

(2001) 12 KL CK 0055

In the High Court Of Kerala

Case No : I. T. R. No. 50 of 1999 14 December 2001 & Income Tax R. No. 50 of 1999

Commissioner of Income Tax

APPELLANT

Vs

M.M. George

RESPONDENT

Date of Decision : 14-12-2001

Acts Referred:

Income Tax Act, 1961 — Section 113, 132, 139, 139(1), 143

Citation : (2002) 173 CTR 357 : (2002) 254 ITR 45

Hon'ble Judges : S. Sankarasubban, J;C.N. Ramachandran Nair, J

Bench : Division Bench

Advocate : P.K. Raveendranatha Menon and George K. George, for the Appellant; T.M. Sreedharan and M. Unnikrishnan, for the Respondent

Judgement

C.N. Ramachandran Nair, J.—This reference is at the instance of the Commissioner of Income Tax, Calicut. Question of law referred is whether on the facts and in the circumstances of the case, the Tribunal is justified in holding that the income below the taxable limit of any previous year is not to be included as the undisclosed income of the block period for the purpose of Section 158BC, even though such income has not been declared by the assessee by filing the return of income?

2. The assessee is an individual deriving income from various business activities including a grocery shop, plying of lorries on hire and also income from agricultural properties. The Department conducted a search u/s 132 of the Income Tax Act in the residential premises of the assessee on 22.11.1995. In response to a notice issued u/s 158BC, the assessee filed return showing undisclosed income of Rs. 88,500/- for the block period from 1.4.1985 to 22.11.1995. The Assessing Officer completed the assessment determining the total undisclosed income of the block period at Rs. 7,22,232/-. As the assessee had not previously paid tax, no deduction was allowed from the income of the assessee. Aggrieved by the assessment under undisclosed income of Rs.

7,22,232/-, the assessee preferred appeal before the Tribunal.

3. Before the Tribunal, the assessee raised many contentions. One of the contentions was that the Assessing Officer was not correct in including the income below the taxable limit as the undisclosed income for the purpose of assessment u/s 158BC. Since the income for the years 1986-87 and 1987-88 were below the taxable limit the assessee has not cared to file the return of the income. This contention was accepted by the Tribunal. The Tribunal also allowed certain other deductions and directed the Assessing Officer to look into the matter. The Revenue has referred to the question with regard to the non-inclusion of the income of the above two years for assessment. From the assessment order, the following is revealed:

Asstt. Year 1986-87: Undisclosed income returned by the assessee Rs. 18,000.00
Asstt. Year 1987-88 Undisclosed income returned by the assessee Rs. 18,000.00
Asstt. Year 1988-89 undisclosed income returned 47,000.00 Add: other sources for shortage of cash 23,669.00 Total undisclosed income Rs. 40,669.00 Asstt. Year 1989-90 Undisclosed income returned 17,000.00 Short term capital gain 37,768.00 Total undisclosed income Rs. 54,768.00 Asstt. Year 1990-91: House property income 5,000.00 Business income and other sources for shortage in cash flow 86,157.00 91,157.00 Less: Return Income 22,000.00 Total undisclosed income Rs. 69,157.00 Asstt. Year 1991-92: House property income 5,000.00 Business income 62,500.00 67,500.00 Less: Returned Income 62,500.00 Undisclosed income Rs. 5,000.00 Asstt. Year 1992-93: House property income 5,000.00 Business income 50,000.00 55,000.00 Less: Returned income 50,000.00 Undisclosed income Rs. 5,000.00 Asstt. Year 1993-94: House property income 5,000.00 Business income 50,000.00 Undisclosed income Rs. 55,000.00 Asstt. Year 1994-95: House property income 5,000.00 Business income (shortage in cash flow) 3,22,888.00 3,27,888.00 Less: Depreciation Lorry 17,500.00 (Cost Rs. 35,000) Undisclosed income Rs. 3,10,388.00 Asstt. Year 1995-96: House property income 5,000.00 Business income 84,000/- Less: Depreciation 8,750/- 75,250.00 Undisclosed income Rs. 80,250.00 Asstt. Year 1996-97: (upto 22.11.95) House property income 5,00.00 Business income 64,000/- Less: Depreciation for eight months) 3,000/- 61,000.00 Undisclosed income Rs. 66,000.00 Summary of the undisclosed income:- Asstt. Year 1986-87 Rs. 18,000.00 1987-88 Rs. 18,000.00 1988-89 Rs. 40,669.00 1989-90 Rs. 54,768.00 1990-91 Rs. 69,157.00 1991-92 Rs. 5,000.00 1992-93 Rs. 5,000.00 1993-94 Rs. 55,000.00 1994-95 Rs. 3,10,388.00 1995-96 Rs. 80,250.00 1996-97 Rs. 66,000.00 (Upto 22.11.95) Net undisclosed income 7,22,232.00 for the block period The assessment for the block period is completed as under: Net undisclosed income for the block period 7,22,232.00 r.o.t. 7,22,230.00 Tax at the rate of 60% 4,44,338.00

4. The case of the assessee is that for the periods 1986-87 and 1987-88, since the income was less than the assessable limit, that income cannot be taken into consideration. The Tribunal accepted this contention. Chapter XIVB of the Income

Tax Act deals with special procedure for assessment of search cases. The block period was the period comprised in previous years relevant to 10 assessment years preceding the previous year in which the search was conducted. Section 158B(b) of the Act defines undisclosed income, which says thus: "undisclosed income" includes any money, bullion, jewellery or other valuable article or thing or any income based on any entry in the books of account or other documents or transactions, where such money, bullion, jewellery, valuable article, thing, entry in the books of account or other document or transaction represents wholly or partly income or property which has not been or would not have been undisclosed for the purpose of this Act". Assessment regarding undisclosed income is dealt with Section 158BA of the Act. Section 158BA(2) of the Act says that the total undisclosed income relating to the block period shall be charged to tax, at the rate specified in Section 113, as income of the block period irrespective of the previous year or years to which such income relates and irrespective of the fact whether regular assessment for any one or more of the relevant assessment years is pending or not. Section 158BB deals with computation of undisclosed income of the block period. It says that the undisclosed income of the block period shall be the aggregate of the total income of the previous years falling within the block period computed, in accordance with the provisions of Chapter IV on the basis of evidence found as a result of search or requisition of books of account or documents and such other materials or information as are available with the Assessing Officer, as reduced by the aggregate of the total income, or as the case may be, as increased by the aggregate of the losses of such previous years, determined. That Section deals with the following:

- "(a) where assessments u/s 143 or Section 144 or Section 147 have been concluded, on the basis of such assessments;
- (b) where returns of income have been filed u/s 139 or Section 147 but assessments have not been made till the date of search or requisition, on the basis of the income disclosed in such returns;
- (c) where the due date for filing a return of income has expired but no return of income has been filed, as nil,
- (d) where the previous year has not ended or the date of filing the return of income under Sub-section (1) of Section 139 has not expired, on the basis of entire relating to such income or transactions as recorded in the books of account and other documents maintained in the normal course on or before the date of the search or requisition relating to such previous years;
- (e) where any order of settlement has been made under Sub-section (4) of Section 245D, on the basis of such order;
- (f) where an assessment of undisclosed income had been made earlier under Clause (c) of Section 158BC, on the basis of such assessment".

5. Contention of the learned counsel for the Revenue is that Section 158B contained in Chapter XIV of the Income Tax Act deals with special procedure for block assessment. Learned counsel submitted that in the block assessment, a particular period is fixed and the assessment is made of the total income for this block period, which was 10 years at the relevant time. Tax is charged as per Section 113, which says that the total disclosed income of the block period, determined u/s 158BC, shall be chargeable to tax at the rate of sixty per cent. Hence, learned counsel submitted that there is no room for finding out whether the income for each of the years was below the taxable limit or not. The only deduction which the assessee is entitled is as provided u/s 158BB Clauses (a) to (f). On the other hand, learned counsel for the assessee submitted that it is true that the assessment was for a block period. But there may be cases where in a particular year the income of the assessee would be less than the assessable income, that income should not be taken into consideration for the purpose of total income, as that would be against him. Learned counsel also brought to our notice Form 2B, which is the relevant form for block assessment. In Note 5 to Form 2B, it is stated thus "Give the details in respect of the previous year on the basis of assessment order if the assessment/prima facie adjustment has been completed. Else, give the details on the basis of return of income filed. For the previous year which has not ended or for which the date of filing of the return u/s 139(1) has not expired and that you are in a position to prove to the satisfaction of the Assessing Officer that such income or the transactions relating to such income have been recorded in the books of account and documents maintained in the normal course, such income is to be indicated against that previous year. For any year, if the return has not been furnished for the reason that the taxable income was not above the maximum amount not chargeable to tax, the total income is to be mentioned against that previous year".

6. According to us, the note does not state as contended by the learned counsel for the assessee. As a matter of fact, the note specifically states that even though the return is not filed on the ground that the total income is below the taxable limit, the total income has to be mentioned against the previous year. Further it is well known that even if the note contains anything, which is in consistent with the Section, then the Section will prevail. Hence, according to us, on the basis of the note, the Section cannot be interpreted. In this context, we refer to a decision of the Gujarat High Court reported in *Khandubhai Vasanji Desai and Others Vs. Deputy Commissioner of Income Tax*, which says as follows: "Chapter XIV devises a special procedure for assessing the undisclosed income. The persons whose undisclosed income is already detected in search proceedings is a valid reason for asking him to declare in the return whether he had any other undisclosed income. The block period is only of ten years which is not more onerous than the upper period of ten years for initiating assessment proceedings for income escaping assessment by issuing notice u/s 148 read with Section 149". According to us, the reasoning given by the Tribunal cannot be accepted. What is taxed is the income for the block period. The rate of tax is

different from the rate of tax in the usual procedure. What Section says is that the income has to be ascertained as per Chapter XIV of the Act. In certain cases, the total income has been reduced if there has been assessment or circumstances mentioned in Section 158 BC. When the assessment is for a block period, then it is not necessary to find out whether the income was below the taxable limit.

7. In the above view of the matter, we answer the question referred in the negative in favour of the Department and against the assessee.