

(1973) 07 KL CK 0019

In the High Court Of Kerala

Case No : Income-tax Reference No. 16 of 1971

Commissioner of Income Tax

APPELLANT

Vs

K. Ahamed

RESPONDENT

Date of Decision : 02-07-1973

Acts Referred:

Income Tax Act, 1961 — Section 271(1)

Citation : (1974) 95 ITR 599

Hon'ble Judges : P. Govindan Nair, Acting C.J.; M.U. Isaac, J; George Vadakkal, J

Bench : Full Bench

Advocate : P.A. Francis and P.K. Ravindranatha Menon, for the Appellant; T.L. Viswanatha Iyer and E.R. Venkiteswaran, for the Respondent

Judgement

Govindan Nair, J.—The question is :

" Whether, on the facts and in the circumstances of the case, the Appellate Tribunal is correct in law in holding that the Explanation to Section 271(1)(c) of the Income Tax Act, 1961, is not applicable to this case ? "

2. This question has been referred to us by the Income Tax Appellate Tribunal, Cochin Bench, at the instance of the Commissioner of Income Tax. The year of assessment is 1963-64. The assessee contended that before March 31, 1963, he had filed a return of the income assessable for the year of assessment 1963-64. The only return available in the records of the case was the one filed by him on September 8, 1966. This return related to the income that is to be assessed for the year 1963-64 is not disputed. The Tribunal has proceeded on the basis that this is the only return and this assumption is not questioned before us either. The amount of income disclosed by the return dated September 8, 1966, was only Rs. 13,764. The assessment was completed and the total income was fixed at Rs. 65,570. The income returned was, therefore, less than 80 per cent. of the total income assessed. So it was urged before the Tribunal by the department that the Explanation to Section 271(1) which was introduced under the Income Tax Act, 1961, by the Finance Act, 1964, was attracted and that it must be presumed that

the assessee had concealed particulars of income or had furnished inaccurate particulars of such income. This contention was negated by the Tribunal on the ground that the Explanation had no retrospective effect and that it would be against the canons of interpretation of statutes to read the Explanation as if it applied to the year of assessment 1963-64. So it was held by the Tribunal that the Explanation has no application. In a judgment in ITR No. 38 of 1970, Commissioner of Income Tax v. Adima Kunju, decided on 26-5-1972 to which one of us was a party, a similar view was taken. The relevant paragraph is paragraph 3 which reads as follows :

" The Explanation to Section 271(1)(c) was incorporated in the Income Tax Act, 1961, only by the Finance Act, 1964, which came into force on April 1, 1964. This provision cannot apply for determining the question of liability u/s 271(1) (c) in relation to the assessment year 1963-64. We, therefore, answer the first question in the affirmative, that is, in favour of the assessee and against the department."

3. This conclusion reached by this court in ITR No. 38 of 1970 requires re-consideration. We do not think that the matter had been discussed with reference to the statutory provisions and the principles applicable. We are inclined to think that the judgment in ITR No. 38 of 1970 was rendered per incuriam.

4. There is no question of the Explanation being retrospective in case it is applied to an act or omission committed after the coming into force of the Explanation. The only question is whether the act or omission took place after the Explanation was introduced in the statute book. The proceeding u/s 271 is a separate proceeding, penal in nature, as has been laid down by the Supreme Court. Such a proceeding, though it may relate to a particular assessment year, can commence only if one of the offences mentioned in that section had been committed. It is the general principle that whether the act or omission would be an offence must be determined with reference to the state of law at the time that act or omission took place. In this case, the act complained of was the furnishing of inaccurate particulars of the income. This was said to have been committed by the return that was filed on September 8, 1966. The law then was Section 271(1) with the Explanation. Whether the presumption introduced by the Explanation is attracted can be determined only when the final assessment is made. This is because whether the presumption is to be applied or not will have to be determined on the basis of the total income fixed in the assessment, but the furnishing of inaccurate particulars is at the time of the filing of the return. If the return was filed before the amendment was made and the Explanation was introduced we think it will be open to the assessee to contend that the Explanation is not attracted. This is what we said in our decision in Hajee K. Assainar v. Commissioner of Income Tax, [1971] 81 ITR 423 (Ker.) and this is also in effect what we said in ITR No. 71 of 1968, Commissioner of Income Tax v. M. Mukundan [1974] 95 ITR 604 (Ker.) (Appendix). But what we said in ITR No.

38 of 1970 goes further and, as we indicated earlier, lays down incorrect law which has to be set right. The correct principle is what is stated by Sir Lionel Leach, Chief Justice of the Madras High Court, in the decision in Commissioner of Income Tax v. Vedlapatla Veera Venkataramiah. The same view has been taken by the Punjab and Haryana High Court in ITR No. 45 of 1971, Commissioner of Income Tax v. Bhan Singh Boot Singh [1974] 95 I T.R. 562 (Punj.).

5. We consider that the proper procedure to adopt would be to refer the case to a Full Bench as the decision in ITR No. 38 of 1970 which was also rendered by a Division Bench, is directly, opposed to the view that we are inclined to take now. We refer the case to a Full Bench for decision.

6. This tax referred case has come up before the Full Bench on an order of reference by a Division Bench dated 28th November, 1972. The reference was made because of the conflict between the decisions in ITR No. 38 of 1970 and ITR No. 71 of 1968.

7. The question is:

" Whether, on the facts and in the circumstances of the case, the Appellate Tribunal is correct in law in holding that the Explanation to Section 271(1)(c) of the Income Tax Act, 1961, is not applicable to this case ?"

8. By the amendments introduced by the Finance Act, 1964, the word "deliberately" has been omitted from Clause (c) of Sub-section (1) of Section 271 and an Explanation was added which is in these terms:

" 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."

9. The year of assessment with which we are concerned is 1963-64. It is admitted that the return filed by the assessee for the year is the one dated September 8, 1966. The amount of income disclosed by the return was only Rs. 13,746. The assessment was completed fixing the total income at Rs. 65,570. The income returned was, therefore, less than 80 per cent. of the total income assessed. The Explanation to Section 271(1)(c) was thus directly attracted. This means that it must be presumed that the assessee had furnished inaccurate particulars of his income, unless he established that the failure to return the correct income did not arise from any fraud or any gross or wilful neglect on his part. The act of furnishing inaccurate particulars had taken place after the

amendments were introduced to the section. Imposition of penalty by the Inspecting Assistant Commissioner was, therefore, justified. The Tribunal held that the amended section would not apply because the year of assessment (1963-64) ended before the amendments were effected. It was further observed that to apply the section would be to give retrospective operation to the section as amended.

10. The year of assessment has nothing to do with the question of liability arising u/s 271(1)(c) of the Income Tax Act, 1961. And to apply the section as amended to an act committed after the amendment is not to give the section retrospective effect. The only question is whether the elements of the section had been satisfied when the act was committed. This is what a Division Bench of this court said in ITR No. 71 of 1968. In that case, the concealment had taken place before the section was amended. However, in another Division Bench decision in ITR No. 38 of 1970 the view was taken that the amendments introduced by the Finance Act, 1964, which came into force on April 1, 1964, will not apply in relation to the assessment year 1963-64. This view, as has been mentioned in the order of reference, does not appear to be correct. The view taken in ITR No. 71 of 1968 is in accordance with the decision of another Division Bench decision of this court in *Hajee K. Assainar v. Commissioner of Income Tax* and the decision of the Punjab and Haryana High Court in *Commissioner of Income Tax Vs. Bhan Singh Boota Singh*, .

11. On general principles too, it is the view taken in ITR No. 71 of 1968 that should prevail. The principle in such cases had been laid down by Sri Lionel Leach, Chief Justice of the Madras High Court, in *COMMISSIONER OF Income Tax, MADRAS Vs. VEDLAPATLA VEERA VENKATARAMIAH AND ANOTHER.*, . Whether an act or omission is an offence must be determined with reference to the law at the time of the commission of the act or omission.

12. In the light of the above, we overrule the decision in ITR No. 38 of 1970. The correct principle is that laid down in the decision in ITR No. 71 of 1968.

13. We, therefore, answer the question that has been referred to us in the negative, that is, in favour of the department and against the assessee. We direct the parties to bear their respective costs.

14. A copy of this judgment under the seal of the High Court and the signature of the Registrar will be forwarded to the Appellate Tribunal, Cochin Bench.