

(1984) 08 KL CK 0022

In the High Court Of Kerala

Case No : Income-tax Reference No. 251 of 1979

Commissioner of Income Tax

APPELLANT

Vs

M.A. Unnerikutty

RESPONDENT

Date of Decision : 08-08-1984

Acts Referred:

Income Tax Act, 1961 — Section 68

Citation : (1985) 154 ITR 844

Hon'ble Judges : T. Kochu Thommen, J; K.P. Radhakrishna Menon, J

Bench : Division Bench

Advocate : P.K.R. Menon, for the Appellant; T.L. Viswanatha Iyer, for the Respondent

Judgement

Radhakrishna Menon, J.—The year of assessment is 1969-70, corresponding to accounting year ending March 31, 1969.

2. The assessee is an individual dealing in copra, oil, etc. While computing the assessable income of the assessee, the ITO estimated the cost of construction of the residential building, he had constructed during the year, at Rs. 69,950. However, he held that the total investment in that regard came only to a sum of Rs. 61,950. This investment was held to have been met out of the assessee's income from sources not disclosed and hence assessed under other sources. In doing so, the assessing authority had rejected the explanation of the assessee that he had utilised for the construction work a sum of Rs. 30,000 as having been given to him by his father. Similarly, the cash credits of Rs. 16,000 in the name of certain creditors was also held to be only a camouflage and as such the said amount was also found to be the assessee's income from undisclosed sources. Accordingly, the assessing authority treated the aforesaid amounts as income from other sources and added them back while determining the total assessable income at Rs. 1,53,021.

3. The AAC, before whom the assessee had filed an appeal, accepted the explanation of the assessee in regard to the contribution of Rs. 30,000 by his

father and accordingly directed deletion of the said amount from the total assessable income. After deletion of the said amount, the unexplained investment in regard to the construction of the building was found to be only Rs. 19,950. Regarding the cash credit of Rs. 16,000, the AAC affirmed the finding of the assessing authority.

4. The Appellate Tribunal concurred with the findings of the AAC. The Appellate Tribunal did not stop there. The Appellate Tribunal, however, found that the aforesaid unexplained amounts, namely, Rs. 19,950 and Rs. 16,000, would be fully covered by the intangible additions made to the assessable income of the assessee in the immediately preceding year. In doing so, it rejected the contention of the Department, based on a decision of the Supreme Court in *Commissioner of Income Tax, A.P. Vs. Althi Bangarayya*, , that the assessee should not be permitted to advance such a plea because the said plea appeared to be self-contradictory.

5. The Department filed a petition u/s 256(1) of the I.T. Act and sought reference of the following question of law to this court:

"Whether, on the facts and in the circumstances of the case, and in the light of the findings entered by the Income Tax Appellate Tribunal that the estimate made by the Income Tax Officer is reasonable ; that the credit was rightly disbelieved and the Income Tax Appellate Tribunal is right in law in allowing the additions of Rs. 19,950 and Rs. 16,000 to be set off against the intangible additions made in the earlier years ?"

6. The Tribunal dismissed the petition holding that it was not a question of law arising out of the order of the Tribunal. The Revenue thereupon filed O.P. No. 888 of 1977-E before this court u/s 256(2). Pursuant to the direction of this court, the above question, at the instance of the Revenue, has been referred to this court. That is how the Revenue is before us.

7. Counsel for the Revenue submitted that the alternative contention raised by the assessee that the unexplained income was covered by the intangible additions made to the income of the assessee in the immediately preceding year was a mere legal argument which cannot be treated as an explanation u/s 68 of the I.T. Act and, hence, the Tribunal was not right in holding that the unexplained income came out of the intangible additions made in the preceding year. He submitted that the mere availability of such income would not automatically suggest that the assessee had not earned secret profits in the year in question. The assessee has to establish that the said intangible additions cover the investment. So is the case with the cash credit found in the accounts of the assessee during the relevant year. In this connection, he called our attention to a decision of the Supreme Court in *Anantharam Veerasinghaiah and Co. Vs. Commissioner of Income Tax , Andhra Pradesh*, . The Supreme Court in the said decision has stated thus (p. 462):

"There can be no escape from the proposition that the secret profits or

undisclosed income of an assessee earned in an earlier assessment year may constitute a fund, even though concealed, from which the assessee may draw subsequently for meeting expenditure or introducing amounts in his account books. But it is quite another thing to say that any part of that fund must necessarily be regarded as the source of unexplained expenditure incurred or of cash credits recorded during a subsequent assessment year. 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. What these several circumstances can be is difficult to enumerate and, indeed, from the nature of the enquiry, it is almost impossible to do so."

8. The counsel also cited a decision of the Delhi High Court in *Commissioner of Income Tax Vs. Kulwant Kaur and Others* (L.Rs. of late Gurbachan Singh), and a decision of this court in *Abraham v. CIT* ILR [1975] 1 Ker 426. It is unnecessary for us to discuss these decisions any more in view of the decision of the Supreme Court referred to above.

9. The counsel for the assessee, however, submitted that the Supreme Court has approved the decision of the Andhra Pradesh High Court in *LAGADAPATI SUBBA RAMAIAH Vs. COMMISSIONER OF Income Tax MADRAS.*, and also the decision of the Madras High Court in *S. Kuppuswami Mudaliar Vs. Commissioner of Income Tax, Madras.* . It is true that the Supreme Court has virtually approved these decisions. But the Supreme Court was not prepared to hold that the mere availability of such a fund would help an assessee to presume that the said fund was always available to cover the unexplained income of the succeeding years. This is what the Supreme Court has said in this connection : "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". That means it is for the assessee to establish that he has not earned any secret profits during the relevant year and that the investment and also the credits found in the accounts in the names of certain persons flowed from the intangible additions

made in the preceding year. The Tribunal has not considered the issue in the manner suggested by the Supreme Court in *Anantharam Veerasinghaiah and Co. Vs. Commissioner of Income Tax , Andhra Pradesh*, mentioned above. The finding of the Tribunal, therefore, cannot be upheld.

10. The counsel for the assessee cited at the bar the following decisions, *Commissioner of Income Tax, Kerala Vs. Manick and Sons, , S. Kuppuswami Mudaliar Vs. Commissioner of Income Tax, Madras, , B. Abdul Qadir Vs. Commissioner of Income Tax, Madras, , Commissioner of Income Tax Vs. Ram Sanahi Gian Chand, ; Commissioner of Income Tax Vs. Ram Achal Ram Sewak, and CIT v. Sahu Brothers [1978] 115 ITR 438*, and argued that the acceptance by the Tribunal of the alternative contention raised by the assessee that the intangible additions made in the preceding year would cover the unexplained income of the year in question, is beyond challenge. This argument is devoid of merit in view of the decision of the Supreme Court aforesaid. We, therefore, reject the same.

11. The counsel for the Revenue did not dispute that the intangible additions made in the preceding years would constitute a fund from which the assessee may draw subsequently to meet his financial needs. But, according to him, it is for the assessee to establish that as a matter of fact, he drew amounts from this fund for investment in a subsequent year. The counsel further submitted that, in the instant case, the Tribunal erred in permitting the assessee to raise the alternative contention which indisputably is contradictory to or inconsistent with the contention raised by him in the beginning. In support of this contention, the counsel cited at the bar a decision of the Supreme Court, namely, *Commissioner of Income Tax, A.P. Vs. Althi Bangarayya, .* These are matters that should initially be enquired into by the Tribunal and not by this court. The Tribunal, however, has not done so. In our view, the Tribunal has not considered the question in the correct perspective.

12. In these circumstances, we decline to answer the question. We accordingly remand the matter to the Tribunal to dispose of the matter taking into account the materials already on record and in accordance with law.

13. A copy of this judgment under the seal of the High Court and the signature of the Registrar shall be forwarded to the Income Tax Appellate Tribunal, Cochin Bench.