
(1971) 08 KL CK 0015

In the High Court Of Kerala

Case No : Income-tax Reference No's. 17 and 18 of 1969

Commissioner of Income Tax

APPELLANT

Vs

Mohammed Kunhi

RESPONDENT

Date of Decision : 20-08-1971

Acts Referred:

Income Tax Act, 1961 — Section 271(1)

Citation : (1973) 87 ITR 189

Hon'ble Judges : T.S. Krishnamoorthy Iyer, J;K.K. Mathew, J

Bench : Division Bench

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

Judgement

Mathew, J.—This is a reference at the instance of the Commissioner of Income Tax u/s 256(1) of the Income Tax Act and the question of law referred is:

" Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was justified in law in holding that the assessee has not concealed his income represented by the difference between the cost of construction of the building as per the Appellate Tribunal's order and the assessee's accounts and in cancelling the penalty u/s 271(1)(c)?"

2. The assessee is an individual and he returned an income of Rs. 5,731 and Rs. 1,359 for the assessment years 1960-61 and 1961-62 respectively. The assessee began the construction of a hotel building at Kasaragod and completed it by the end of December, 1970. The total cost of construction of the building according to his books of account was Rs. 86,081. The Income Tax Officer estimated the cost of construction at Rs. 2,29,460. He arrived at the sum of Rs. 1,13,400 being the excess investment of the assessee in the building not accounted for by him and included the sum as his undisclosed income for the two years, since the source of the fund remained unexplained. The Income Tax Officer, therefore, passed an order on April 27, 1962, u/s 23(3) of the Income Tax Act (for short "the Act") on that basis. An appeal was filed by the assessee to the Appellate

Assistant Commissioner. He reduced the estimate of the cost of construction, of the building to Rs. 1,70,000 relying on the inspector's valuation report. The assessee's undisclosed income for each year was thus reduced to Rs. 41,958. The assessee appealed to the Income Tax Appellate Tribunal against the Assistant Commissioner's order. The Tribunal appointed an engineer as commissioner u/s 37(3) for valuing the cost of construction of the assessee's building and the commissioner submitted a report. On the basis of the report the Tribunal reduced the income from the undisclosed source in respect of each year to Rs. 33,385.

3. The Income Tax Officer being satisfied that the assessee has concealed the income, initiated penalty proceedings u/s 271(1)(c) of the Act for the two years. As the minimum penalty leviable u/s 271(1)(c) for each year exceeded Rs. 1,000, the cases were referred to the Inspecting Assistant Commissioner of Income Tax for disposal. The Inspecting Assistant Commissioner rejected the assessee's plea that he had not deliberately concealed the particulars of the income and held that there was concealment of the income to the extent of the difference between the Appellate Assistant Commissioner's valuation of the cost of the construction of the building and the assessee's estimate of such cost. The Inspecting Assistant Commissioner by his combined order dated March 20, 1964, passed u/s 271(1)(c) read with Section 274(2) of the Act, imposed a penalty of Rs. 17,000 for 1960-61 and a penalty of Rs. 14,000 for 1961-62. The assessee filed appeals to the Appellate Tribunal. The Appellate Tribunal pointed out that the cost of construction of the building was determined only on the basis of an estimate which varied from Rs. 2,29,460 as determined by the Income Tax Officer to Rs. 1,52,855 as finally adopted by the Appellate Tribunal. It observed that although the assessee's explanation that he had used stones taken from his quarries and the timber from his forests for the construction of the building was found to be unsupported by any proper evidence, that circumstance did not necessarily imply that the assessee's accounts were totally false. In other words, the Tribunal held that though for lack of proper evidence the cost of construction was estimated at Rs. 1,52,855 it cannot be said that the cost of construction according to the assessee's accounts could be held to be totally false. It, therefore, came to the conclusion that the assessee had not concealed his income to the extent of the difference.

4. It is now well established by the decision of the Supreme Court in Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, that penalty proceedings are penal in character, and the department has to establish that the assessee has concealed his taxable income. In that case the Supreme Court said :

"The gist of the offence u/s 28(1)(c) is that the assessee has concealed the particulars of his income or deliberately furnished inaccurate particulars of such income and the burden is on the department to establish that the receipt of the amount in dispute constitutes income of the assessee. If there is no evidence on

the record except the explanation given by the assessee, which explanation has been found to be false, it does not follow that the receipt constitutes his taxable income..... It would be perfectly legitimate to say that the mere fact that the explanation of the assessee is false does not necessarily give rise to the inference that the disputed amount represents income. It cannot be said that the finding given in the assessment proceedings for determining or computing the tax is conclusive. However, it is good evidence. Before penalty can be imposed the entirety of circumstances must reasonably point to the conclusion that the disputed amount represented income and that the assessee had consciously concealed the particulars of his income or had deliberately furnished inaccurate particulars."

5. See also our judgment in ITR No. 11 of 1969 dated 17-8-1971, Dawn and Co. Vs. Commissioner of Income Tax, .

6. This court in N. Kunhali Haji Vs. Commissioner of Income Tax, Kerala, held :

"the proceedings u/s 28 are in the nature of a penal proceeding... The onus of proof is on the department and the degree of proof is that of a criminal prosecution; the mere preponderance of probability will not suffice as in the case of a civil action. . . .It would be but legitimate to say that mere falsity of an explanation given in assessment proceedings would not necessarily lead to the inference that the disputed amount represented income, and that, besides that circumstance, there must be some additional material from which the Income Tax Officer has to satisfy himself whether the assessee was guilty of the charge against him u/s 28."

7. Applying that principle to this case it will be found that even if the explanation offered by the assessee cannot be accepted there must be some material or evidence before the Income Tax Officer to find that the assessee has concealed his taxable income. We are of opinion that the Income Tax Officer had no materials before him for coming to the conclusion that the assessee has concealed his taxable income and that the Appellate Tribunal came to the right conclusion.

8. We, therefore, answer the question of law referred in the affirmative and in favour of the assessee. We make no order as to costs.

9. A copy of this judgment will be sent to the Appellate Tribunal under the seal of the High Court and the signature of the Registrar.