

(1999) 12 KL CK 0007

In the High Court Of Kerala

Case No : Income-tax Reference No. 33 of 1988

Commissioner of Income Tax

APPELLANT

Vs

Kishorekumar Shamji

RESPONDENT

Date of Decision : 18-12-1999

Acts Referred:

Income Tax Act, 1961 — Section 271(1)

Citation : (2000) 161 CTR 225 : (2000) 244 ITR 702

Hon'ble Judges : Arijit Pasayat, C.J.;K.S. Radhakrishnan, J

Bench : Division Bench

Advocate : P.K.R. Menon and N.R.K. Nair, for the Appellant; Vinod Chandran K. and George Mathan, for the Respondent

Judgement

Arijit Pasayat, C.J.—Pursuant to a direction given by this court in Original Petition No. 7516 of 1985, the following questions have been referred by the Income Tax Appellate Tribunal, Cochin Bench (in short, "the Tribunal"), at the instance of the Revenue, u/s 256(2) of the Income Tax Act, 1961 (in short, "the Act") :

"1. Whether, on the facts and in the circumstances of the case, and particularly in the light of the facts mentioned in the enclosure to the reference application, is the Tribunal right,--

(i) in holding" that the assessee is not liable to a penalty u/s 271(1)(c) ?

(ii) in cancelling" the penalty in full, instead of sustaining at least a penalty of Rs. 55,650 ?

2. Whether, on the facts and in the circumstances of the case, did the Tribunal have any material to hold that,--

(i) "credit for this increased price has been given to the seller in his account" or that-

(ii) "in fact the seller has shown this as her income and has been assessed on this" including the "other amount of Rs. 81,760" ?"

3. Whether, on the facts and in the circumstances of the case, is the Tribunal right,--

(i) "in relying on the second return as a revised return" ? and

(ii) in casting the burden of proof on the Revenue ?

4. Whether, on the facts and in the circumstances of the case, and also in view of the Explanation to Section 271(1)(c), did the assessee admitting a concealment of income by Rs. 5,81,760, discharge the burden that lay on him ?

5. Whether, on the facts and in the circumstances of the case, is the Tribunal justified in considering and also in relying on the additional ground of an alleged "understanding/misunderstanding" ?

6. Did the Tribunal have any materials to hold that the purchases were made at rates higher than the market rates (as stated in paragraph 33) and is not the above finding wrong and inconsistent with the finding in para. 37 ?"

2. As suggested by learned counsel for parties, we consolidate and reframe the questions to read as follows:-

"Whether, on the facts and in the circumstances of the case, the Tribunal was justified in cancelling the penalty imposed u/s 271(1)(c) of the Act ?"

3. The factual position necessary for answering the reference is as under : The assessee is an individual. For the assessment year 1978-79, corresponding to the previous year ended on March 31, 1978, the assessment was originally completed on September 20, 1978, on a total income of Rs. 86,740. On July 7, 1979, a search was conducted in the premises of the assessee u/s 132 of the Act. Certain books of account maintained by the assessee for the assessment year 1978-79 were seized along with other documents, One of the documents seized was a bill regarding purchase of 500 quintals of pepper from Spot Spices Co., Cochin-2 (hereinafter referred to as "the seller"). The said bill bore the number 653, and was dated January 25, 1978. In the bill, the rate originally recorded was Rs. 1,975 per quintal. But this was corrected as Rs. 2,975 per quintal. By this correction, increase in price was Rs. 5,00,000. On August 4, 1979, the assessee filed a letter before the Income Tax Officer (in short "the ITO"), enclosing a revised return dated August 3, 1979, showing in Part III thereof a sum of Rs. 5,00,000 describing it as profit earned by inflating purchase bill mentioned above. It was also stated therein that he had omitted to show the sum of Rs. 5,00,000 in the original return and that this amount was earned by him by inflating the purchase of 500 quintals of pepper as per above mentioned bill. The Income Tax Officer issued a notice u/s 148 on October 11, 1979. The assessee filed a return on October 26, 1979, along with another letter. In this return, he had shown total income from business at Rs. 5,90,387.51 as against Rs. 90,387.50 shown in the original return. The Income Tax Officer made a reassessment by adding not only the sum of Rs. 5,00,000 offered by the assessee, but also another sum of Rs. 81,760. The said sum of Rs. 81,760 was

calculated to be further inflation in respect of other purchases made by the assessee which were found out during the reassessment proceedings. There was no challenge to the order of reassessment. The Income Tax Officer initiated proceedings for imposition of penalty u/s 271(1)(c) of the Act. The assessee pleaded that there was no concealment. But the Income Tax Officer imposed a minimum penalty of Rs. 4,00,652, which was confirmed in appeal by the Commissioner of Income Tax (Appeals) (in short, "the CIT(A)"). The matter was carried by the assessee in appeal before the Tribunal. Its stand before the Tribunal was to the effect that the seller is a proprietary concern belonging to the assessee's wife. For the purpose of availing of benefit relating to sales tax exemption in respect of purchases for the purpose of export, the arrangement was made. The assessee and his wife found that while the business of the assessee had shown substantially higher profits, the seller had shown substantial loss. It was also found that the purchases from the seller in many instances were for prices below the market rate. Therefore, it was considered necessary to correct the lopsided picture of profits and, accordingly, the decision was taken to increase the price relating to the total purchases made from the seller. An accountant was directed to do so. But he did not do so by passing journal entries in respect of the prices. He made the adjustment by correcting and inflating bill No. 653 referred to earlier. It was stated that the only intention of the assessee was to allow due share of profit to the seller and not to conceal income of the assessee. An account of seller was credited with the sum of Rs. 5,00,000 as increase in purchase price. After discussion with the Additional Director of Investigation (in short, "ADI") and the Commissioner of Income Tax (in short, "the CIT"), the assessee understood that there would be no levy of penalty for concealment or prosecution if the assessee agreed to assessment of Rs. 5,00,000. It was only on the said basis that the assessee described the transaction as an inflation of purchase price and filed a return showing the amount as income. The assessee could not put forward the correct explanation before the Income Tax Officer. The Revenue's stand was that the levy of penalty was in order. The Tribunal considered the explanation of the assessee and cancelled the penalty levied.

4. Learned counsel for the Revenue submitted that the Tribunal has not taken into account the real factual position and has proceeded on unacceptable materials. The stand of counsel for the assessee that the assessee was assured of immunity from levy of penalty is not borne out from record, and for the first time, such a stand was taken before the Tribunal. Even during the hearing of penalty proceedings before the Assessing Officer and at the first appellate stage, this stand was not taken. A plea put forth by the assessee that there was an adjustment of price to bring parity of price is clearly contrary to the assessee's own admissions at various stages. The onus of proving that there was no concealment is on the assessee and by giving a vague explanation, that onus cannot be said to have been discharged. The conclusions of the Tribunal, when read in the background of the assessee's admissions, clearly go to show that it

lost sight of the factual position and erroneously cancelled the penalty. The true import of Section 271(1)(c) has not been considered by the Tribunal.

5. Learned counsel for the assessee, on the other hand, submitted that in reality, no new stand was taken before the Tribunal, as is contended. What was stated regarding the implied agreement is clearly borne out from circumstances, if not so apparently from the records. In any event, the Tribunal has considered all relevant aspects and has come to the right conclusion, which are factual conclusions giving rise to no question of law. Merely because at some stage, the assessee had agreed to surrender any income for inclusion in its total income, that does not per se amount to concealment. By way of reply, it is submitted by learned counsel for the Revenue that when there is a conscious surrender, it prima facie establishes concealment.

6. Penalty proceedings are apart and separate from assessment proceedings. An assessee is entitled to adduce evidence, even if he had not adduced it earlier at the assessment stage, when penal proceedings are taken up. Even if an amount had been surrendered for inclusion in the assessee's income as undisclosed income that per se cannot be held to be concealment. It is open to the assessee to explain the nature of the income in the penalty proceeding. The explanation has to be considered by the Assessing Officer. It cannot be laid down as a general rule that no penalty can be levied for concealment in respect of surrendered income. If no explanation is offered or the explanation offered is found to be not plausible and/or acceptable, penalty can be levied.

7. At this juncture, it is necessary to refer to the legislative history so far as Section 271(1)(c) is concerned. There are three stages of amendment of Section 271(1)(c). The periods are (a) prior to April 1, 1964, (b) April 1, 1964, to March 31, 1976, and (c) after April 1, 1976. Originally, the word "deliberately" existed which was omitted by the Finance Act, 1964, with effect from April 1, 1964. An Explanation was inserted at the end of Sub-section (1) of Section 271 by the said Finance Act (section 40 of the Finance Act, 1964). In between, by the Finance Act, 1968, the base for levy of penalty became the amount of concealment as against the quantum of tax sought to be avoided under the then existing provisions. Subsequently, further amendments were brought by the Taxation Laws (Amendment) Act, 1975 (section 61 of the said amending Act). Four Explanations were substituted for the Explanation introduced by the Finance Act, 1964. The effect of the said amendment, so far as we are concerned, is that where, in respect of facts material to the computation of the total income of the assessee, he furnishes no explanation, or he cannot substantiate the explanation offered by him or the explanation offered by him is found to be false, the relevant income shall be deemed to be his concealed income. Another change was the base for levy of penalty for concealment. The base which was made, viz., the concealed income, was again changed to tax sought to be evaded. We are not very much concerned with the other changes. The effect of the amendment with effect from April 1, 1976, is that a deemed provision was

introduced. The provision at the relevant time reads as follows :

"271. (1) If the Income Tax Officer or the Appellate Assistant Commissioner, in the course of any proceedings under this Act, is satisfied that any person-

(c) has concealed the particulars of his income or furnished inaccurate particulars of such income,

he may direct that such person shall pay by way of penalty,--

(iii) in the cases referred to in Clause (c), in addition to any tax payable by him, a sum which shall not be less than, but which shall not exceed twice, the amount of tax sought to be evaded by reason of the concealment of particulars of his income or the furnishing of inaccurate particulars of such income :

8. Provided that, if in a case falling under Clause (c), the amount of income (as determined by the Income Tax Officer on assessment) in respect of which the particulars have been concealed or inaccurate particulars have been furnished exceeds a sum of twenty-five thousand rupees, the Income Tax Officer shall not issue any direction for payment by way of penalty without the previous approval of the Inspecting Assistant Commissioner.

Explanation I.--Where in respect of any facts material to the computation of the total income of any person under this Act,--

(A) such person fails to offer an explanation or offers an explanation which is found by the Income Tax Officer or the Appellate Assistant Commissioner to be false, or

(B) such person offers an explanation which he is not able to substantiate,

then, the amount added or disallowed in computing" the total income of such person as a result thereof shall, for the purposes of Clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed :

Provided that nothing contained in this Explanation shall apply to a case referred to in Clause (B) in respect of any amount added or disallowed as a result of the rejection of any explanation offered by such person, if such explanation is bona fide and all the facts relating to the same and material to the computation of his total income have been disclosed by him."

9. The question of onus is of primary and added importance in legal acrimony. In Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, , the apex court laid down that before a person could be visited with a penalty for concealment, etc., the Revenue must prove that the amount in question was the income of the assessee and that he had concealed it with a motive. It was further held that the penalty could not be imposed merely because any explanation given by the assessee in regard to the items in question was not believed to be true. The position of law on or after April 1, 1976, is that where, in

respect of any item of credit, (a) the assessee fails to offer an explanation, or (b) the assessee offers an explanation which the taxing officer considers to be false, or (c) the assessee offers an explanation but no material or evidence to substantiate it, he shall be deemed to have concealed such income within the meaning of Section 271(1)(c). What sections 68, 69, 69A, 69B and 69C deem for the purpose of assessment was injected for the purpose of penalty by operation of a deeming provision. A proviso was added to the new Explanation. It concerns cases where the assessee offers an explanation which he is not able to substantiate. Consequentially, the proviso intended to save such amount from imposition of penalty, although the same had been added to the assessee's income in the assessment, if the assessee's explanation is found to be bona fide and all the facts relating to the same and material to the computation of his total income have been disclosed by him.

10. Section 271(1)(c) is attracted where, in the course of any proceedings under the Act, the Assessing Officer or the first appellate authority is satisfied that (a) any person has concealed the particulars of his income, or (b) has furnished inaccurate particulars of such income. The expressions "has concealed" and "has furnished inaccurate particulars" have not been defined either in the section or elsewhere in the Act. However, notwithstanding differences in the two circumstances, they lead to the same effect, viz., keeping off a certain portion of the income. The former is direct while the latter may be indirect in its execution. The word "conceal" is derived from the Latin word "concelare" which implies "to hide". In Webster's New International Dictionary, the word has been equated "to hide or withdraw from observation ; to cover or keep from sight ; to prevent discovery of ; to withhold knowledge of". There may be cases where the facts may attract both the offences, and in some cases there may be overlapping of the two offences.

11. If, in the facts and circumstances of a particular case and on the materials before it, the Tribunal reaches a conclusion that concealment was not proved, it is a question of fact and no question of law arises from such order. Similarly, whether the burden in a given case has been discharged on a set of facts or not, is a question of fact. Where a finding of fact arrived at by the Tribunal is based on no material or is perverse or arrived at by application of wrong principles of law, a question of law arises. Where the Tribunal fails to arrive at its own conclusion of fact after due and proper consideration of the entire materials for and against the assessee and cancels the penalty, a question of law arises. Similar is the case where the conclusions of the Tribunal suffer from any infirmity on account of relevant materials and evidence being ignored.

12. A conspectus of the Explanation added by the Finance Act, 1964, and the subsequent substituted Explanations makes it clear that the statute visualised the assessment proceedings and penalty proceedings to be wholly distinct and independent of each other. In essence, an Explanation (both after 1964 and 1976) is a rule of evidence. Presumptions which are rebuttable in nature are

available to be drawn. The initial burden of discharging the onus of rebuttal is on the assessee. Rationale behind this view is that the basic facts are within the special knowledge of the assessee. Section 106 of the Indian Evidence Act, 1872, gives statutory recognition to this universally accepted rule of evidence. There is no discretion conferred on the Assessing Officer as to whether he can invoke the Explanation or not. Explanation 1, which primarily concerns the case at hand, automatically comes into operation when, in respect of any facts material to the computation of total income of any person, there is failure to offer an explanation or the explanation is offered which is found to be false by the Assessing Officer or the first appellate authority, or an (explanation is offered which is not substantiated. In such a case, the amount added or disallowed in computing" the total income is deemed to represent the income in respect of which particulars have been concealed. As per the proviso to Explanation 1, the onus to establish that the explanation offered was bona fide and all facts relating to the same and material to the computation of his income have been disclosed by him will be on the person charged with concealment. Mere failure to substantiate the explanation is not enough to warrant penalty. The Revenue has to establish that the explanation offered was not substantiated. The proviso to Explanation 1 is concerned only with cases coming under Clause (B) of the Explanation, where the assessee offered an explanation which he was not able to substantiate. The explanation of the assessee for the purpose of avoidance of penalty must be an acceptable explanation ; it should not be a fantastic or fanciful one. As indicated above, consequence follows as a matter of law. The burden is on the assessee. If he fails to discharge that burden, the presumption that he had concealed the income or furnished inaccurate particulars thereof is available to be drawn.

13. The principal logical import of the explanation is to shift the burden of proof from the Revenue on to the assessee. Rebuttal must be on materials relevant and cogent. It is for the fact-finding body to judge the relevancy and sufficiency of the materials. If such a fact-finding body, bearing the aforesaid principles in mind, comes to the conclusion that the assessee has discharged the onus, it becomes a conclusion of fact, and no question of law arises. As observed earlier, the initial burden is on the assessee. Once the initial burden is discharged, the assessee would be out of the mischief unless further evidence is adduced. It is plain on the principles that it is not the law that the moment any fantastic or unacceptable explanation is offered, the burden placed would be discharged and presumption rebutted. As pointed out by the apex court in *Commissioner of Income Tax Vs. Mussadilal Ram Bharose*, , the burden placed upon the assessee is not discharged by any fantastic explanation. It must be an explanation acceptable to the fact-finding body.

14. The position on and after April 1, 1976, is clear that where, in respect of any item of credit, the assessee has offered an explanation which the taxing officer has considered to be false or the assessee has offered an explanation but no material or evidence to substantiate it, he shall be deemed to have concealed such income within the meaning of Section 271(1)(c). By operation of the

Explanation, the onus lay on the assessee and finding's given at the time of assessment are relevant and have probative value where the assessee offered nothing beyond the explanation offered at the assessment stage or if no acceptable or plausible explanation, as indicated above, is offered. In such cases, it cannot be said that the assessee had discharged the onus even by a preponderance of probabilities.

15. In the aforesaid legal background, the factual position has to be analysed. As has been fairly admitted by learned counsel for the assessee, the plea that there! was an agreement for not resorting to penal proceedings was not specifically taken before the Assessing Officer as well as the Commissioner of Income Tax (Appeals). But, by way of clarification, it is stated that this position is clearly borne out from the record and, therefore, even if such a plea was not specifically taken, the Tribunal was justified in considering the same.

16. A letter accompanying the return filed on October 26, 1979, throws considerable light on the real background of correction of the bill in question. The letter reads as follows :

"1. Your notice above calling upon me to file a return of income for the assessment year 1978-79 in view of your having reason to believe that income chargeable to tax for the said assessment year has escaped assessment, has been received by me on October 12, 1979.

2. I submit that for the assessment year 1978-79 I had filed my return of income dated July 31, 1978, and the assessment has been completed as per order dated, September 20, 1978.

3. Thereafter voluntarily I filed a revised return of income dated August 3, 1979, along with an explanatory covering letter dated August 4, 1979, and the said return and the statement with the covering letter dated August 4, 1979, of my advocates was also filed in your office on August 4, 1979.

4. I submit, that at the time of filing the original return of income a sum of Rs. 5,00,000 (rupees five lakhs) being profit earned by me during the account year ended on March 31, 1978, was omitted to be shown in the original return of income dated July 31, 1978. This amount was earned by me by inflating purchase of 500 quintals of pepper as per bill No. 653 dated January 25, 1978, from Spot Spices Co., Jew Town, Cochin-2. As against the rate of Rs. 1,975 per quintal the purchase rate was shown as Rs. 2,975 per quintal and it is this purchase at the rate of Rs. 2,975 per quintal which has been debited in my books of account. This inflation in purchase has resulted in reducing my actual profit by Rs. 5,00,000.

5. In view of the above, I filed the revised return of income dated August 3, 1979, showing in Part III of the said return of income, the sum of Rs. 5,00,000 (rupees five lakhs) being the profits earned by inflation of the purchase as per bill No. 653, dated January 25, 1978.

6. In pursuance of your present notice, I am enclosing herewith the return of income dated October 26, 1979, together with a vakalath executed in favour of my advocates, Kamath and Kamath, Cochin-2. In the said return of income, I submit that the total income from business has been shown by me at Rs. 5,90,387.51 as against the sum of Rs. 90,387.51 shown by me in the original return dated July 31, 1978.

7. I submit that the sum of Rs. 5,00,000 (rupees five lakhs only) was kept as cash and this amount has been introduced today into the books of account of my proprietary concern, Kishore Spices Co., Cochin-2. The sum of Rs. 3,30,159 being the tax payable u/s 140A as per the present return of income filed by me has been remitted today and the challan receipt is enclosed herewith.

8. In view of the fact that I have voluntarily filed a revised return of income dated August 3, 1979, together with the explanatory letter dated August 4, 1979. I request you to kindly take a very sympathetic and lenient view in my case and refrain from initiating any penal proceedings against me."

17. The return dated August 3, 1979, which was filed on August 4, 1979, with an accompanying letter was admittedly filed after completion of the assessment on September 20, 1978. Therefore, it cannot be legally termed as a revised return. After initiation of proceeding u/s 147(a), return was filed on October 27, 1979, and that is the return which could really be considered by the Assessing Officer, and in fact has been considered. The explanation of the assessee that there was understatement of prices and Rs. 5,00,000 was intended to undo the financial loss of the company is clearly unacceptable in view of the letter dated October 27, 1979, the statements made in the return dated August 3, 1979, filed on August 4, 1979 (though an invalid return) and a letter accompanying it. In the revised return, the amount was shown as income from "business". The Tribunal's conclusion is that the revised entry had the effect of increase on the purchase of relevant quantity of pepper. It was of the view that even if the purchase was not in the normal course of trade, it cannot be said that it did not record the transaction truly and the provisions of Section 40A(2) of the Act could have been attracted. To say the least, the Tribunal had completely lost sight of the true nature of controversy. Its other conclusion that the interpolation did not render the position different is a conclusion which has no legal sanctity. Its further conclusion that in essence, the sum of Rs. 5.00,000 represented only an adjustment of the price for the entire quantity purchased in the year from the seller and not on the particular transaction is also contrary to the assessee's own case as indicated in the letter, which has been extracted above in the revised return. The Tribunal observed that the journal entry could have been to make the adjustment in respect of the entire purchases of the year and not for the particular purchase. But the accountant, by mistake, corrected the bill though he was not directed to do otherwise. Paragraphs 4, 5 and 7 of the letter extracted above clearly indicate a different position. In fact, that was an admission in clear terms, that there was inflation of purchase, that the amount was kept in cash

and had been introduced into the books of account of his proprietary concern. That being the position, the finding of the Tribunal that the amount had in reality been paid to the seller is clearly contrary to materials on record. So far as the alleged promise by the Revenue authorities not to impose penalty is concerned, the Tribunal itself has referred to the letter of the Commissioner of Income Tax, who had stated that if the assessee extends co-operation in reassessment proceedings, that would be taken into account while determining the quantum of penalty and in deciding the question of initiating prosecution or in fixing compounding fee for prosecution. True to the indication, the minimum penalty has been imposed. The Tribunal was clearly in error in making out a case contrary to the accepted stand of the assessee and in arriving at conclusions which are based on surmises and conjectures. It has left out of consideration relevant materials and acted on irrelevant materials. Its conclusions are, therefore, not sustainable, and the cancellation of penalty as directed is indefensible.

18. Reference is accordingly answered in favour of the Revenue and against the assessee.