on the part of the assessee to disclose his income conveyed to the officer in charge of the search does not amount to a statement under oath for the purpose of Section 132(4) of the Act and the Explanation to Section 271(1) of the Act. Such expression of desire would not in any way bind either the maker or the person to whom the statement was made, as it would always be open to the assessee to change his mind and decline to proceed with that professed desire expressed on the date of the search. The statement made u/s 132(4) of the Act is a statement which could be used in evidence in any proceeding under the Act. The mere expression of desire without anything more is obviously not a statement which can be used as evidence in any proceeding under the Act, as that would not amount to evidence for the purpose of proving anything required to be proved for the purpose of the Act.

8. Moreover, the assessee had not at any time questioned the imposition of penalty on the ground that the income had not been concealed. The order imposing penalty has become final subject to the discretionary power to grant waiver to the extent that may be permissible in law. The conduct of the assessee also thus shows that the assessee had concealed his income and the income so concealed was not taken out of the purview of Section 271 by reason of the expression of his desire to make a disclosure on the date of the search.

9. Counsel for the assessee submitted that the Commissioner has failed to apply his mind to the case that had been pleaded before him and has misconstrued the statutory provisions and abdicated his jurisdiction in rejecting the prayer for waiver. It was submitted that the disclosure made by the assessee on October 1, 1987, was a disclosure made voluntarily and in good faith, that the disclosure was full and true and further such disclosure had been made prior to the detection by the Income Tax Officer of the particulars of income, or of inaccuracy of particulars in respect of such income.

10. Counsel laid stress on the word "detection" used in Section 273A(1)(b) of the Act. That provision reads as under :

"in the case referred to in Clause (ii), has, prior to the detection by the Assessing Officer, of the concealment of particulars of income or of the inaccuracy of particulars furnished in respect of such income, voluntarily and in good faith, made full and true disclosure of such particulars ;"

11. The argument was that the detection is at terms different from seizure or search as something more may have to be done after the search in order to enable the Assessing Officer to come to a conclusion that there had been concealment of particulars of income or inaccuracy in the particulars furnished in respect of the income. His further argument was that if the statement of disclosure was made by the assessee before the Assessing Officer completed his scrutiny of the material that was seized and came to a conclusion that the concealment had been established and had quantified the same, the disclosure made by the assessee should be regarded as voluntary and in good faith and, therefore, the Commissioner should have exercised the discretionary power u/s 273A of the Act, in favour of the petitioner.

12. Counsel also referred to the word "voluntarily" in Section 273A(1)(b) and submitted by placing reliance on the decision of a Full Bench of the Allahabad High Court in the case of Bhairav Lal Verma Vs. Union of India (UOI), , submitted that the word "voluntarily" in Section 273A of the Act means out of free will without any compulsion and the assessee's disclosure being one made without any compulsion even before the detection of the concealed income by the Income Tax Officer, the disclosure must be treated as voluntary. Counsel also relied on the decision to support his argument that it cannot be said as a principle of law that disclosure of concealed income after the day of search cannot be voluntary, as the disclosure may extend to matters which could not have been detected even after scrutiny of the material that was seized during the course of the search. For the same proposition, reliance was also placed on the decision of the High Court of Kerala in the case of A.V. Joy, Alukkas Jewellery Vs. Commissioner of Income Tax and Others, , wherein it was observed that the disclosure or the filing of return after the search by itself would not be decisive of the fact that the returns and disclosures were not voluntary.

13. A reference was also made to the case of Harjas Rai Vs. Commissioner of Income Tax and Another, , wherein a learned single judge held that Section 273A has to be liberally construed as it is intended to encourage voluntary disclosure of income. The facts of that case show that there had been no search in the premises of the assessee.

14. Counsel fairly brought to the notice of the court the Explanation that formed part of Section 273A(1), which Explanation remained on the statute book from October 1, 1984, to May 24, 1985. That Explanation read as under :

"Explanation 2.--Where any books of account, other documents, money, bullion, jewellery or other valuable article or thing belonging to a person are seized u/s 132 and within fifteen days of such seizure, the person makes a full and true disclosure of his income to the Commissioner, such person shall, for the purposes of Clause (b) of this sub-section, be deemed to have made, prior to the detection by the Income Tax Officer of the concealment of particulars of income or of the inaccuracy of particulars furnished in respect of such income, voluntarily and in good faith, a disclosure of such particulars."

15. It was submitted by counsel that under that Explanation, if the assessee whose premises had been searched and valuable articles have been seized, within a period of fifteen days of such seizure, makes a full disclosure of his income, such disclosure if made within the time specified, shall be deemed to have been made prior to the detection by the Income Tax Officer of the concealment of particulars of income or of the inaccuracy of the particulars. The deletion of the Explanation according to counsel, would still not have the effect of limiting the rights of the assessee and the assessee by expressing his desire at the time of search to make a disclosure, and thereafter following it up with the disclosure within a reasonable time would be entitled to the benefit of Explanation 5 Clause (b)(2) of Section 271(1) of the Act. It was also submitted that notwithstanding the reference to seizure and detection in that Explanation, detection is not to be equated with seizure; that detection can be said to have been made only after what had been seized had been scrutinised and analysed by the Assessing Officer, and the extent of concealment or inaccuracy in the particulars had been determined.

16. Counsel for the Revenue, on the other hand, supported the order of the Commissioner and submitted that the assessee cannot invoke Explanation 2 to Section 273A(1)(b) of the Act as the assessee had submitted to the penalty that had been imposed and there was no appeal against that order. The language of the Explanation also, it was submitted, would show that the statement referred to therein could have to be made at the time of the search and not at any subsequent point of time. Counsel submitted that the disclosure made after a search can never be regarded as voluntary, as but for the search no declaration would have been made at all, and it was not even the case of the assessee that even if the search had not been made the disclosure would have been still made by the assessee. The provocation for the disclosure was the search and the mere fact that by making a disclosure after some time and trouble was saved to the Department in having to scrutinise the books and making further investigation, and thereafter determining the extent of concealment and inaccuracy in the particulars would not render what was essentially involuntary into a voluntary disclosure. The deletion of the Explanation that had been added on October 1, 1984, also disclosed the legislative intention of treating the disclosure made after the time of search as involuntary. It was further submitted that the word "detection" in Section 273A(1)(b) should be understood as referring to the seizure, as the process of detection commenced with the seizure and so construed the disclosure made subsequent to the search and seizure was not a voluntary disclosure. It was therefore submitted that the Commissioner was right in denying any relief to the assessee.

17. Counsel for the Revenue invited my attention to the decision of the Supreme Court in the case of *Tribhovandas Bhimji Zaveri Vs. Union of India (UOI) and Others*, in support of the submission that the disclosures made subsequent to a search are not voluntary. The Supreme Court at page 376 of the report observed that the declaration of the concealed income made after the books of account or

other documents or valuable assets have been seized cannot be said to be a voluntary disclosure. It is so because the documents and assets seized would disclose to the assessing authority the concealment of income. Such concealment could have been in respect of the previous year in which the seizure was made or in respect of any previous year prior thereto.

18. Attention was also invited to the decision of the apex court in the case of Smt. Harbans Kaur etc. Vs. Commissioner of Wealth-tax, Jullundur, wherein the court held with reference to Section 18B of the Wealth-tax Act, 1957, that if the conditions stipulated in the section are satisfied, the Commissioner has a discretion in the matter and if the order shows that he applied his mind and reasons are given for his decision not to waive the penalty in full, the discretion is not to be lightly interfered with.

19. The assessee in this case appears to have carried on extensive business of money-lending. The disclosure made by the assessee shows that the money-lending outstanding was Rs. 9,98,000. The investments made in the houses purchased in his own name and in the name of his daughter as also the cash seized and the jewels were apparently made out of or is a part of the income realised from money-lending.

20. During the search which was conducted not only in the residence of the assessee but also in his business premises, the Revenue had seized in addition to cash and gold, account books and various other documents. After the search and seizure of bullion, cash and account books the assessee came forward with his disclosure. The assessee did not file any appeal against the order imposing penalty. The assessee sought for waiver only on the premise that the penalty was leviable. Penalty in the circumstance, in fact is leviable as the income had admittedly been concealed and the assessee had failed to make a statement during the course of the search admitting the concealment of income, the manner in which such concealment had been effected and the acquisition of all the proceeds from out of the concealed income.

21. In the petition for waiver the assessee had not pleaded that he had disclosed something which could not have been discovered from a scrutiny of what had been seized. The request for waiver was based on the alleged promise held out by the investigating authorities that a true and complete disclosure would be rewarded by a waiver of the penalty. No evidence was adduced before the Commissioner to support that alleged promise and it is not also the case pleaded in the petition.

22. Counsel for the petitioner strenuously contended that disclosures made subsequent to seizure cannot be indiscriminately branded as involuntary, that the voluntary character of the disclosure must be determined with reference to the nature and extent of the bullion, cash or documents seized and the extent to which the amount of income concealed, or the inaccuracy in the particulars of the income furnished, could be ascertained from the examination of the seized

materials. It was also contended that the Commissioner was under a duty to embark upon such exercise and treat such disclosure as having been voluntarily disclosed and eligible for waiver of penalty.

23. Section 273A(1)(b) uses the term "detection" while Section 132 refers to search and seizure, and the Explanation that was part of Section 273A(1) referred to both seizure and detection. The Explanation which was on the statute book for a short time furnishes a clue to the ascertainment of the legislative intention in using the word "detection" in Section 273A(1)(b). The term is used in this provision in a very wide sense and not in the narrow sense in which counsel invited the court to view the term. After a search is conducted, the provisions of the Act prescribe a time limit within which the seized material has to be examined and on the basis of which further steps are to be taken by the Revenue. It could not have been the intention of Parliament after having provided for search and seizure and such time limits within which further steps pursuant to such search and seizure are to be completed, to open the gates as it were and permit the assessee who had been subjected to search to avoid all penalty by enabling him to make a disclosure on any day prior to the date of completion of the reassessment consequent to the search, as it is only when the reassessment is made, it can be said with definiteness that the extent of income concealed as also the extent of the inaccuracies in the particulars furnished are determined and quantified. Even the Explanation that was on the statute book for a short time from October 1, 1984, to May 24, 1985, had only provided a limit of fifteen days from the date of search, within which the assessee was required to make the disclosure, which if made would be regarded as a voluntary disclosure of the concealed income. The word "detection" in Section 273A(1)(b) therefore cannot be construed as referring to the final stage or the final step of quantification in the reassessment order about the extent of income concealed and the nature or extent of the inaccuracies in the particulars furnished in respect of such income.

24. The Explanation that was deleted referred to both seizure and detection. Parliament appears to have intended that when the wrong doing on the part of the assessee in failing to disclose his income fully was detected by the search and seizure, that is the time at which detection is made and the disclosure if any made by the assessee before it can be characterised as voluntary, it should have been made prior to such detection.

25. The Income Tax Act deals with assessees. It is the assessee who is primarily liable for the payment of the tax. The concealment of income which is to be penalised is the concealment of income by the assessee. The assessee may have several sources of income. The concealment by the assessee of any part of his income derived from any one source is concealment even if he had disclosed fully the income from other sources. The detection referred to in Section 273A(1)(b) is the detection of income concealed by the assessee. Any disclosure by the assessee after such detection is only for the purpose of setting out fully and

completely the true extent of his income. The fact that during the search the material seized was capable of establishing the concealment of income derived from one source to a limited extent, when in fact the assessee had concealed income to a greater degree and had also concealed income from other sources, would not render any disclosure made by the assessee of any larger income than that which could have been ascertained from an examination of the seized material or by the disclosure of his concealed income from other sources, as capable of being regarded as voluntary disclosure. The provision deals with the culprit and the crime committed may be more than one. Once it is ascertained that a crime has been committed by the culprit, the fact that he has chosen to confess to the other crimes as well, does not make him any less a culprit nor give the confession a character of true voluntariness. The provocation for the disclosure is the search and in the absence of a search no disclosure would have been forthcoming. The assessee in this case has also nowhere pleaded that even if the search had not taken place, the assessee would have disclosed his income and that disclosure actually made was independent of the search and was actuated by motive which had nothing to do with the search. The plea of the assessee, on the other hand, was that the disclosure was made in the hope that the penalty would not be levied.

26. The decision of the Allahabad High Court relied on by counsel has interpreted the word "voluntary" as being something made out of free will. I am in respectful agreement with the view that the word "voluntary" can only refer to an act made out of free will without any compulsion, inducement or provocation. I am however unable to subscribe to the view, with great respect, that the disclosure made after the search is still to be regarded as voluntary to the extent such disclosure deals with matters which either had not been ascertained from materials gathered at the search or could not have been so ascertained. Though the proposition that penal provision must be given a consideration which would favour the assessee rather than the Revenue, is not to be lightly departed from. I am unable to read Section 273A as a charter for an assessee who has deliberately concealed his income to claim immunity from penalty after a search had been made in his premises and incriminating materials seized, by claiming that he had disclosed more than what could have been ascertained from the materials that had been seized. The reward provided for u/s 273A by way of waiver of penalty is a reward meant for those who voluntarily in good faith make full and true disclosure of the income concealed. It is no doubt true that such a reward is made available to the assessees who had already broken the law by failing to disclose their income truly and fully in the returns filed by them. But that reward is limited to circumstances where the disclosure is made voluntarily and in good faith and not in other circumstances. If the disclosure made after a search and seizure of incriminating material which may or may not lead to the detection of the exact quantum of concealed income disclosed by the assessee, is still the causative factor for the disclosure actually made by the assessee, who being apprehensive of the future course of events chooses to make a clean

breast of things, sooner than later, such disclosure cannot be treated as voluntarily. Parliament had in fact sought to treat such disclosures as the one made in the present case, as voluntary by the Explanation that had been added to this provision, but that Explanation was subsequently deleted. After the deletion it can no longer be said that the disclosure made after the search is in fact a purely voluntary act. Under the voluntary disclosure income schemes enacted by Parliament from time to time persons who have concealed income, and later come forward to disclose such income, have not only escaped penalty but even the interest for delayed payment and have been given immunity from prosecution. But that part of the legislative wisdom cannot be extended or incorporated into the provisions of the Act when Parliament has not legislated to that effect.

27. The object of Section 273A is to limit the reduction or waiver of penalty only to cases where the disclosure is voluntary, is in good faith, is full and complete and is made prior to the detection. The scope of the term "voluntarily" may vary depending on the context. Having regard to the context in which it occurs in Section 273A(1)(b) and having regard to the scheme of the Act, it must be held to refer to disclosure made by the assessee wholly divorced from compulsion or provocation resulting from search and seizure.

28. In the result the writ petition is dismissed. No costs. Consequently, W. M. P. No. 22074 of 1994 is also dismissed.