
(1992) 06 KL CK 0049

In the High Court Of Kerala

Case No : Income-tax Reference No's. 21 and 22 of 1989

Commissioner of Income Tax

APPELLANT

Vs

K. Sreedharan

RESPONDENT

Date of Decision : 25-06-1992

Acts Referred:

Income Tax Act, 1961 — Section 68

Citation : (1992) 106 CTR 12 : (1993) 201 ITR 1010

Hon'ble Judges : T.L. Viswanatha Iyer, J; L. Manoharan, J

Bench : Division Bench

Advocate : P.K. Ravindranatha Menon and N.R.K. Nair, for the Appellant; P.G.K. Warriar and H. Sivaraman, for the Respondent

Judgement

T.L. Viswanatha Iyer, J.—The assessee, K. Sreedharan, was a partner in two firms, Sreedharan & Co. and Kavitha Trading Company. He was also associated with the company M/s. Sreedharan & Co. (P.) Ltd., in which there appeared five cash credits of Rs. 50,000 each on January 1 and 5, 1980, March 15 and 28, 1980, and Rs. One lakh on March 3, 1980, aggregating to Rs. 3 lakhs. In completing the assessment under the Income Tax Act for the year 1980-81, the assessing authority held that these credits have not been satisfactorily explained by the assessee and, accordingly, treated them as his income liable to tax. The assessment was affirmed in first appeal, but on second appeal, the Tribunal, by its order annexure C, accepted the assessee's explanation in relation to these credits and deleted the amount from the assessment.

2. The assessee's explanation for these cash credits was that he had substantial receipts from the firms, Sreedharan & Co. and Kavitha Trading Company, during the assessment year 1976-77 and that the cash credits came out of those receipts. In fact, an application had been made to the Settlement Commission which was admitted on July 30, 1979, offering further amounts for assessment for that year. The final order of the Settlement Commission was passed on June 22, 1984, as per annexure F, making still further additions to the income offered

for assessment. Thus, the firm, Sreedharan and Co., had offered an amount of Rs. 7 lakhs for assessment, over and above the amount of Rs. 11,70,460 disclosed and returned, of which the assessee's 50% share amounted to Rs. 3,50,000. The Settlement Commission made a further addition of Rs. 5,57,000 as additional income, of which the assessee's share came to Rs. 2,78,500. The firm, Kavitha Trading Company, had offered for assessment an amount of Rs. 11 lakhs as against Rs. 10,00,850 disclosed and assessed. The assessee's 25% share of the additional amount offered was Rs. 24,785. The Settlement Commission made a further addition of Rs. 1,04,000 as additional income and disallowance of excess depreciation of which the assessee's share came to Rs. 26,000.

3. The Tribunal accepted the case of the assessee and held that, in the absence of any evidence to show that he had utilised these amounts, it could not be said that the money was not available with him for investment. In fact, there was no evidence on record to show that he had utilised the aforesaid amount. After making a computation of the amount that would be available with the assessee, the Tribunal came to the conclusion that he had with him an amount of Rs. 3,87,533 which could form the source of the credits aggregating to Rs. 3 lakhs between January 1, 1980, and March 28, 1980. It was accordingly that the appeal was allowed and the addition deleted.

4. The Department applied for rectification of the order of the Tribunal on the ground that the "extra income" offered by the assessee before the Settlement Commission "admittedly" represented unrecorded and inadmissible expenses which could not, therefore, be available for subsequent investment, and that, the income brought to tax by the Settlement Commission over and above that offered in the settlement application came into existence for the first time only after the order of the Settlement Commission was passed on June 22, 1984, that the order of the Tribunal was vitiated for non-consideration of these relevant points and it should, therefore, be recalled. The Tribunal found no merit in this application and it was dismissed by the order annexure E. The Commissioner sought reference of the following question of law as arising out of these two orders, annexures C and E.

"Whether, on the facts and in the circumstances of the case, and on a proper appreciation of all the material evidences in its overall picture, the Appellate Tribunal had material to arrive at a finding that the cash credits of Rs. 3 lakhs appearing in the assessee's current account with M/s. Sreedharan and Co. in the assessment year 1980-81 have been properly explained with reference to monies representing assessee's share income from the two firms, M/s. K. Sreedharan and Co. and M/s. Kavitha Trading Company, having regard to the adverse time factor and in the light of the ratio of the Kerala High Court decision in the case of Abraham v. CIT 121 ITR 433 (sic) and the Supreme Court decision in Anantharam Veerasinghaiah and Co. Vs. Commissioner of Income Tax , Andhra Pradesh, ?"

5. The Tribunal, thereupon, referred the following question of law as arising out of its order :

" Whether, on the facts and in the circumstances of the case, the Tribunal was justified in deleting the addition of Rs. 3 lakhs made under other sources ?"

6. The challenge to annexure C is based on two grounds. One is that there was a shift in the case of the assessee in that he had referred the source of the investment to the additional amount offered for assessment in the application for settlement, but the finding of the Tribunal is based on the availability of the entire intangible additions made by the Settlement Commission, namely that offered, and that added by the ultimate order annexure F. Secondly, it is contended that, even if the amount as found by the Tribunal was available with the assessee in the year 1976-77, there was nothing to indicate that it remained unspent and was available for investment in the assessment order 1980-81. On the first aspect, standing counsel, inter alia, referred to the computation made by the Tribunal that out of the assessee's share of Rs. 3.5 lakhs offered by Sreedharan and Co. before the Settlement Commission, only an amount of Rs. 59,248 was actually available after providing for the firm's tax liability of Rs. 92,400 and the assessee's liability for tax of Rs. 1,98,352.

7. Counsel for the assessee, however, contended that the entire amount offered and added as per annexure F was available with the assessee, the intangible addition being a real asset available for investment. The assessee's application for settlement was admitted on July 30, 1979, which emboldened him to bring out the undisclosed income subsequently in his business. The cash credit of Rs. 3 lakhs was part of this amount which was available with him. The period of time between the earning of the secret income and the instant assessment year was only a short one and it could not be presumed that the assessee had spent the amount in the meanwhile.

8. Counsel for the Revenue relied on the decisions of the Supreme Court in *Anantharam Veerasinghaiah and Co. Vs. Commissioner of Income Tax , Andhra Pradesh*, , *Commissioner of Wealth Tax, Kanpur Vs. J.K. Cotton Manufacturers Ltd.*, , and of this court in *Smt. Annamma Paul Vs. Commissioner of Income Tax*, . In *Anantharam Veerasinghaiah* [1980 123 ITR 457 which was a case of penalty u/s 271(1)(c) of the Income Tax Act, Pathak J., speaking for the court, observed (at page 462) :

" Now it can hardly be denied that when an "intangible" addition is made to the book profits during an assessment proceeding, it is on the basis that the amount represented by that addition constitutes the undisclosed income of the assessee. That income, although commonly described as "intangible", is as much a part of his real income as that disclosed by his account books. It has the same concrete existence. It could be available to the assessee as the book profits could be."

9. The court then went on to state (at page 413) :

" The mere availability of such a fund cannot, in all cases, imply that the assessee has not earned further secret profits during the relevant assessment year. Neither law nor human experience guarantees that an assessee who has been dishonest in one assessment year is bound to be honest in a subsequent assessment year. It is a matter for consideration by the taxing authority in each case whether the unexplained cash deficits and the cash credits can be reasonably attributed to a pre-existing fund of concealed profits or they are reasonably explained by reference to concealed income earned in that very year. In each case, the true nature of the cash deficit and the cash credit must be ascertained from an overall consideration of the particular facts and circumstances of the case. Evidence may exist to show that reliance cannot be placed completely on the availability of a previously earned undisclosed income. A number of circumstances of vital significance may point to the conclusion that the cash deficit or cash credit cannot reasonably be related to the amount covered by the intangible addition but must be regarded as pointing to the receipt of undisclosed income earned during the assessment year under consideration. It is open to the Revenue to rely on all the circumstances pointing to that conclusion."

10. In *Commissioner of Wealth Tax, Kanpur Vs. J.K. Cotton Manufacturers Ltd.*, , the court was concerned with an assessment to wealth-tax as on the valuation dates, June 30, 1956, and December 31, 1956. The matter related to the secret profits admittedly earned by the assessee prior to September, 1948. The question was whether any presumption could be raised that these secret profits were retained by the assessee on the aforesaid valuation dates. In that context, the Supreme Court approved the decision of this court in *Annamma Paul Perincherry Vs. Commissioner of Wealth-tax*, and of the Allahabad High Court in *Commissioner of Wealth-tax Vs. J.K. Jute Mills Co. Ltd.*, holding that no such presumption can be raised after the lapse of a sufficiently long period.

11. In *Smt. Annamma Paul Vs. Commissioner of Income Tax*, , this court held that it was for the assessee to satisfactorily explain the cash credits entering in his books. If the explanation furnished by him was found to be not acceptable, the entries may be taken to represent the income that had accrued to him during the year of account. This principle was not rendered inapplicable merely because it was found that he had earned some undisclosed income in some year anterior to the period of account. But if the assessee had such a case that the cash credit came out of an amount which had been added to his income in earlier years, that was a matter to be taken note of by the assessing authority in considering the question whether the source of the cash credit had been satisfactorily explained by the assessee. The burden of proof was, however, on the assessee to establish the truth and tenability of the explanation.

12. In making these observations, the court, *inter alia* relied on an earlier decision of this court in *M.I. Chakkoru Vs. Commissioner of Income Tax*, , where this court stated the propositions as mentioned above and proceeded to observe

that the question whether a particular cash credit entry has been explained in a satisfactory manner was a matter completely within the purview of the assessing authority and finally, the Tribunal.

13. It is now established that the onus is on the assessee to explain the cash credit entries in his books of account. He may relate it to the intangible additions made for a previous year. An intangible addition made to the book profits of an assessee is as real an income as that disclosed by the assessee. The fact that it represented secret profits, not disclosed, but added in the course of the assessment proceedings or disclosed in some other ancillary proceedings does not make it any the less the income of the assessee available for investment. Once an intangible addition is made, that is as good as the other disclosed income of the assessee and it could be treated as available for investment from the year in which such an addition was made. It is for the assessing authority to consider the acceptability of the explanation of a cash credit entry with reference to all the facts and circumstances of the case.

14. The assessee's share of the amounts offered for assessment by Sreedharan & Co. and Kavitha Trading Company as well as the amounts added by the Settlement Commission by its final order, annexure F, must, having regard to the decision in *Anantharam Veerasinghaiah and Co. Vs. Commissioner of Income Tax , Andhra Pradesh*, be deemed to be available to the assessee for investment in the years subsequent to 1976-77. This would relate not only to the income offered for assessment but also to the income added by the Settlement Commission by the final order, annexure F. The contention that the amounts added additionally by the final order, annexure F, could be deemed to be available only on and after June 22, 1984, is untenable and raised without taking note of the real character of the intangible addition as the real income of the year in which the addition was made as held in *Anantharam Veerasinghaiah and Co. Vs. Commissioner of Income Tax , Andhra Pradesh*, .

15. Thus the assessee had an amount of Rs. 24,78.5 plus Rs. 26,000 as his share of the income of Kavitha Trading Company and an amount of Rs. 3,50,000 and Rs. 2,78,500 as his share from Sreedharan and Co. These intangible additions enure to his benefit and must be treated as available to him for investment from 1976-77. The assessee's case is that, when these amounts were available with him, he had occasion to bring them out only after the Settlement Commission admitted his application on July 30, 1979.

16. Counsel for the Revenue would, however, submit that the assessee had relied only on the additional amounts offered for assessment in the settlement applications and not on the subsequent additions made by the Settlement Commission under annexure F. We do not agree that the assessee's case should be so limited. The explanation offered by him related to the availability of additional funds from Sreedharan and Co. and Kavitha Trading Company. This was undisclosed income the quantum of which stood quantified and disclosed only by the final order of the Settlement Commission. The fact that a lesser

amount was offered earlier, but it was enhanced by the Settlement Commission does not detract from the validity of the explanation that the source relied on was really his share of the undisclosed income of Sreedharan & Co. and Kavitha Trading Company, The fact remains that, having regard to the intangible additions made by the Settlement Commission, the assessee must be deemed to be in possession of those amounts from 1976-77 itself.

17. The assessing authority as well as the Inspecting Assistant Commissioner who accorded sanction u/s 144B did not accept the case of the assessee for the reason that the amounts to which the source was traced had not been disclosed in the wealth-tax returns up to the year 1980-81. It is puerile to expect the assessee to disclose undisclosed amounts in his wealth-tax returns. The very fact that the amounts had not been disclosed for purposes of Income Tax shows the animus of the assessee in not bringing them to the notice of the Department. The first occasion when he was emboldened to do so was only after the settlement application was admitted by the Commission on July 30, 1979. It is too naive to expect the assessee to disclose the amount for purposes of wealth-tax, when it remains undisclosed otherwise.

18. It was next suggested that the introduction of the amounts in instalments was itself proof positive that the source was not the anterior amount available in 1976-77. This again is unsustainable for the reason that the amount need be invested only as and when it is necessary. It need not be in lump merely because it was being drawn from a consolidated fund. This strand of reasoning adopted by the assessing authority and the Inspecting Assistant Commissioner does not appeal to us.

19. We are not thus impressed with the first contention of counsel for the Revenue that there was a shift in the stand taken by the assessee regarding the source of the amounts covered by the cash credit. We are of the view that the assessee had traced the source to the amounts of undisclosed income of Sreedharan and Co. and Kavitha Trading Company, In this view of the matter, the decision of the Delhi High Court in Commissioner of Income Tax Vs. Kulwant Kaur and Others (L.Rs. of late Gurbachan Singh), holding that the question regarding source of an investment was essentially one of fact which could not be raised as a legal argument in the alternative, (on which heavy reliance was placed by standing counsel) does not arise for consideration.

20. The next question is whether the amount of the intangible addition was still available with the assessee for investment in January-March, 1980, The initial onus of proving that the amount was available is no doubt on the assessee, for the reason that it is for him to prove the source of his cash credits. Therefore, he has got to establish, inter alia, that the amount which was with him in 1976-77 was still available in 1980-81. It is also true that a presumption cannot be drawn on this point if a sufficiently long period of time has elapsed after the earning of the undisclosed profits. The question is whether the time lag of four years is so long as to hold that the assessee has not discharged the burden cast on him.

21. The firms, Sreedharan and Co. and Kavitha Trading Company, had made the applications for settlement in 1978 and they were admitted on July 30, 1979. The assessee's share of the income offered for settlement was Rs. 3,74,785 from the two firms. In addition, we have also to treat the amounts added by the Settlement Commission as available with the assessee since 1976-77. The assessee has denied that he had spent these amounts, according to him, they were still available with him. The matter has to be decided on an overall view of all the facts and circumstances of the case. The Department has not pointed out any circumstances from which an inference could be drawn that the assessee had, as a matter of fact, spent the amounts. We have already dealt with earlier the circumstances relied on by the assessing authority and the Inspecting Assistant Commissioner. The only other circumstance which requires consideration is regarding the construction of the theatre.

22. It is stated that the assessee had invested Rs. 40 lakhs for the construction of a theatre between 1977 and 1980 for which he had taken only a loan of Rs. 20 lakhs from the bank. But that does not imply that the amount in question had also been utilised for the construction when the assessee had substantial sources of income even otherwise, from the profits of the two firms. It is not a case where the assessee had no other source at all except the loan from the bank. On the other hand, it is evident that the assessee had substantial receipts from the businesses in the prior years. We do not think that this circumstance relied on by the Revenue by itself, and without anything more is sufficient to hold that the secret profits had been spent by the assessee.

23. What the assessee is expected to prove is a negative fact, that he has not spent the amounts. The income being undisclosed and secret, from its very nature, positive evidence will not be available to prove its existence in 1980-81. On the other hand, the fact that the assessee offered a large amount for settlement with readiness to make payment of a large amount by way of tax any time the Settlement Commission passed its order, is itself indicative that the assessee did have sufficient amounts with him. The Tribunal has found as a fact that the assessee could in any event have an amount of Rs. 3,87,544 with him available for investment in January/ March, 1980. The period of four years between 1976-77 and 1980-81 is not so long a period as to rebut the presumption regarding the continued availability of the amount. We are, therefore, of the view that, on the facts of the case, the assessee has discharged the burden that lay on him to prove the source of the amounts of the cash credit entries made in January/ March, 1980.

24. Counsel for the assessee contended that the findings rendered by the Tribunal are findings of fact based on the evidence in the case. Counsel for the Revenue would, however, contend that the said findings of fact have been arrived at by misplacing the burden of proof on the Department. In the view that we have taken, it is unnecessary to go into this question and decide whether the findings rendered are mere findings of fact not liable to be challenged in a reference u/s

256(1).

25. No other points are raised before us. We are in agreement with the Appellate Tribunal in the view taken by it regarding the source of the cash credits in question. The question referred is, therefore, answered in the affirmative, in favour of the assessee. There will be no order as to costs.

26. Communicate a copy of this judgment under the seal of this court to the Income Tax Appellate Tribunal, Cochin Bench.