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**(1970) 09 KL CK 0002**

**In the High Court Of Kerala**

**Case No :** Income-tax Reference No's. 29 and 30 of 1968

Commissioner of Income Tax

APPELLANT

Vs

Malangadan Timber Traders

RESPONDENT

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**Date of Decision :** 15-09-1970

**Acts Referred:**

Income Tax Act, 1922 — Section 22(1), 23(5), 26A, 28(1)

**Citation :** (1973) 88 ITR 215

**Hon'ble Judges :** P. Govindan Nair, J; M.U. Isaac, J

**Bench :** Division Bench

**Advocate :** P.K. Krishnankutty Menon, for the Appellant; K.P. Radhakrishna Menon, for the Respondent

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## **Judgement**

Govindan Nair, J.—The Income Tax Appellate Tribunal, Madras Bench "B", has stated two cases in relation to the assessment years 1960-61 and 1961-62 and has referred the following common question arising for the two years for our decision :

" Whether, on the facts and in the circumstances of the case, the penalty imposed on the assessee u/s 271(1)(a) for the assessment years 1960-61 and 1961-62 is liable to be cancelled ? "

2. The assessee, a firm, was registered by certificate issued on March 26, 1962, for the assessment year 1960-61. The firm was constituted on January 19, 1960, and the application u/s 26A of the Indian Income Tax Act, 1922, was on March 1, 1960. The application is, therefore, in conformity with the rules framed u/s 59 of the Indian Income Tax Act, 1922, and it is clear from Rule 4 that the certificate of registration will have effect for the assessment year ending on 31st March, 1961. The registration of the firm had been renewed for the year 1961-62 as well. For the two years returns were submitted by the firm only on June 21, 1961, and April 6, 1962, respectively. Admittedly these returns had been submitted out of time. Penalty was, therefore, sought to be imposed on the firm u/s 28(1)(a) of the Indian Income Tax Act, 1922, for not having complied with Section 22(1) of

the Act. Though the Income Tax Officer imposed penalty for the two years, the Appellate Assistant Commissioner set aside the orders imposing penalty on the ground that the firm which was duly registered under the Act had no income in excess of the maximum amount not chargeable to Income Tax during the two corresponding previous years to the assessment years 1960-61 and 1961-62. It was, therefore, held that there was no obligation on the part of the firm to file any return. Consequently, it was held that no penalty can be imposed u/s 28(1) (a). The contention raised was that at the time (when the return should have been filed) the firm was obliged to file a return u/s 22(1) as it could not be taken to have been registered then, the certificate of registration being dated March 26, 1962, a date after the date before which the return should have been submitted. It was held that the registration will have effect for the assessment year and must, therefore, govern the provision relating to the submission of returns for that assessment year. This view of the Appellate Assistant Commissioner has been accepted by the Income Tax Appellate Tribunal but is hotly contested before us by counsel on behalf of the revenue.

3. We have been referred to various sections of the Indian Income Tax Act, 1922, such as Sections 23(5), 26 and 28, proviso (d), and it is submitted that the income of the firm at least in so far as the shares of its partners are concerned are liable to be taxed u/s 23(5) and that when penalty is to be imposed, the quantum of the penalty has got to be determined as indicated in Clause (d) of the proviso to Section 28(1) and that this clause clearly indicates that even in cases where no tax can be imposed as such on the firm, a penalty can be imposed on the firm. Reliance has also been placed on the two decisions, one of the Calcutta High Court in KHUSIRAM MURARILAL Vs. COMMISSIONER OF Income Tax, CENTRAL, CALCUTTA., and the other of the Supreme Court in Commissioner of Income Tax, Madras, and Another Vs. S.V. Angidi Chettiar, in support of the contentions urged.

4. We shall read the relevant Sections 22(1), 23(5), 26 and 28(1)(a) as well as the proviso to Clause (d) to Sub-section (1) of Section 28 :

" 22. Return of income.--(1) The Income Tax Officer shall, on or before the 1st day of May in each year, give notice, by publication in the press and by publication in the prescribed manner, requiring every person whose total income during the previous year exceeded the maximum amount which is not chargeable to Income Tax to furnish, within such period not being less than sixty days as may be specified in the notice, a return, in the prescribed form and verified in the prescribed manner, setting forth (along with such other particulars as may be required by the notice) his total income and total world income during that year. "

"23. (5) Notwithstanding anything contained in the foregoing subsections when the assessee is a firm and the total income of the firm has been assessed under Sub-section (1), Sub-section (3) or Sub-section (4), as the case may be,--

(a) in the case of a registered firm, the sum payable by the firm itself shall not

be determined but the total income of each partner of the firm, including therein his share of its income, profits and gains of the previous year, shall be assessed and the sum payable by him on the basis of such assessment shall be determined :

Provided that if such share of any partner is a loss it shall be set off against his other income or carried forward and set off in accordance with the provisions of Section 24 :

Provided further that when any of such partners is a person not resident in the taxable territories, his share of the income, profits and gains of the firm shall be assessed on the firm at the rates which would be applicable if it were assessed on him personally, and the sum so determined as payable shall be paid by the firm :

Provided also that if at the time of assessment of any partner of a registered firm, the Income Tax Officer is of opinion that the partner is residing in Pakistan, the partner's share of the income, profits and gains of the firm shall be assessed on the firm in the manner laid down in the preceding proviso and the sum so determined as payable shall be paid by the firm; and

(b) in the case of an unregistered firm, the Income Tax Officer may instead of determining the sum payable by the firm itself proceed in the manner laid down in Clause (a) as applicable to a registered firm, if, in his opinion, the aggregate amount of the tax including super-tax, if any, payable by the partners under such procedure would be greater than the aggregate amount which would be payable by the firm and the partners individually if the firm were assessed as an unregistered firm."

"26. Change in constitution of a firm.--(1) Where, at the time of making an assessment u/s 23, it is found that a change has occurred in the constitution of a firm or that a firm has been newly constituted, the assessment shall be made on the firm as constituted at the time of making the assessment :

Provided that the income, profits and gains of the previous year shall, for the purpose of inclusion in the total incomes of the partners, be apportioned between the partners who in such previous year were entitled to receive the same :

Provided further that when the tax assessed upon a partner cannot be recovered from him it shall be recovered from the firm as constituted at the time of making the assessment.

(2) Where a person carrying on any business, profession or vocation has been succeeded in such capacity by another person, such person and such other person shall, subject to the provisions of Sub-section (4) of Section 25, each be assessed in respect of his actual share, if any, of the income profits and gains of the previous year :

Provided that, when the person succeeded in the business, profession or vocation

cannot be found, the assessment of the profits of the year in which the succession took place up to the date of succession, and for the year preceding that year shall be made on the person succeeding him in like manner and to the same amount as it would have been made on the person succeeded or when the tax in respect of the assessment made for either of such years assessed on the person succeeded cannot be recovered from him, it shall be payable by and recoverable from the person succeeding, and such person shall be entitled to recover from the person succeeded the amount of any tax so paid."

" 28. Penalty for concealment of income or improper distribution of profits.--(1) If the Income Tax Officer, the Appellate Assistant Commissioner or the Appellate Tribunal, in the course of any proceedings under this Act, is satisfied that any person-

(a) has without reasonable cause failed to furnish the return of his total income which he was required to furnish by notice given under Sub-section (1) or Sub-section (2) of Section 22 or Section 34 or has without reasonable cause failed to furnish it within the time allowed and in the manner required by such notice; . . . "

5. Proviso to Clause (d) to Sub-section (1) of Section 28 :

" Provided that--....

(d) when the person liable to penalty is a registered firm, or an unregistered firm treated u/s 23(5)(b) as a registered firm, so that the amount of the Income Tax and super-tax payable by the firm itself has not been determined, that amount shall be taken to be an amount equal to the tax which could have been payable by an unregistered firm on an income equal to the firm's total income, and, in the cases referred to in Clauses (b) and (c), the amount of the Income Tax and super-tax which would have been avoided if the income as returned had been accepted as the correct income, shall be taken to be the difference between the amount of the tax which would have been payable by an unregistered firm on an income equal to the firm's total income and the amount of the tax payable by an unregistered firm on an income equal to the income of the firm as actually returned by the firm,"

6. Only a person who without reasonable cause fails to furnish the return of his total income which he was required to furnish by notice given under Sub-section (1) of Section 22 is liable to be penalised for failure to submit a return generally. Section 22(1) enjoins on every person " whose total income during the previous year exceeded the maximum amount which is not chargeable to Income Tax to furnish " within the stipulated time a return in the prescribed form and verified in the prescribed manner. Reading this section leaves no doubt in our minds that only persons whose total income during the previous year exceeded the maximum amount which is not chargeable to Income Tax are liable to be penalised u/s 28(1)(a). A person will include a firm and a firm registered u/s 26A of the Indian Income Tax Act, 1922. In the case of a firm so registered the

maximum amount which is not chargeable to Income Tax of that firm's income is Rs. 40,000. So that firm, as we read Section 22(1), is obliged to file a return only if its income exceeded Rs. 40,000. Admittedly, the income of the assessee in this case did not exceed Rs. 40,000 as it was finally determined. So we are of the opinion that there was no obligation on the assessee-firm to file a return u/s 22(1). This being so, a fortiori, Section 28(1)(a) has no application. This is so, notwithstanding the fact that if the firm was obliged to file a return, an assessment on the partners would have been made in the manner indicated in Sub-section (5) of Section 23 or the further fact that if the firm was liable to be penalised the quantum of the liability would have been fixed under Clause (d) of the proviso to Section 28(1). These sections cannot add to the provisions in Section 22(1) of the Indian Income Tax Act a failure to comply with which is penalised u/s 28(1)(a). These sections have only applicability regarding the manner and the method of assessment and may be termed to be what are known as machinery sections. We are of the view that these sections cannot be pressed into service to change the ordinary meaning according to the literal grammatical sense of the words used in Sections 22(1) and 28(1)(a). The meaning that counsel for the revenue seeks to place on Section 22(1) that if any income is liable to tax under the Act--the assessor, a firm for instance, whose income it is not--the assessee therefore must file a return, cannot be given to the section. Nor are we satisfied that the two decisions relied on by counsel are of any help in resolving the question before us. In one case the penalty was imposed for concealing income and in the other for failure to produce accounts.

7. We see also no force in the contention that the registration certificate being issued only on March 26, 1962, the assessee had an obligation to file a return u/s 22(1), As we pointed out earlier, the certificate will have effect for the year of assessment and must therefore apply not only in regard to the assessment proceedings but in regard to the proceedings relating to the filing of the return.

8. We, therefore, answer the question referred to us in the affirmative, that is, in favour of the assessee and against the department.

9. A copy of this judgment under the seal of the High Court and the signature of the Registrar will be sent to the Appellate Tribunal as required by Sub-section (1) of Section 260 of the Indian Income Tax Act, 1961.

Question answered in the affirmative.