

(1975) 12 MAD CK 0012

In the Madras High Court

Case No : Tax Case No. 162 of 1970 (Reference No. 37 of 1970)

Commissioner of Income Tax

APPELLANT

Vs

Khateeb Mahmood

RESPONDENT

Date of Decision : 12-12-1975

Acts Referred:

Income Tax Act, 1961 — Section 139(2), 175, 221, 271(1), 69A

Citation : (1977) 109 ITR 408

Hon'ble Judges : V. Sethuraman, J; V. Ramaswami, J

Bench : Division Bench

Advocate : J. Jayaraman, for the Appellant; P.M. Jummakhan, for M.R.M. Abdul Karim, M.M. Abdul Razak and S. Abdul Karim, for the Respondent

Judgement

V. Ramaswami, J.—The assessee was formerly carrying on business in Ceylon in gold and gems from 1920 to 1958 as a partner in the firm

of Messrs. Khateeb & Bros. He left Ceylon for good in 1958 and settled down at Kayalpatnam in India. On July 2, 1964, the customs authorities

searched the premises No. 90, Naina Street, Kayalpatnam, belonging to the son-in-law of the assessee and found a sum of Rs. 1,70,000 in ten

rupee notes kept in two boxes which were buried in the earth in an open place in the house. On information relating to the discovery of this amount

and the admission by the assessee that the money belonged to him, the Income Tax Officer started assessment proceedings invoking his power u/s

175 of the Act. He issued a notice u/s 139(2) on January 11, 1965. In response to this notice, the assessee filed a return on January 19, 1965,

admitting an income of Rs. 5,000 under the head of "Property income". With reference to the sum of Rs. 1,70,000, it was explained on behalf of

the assessee that he and his two sons were carrying on business in Ceylon for a

number of years and that the said money represented the amounts saved by them in that business and remitted into India. The Income Tax Officer called for details of the remittance. The remittances as evidenced by the passport of the assessee and his sons worked out to Rs. 50,930. The investment in properties in India came to Rs. 50,000. There was also evidence to show that the assessee had spent about Rs. 9,500 for the marriages of his two daughters after 1956. Even before the Income Tax Officer the assessee admitted that the sum of Rs. 1,70,000 belonged to him. On the ground that the explanation of the assessee relating to the source was not acceptable and was not supported by any documentary or oral evidence, the Income Tax Officer came to the conclusion that the said sum represented income of the assessee from undisclosed sources. In coming to this view, the Income Tax Officer specifically relied on Section 69A of the Act. The Income Tax Officer also proposed to levy penalty u/s 271(1)(c) and since the penalty leviable was more than Rs. 1,000 he referred the matter to the Inspecting Assistant Commissioner. After issuing show-cause notice and following the prescribed procedure, the Inspecting Assistant Commissioner, finding the assessee guilty of having concealed the particulars of his income and also furnished inaccurate particulars, imposed a penalty of Rs. 50,000 by his order dated March 22, 1966. Along with the assessment order, the Income Tax Officer had also issued a demand notice for paying a tax of Rs. 1,28,221.87. This amount was payable within ten days from the date of service of the demand notice. Since the tax was not paid, as demanded, within the time allowed, a show-cause notice was issued by the Income Tax Officer u/s 221 of the Act and ultimately imposed a penalty of Rs. 6,400 equivalent to 5 per cent. of the tax. The assessee preferred appeals to the Appellate Assistant Commissioner against the assessment order and the penalty levied u/s 221. The Appellate Assistant Commissioner confirmed the finding of the Income Tax Officer that the explanation of the assessee was not acceptable and that the sum of Rs. 1,70,000 was the income of the assessee from undisclosed sources. Accordingly, he confirmed the assessment and dismissed the appeal. He also confirmed the finding of the Income Tax Officer relating to the liability of the assessee for penalty u/s 221, but all the same, reduced the penalty from Rs. 6,400 to Rs. 2,500.

The assessee preferred further appeals to the Income Tax Appellate Tribunal against these orders of the Appellate Assistant Commissioner. He also preferred an appeal to the Tribunal against the order of the Inspecting Assistant Commissioner made u/s 271(1)(c) of the Act. The department also preferred an appeal against the order of the Appellate Assistant Commissioner reducing the penalty from Rs. 6,400 to Rs. 2,500. All these appeals were taken together for hearing by the Tribunal.

2. The Tribunal considered that the assessee was carrying on business at Ceylon on a considerably large scale and that there was reason to believe

that the assessee was earning much more income than the one he was actually assessed to. There was no evidence to show that he was investing

or spending on any extraordinary expenses apart from his ordinary household expenses and that, therefore, it was reasonable to think that he must

have saved his income in Ceylon and could have remitted it into India from time to time. In so far as the remittances prior to 1949 are concerned,

there were no restrictions on the remittances and that, therefore, the assessee might not have kept any accounts of the remittances. And so far as

the remittances after 1949 are concerned, since there were restrictions on the remittance, it would not be fair to expect any evidence of such

remittances as they would be in the nature of clandestine remittances. The Tribunal also pointed out that if as large an amount of Rs. 1,70,000 is to

be earned in the normal course of business, it would require a large amount of capital and there is no evidence of investment of such capital in India

by the assessee. On these reasonings, the Tribunal held that there was no material for them to hold that the amount in question represented the

income of the assessee. On this finding the Tribunal set aside the order of assessment. Consequently, the appeals filed by the assessee against the

penalty order u/s 271(1)(c) and Section 221 were also allowed and the appeal filed by the department against the reduction of the penalty levied

u/s 221 was dismissed.

3. On a direction from this court at the instance of the revenue, the following questions have been referred :

1. Whether, on the facts and in the circumstances of the case, and having regard to the provisions of Section 69A of the Income Tax Act, 1961,

the Appellate Tribunal had material to hold and was justified in law in holding

that there was no justification for treating the sum of Rs. 1,70,000 as the taxable income of the assessee for the assessment year 1964-65 ?

2. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was supported by any materials and legally justified in

cancelling the penalty levied u/s 271(1)(c) for the assessment year 1964-65?

3. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was supported by any materials and was legally justified in

cancelling the penalty of Rs. 6,400 levied u/s 221(1) for the assessment year 1964-65 ?

4. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was justified in law in refusing to restore the quantum of

penalty levied by the Income Tax Officer in the sum of Rs. 6,400 and in cancelling even the penalty of Rs. 2,500 to which sum the Appellate

Assistant Commissioner reduced it ?

4. The learned counsel for the revenue contended that the finding of the Tribunal that there was no material for them to hold that the amount in

question represented the income of the assessee was based on assumptions and presumptions and not on any legal evidence. He also contended

that the Income Tax Officer and the Appellate Assistant Commissioner specifically relied on Section 69A and, in fact, the Tribunal also held that

Section 69A was applicable, and in view of the provisions contained in that section the Income Tax Officer was right in drawing the inference that

the sum of Rs. 1,70,000 represented the income of the assessee. On the other hand, the learned counsel for the assessee contended that the onus

of proof u/s 69A does not rest with the assessee throughout the proceedings and when he lets in certain evidence, the burden shifts to the

department to prove that the money represented the income of the assessee. He also contended on the merits that the Tribunal came to a

conclusion that the explanation of the assessee was acceptable and that is a finding on a question of fact and that, therefore, that could not be

interfered with in this reference.

5. It is not necessary for us to go into the full scope of Section 69A as, even on the facts, the finding of the Tribunal could not be accepted. Even

assuming that the business carried on by the assessee in Ceylon was on a considerable scale and he might have been earning a large income, from

that fact alone no inference could be drawn that the sum of Rs. 1,70,000 unearthed in the house of the assessee's son-in-law represented the savings in such business and its remittance into India from time to time. The remittances, as evidenced in the documents produced by the assessee show only to an extent of Rs. 50,930 out of which the assessee had invested a sum of Rs. 50,000 in the purchase of properties. It is not possible for us to assume any contravention of the Foreign Exchange Regulations and clandestine remittances of the money into India, as assumed by the Tribunal. In fact, there is practically no evidence worth mentioning to connect the sum of Rs. 1,70,000 with any remittance from the income of the assessee from Ceylon. The Tribunal also proceeded on the wrong assumption that it was for the department to prove that the assessee could not have saved any money from the business in Ceylon or that the sum of Rs. 1,70,000 represented the income from any business carried on by the assessee in India. The explanation of the assessee, to say the least, had not been supported by any evidence, and the rejection of the explanation by the Income Tax Officer was, therefore, absolutely proper. The entire order of the Tribunal is vitiated by the fact that the finding is reached only by presumptions and assumptions and not on any relevant evidence or circumstance. Though we might have considered the question as to whether the mere rejection of the explanation of the assessee could lead to a presumption that the amount represented income of the assessee, if there was some evidence or a possible inference that the amount could have been remitted into India, as the evidence in this case is next to nothing and the finding of the Tribunal is only based on assumptions. It is not necessary for us to go into that question in detail in this case. Even the finding of the Tribunal, namely : ""There is also no material for us to hold that the amount in question represented the income of the assessee of the past several years which he might have derived from some activity undertaken by him after his return to India in 1958"", is clearly wrong, as it is throwing the burden on the department to prove that the amount in question was the income of the assessee. We are also unable to agree with the learned counsel for the assessee that the finding of the Tribunal was on a question of fact and that, therefore, it could not be challenged in these proceedings. As could be seen from the first question referred to this court, we are entitled to go into the question as to whether the Tribunal had

any material to hold and was justified in law in holding that there was no justification for treating the sum of Rs. 1,70,00,tf as the taxable income of

the assessee. The revenue has sought a reference to this court even on the merits of the case and, therefore, we are entitled to go into that question.

There can be no doubt that a reference could be asked for even on a question of fact, if that finding is attacked on the ground that there was no

evidence to support it or it was perverse or has been reached without due consideration of the several matters relevant for such determination. This

was so held by the Supreme Court in BAI VELBAI Vs. COMMISSIONER OF Income Tax, BOMBAY CITY., . Since we have come to the

conclusion that there was no material for coming to that finding we have to answer the first question referred to us in the negative and in favour of

the revenue.

6. In the view that the amount did not represent the income of the assessee, the Tribunal had allowed the appeals filed by the assessee in respect of

the penalties levied under Sections 271(1)(c) and 221 and dismissed the department's appeal preferred against the reduction of the penalty u/s

221. The Tribunal did not go into the question in these appeals on merits. Since we are now holding that the finding of the Tribunal in the

assessment proceedings was wrong, the Tribunal will now have to go into questions Nos. 2, 3 and 4 in the respective appeals. But technically we

answer all the other three questions also in the negative and in favour of the revenue with a direction to the Tribunal to go into the matter afresh on

merits. The revenue will be entitled to its costs. Counsel fee Rs. 250.