
(1985) 05 KL CK 0007

In the High Court Of Kerala

Case No : Income-tax Reference No. 191 of 1979

Commissioner of Income Tax

APPELLANT

Vs

C.M. Mathen

RESPONDENT

Date of Decision : 31-05-1985

Acts Referred:

Income Tax Act, 1961 — Section 271(1)

Citation : (1986) 158 ITR 459

Hon'ble Judges : K. Bhaskaran, C.J.;V. Bhaskaran Nambiar, J

Bench : Division Bench

Advocate : P.K. Ravindranatha Menon, for the Appellant; K.K. Ravindranath, for the Respondent

Judgement

Bhaskaran, C.J.—The questions of law referred to this court by the Income Tax Appellate Tribunal, Cochin Bench, on a direction given by this court in O.P. No. 2755 of 1975 are the following :--

" 1. Whether, on the facts and in the circumstances of the case, and having regard to the Explanation to Section 271, the Appellate Tribunal was right in cancelling the penalty of Rs. 10,000 levied u/s 271(1)(c) in the assessee's case for the assessment year 1964-65 ?

2. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in holding that the findings of the Appellate Assistant Commissioner in the assessment appeal given after the Inspecting Assistant Commissioner's penalty order cannot be considered for deciding the penalty appeal ?

3. Whether the Appellate Tribunal's finding that the assessee had not committed any fraud, gross or wilful neglect is based on valid materials and is a reasonable view to take on the facts of the case ? "

2. The assessment year involved is 1964-65, the accounting period ending on March 31, 1964. The assessee carried on business in the name of Asok Pictures.

In the year of account, the Income Tax Officer noticed a credit of Rs. 35,000. Ultimately, having found that the credit entries really represented the assessee's own income, penalty proceedings were initiated u/s 271(1)(c) of the Income Tax Act. By annexure "B", the Income Tax Officer, Ernakulam, levied a penalty of Rs. 10,000. Aggrieved by that order of penalty, the matter was taken in appeal before the Appellate Assistant Commissioner of Income Tax, Trivandrum, who by annexure "C" order confirmed annexure "B" order passed by the Inspecting Assistant Commissioner. Against the order of penalty, an appeal was filed before the Income Tax Appellate Tribunal and annexure "D" is the order disposing of the appeal. The Tribunal allowed the appeal against the penalty while dismissing the appeal against the quantum filed against annexure "C". While disposing of the appeal, in paragraph 7, the reasons advanced in support of the conclusion read as follows:

"It is true that the Appellate Assistant Commissioner while disposing of the quantum appeal has examined those three bankers with reference to the loans they are alleged to have given to the assessee. An opportunity to cross-examine was also given. But, these actions by the Appellate Assistant Commissioner had taken place after the passing of the penalty order. This cannot be considered as part of the penalty order. The Appellate Assistant Commissioner had got Shri Gopaldas Shyamlal examined on September 14, 1970. Shri Lekshmidhand Mulchand was also examined on the same date. There was no examination of Seth Muralidhar Hiranand. If these materials were incorporated in the penalty order, perhaps our order might have been different. But, as it is, we cannot consider these materials because they were not in the mind of the Inspecting Assistant Commissioner when he imposed the penalty. As we have stated earlier, the penalty order has to be decided on the materials brought in the order itself to support it. If we were to consider materials which were not present in the order, then we would be substituting our penalty order in place of the Inspecting Assistant Commissioner's order."

3. It is an admitted fact that the return submitted by the assessee had shown a sum of Rs. 35,000 as outstanding in favour of three parties, but ultimately it was not established and the assessment was completed treating that amount also as the earning or income of the assessee. There being substantial difference between the income returned and the income with respect to which the assessment had been completed, in penalty proceedings the onus is on the assessee to establish that he had no intention to conceal the income so as to attract the provisions of Section 271(1)(c) of the Act. The counsel for the assessee relied on the decision of the Supreme Court in Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, . No doubt, that decision laid down that before penalty could be imposed, the entirety of circumstances must reasonably point to the conclusion that the disputed amount represented income and that the assessee had consciously concealed the particulars of his income or had deliberately furnished inaccurate particulars. It was also stated that it would be perfectly legitimate to say that the mere fact that the explanation of the

assessee was false did not necessarily give rise to the inference that the disputed amount represented income. It has, however, to be borne in mind that the assessment in question being of the year 1964-65, it is the provision in Section 271(1)(c) of the 1961 Act before its amendment by the Taxation Laws (Amendment) Act, 1975, which came into force from April 1, 1976, that is applicable to this case. Section 271(1)(c), as it stood during the relevant period, contained the following Explanation:

" Where the total income returned by any person is less than eighty per cent, of the total income (hereinafter in this Explanation referred to as the correct income) as assessed u/s 143 or Section 144 or Section 147 (reduced by the expenditure incurred bona fide by him for the purpose of making or earning any income included in the total income but which has been disallowed as a deduction) such person shall, unless he proves that the failure to return the correct income did not arise from any fraud or any gross or wilful neglect on his part, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income for the purposes of Clause (c) of this sub-section."

4. Obviously, the decision rendered in Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, , dealing with the position in Section 28(1)(c) of the 1922 Act, cannot have any application to the facts of this case. The Tribunal appears to have overlooked the impact of the Explanation to the section on the facts of the case. We are clear in our mind that the Tribunal has wrongly cast the burden on the Revenue to establish that there was concealment of income.

5. For the foregoing reasons, we answer question No. 1 referred in favour of the Revenue and against the assessee. Regarding questions Nos. 2 and 3, we decline to answer, as they do not arise for consideration.

6. A copy of this judgment under the signature of the Registrar and seal of this court shall be forwarded to the Income Tax Appellate Tribunal, Cochin Bench.