

**(1981) 11 MAD CK 0007**

**In the Madras High Court**

**Case No :** Tax Case No. 1266 of 1977 & Taxation Case No.1266 of 1977

Commissioner of Income Tax

APPELLANT

Vs

Apsara Talkies

RESPONDENT

**Date of Decision :** 24-11-1981

**Acts Referred:**

Income Tax Act, 1961 — Section 271(1)(c)

**Citation :** (1983) 15 TAXMAN 384

**Hon'ble Judges :** V. Balasubrahmanyam, J;S. Padmanabhan, J

**Bench :** Division Bench

**Advocate :** J. Jayaraman and Mrs. Nalini Chidambaram, for the Appellant; K. Srinivasan, for the Respondent

## Judgement

V. Balasubrahmanyam, J.—In this reference, by way of case stated, the question for our consideration is whether the Tribunal was justified in

cancelling a penalty of Rs. 1,01,000 levied on an assessee by an IAC u/s 271(1)(c) of the income tax Act, 1961 ("the Act"). The assessee in

question is a firm of four partners. They run a cinema theatre in Vellore. The theatre was built from the firm's funds. The partnership accounts

disclosed the expenses of construction at Rs. 4,41,284. The ITO obtained an independent estimate of the construction cost of the theatre from his

departmental valuer. That estimate put the figure at Rs. 5,67,300. Relying on the valuer's estimate, the officer held that the theatre must have cost

more to build than was shown in the accounts. He further held that the expenses not shown in the accounts must have come out of some source of

income not disclosed by the assessee to the department. On the same basis, the IAC later imposed a penalty on the assessee u/s 271(1)(c),

holding that there was concealment of income on the assessee's part to the

extent that the expenses in its construction account fell short of the figure of cost as estimated by the department valuer. The IAC relied in this connection on the Explanation to section 271(1)(c).

2. On appeal by the assessee, the Tribunal cancelled the penalty. They held that it was not proper to infer a finding of concealment of income

merely on the score that the department's estimate of the cost of the theatre exceeded the construction expenses in the assessee's accounts. The

Tribunal held out the applicability of the Explanation to section 271(1)(c), holding that the difference between the assessment and the assessee's

return arose because of the addition based on the estimated cost of construction of the theatre and not because of any fraud or wilful neglect on the

part of the assessee in making its return of income.

3. We agree with the reasoning and conclusion of the Tribunal. The whole basis for rejecting the assessee's return was the departmental valuer's

estimate of the cost of construction of the theatre. We, however, fail to see how a finding of concealment of income, can be founded on a valuer's

estimate. It is jocularly said that a valuer is one who, if you have forgotten your telephone number, will estimate it for you. The truth behind this

utterance is that a valuation is, even in the most expert hands, an inexact instrument of measurement. It is only an estimate, and no two valuers will

agree on the same subject. In this very case, there were as many as three different valuation reports. One was by an executive engineer of the

Public Works Department. His estimate of the theatre was at Rs. 2,64,557. There was another estimate by an approved valuer, it put the cost at

Rs. 3,10,541. As earlier mentioned, the departmental valuer put the figure at Rs. 5,67,300. As if these were not enough, the ITO himself put his

valuation at Rs. 5,55,580. In this welter of estimates, there is no scope whatever for drawing the inference that the assessee's book figure of cost

at Rs. 4,41,280 was not only an understatement but it involved an actual concealment of income.

4. There is no evidence in this case to show that the assessee had understated the construction expenses in its accounts. The only basis for the

addition in the assessment as well as for the levy of penalty is that furnished by the department valuer's estimated figure. We are satisfied that a

valuation estimate, without more, cannot justify a finding of concealment.

5. The department had obtained from the Tribunal a reference on two questions of law. The first question is as follows:

Whether, on the facts and in the circumstances of the case, and having regard to the Appellate Tribunal's finding in the quantum appeal, the

Appellate Tribunal was right in cancelling the entire penalty of Rs. 1,01,000 levied u/s 271(1)(c)?

For the reasons we have stated above, our answer to this question of law is in the affirmative and against the department.

6. The department had also obtained another question from the Tribunal which is in the following term:

Whether the Tribunal had any material to hold that the assessee had a plausible explanation for the disparity between the cost of construction

shown by it and the cost of construction estimated by the estate duty valuer in the context of its reference to the decision in Commissioner of

Income Tax Vs. Mohammed Kunhi, ?

The question is somewhat unusually framed with a citation of case law in it. Commissioner of Income Tax Vs. Mohammed Kunhi, is a decision by

the Kerala High Court. It contains a clear ruling that a penalty cannot be levied on the basis, merely of an estimate of cost of construction of a

building built by an assessee with his funds. In the case before that High Court, an addition was made to the income returned on the score that the

cost of construction as disclosed in the assessee's book was lower than the estimated cost of the building as rendered by a valuer. The learned

Judges held that a mere estimate of cost cannot constitute material on which a finding of concealment can be rendered. In that case, some

explanation had been offered by the assessee as to why the construction was at an economical cost. This explanation was not accepted by the

ITO. The learned Judges held that even if the assessee's explanation were not acceptable, it would still require some further material to support the

finding that the assessee had concealed its taxable income. We respectfully agree with this view.

7. Our answer to the second question is, accordingly, in the affirmative and in favour of the assessee. Having regard to our answers to the two

questions, we direct the department to pay the assessee's costs. Counsel's fee Rs. 500.