

(1999) 11 KL CK 0027

In the High Court Of Kerala

Case No : Income-tax Reference No. 137 of 1996

Commissioner of Income Tax

APPELLANT

Vs

A. Sreenivasa Pai

RESPONDENT

Date of Decision : 01-11-1999

Acts Referred:

Income Tax Act, 1961 — Section 139, 139(5), 271, 271(1)

Citation : (2000) 160 CTR 216 : (2000) 242 ITR 29

Hon'ble Judges : Arijit Pasayat, C.J.;K.S. Radhakrishnan, J

Bench : Division Bench

Advocate : P.K.R. Menon and N.R.K. Nair, for the Appellant; C. Kochunni Nair and Dale P. Kurian, for the Respondent

Judgement

Arijit Pasayat, C.J.—Pursuant to a direction given by this court, the following question has been referred for opinion u/s 256(2) of the Income Tax Act, 1961 (in short "the Act"), by the Income Tax Appellate Tribunal, Cochin Bench (in short "the Tribunal") :

"Whether, on the facts and in the circumstances of the case, the Tribunal is right in law and fact in cancelling the February 2, 1988, on a total income of Rs. 6,24,640 including the sum of Rs. 3,24,650 offered by the assessee as income under the head "Other sources" in the revised return filed on October 16, 1987. In the course of assessment proceedings, the Assessing Officer initiated penalty proceedings u/s 271(l)(c) on the view that the revised return filed by the assessee admitting a higher income could penalty ?"

2. The factual position as set out in the statement of case is as follows : The assessee is a partnership firm carrying on business in provision goods, rice, sugar, etc. For the assessment year 1987-88, the return of income on behalf of the firm was filed on June 29, 1987, declaring a total income of Rs. 2,77,698. On October 16, 1987, the assessee filed a revised return offering an additional income of Rs. 3,24,650 under the head "Other sources" with the remark "offered for assessment without explanation". Assessment was completed on not be

treated as a voluntary one as the same was filed only after the Department had started enquiries with regard to the credit balances and with regard to the demand draft accounts. The Assessing Officer held the view that the second return filed by the assessee could not be considered as a revised return u/s 139(5) as the same was filed after the Department had started making enquiries and that the mere fact that the additional income offered by the assessee was accepted would not absolve the assessee of the liability for penalty in the light of the decision of the Madras High Court in Commissioner of Income Tax Vs. Krishna and Co., . On this view of the matter, the Assessing Officer levied a penalty of Rs. 1,62,325 which is 100 per cent, on the amount of tax sought to be evaded. The assessee carried the matter in appeal. After advertng to the circumstances in which a second return was filed by the assessee, the Commissioner of Income Tax (Appeals) (in short "the CIT(A)"), upheld the view of the Assessing Officer that the second return could not be treated as a revised return u/s 139(5). On the view that the filing of the second return was not voluntary and was not inspired by bona fide motives, the appellate authority upheld the levy of penalty.

3. The Tribunal cancelled the penalty being of the view that the income as shown in the revised return was accepted in the assessment and so there was full and complete disclosure of income by the assessee. With reference to the entries in the order sheet of the assessment records, it was observed that there was nothing to show that the return filed on October 16, 1987, was to overcome suppression already detected by the Assessing Officer. Though the Tribunal noticed that the Assessing Officer entertained doubts about the credit balance of one Gorantala Yadagri and Co. and wanted to verify similar other credit balances in the books and though summons and letters were stated to have been issued to different concerns wherefrom the assessee had purchased sugar and rice during the relevant previous year, there was nothing to show that the assessee was in knowledge of the contents of the order sheet entries regarding suspicions drawn therefrom by the Assessing Officer. There was also no material before the Tribunal to say that the summons were served on the parties before the assessee filed the second" return of income offering additional income and further there was nothing on record to say that the assessee was in knowledge of the enquiries made by the Income Tax Inspector. The stand of the Revenue was that the Income Tax Inspector has submitted his report on October 14, 1987, which would mean that he had visited the banks on or before the date making enquiries about the assessee and the assessee had got wind of the same, as a result whereof he had rushed with the second return of income offering additional income. It was concluded by the Tribunal that whatever might have happened behind the back of the assessee, the assessee was unaware of the same when it filed the second return on October 16, 1987, surrendering a further sum of Rs. 3,24,650.

4. In support of the application, learned counsel for the Revenue submitted that the second return cannot be termed a return within the meaning of Section

139(5) of the Act and whatever the assessee had disclosed subsequently was by way of an attempt to forestall further action after the omissions were detected. Learned counsel for the assessee, on the other hand, submitted that there was no suppression of purchases made. Certain credit facilities were availed of by the assessee which it thought can be proved. But later on after discussions with its authorised representatives, it was considered prudent to offer the amount voluntarily for taxation. That itself is sufficient to term the second return a revised return, and no mala fides are involved to warrant imposition of penalty. The Tribunal, after considering the factual aspects, has cancelled the penalty. Its conclusions are essentially factual giving rise to no question of law.

5. At this juncture, it is necessary to refer to the legislative history so far as Section 271(l)(c) is concerned. There are three stages of amendment of Section 271(l)(c). The periods are (a) prior to April 1, 1964, (b) April 1, 1964 to March 31, 1976, and (c) after April 1, 1976. Originally, the word "deliberately" existed which was omitted by the Finance Act, 1964, with effect from April 1, 1964. An Explanation was inserted at the end of Sub-section (1) of Section 271 by the said Finance Act (Section 40 of the Finance Act, 1964). In between, by the Finance Act, 1968, the base for levy of penalty became the amount of concealment as against the quantum of tax sought to be avoided under the then existing provisions. Subsequently, further amendments were brought by the Taxation Laws (Amendment) Act, 1975, (Section 61 of the said amending Act). Four Explanations were substituted for the Explanation introduced by the Finance Act, 1964. The effect of the said amendment, so far as we are concerned, is that where, in respect of facts material to the computation of the total income of the assessee, he furnishes no explanation or he cannot substantiate the explanation offered by him or the explanation offered by him is found to be false, the relevant income shall be deemed to be his concealed income. Another change was the base for levy of penalty for concealment. The base which was made, viz., the concealed income, was again changed to tax sought to be evaded. We are not very much concerned with the other changes. The effect of the amendment with effect from April 1, 1976, is that a deeming provision was introduced. The provision at the relevant time read as follows :

"271. (1) If the Income Tax Officer or the Appellate Assistant Commissioner in the course of any proceedings under this Act, is satisfied that any person-- . . .

(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,-- . . .

(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 Income Tax 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 Income Tax Officer shall not issue any direction for payment by way of penalty without the previous approval of the Inspecting Assistant Commissioner.

Explanation 1.--Where in respect of any facts material to the computation of the total income of any person under this Act,--

(A) such person fails to offer an explanation or offers an explanation which is found by the Income Tax Officer or by the Appellate Assistant Commissioner to be false, or

(B) such person offers an explanation which he is not able to substantiate,

then, the amount added or disallowed in computing the total income of such person as a result thereof shall, for the purposes of Clause (c) of this Sub-section, be deemed to represent the income in respect of which particulars have been concealed :

Provided that nothing contained in this Explanation shall apply to a case referred to in Clause (B) in respect of any amount added or disallowed as a result of the rejection of any explanation offered by such person, if such explanation is bona fide and all the facts relating to the same and material to the computation of his total income have been disclosed by him."

6. The question of onus is of primary and added importance in legal acrimony. In Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, , the apex court laid down that, before a person could be visited with a penalty for concealment, etc., the Revenue must prove that the amount in question was the income of the assessee and that he had concealed it with a motive. It was further held that the penalty could not be imposed merely because any explanation given by the assessee in regard to items in question was not believed to be true. The position of law on or after April 1, 1976, is that where, in respect of any item of credit, (a) the assessee fails to offer an explanation, or (b) the assessee offers an explanation which the taxing officer considers to be false, or (c) the assessee offers an explanation but no material or evidence to substantiate it, he shall be deemed to have concealed such income within the meaning of Section 271(l)(c). What Sections 68, 69, 69A, 69B and 69C deem for the purpose of assessment was injected for the purpose of penalty by operation of a deeming provision. A proviso was added to the new Explanation. It concerns cases where the assessee offers an explanation which he is not able to substantiate. Consequentially, the provision intended to save such amount from imposition of penalty, although the same had been added to the assessee's income in assessment, if the assessee's explanation is found to be bona fide and all the facts relating to the same and material to the computation of his total income have been disclosed by him.

7. Section 271(l)(c) is attracted where, in the course of any proceedings under the Act, the Assessing Officer or the first appellate authority is satisfied that (a)

any person has concealed the particulars of his income, or (b) has furnished inaccurate particulars of such income. The expressions "has concealed" and "has furnished inaccurate particulars" have not been defined either in the Section or elsewhere in the Act. However, notwithstanding differences in the two circumstances, they lead to the same effect, viz., keeping off a certain portion of the income. The former is direct while the latter may be indirect in its execution. The word "conceal" is derived from the Latin word "concelare" which implies "to hide". In Webster's New International Dictionary, the word has been equated "to hide or withdraw from observation ; to cover or keep from sight; to prevent discovery of; to withhold knowledge of". There may be cases where the facts may attract both the offences, and in some cases there may be overlapping of the two offences.

8. If in the facts and circumstances of a particular case and on the materials before it, the Tribunal reaches a conclusion that concealment was not proved, it is a question of fact and no question of law arises from such order. Similarly, whether the burden in a given case has been discharged on a set of facts or not is a question of fact. Where a finding of fact arrived at by the Tribunal is based on no material or is perverse or is based on irrelevant, extraneous or inadmissible considerations or is arrived at by the application of wrong principles of law, a question of law arises. Where the Tribunal fails to arrive at its own conclusion of fact after due and proper consideration of the entire materials for and against the assessee and cancels the penalty, a question of law arises. Similar is the case where conclusions of the Tribunal suffer from infirmity on account of relevant materials and evidence being ignored.

9. A conspectus of the Explanation added by the Finance Act, 1964, and the subsequent substituted Explanations makes it clear that the statute visualised assessment proceedings and penalty proceedings to be wholly distinct and independent of each other. In essence, an Explanation (both after 1964 and 1976) is a rule of evidence. Presumptions which are rebut-table in nature are available to be drawn. The initial burden of discharging the onus of rebuttal is on the assessee. The rationale behind this view is that the basic facts are within the special knowledge of the assessee. Section 106 of the Indian Evidence Act, 1872, gives statutory recognition to this universally accepted rule of evidence. There is no discretion conferred on the Assessing Officer as to whether he can invoke the Explanation or not. Explanation 1, which primarily concerns the case at hand, automatically comes into operation when, in respect of any facts material to the computation of the total income of any person, there is failure to offer an explanation or an explanation is offered which is found to be false by the Assessing Officer or the first appellate authority, or an explanation is offered which is not substantiated. In such a case, the amount added or disallowed in computing the total income is deemed to represent the income in respect of which the particulars have been concealed. As per the proviso to Explanation 1, the onus to establish that the explanation offered was bona fide and all facts relating to the same and material to the computation of his income have been

disclosed by him will be on the person charged with concealment. Mere failure to substantiate the explanation is not enough to warrant penalty. The Revenue has to establish that the explanation offered was not substantiated. The proviso to Explanation 1 is concerned only with cases coming under Clause (B) of the Explanation, where the assessee offered an explanation which he was not able to substantiate. The explanation of the assessee for purposes of avoidance of penalty must be an acceptable explanation ; it should not be a fantastic or fanciful one. As indicated above, consequence follows as a matter of law. The burden is on the assessee. If he fails to discharge that burden, the presumption that he had concealed income or furnished inaccurate particulars thereof is available to be drawn.

10. The principal logical import of the Explanation is to shift the burden of proof from the Revenue on to the assessee. Rebuttal must be on materials relevant and cogent. It is for the fact-finding body to judge the relevancy and sufficiency of the materials. If such a fact-finding body, bearing the aforesaid principles in mind, comes to a conclusion that the assessee has discharged the onus, it becomes a conclusion of fact, and no question of law arises. As observed earlier, the initial burden is on the assessee. Once the initial burden is discharged, the assessee would be out of mischief unless further evidence is adduced. It is plain on principle that it is not the law that the moment any fantastic or unacceptable explanation is offered, the burden placed would be discharged and the presumption rebutted. As pointed out by the apex court in *Commissioner of Income Tax Vs. Mussadilal Ram Bharose*, , the burden placed upon the assessee is not discharged by any fantastic explanation. It must be an explanation acceptable to the fact-finding body.

11. The position on and after April 1, 1976, is clear that where, in respect of any item of credit, the assessee has offered an explanation which the taxing officer has considered to be false or the assessee has offered an explanation but no material or evidence to substantiate it, he shall be deemed to have concealed such income within the meaning of Section 271(l)(c). By operation of the Explanation, the onus lay on the assessee and the findings given at the time of assessment are relevant and have probative value where the assessee offered nothing beyond the explanation offered at the assessment stage. In such cases, it cannot be said that the assessee had discharged the onus even by a preponderance of probabilities.

12. When an assessee files a revised return, in fact, it is admitted that the original return was not correct and complete and it is intended to be substituted by a revised return which, according to the assessee, is correct and complete. It is quite possible and natural that in submitting a return disclosing full particulars of income in the return, some bona fide omission or some wrong statement may have occurred. In order to obviate this possibility, the Legislature has enacted Section 139(5) enabling the assessee to furnish a revised return. But to come under the said provision, the omission or wrong statement that might have

occurred or crept in (i) must be bona fide, and (ii) must have been discovered by the assessee himself. If, however, an omission or wrong statement is discovered by the Department as a result of enquiry and thereafter a revised return is furnished making amendments that will not amount to a revised return as contemplated u/s 139(5). Section 139(5) is nothing more than to permit an assessee when a genuine omission or wrong statement is detected, to file a revised return in time before the assessment is made. This could only mean that the right to file a revised return may be exercised to cure an omission or wrong statement when it was inadvertent or accidental and not deliberate. Such revised return does not save the consequences of intentional filing of a false or incorrect return. Where, in order to make good an omission in the originally filed return, the assessee voluntarily furnishes a revised return inclusive of the omitted income, a question arises whether the filing of the revised return will not expatiate contumacious conduct, if any, on the part of the assessee in not having disclosed the true income in the originally filed return. Blame worthiness attached to the assessee with reference to the original return cannot be avoided by filing a fresh return after concealment was detected by the Assessing Officer. Where a revised return is made by the assessee on his own volition before concealment was detected in the course of the assessment proceedings, the conduct of the assessee has to be taken note of. Section 139(5) applies only to cases of omission or wrong statement and not to cases of concealment or false statements. Section 139(5) has application to a limited category of cases, namely, where in the original return there was an omission or any wrong statement. The very word "omission" denotes an omission bona fide. Equally, the words "wrong statement" will not take in "a statement known to be false to the person who made the statement". However, the word "discovered" coming in Section 139(5) makes it clear that at the time of discovering only a person who has furnished a return finds out that an inadvertent omission or an unintended wrong statement had crept in the return filed by him. If a person who filed a return was aware of the falsity of statement and incorrectness of the particulars of income even at the time when he filed the original return, there is no question of that person subsequently discovering the existence of an omission or creeping in of a wrong statement in the return already filed by him. In a nutshell, the return filed so as to include the concealed income cannot be treated as a revised return because the omission to file the correct income in the original return cannot be said in such circumstances to be due to any bona fide mistake or omission.

13. The onus is, therefore, on the assessee to show that the omission or wrong statement was discovered subsequent to the filing of the original return. This onus can be discharged with reference to material aspects to be brought on record by the assessee. In the instant case, a few relevant dates are necessary to be noted. The original return was filed on June 29, 1987. The case was posted to September 29, 1987. When the assessee's representative appeared before the Assessing Officer and the date was adjourned to the next day, when several

books of account were impounded for scrutiny of the correctness of the entries made therein. 15 days time available for retention expired on October 21, 1987, and before that date, the Commissioner's permission for retention till June 30, 1988, was sought for. Summons were issued to various persons on October 6, 1987, and October 21, 1987. On October 16, 1987, the assessee was served with a copy of the proceedings by the Commissioner of Income Tax sanctioning continued retention of the books of account. On October 14, 1987, the inspector's report after verifications and enquiries was received. The Tribunal seems to have proceeded on the basis as if the assessee was totally unaware of what was happening including verification in the banks' records, issuance of summons to various parties. It proceeded on the basis that the assessee was unaware of what was recorded in the order sheet. It seems to have lost sight of one significant factor, i.e., order of impounding made on September 30, 1987, for scrutiny of correctness of entries. The books impounded were day book, ledger A2, B2, C1 and purchase bills. Therefore, it cannot, by any stretch of imagination, be said that the assessee was unaware of the purpose of impounding of the records. The conclusions of the Tribunal that the assessee was unaware of what was happening have been arrived at by placing the onus on the wrong shoulders. It was for the assessee to show that it was unaware of what was happening and not for the Revenue to show that it was aware. In any event, as indicated above, the impounding of the books for the purpose of scrutiny of entries itself was a factor which has not been considered by the Tribunal in its proper perspective. The factual background as described above shows that the revised return was filed as an attempt to plug the loopholes after detection and it was not intended to bring on record materials which were discovered subsequent to the filing of the return. The inevitable conclusion is that the penalty is imposable and the Tribunal was not justified in cancelling it.

14. Our answer to the question, therefore, is in the negative in favour of the Revenue and against the assessee.