

(1980) 12 KL CK 0008

In the High Court Of Kerala

Case No : Income-tax Reference No. 159 of 1979

Commissioner of Income Tax

APPELLANT

Vs

Haji P. Mohammed

RESPONDENT

Date of Decision : 10-12-1980

Acts Referred:

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

Citation : (1981) 23 CTR 39 : (1981) 132 ITR 623

Hon'ble Judges : V. Balakrishna Eradi, C.J.;K. Baskaran, J

Bench : Division Bench

Advocate : P.K.R. Menon, for the Appellant; T.L. Viswanatha Iyer, for the Respondent

Judgement

Balakrishna Eradi, C.J.—Pursuant to the order passed by this court in O.P. No. 2674 of 1976, filed by the Commissioner of Income Tax, Kerala, the Income Tax Appellate Tribunal, Cochin Bench (hereinafter called " the Tribunal "), has referred the following questions of law to this court u/s 256(2) of the I.T. Act, 1961, for short, " the Act ", as arising out of the Tribunal's order dated June 26, 1975, in I.T.A. No. 215 (Coch)/74-75 :

"1. Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is right in law in finding that the department has no case for levy of penalty for concealment and that a case cannot be made out for a penalty under the " main provisions" of Section 271(1)(c) of the Income Tax Act, 1961, and is not the said finding perverse and unreasonable ?

2. Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is right in law in finding that there is no fraud or wilful neglect or gross neglect on the part of the assessee for the application of the Explanation u/s 271(1)(c) of the Income Tax Act, 1961, and is not the said finding perverse and unreasonable ?

3. Whether, on the facts and in the circumstances of the case, the Income Tax

Appellate Tribunal is right in law in giving too much emphasis to the mode of encashments of the cheques in question and in finding that if the bank accounts of the assessee do not show the receipts of the cheques amounting to Rs. 1,17,633 then the assessee might have been only guilty of negligence and not gross negligence for the purpose of the Explanation to Section 271(1)(c) of the Income Tax Act, 1961, and is not such finding perverse and unreasonable ?

4. If the answer to question No. 3 above is in favour of the department, whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is right in law in sending back the case to the Appellate Assistant Commissioner to find out how the cheques were encashed by the assessee and what documents were available with him which could reflect the encashment of them ?"

2. The assessee, an individual, is a contractor who has been executing works for the Public Works Dept. of the State Govt. For the assessment year 1971-72, the assessee filed a return declaring a total income of Rs. 21,240 under the head "Business". He had purported to arrive at the said figure of income by applying a flat rate of 10 per cent. to the aggregate amount said to have been received by him from the Public Works Dept., namely, Rs. 2,12,388. This had been made clear in the return filed by the assessee. When the assessment was taken up for finalisation, the ITO questioned the assessee, with reference to information that he had in his possession, relating to amounts received by the assessee from the Executive Engineer, Irrigation Division, Calicut, which had not been included in the aggregate receipts disclosed by the assessee in his return. On the said omission being pointed out by the ITO at the time of hearing on December 10, 1971, the assessee obtained an adjournment of the assessment proceedings and thereafter he filed a revised return on December 27, 1971, disclosing an income of Rs. 33,020 which was worked out by adding the sum of Rs. 2,12,388, received by the assessee from the Executive Engineer, Irrigation Division, Calicut, in respect of contract works executed by him, to the amount of aggregate receipt disclosed in the original return and applying 10 per cent. as the profit rate. The ITO completed the assessment on the basis of the aggregate amount received by the assessee in respect of all the contract works executed by him and applying the net profit rate of 12 1/2 per cent. That resulted in the fixation of the total assessable income at Rs. 41,270. The said assessment has become final.

3. Simultaneously, with the completion of the assessment, the ITO issued a notice to the assessee u/s 274 to show cause why penalty should not be levied against him for the concealment of income. The assessee submitted his explanation wherein it was pleaded that he had no intention to furnish inaccurate particulars or to conceal any income. It was contended by the assessee that he was not keeping any books of accounts and that while furnishing the original return, the sheet of paper on which the receipts from the Executive Engineer, Irrigation Division, Calicut, had been noted was misplaced and that had resulted in the omission to include in the original return the amounts received from the

Executive Engineer, Irrigation Division, Calicut.

4. The ITO was not satisfied with the aforesaid explanation furnished by the assessee. He held that in omitting to disclose receipts amounting to Rs. 1,17,796 there had been a concealment of income by the assessee and the filing of a revised return after the assessee had been confronted by the ITO with " the information in his possession relating to the assessee having received the amount of Rs. 1,17,633 from the Executive Engineer, Irrigation Division, Calicut, cannot absolve the assessee of guilt. The assessing authority also held that the plea put forward by the assessee that he had noted the payment received from the Executive Engineer, Calicut, on a sheet of paper and it was on account of the fact that the said paper had been misplaced that the said receipt had not been included in the original return filed by him was not substantiated. Accordingly, the ITO held that the assessee was guilty of concealment of income u/s 271(1) (c) and levied a penalty of Rs. 15,000.

5. The assessee took up the matter in appeal before the AAC. Strangely, the AAC merely set out the arguments advanced before him by the representative appearing on behalf of the assessee on the question as to whether the assessee could be said to be guilty of concealment u/s 271(1)(c) without proceeding to discuss the merits of those arguments and record any finding of his own on the said crucial question. Instead, what the AAC did was to consider only the question of liability of the assessee for a penalty under the Explanation to Section 271(1) of the Act. On the basis of such an approach, the AAC held that since the assessee was maintaining no books of account during the relevant accounting period as well as in the previous years and he had not been subjected to the levy of penalty in any of the previous years, it would be reasonable to regard the failure on the part of the assessee to return the correct income as not arising from any fraud or gross or wilful neglect on his part. In the opinion of the AAC, since the receipt of the amount which the assessee had not disclosed in his original return was from a Govt. dept. it was unlikely that the assessee would have chosen to conceal the particulars of the said receipt. On the aforesaid reasoning, the AAC reversed the order of the ITO holding that the latter was not justified in levying the penalty. The department took up the matter in appeal before the Tribunal contending that the interference made by the AAC with the order of the ITO was uncalled for and illegal. The Tribunal disposed of the main point relating to the culpability of the assessee under Clause (a) of Sub-section (1) of Section 271 very summarily by stating that since the assessee had not been maintaining books of account for the past several years and the assessments against him had been made on estimate basis and the amounts received from the Executive Engineer, Irrigation Division, Calicut, during the earlier years had been included by the assessee in the returns filed by him for those years and since for the assessment year in question the assessee himself had filed a revised return within a short period of the omission being brought to his notice " a case cannot be made out for a penalty under the main provisions of Section 271(1)(c) ".

6. Thereafter, the Tribunal proceeded to consider whether the assessee could be deemed to have concealed the income by virtue of the provision contained in the Explanation to Section 271(1). On the said question, the Tribunal felt that further evidence relating to the actual manner in which the cheques received by the assessee from the Executive Engineer, Irrigation Division, Calicut, had been encashed was necessary for a satisfactory determination of the question of applicability of the Explanation and hence it set aside the order of the AAC for fresh consideration and disposal in the light of the findings and observations contained in the Tribunal's order.

7. The first question referred to us concerns the legality and correctness of the view taken by the Tribunal that a case for the levy of penalty under the main provisions of Section 271(1)(c) had not been made out against the assessee. Counsel appearing on behalf of the revenue strongly urged before us that the fact that the assessee had not been maintaining accounts and that assessments against him had been made on estimate basis during the previous years as also the further fact relied on by the Tribunal that the assessee had not been subjected to any levy of penalty during any of the previous years are totally irrelevant for the purpose of determining whether there has been a concealment of income by the assessee during the assessment year with which we are now concerned. It was also contended by counsel that the second return filed by the assessee after his having been confronted by the ITO with information which the officer had in his possession about the assessee having received from the Executive Engineer, Irrigation Circle, Calicut, a sum of Rs. 1,17,633, which had not been included in the return filed by the assessee, " cannot be regarded as a revised return " voluntarily filed by the assessee u/s 139(5) of the Act so as to exonerate the assessee from the charge of concealment of income.

8. After hearing both sides, we have unhesitatingly come to the conclusion that the aforesaid contentions urged before us on behalf of the revenue have to be upheld. During the relevant accounting period the assessee had, as a matter of fact, executed contract works for which he had received in the aggregate Rs. 3,30,184. Out of the said sum an amount of Rs. 1,17,633 pertained to the execution of a contract which the assessee had entered into with the Executive Engineer, Irrigation Division, Calicut. In the return filed by the assessee he did not disclose the receipt of Rs. 1,17,633 pertaining to the contract with the Executive Engineer, Irrigation Division, Calicut, and only an amount of Rs. 2,12,388 which related to the other contract works executed by the assessee had been disclosed in the return. The ITO had, however, information in his possession regarding the receipt of the aforesaid amount of Rs. 1,17,633 by the assessee from the Executive Engineer, Irrigation Division, Calicut. At the time when the assessment was taken up for finalisation the ITO confronted the assessee with the aforesaid information which he had and questioned the assessee as to why the said amount had not been included in the return. It was only thereafter that the assessee purported to file a revised return including therein an amount of Rs. 1,17,633 received from the Executive Engineer, Calicut. In the order imposing

penalty on the assessee the ITO had duly considered the explanation put forward by the assessee and he came to the conclusion that the non-inclusion by the assessee of the amount received by him in respect of the contract work entered into with the Executive Engineer, Irrigation Division, Calicut, constituted a deliberate concealment of income so as to attract the levy of penalty u/s 271(1)(c) of the Act. He found that the plea put forward by the assessee that he was not maintaining accounts and that the sheet of paper in which he had noted down the figures relating to the contract entered into with the Executive Engineer, Calicut, had been misplaced and that it was as a consequence thereof that the said amount was omitted to be included in the original return and it was a bona fide mistake committed by him could not be accepted as valid or true. It was on the basis of the said finding that the ITO imposed on the assessee penalty of Rs. 15,000 finding the assessee guilty of concealment u/s 271(1).

9. We have already adverted to the reasons stated by the Tribunal for holding that a case had not been made out for the levy of penalty against the assessee under the main provisions of Section 271(1)(c). In our opinion, none of the reasons stated by the Tribunal can be regarded as valid or sound in law. The first ground stated by the Tribunal is that the conduct of the assessee shows that no books of account had been maintained by him "all these years " and that the assessments have been made on estimate basis on the total receipts. It is further stated that "the receipts in the earlier years had included those from the Executive Engineer, Irrigation Division, Calicut, also ". We fail to see how the omission on the part of the assessee to maintain accounts can be regarded in law as a ground for exonerating the liability of the assessee from culpability u/s 271(1)(c) where the question to be considered is whether the assessee has concealed the particulars of his income or furnished inaccurate particulars of such income. The Tribunal has not found--nor is there any scope in law for such a finding being reasonably arrived at on the facts of this case--that the assessee was unaware of the fact of his having received the sum of Rs. 1,17,633 during the relevant accounting period in respect of the contract entered into by him with the Executive Engineer, Irrigation Division, Calicut. The total business of the assessee is not such as would justify any proper inference being drawn that the assessee might have inadvertently omitted to include the said receipt, because the contract entered into by him with the Executive Engineer, Irrigation Division, Calicut, has fetched more than 1/3rd of the aggregate amount received by him in respect of contract works undertaken by him during the relevant accounting period. Such being the position, the conclusion is inescapable in law that in consciously omitting to disclose in the original return the amounts received by the assessee from the Executive Engineer, Irrigation Division, Calicut, there was concealment of income by the assessee as well as the furnishing by him of inaccurate particulars of his income. The fact that the assessee purported to file a " revised return " after his coming to know that the ITO had already information in his possession regarding receipt by the assessee of the sum of Rs. 1,17,633 from the Executive Engineer, Irrigation Division, Calicut, which had not

been shown in the original return will not absolve the assessee from culpability u/s 271(1)(c). In the light of our conclusion that at the time of filing the original return the assessee must be taken to have duly aware of his having received the aforesaid amount from the Executive Engineer and had nevertheless omitted to disclose the said receipt in the original return, the second return filed by the assessee cannot be regarded as a " revised return" filed u/s 139(5) of the Act since it could not be said that there was any discovery by the assessee of any omission or wrong statement having been made by him by inadvertence in the original return. We are supported in this view by the decision of the Assam High Court in F.C. Agarwal Vs. Commissioner of Income Tax, and of the Madras High Court in Commissioner of Income Tax Vs. J.K.A. Subramania Chettiar, with which we are in respectful agreement.

10. In the light of the foregoing discussion, we hold that the view taken by the ITO that the assessee was guilty of concealment of income u/s 271(1)(c) of the Act and was, therefore, liable to be subjected to penalty under the said provision was perfectly correct in law and that the interference with the order of the ITO by the AAC and by the Tribunal was illegal and unwarranted. Accordingly, we answer question No. 1 in the negative, that is, against the assessee and in favour of the department.

11. In the light of the conclusion recorded by us on question No. 1, it is unnecessary for us to consider questions Nos. 2 and 4 and, accordingly, we decline to answer those questions. The parties will bear their retrospective costs.

12. A copy of this judgment under the seal of the court and the signature of the Registrar will be forwarded to the Tribunal, as required by law.