
(1983) 07 KL CK 0020

In the High Court Of Kerala

Case No : Income-tax Reference No's. 154 and 155 of 1979

Commissioner of Income Tax

APPELLANT

Vs

K. Mahim

RESPONDENT

Date of Decision : 19-07-1983

Acts Referred:

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

Citation : (1984) 39 CTR 337 : (1984) 1 ILR (Ker) 74 : (1984) 149 ITR 737

Hon'ble Judges : P. Subramonian Poti, C.J;K. Sukumaran, J

Bench : Division Bench

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

Judgement

Sukumaran, J.—The assessee, an individual, had earned income under different heads in the years 1966-67 and 1967-68. He had earlier been assessed in respect of the years 1964-65 and 1965-66. The assessment for 1964-65 had been, however, reopened by a notice u/s 148 of the I.T. Act, 1961 (hereinafter referred to as "the Act"), on July 20, 1965.

The returns for the two years in question were initially filed on June 26, 1968.

2. In the meantime, detailed enquiries were being pursued in respect of the reopened assessment. The Department was in seisin of information about the assessee's connection with smuggling activities, and of his having started a retail business in cloth from November 20, 1963. The details of the proceedings before the officer in relation to that assessment year are gatherable from the statement, annexure "A", to the reference case.

3. The original income returned by the assessee for 1966-67 and 1967-68 was respectively Rs. 3,692 and Rs. 2,723. Revised returns were filed by him on January 30, 1971. The income returned for the two years was respectively Rs. 23,435 and Rs. 24,882, which included income from cloth business, from the contract business and the share of profit from a firm "Kallatra Constructions".

The ITO referred to the IAC, the proceedings for imposition of penalty u/s 274(2) read with Section 271 of the Act, even prior to the completion of the assessment. The assessments for the two years were duly completed computing the total income respectively in the sum of Rs. 22,850 and Rs. 33,140.

4. Notices u/s 271(1)(c) of the Act were issued to the assessee to show cause why penalty should not be imposed. The reply of the assessee dated February 13, 1973, in respect of the year 1967-68 is annexure "B". The notice dated March 26, 1973, proposing penalty in respect of the year 1966-67 was also replied in similar terms. The gist of the reply was that there was no concealment of income, and the difference between the assessed and returned income was "due to the adoption of the correct share income from the firm". It was maintained that inasmuch as the return had been revised and that the assessment had been completed on the basis of the revised return, no penalty was called for when no concealment was established with reference to the revised return. A plea that the assessee was illiterate and that he could not get proper advice while filing the original return was also put forward. It was claimed that the assessee filed a revised return no sooner than he came to know of his mistake

5. The IAC, however, did not find his way to accept the excuses put forward by the assessee to escape from penalty. He held that there was no justification for not imposing penalty on the only ground that a revised return had been filed subsequently. The plea of illiteracy of the assessee was also found to be of no avail while considering his failure to disclose the source of income relating to contract business. Illiteracy could not be a justification for failure to disclose income from all sources. The assessee was a man well-experienced in business. It was observed :

"At any rate he could not have been ignorant of the P.W.D. contract which he undertook and executed during the year in question and the income derived therefrom. "

6. Section 271(1)(c) was found to be attracted. Penalty was, therefore, imposed for the two years. A lenient view was taken by the IAC as regards the quantum of penalty. Though the maximum penalty impos-able was respectively Rs. 38,316 and Rs. 60,838, penalty actually imposed was only Rs. 20,000 and Rs. 30,500 respectively.

7. The assessee took up the matter in appeals before the Appellate Tribunal. By a common order dated August 11, 1975, the appeals were disposed of by the Tribunal. The Tribunal took the view that "so long as the assessment proceedings were pending, the assessee can get the return rectified by filing a revised return by virtue of Section 139(5)." In its endeavour to find whether the omissions were bona fide, it referred to the nature of the investigations undertaken by the Department against the assessee, perused the order sheets of the assessment years and the proceeding for the two years, and ultimately expressed its inability

"to find anything therein "by which it "could come to a conclusion that the Department was aware of the contract business of the assessee". It cancelled the penalty in its entirety as regards the year 1966-67. The levy of penalty was, however, upheld but only with reference to the income from Messrs. Kallatra Constructions, as regards the subsequent year. The share of profit of the assessee under that head was noted by the Tribunal to be Rs. 14,242. It also stated :

"It is quite possible to argue that the minimum penalty should be Rs. 14,242, that being the income which was assessed. "

8. The penalty was, however, reduced to Rs. 6,000 as, in the view of the Tribunal, the income under the concealed head as returned by the assessee was only Rs. 5,982.

9. The Tribunal declined the prayer of the Revenue for referring the the questions of law formulated in the reference application for the two years.

10. This court, however, by its order in O.P. Nos. 3772 and 3773 of 1976, directed the Tribunal to state a case and refer the questions of law made mention of in the order. The frame and form of the first two questions are the same, the only difference being the assessment year. It is, therefore, sufficient to extract these questions as they pertain to the year 1966-67 :

"(1) Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is right in law in deciding the appeal for the assessment year 1966-67 on the basis that filing of revised returns voluntarily by the assessee will exonerate the assessee from the penal provision u/s 271(1)(c) of the Income Tax Act, 1961 ?

(2) Whether, on the facts and in the circumstances of the case, and in view of the position that the assessee had filed the revised returns when he came to know that investigations by the Department were going against him, the finding of the Income Tax Appellate Tribunal that the assessee has filed the revised returns "by himself voluntarily" and that he had disclosed the income for the assessment year 1966-67, is perverse and unreasonable ? "

11. A third question which arose from the order of the Tribunal in respect of the year 1967-68 and which was directed to be referred to this court reads :

"Whether, on the facts and in the circumstances of the case, and on an interpretation of Section 271(1)(c) of the Income Tax Act, the Income Tax Appellate Tribunal is right in law in limiting the penalty leviable to the income returned by the assessee as his share from Kallatra Construction Company, and not to the income assessed as the correct income from the said source for the assessment year 1967-68 ?"

12. Counsel for the Revenue submitted before us that the approach of the Tribunal was fundamentally erroneous, that the Tribunal was under an obsession

that the mere filing of a revised return, before the Department became aware of the particular activity in respect of which the income was concealed, would give to the assessee immunity from penalty. By approaching the question only from the point of view of the extent of the knowledge of the Department as regards the head of business in respect of which concealment was alleged, the Tribunal had misdirected itself, according to the Revenue.

13. After hearing the arguments on either side, we are satisfied that the Tribunal has erred in its approach to the questions of law.

14. Evasion of Income Tax was a feature closely noticed, ever since the imposition of the same by the first ever Income Tax Act in England, which came into force in 1799. (It was William Pitt, one of the youngest Prime Ministers of England, who held the office of Prime Minister for a fairly long period of time, and who is described as " the embodiment and watchword of British determination ", who introduced the measure (conceived then as a temporary measure) in Parliament, in December, 1798, in the background of an apprehended French invasion. About the time at which the tax was so introduced it is recorded : " Never in the history of England was there a darker hour ". The French writer Mallet du Pan, who heard the oration in which Pitt boldly carried through "an Income Tax of minute and complicated graduation ", says: " it is not a speech spoken by the Minister ; it is a complete course of public economy ; a work, and one of the finest works, upon practical and theoretical finance that ever distinguished the pen of a philosopher and statesman." (See Pitt by Lord Rosebury, Me Millan & Co. 1921, pages 135, 136 and 163).

15. The Commissioners of Inland Revenue, in their report of 1870, said :

".....,We find the Income Tax returns largely deficient.

And, moreover, this is not confined to any particular class, trade or profession....."

16. It is not necessary for the purpose of this case to make a detailed reference to the attempts of assesseees to evade and avoid tax, and the parliamentary exercises in making the patches, and the phenomenon of the patches on patches growing thicker. H. H. Monroe, in his lecture referred to above, observes that " cheating at tax is and always has been widespread" and that " within limits it has been made socially acceptable", as illustrated by the dialogue among the ghosts in W.S. Gilbert's book "Ruddigore". He noted that evasion and avoidance were two words which frequently got confused. According to him : " Evasion is normally reserved for cheating, the dishonest and fraudulent avoidance of tax. Avoidance is a more subtle concept difficult to define", (see pages 66-67). The cause for both was similar. He further states:

"The odious imposition becomes intolerable as rate increases. Truly, or in imagination and fancy, the load is so grievous that the adopting of almost any means to escape it becomes acceptable. Habits are infectious."

17. Courts of law are not concerned with the social philosophy behind a heavy dose of taxation or about the social attitudes in the matter. The laws enacted by Parliament, including the penal provisions thereof, have to be interpreted on their plain terms and given effect to, regardless of other considerations. And what the Commissioners said in 1870 has relevance and significance even now and in the present context: " the exemption of one man means the extra taxation of another". If stringent measures (such as Section 271 of the Act) are enacted, neither the courts (nor the taxation authorities nor the Tribunal) can render them nugatory by adopting a fundamentally erroneous approach to the statutory scheme.

18. The principles in relation to the question of concealment vis-a-vis a revised return by assesseees have been discussed in decisions spread over a half century by now. A Full Bench of the Madras High Court, although in the context of the Indian I.T; Act, 1922, has analysed the relevant provisions and laid down the guiding principles in *Arunachalam Ckettayar v. CIT* [1931] 6 ITC 58. An assessee who made a bona fide discovery about having made a previous incorrect return was entitled to make a revised return invoking the enabling provision of Section 22(3) of the 1922 Act. Such a course, however, is not open when a previous return was dishonestly made. The Full Bench had no hesitation to reject outright a contention, though "seriously argued", that an assessee is enabled to put in a return correcting a former inaccurate one notwithstanding the fact that the previous return was a deliberately dishonest one. Such an exercise could not absolve him from liability to penalty. A different conclusion, according to the court, was " to put a premium on dishonesty. " It is not necessary to pursue this stand of logical reasoning over the years, for, the relevant and important decisions on this aspect have been, if we may say so with great respect, neatly and exhaustively analysed in *Commissioner of Income Tax Vs. J.K.A. Subramania Chettiar*, . The decisions considered by the court in the aforesaid judgment include: *M. Ayyasami Nadar and Bros., Colombo Vs. Commissioner of Income Tax, Madras*, , *Vadilal Ichhachand Vs. Commissioner of Income Tax, Bombay North, Kutch and Saurashtra, Ahmedabad*, , *Dayabhai Girdharbhai Vs. Commissioner of Income Tax, Madhya Pradesh and Bhandara, Nagpur*, , *Sivagaminatha Moopnar and Sons Vs. Commissioner of Income Tax, Madras*, , *Commissioner of Income Tax Vs. Ramdas Pharmacy*, , *Bakshi Mohd. Yusuf and Bakshi Mohd. Shafi Vs. Commissioner of Income Tax*, and *F.C. Agarwal Vs. Commissioner of Income Tax*,

19. Certain observations in *Sivagaminatha Moopnar and Sons Vs. Commissioner of Income Tax, Madras*, were liable to be misunderstood, if read torn out of the context. Such is, for example, the observation therein, which reads (p. 596) :

" Where for example the original return is incorrect, but the assessee voluntarily submits the correct return before the assessment, the Tribunal would be justified in coming to the conclusion that there was no concealment. This would be so even if the assessee put forward a false case after giving voluntarily the

particulars. "

20. The decision in *Sivagaminatha Moopanar and Sons Vs. Commissioner of Income Tax, Madras*, , which was noted in *Commissioner of Income Tax Vs. J.K.A. Subramania Chettiar*, , had "a mixing up of two things", namely, the act of filing of the subsequent return and the stage and the time at which the subsequent return was filed. It was pointed out that the second aspect would have no relevancy whatever to a case where there was concealment in the original return, for concealment necessarily implied a deliberate and intentional act on the part of the assessee. The following passage, according to us, correctly sums up the legal position (p. 613):

" After having originally concealed the income, if an assessee subsequently files a fresh return voluntarily before the Income Tax department has made any investigation or detected concealment of income, even then he cannot escape from the consequence of his having concealed the income and he will be liable to penalty. If, on the other hand, the defect in the original return was merely an inadvertent omission or unintended wrong statement, certainly the assessee had a right to have the same corrected and to file a revised return u/s 22(3) of the 1922 Act or u/s 139(5) of the 1961 Act and whether the assessee so files a revised return voluntarily or after the Income Tax Officer has noticed the omission or wrong statement will be totally immaterial."

21. The above decision of the Madras High Court had commended itself for acceptance by a Bench of this court consisting of Balakrishna Eradi C.J. and Justice Bhaskaran in *CIT v. Haji P. Mohammed* [1981] 132 ITR 623. This court, in the aforesaid decision, observed that the reasons stated by the Tribunal in that case for invalidating a penalty levied by the taxing officer were not valid or sound in law. That the assessee had maintained no books of account in respect of the fairly long previous period of assessments, that the assessments had been made on estimate basis, the fact that the assessee had, in the previous years, returned income arising under the particular head in respect of which concealment of income was alleged during the year in question, were held to be totally irrelevant and unsustainable reasons for the cancellation of penalty imposed by the ITO. It was pointed out there that the assessee could not have been unaware of the fact of his having received a substantial income which was about 1/3rd of the aggregate income received by him during the relevant accounting period in respect of a Public Works Division in which he had executed works.

22. We do not underrate the difficulty in the preparation of a return under the Act, a legislation which lacks charm, which has " a poor name and a worse record", and which according to some, may be "fairly castigated as unnecessarily complex and obscure " (as posed in the question by H. H. Munroe in his Hamlyn Lectures, pages 1 and 40). It is quite likely that notwithstanding the best of diligence and care, omissions or wrong statements might occur in the return filed by an assessee. (The 1870 Report, of the Special Commissioners in England noted " We are far from saying that in all the cases in which Income Tax returns

are deficient, there has been a wilful attempt to defraud the Revenue, In many instances no doubt the errors which are committed are unintentional ". (Whether this is also the Indian situation, after more than a century of that Report is a different question). It may be particularly so when the transactions are numerous and complicated, where there are massive account books, loaded with details of many-faceted activities and where co-ordination of the accounts and the reconciliation and tally of details require much labour and time. A mere omission or wrong statement in such a case may not amount to a concealment as contemplated u/s 271(1)(c) of the Act, for the necessary foul intention is absent in such a case. There is then no suppression of truth or a known fact by the assessee to the prejudice of the Department. The I.T. Act itself envisages such situations and relieves honest and bona fide assesseees to mend matters and rectify the situation. Section 139(5) of the Act is properly attracted to such cases of bona fide or honest mistakes on the part of the assessee. It can correctly be said that, in such a case, the assessee discovers an omission or a wrong statement in the earlier return. A concept of discovery is, however, totally incompatible with the mental condition of an assessee who intentionally suppressed his income or the particulars thereof. In one sense, where the omission to return an income is accidental, no result may ensue by reason of such an omission, as pointed out by the Bombay High Court in *Dayabhai Girdharbhai Vs. Commissioner of Income Tax, Madhya Pradesh and Bhandara, Nagpur*, . It is not the point of time of submission of a revised return that is crucial on the question. Revised return must be one which properly brings it u/s 139(5) of the Act; and there must be a total absence of fraudulent intent on the part of the assessee at the time of the filing of the original return.

23. Two other decisions, one of the Patna High Court and the other of the Delhi High Court, may also be noted in this connection. They are *Badshah Prasad Vs. Commissioner of Income Tax*, and *Qammar-Ud-Din and Sons Vs. Commissioner of Income Tax*, .

24. In the former, the Patna High Court set aside the imposition of penalty by the taxing authorities and the Tribunal. In that case, the assessee, a contractor, who revised his return twice, the second revised return disclosing an income of Rs. 48,850 as against Rs. 13,480 disclosed in the original return, did not maintain any books of account. It was contended by him that the return was based on payment certificates and that as and when he obtained additional payment certificates from certain divisions in which he carried out the work, he submitted revised return of his income. The taxing authorities and the Tribunal took the view that the assessee was fully aware of the total volume of work done by him and the payment to which he was entitled on that account and that there was an intention to conceal the income. The High Court, however, observed (p. 607-608):

"The only material, if at all that can be called a material, is a mere presumption that the assessee must be aware of the total volume of work done by him and of the payments that he was entitled to receive on that account. Presumption of

fact "cannot be equated to a finding of fact and more so when, against the concrete assertion by the assessee, the Department has not been able to find any fact to contradict such assertion ".

25. It is not necessary for us to consider the correctness of the above conclusion. The decision quoted with approval the principles laid down by the Gauhati High Court in F.C. Agarwal Vs. Commissioner of Income Tax, Other decisions, particularly that of the Madras High Court in Commissioner of Income Tax Vs. J.K.A. Subramania Chettiar, , referred to above, do not appear to have been considered in the aforesaid decision. The decision must be understood as confined to the facts of the case and is not of any general application.

26. The Delhi High Court considered the case of a firm which filed a return on October 20, 1965, but without attaching its statement of account. A notice u/s 143(2) of the Act was issued, on the first occasion on November 29, 1965, and on the second occasion, more than a year later, on December 9, 1966. The later notice fixed the date of hearing on December 22, 1966. The assessee claimed to have filed in the meanwhile, on an unknown date, a profit and loss account. The ITO found the net profit of the firm to be Rs. 83,790 as against Rs. 35,000 returned by the assessee and, therefore, called upon the assessee to file a revised return along with an explanation. Such a revised return showing an income of Rs. 83,790 was filed on December 24, 1966. After making some adjustments the total income was computed at Rs. 89,642. Penalty proceedings were thereafter initiated. Penalty was imposed by the IAC and it was upheld by the Tribunal. In the High Court, counsel for the assessee referred to the decision in Commissioner of Income Tax Vs. Ramdas Pharmacy, . The High Court was persuaded to take the view that penalty was not attracted to the case ; particular emphasis was made on the decision of the Madras High Court in the judgment of Justice Ranganathan (see page 708 of 129 ITR). As regards that case, the High Court observed I

" In the case decided by the Madras High Court, the facts were much more adverse to the assessee but still the conclusion of the Tribunal that there had been no concealment because the assessee had filed a revised return, was upheld by the High Court ".

27. It is seen that the later decision of the Madras High Court in Commissioner of Income Tax Vs. J.K.A. Subramania Chettiar, , which had considered Commissioner of Income Tax Vs. Ramdas Pharmacy, and explained it fairly exhaustively at page 615, had not been brought to the notice of the Delhi High Court. Khanna J., who concurred with the judgment of Justice Ranganathan, chose to rest his conclusion in the penultimate paragraph of his judgment, reading (see p. 710 of 129 ITR) :

"My learned brother has in this regard observed that the filing of the profit and loss account was a voluntary act of the assessee, and this negated any intention on its part to conceal income, as it had substantially brought out the

true income. The misfortune of the death of one of the partners before the filing of the return has also been taken note of. Considering these circumstances, I am inclined to concur with the final conclusion that the penalty be quashed ".

28. In the light of the discussion already made above, it is difficult to agree with the approach made by the Delhi High Court which, as stated earlier, does not appear to have considered other relevant decisions including the later one of the Madras High Court itself.

29. The principles emerging from the decisions alluded to above have, however, not been applied by the Tribunal in relation to the facts of the case. The Tribunal oversimplified the issue and enunciated the legal principles incorrectly when it observed :

"If the assessee had filed the returns by himself voluntarily and he disclosed the income from contracts which was omitted in the original return, we think, there cannot be any case for penalty."

30. The submission of the revised return may, in given cases, be voluntary, but such a voluntary filing by itself does not lead to the conclusion that there was no intention on the part of the assessee to conceal his income when he filed the original return. That naturally depends upon the facts and circumstances which throw light on the mental process of the assessee at the time of the submission of his original return. A subsequent conduct may be one of the factors which could be duly taken note of in the process of that difficult decision. We have, however, no hesitation to hold that a mere filing of a revised return by the assessee, at any time prior to the Department cornering the assessee in relation to a particular head of concealed income, would not be sufficient to exonerate the assessee from the penal consequences. The mere fact that investigation by the Department is afoot, though nothing tangible had come into the possession of the Department at any particular point of time, may induce a dishonest assessee to submit a revised return. Such an exercise will not absolve him of the consequences flowing from an act which on his part had already been completed, namely, the concealment of income or the particulars thereof. Conversely, it may so happen that an assessee realises the error or omission in his original return, when the assessment proceedings including investigation by the officials of the Department, had progressed to a considerable stage ; if the omission or error in the submission of the first return is honest and bona fide, the fact that the submission of the revised return is belated, and after investigation had advanced much, by itself, will not visit him with penal consequences. The facts of this case have to be carefully analysed and examined in the light of the above principles and guidelines.

31. The assessee had a definite case before the authorities as explanation in relation to the charge of concealment of income. Both the ITO and the AAC had considered these contentions but rejected them. The Tribunal, however, did not examine the cause so pleaded by the assessee but allowed itself to be swayed by

other and irrelevant considerations, such as the details of the enquiry in relation to the assessee by the Department in relation to the previous years, and the proximity to which the Department had come to in relation to its other and undisclosed source of income.

32. We are of the view that the Tribunal has erred in its assumption that the filing of a revised return voluntarily would exonerate the assessee from the liability for penalty u/s 271(1)(c) of the Act. We would, therefore, answer the first question in the negative, that is, in favour of the Department and against the assessee.

33. Having regard to the frame of the questions referred for our decision, we find that the proper course to be adopted in this case is to answer those questions and direct the Tribunal to consider the appeals and dispose them of afresh in the light of the answer given by us and in the light of the discussion contained hereinabove. We have, in view of the course so adopted, refrained from expressing ourselves on the culpability or otherwise of the assessee in a more categoric or conclusive manner.

34. In the light of our answer to question No. 1, it may not be necessary to enter a specific answer to question No. 2, particularly having regard to the way in which the latter limb of the question is couched. The question is : " Whether the finding of the Income Tax Appellate Tribunal that he (assessee) had disclosed the income for the assessment year 1966-67 is perverse and unreasonable". If it relates to the sustainability of the finding relating to a disclosure of the true income of the assessee, we would answer that the Tribunal's finding is not reasonable inasmuch as it has applied incorrect principles of law. As indicated earlier, the matter will have to be approached afresh in the light of the decision and discussion contained hereinbefore.

35. We are also satisfied that the Tribunal is in error in the computation of penalty imposable on the assessee for the year 1967-68. The order of the Tribunal does not indicate how it arrived at the concealed income in the sum of Rs. 5,982 even after noting that it was " quite possible to argue that the minimum..... penalty should be Rs. 14,242, that being the income which was assessed". Penalty u/s 271(1)(c) of the Act is geared to the amount of the income in respect of which the particulars have been concealed or inaccurate particulars have been furnished. The correct income of the assessee, after the assessments have become final, cannot be a matter of conjecture. There was a total omission in the original return relating to the share of income from Kallatra Constructions. The correct, income in relation to that source has now been fixed at Rs. 14,242. We are of the view that the correct income for the purpose of computation of penalty should be reckoned as Rs. 14,242, in the event of its being held that penalty is leviable.

36. The answer to question No. 3 in relation to the assessment year 1967-68, in the light of the above discussion, is in the negative, that is against the assessee

and in favour of the Department.

The references are answered in the manner indicated above.

37. 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 as required by Sub-section (1) of Section 260 of the Act.

P. Subramonian Poti, C.J.

38. I agree with the approach and the conclusion reached by my learned brother, Sukumaran J.