

(2003) 07 KL CK 0049
In the High Court Of Kerala
Case No : IT Appeal No. 51 of 2000

Commissioner of Income Tax

APPELLANT

Vs

N.S. Babu

RESPONDENT

Date of Decision : 04-07-2003

Acts Referred:

Income Tax Act, 1961 — Section 253(5), 271(1)

Citation : (2003) 184 CTR 231 : (2004) 266 ITR 616

Hon'ble Judges : Kurian Joseph, J;G. Sivarajan, J

Bench : Division Bench

Advocate : P.K.R. Menon and George K. George, for the Appellant; Thottathil B. Radhakrishnan, R. Meeradevi, Sreekumar K.S. and George Varghese Perumpallikuttiiyil, for the Respondent

Judgement

1. This is an appeal filed by the CIT Thiruvananthapuram against the order of the Tribunal, Cochin Bench in C.O. No.41/Coch/1999 in ITA No. 682/Coch/1995 cancelling the penalty u/s 271(1)(c) of the Income Tax Act, 1961, for short the Act". While admitting the appeal notice was ordered on the following questions of law :

(1) Whether, on the facts and in the circumstances of the case and in the light of the decisions of the Supreme Court in Commissioner of Income Tax (Additional), Lucknow Vs. Jeevan Lal Sah, and other Supreme Court decisions the Tribunal is right in law and fact in holding that "for levy of penalty u/s 271(1)(c) there should be a conscious concealment of income on the part of the assessee" and is not the approach of the Tribunal based on the above principle and the consequential conclusion wrong, vitiated and against law ?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal is right in law and fact in holding that "There is no material brought on record by the AO to rebut the plea of the assessee that the failure to return the correct income did not arise from any fraud or gross or wilful neglect" and is not the finding and the approach and the consequential conclusion, vitiated and against

law ?

(3) Whether, on the facts and in the circumstances of the case, the Tribunal is right in law and fact in holding that on a preponderance of probabilities it is to be held that the amounts offered for assessment did not represent income which were concealed by the assessee within the meaning of Section 271(1)(c) ?

(4) Whether, on the facts and in the circumstances of the case and in the lights of the recent Supreme Court decisions, the Tribunal is right in law and fact

(i) in relying on the decision in Commissioner of Income Tax Vs. India Sea Foods, .

(ii) in finding that "the AO was not justified in levying penalty u/s 271(1)(c) on the ground that there was concealment of income on the part of the assessee ?

(5) Whether, on the facts and in the circumstances of the case-

(i) should not the Tribunal have considered the case under the relevant Explanation.

(ii) The Tribunal is right in law in placing the burden on proof on the Revenue;

(6) Whether, on the facts and in the circumstances of the case and after having found that "as the assessee admitted that the sum of Rs. 1,68,748 could be assessed as income he cannot now deny that there was no omission or error in not disclosing the same in the return of income furnished by him" should not the Tribunal have considered the case under the relevant Explanation without placing the burden of proof on the Revenue ?

(7) Whether, on the facts and in the circumstances of the case, if according to the learned representative of the assessee "the assessee was not well-versed in accounts and that he had to depend on his chartered accountant" (vide para 11) are not the contentions of the representative that "the assessee went through the details and found that two accounts were remaining unadjusted", "the assessee could have disputed that the income did not represent the income of the current year (para. 11, lower down) inconsistent, militating against each other and are not both the contentions unacceptable and false and the Tribunal unjustified in relying on the above submissions and in finding "we see no reason to doubt the plea of the assessee that it was a bona fide mistake or omission."

(8) Whether, on the facts and in the circumstances of the case and in the light of the letters dt. 1st Jan., 1992, from the AO putting the assessee at the point of being caught and alerting him of the consequences and the assessee's reply dt. 10th Jan., 1992 and 22nd Jan., 1992 and also in the light of the decision of this Hon'ble Court in Sreenivasa Pai (ITS 137/96 dt. 1st Nov., 1999) and other cases the Tribunal is right in law and fact in holding that "it was a bona fide mistake in accounting" and also in deleting the penalty sustained by the CIT(A) ?

(9) Whether, on the facts and in the circumstances of the case and solely relying on the submission of the counsel and the self-serving affidavit of the assessee and without giving an opportunity to the Revenue to rebut, the Tribunal is right in law and fact in condoning the long delay of four years in filing the cross-objection ?

(10) Whether, on the facts and in the circumstances of the case and in view of the fact that only when the assessee received summons from the Chief Judicial Magistrate, Ernakulam in the case filed by the Revenue u/s 276C, the assessee has chosen to file the cross-objection the Tribunal is right in law in condoning the delay based on some other "material" and without affording an opportunity to the Revenue to rebut the evidence or material ?"

2. The brief facts necessary for the purpose of this case is as follows :

The respondent-assessee is an individual deriving income mainly from the proprietary business, in the name of M/s Bharathy Clays and M/s Bharathy Earth Engineering Contractors. For the asst. yr. 1989-90, the assessee filed a return showing a loss of Rs. 4,685. The AO issued a notice to the assessee stating that he proposes to complete the assessment ex pane on an income of Rs. 40 lakhs since the assessee did not respond to the various notices. The assessee then filed a reply stating that the two items appearing in the schedule of advances totalling Rs. 40,413 shown as advance in the name of Kalpaka Finance, Thiruvananthapuram is actually interest received from that concern and another sum of Rs. 1,28,335 shown as advance in the name of Travancore Cements Ltd., Kottayam was not really outstanding this year since supplies relating to this advance were made during the relevant assessment years. The assessment was completed u/s 143(3) of the Act. In addition to Rs. 1,68,748 so offered the AO made an addition of Rs. 43,499 by way of advance out of the business promotion expenses.

3. In this appeal we are concerned with the proceedings u/s 271(1)(c) of the Act for imposition of penalty on the ground that the assessee had suppressed income to the tune of Rs. 1,68,748 and on the ground of disallowance of Rs. 43,499 pursuant to a notice issued u/s 274 of the Act. After considering the objections filed by the assessee the officer imposed a minimum penalty of Rs. 1,20,000 as per order dt. 17th Aug., 1992 on a concealed income of Rs. 2,12,245 (Annexure-A). The assessee took up the matter in appeal before the CIT(A), Thiruvananthapuram who by his order dt. 28th June., 1995 (Annexure-B) allowed the appeal in part. The first appellate authority held that the sum of Rs. 43,499 disallowed cannot be reckoned since this was deleted by the CIT(A) in quantum appeal. It was also held that the assessee had surrendered the amount of Rs. 1,68,748 only as a result of the queries made by the AO and therefore the offer made by the assessee cannot be treated as voluntary. It was held that the assessee has to be treated as having concealed income to the extent of Rs. 1,68,748 and directed the AO to levy the minimum penalty on that amount. The Department filed appeal No. 682/Coch/1995 to the extent the CIT(A) had

directed the deletion of a sum of Rs. 43,499 for the computation of minimum penalty. The assessee had filed a cross-objection to the extent the CIT(A) sustained the imposition of penalty on a concealed income of Rs. 1,68,748. The Tribunal by the impugned order, had dismissed the appeal filed by the Revenue and allowed the cross-objection filed by the assessee and ordered.

4. Sri. P.K.R. Menon, senior counsel, (Government of India) Taxes, appearing for the appellant submits that in the instant case the Tribunal was not justified in entertaining the cross-objection filed by the assessee beyond the time prescribed therefore in the Act. The senior counsel submits that the Tribunal had wrongly cast the burden of establishing that penalty u/s 271(1)(c) of the Act is exigible on the Revenue, The senior counsel in support of his case relied on the decisions of the Supreme Court in Commissioner of Income Tax Vs. A. Sreenivasa Pai, , M/s. K.P. Madhusudhanan Vs. Commissioner of Income Tax, Cochin, and the decision of the Division Bench of this Court in the judgment in IT Ref. No. 42/1999 and other decisions in Kerala Chemicals and Proteins Ltd. Vs. Commissioner of Income Tax, .

5. The senior counsel on the basis of all these decisions submitted that the decision of the Tribunal is erroneous. The senior counsel therefore submits that the Tribunal must be directed to consider the question in the light of the principles laid down by the Supreme Court and this Court on the question of burden in the above mentioned cases.

6. Sri. Thottathil B. Radhakrishnan learned counsel appearing for the respondent-assessee submits that the Tribunal had in fact found as a fact that the omission to include the two amounts, namely Rs. 40,413 shown as advance received from Kalpaka Finance, Thiruvananthapuram and a sum of Rs. 1,28,335 as advance received from Travancore Cements Ltd., was due to a bona fide mistake and that the assessee immediately after noticing the mistake had offered the same for assessment voluntarily and before detection, Counsel submitted that the accounts of the assessee are subjected to audit as contemplated u/s 44AB and in the balance sheet the four amounts are shown in sundry credits account. The counsel further submitted that on the finding of fact entered by the Tribunal it was very clear that there was no case for penalty u/s 271(1)(c) of the Act. The counsel further submitted that the Tribunal has decided the appeal based on the principles laid down by the Supreme Court and by this Court, though the said decisions happened to be overruled or not followed subsequently. The senior counsel for the Revenue then submitted that when the Tribunal has come to the conclusion that there is no case for imposition of penalty u/s 271(1)(c) both on facts and on legal principles laid down in the decided cases, it will not be possible for one to say that with certainty as to which factor weighed with the Tribunal in coming to the conclusion so reached and, therefore, the appropriate course would be to remit the matter to the Tribunal for considering the question afresh in accordance with law. We find merit in the said submission. In this case we find on perusal of the order of the Tribunal that the Tribunal has considered the facts

of the case and it observed that the omission to include two amounts in the return was bona fide. However, the Tribunal has considered the matter in the light of the principles laid down by the Supreme Court and of this Court mentioned in the order itself. It is an admitted position that those principles are no more good law in view of the decisions of the Supreme Court and of this Court relied on by the senior counsel for the Revenue in support of his contentions regarding the burden. In these circumstances we are of the view that the matter must be remitted to the Tribunal for fresh consideration in accordance with law. We accordingly set aside the order of the Tribunal and remit the matter back, to the Tribunal for fresh consideration in the light of the facts and circumstances of the case and also in the light of the legal principles regarding the burden in the decision of the Supreme Court and of this Court relied on by the senior counsel and in other cases. We make it clear that we have not considered the merits of the case in this appeal. We also make it clear that the issue involved in this case is only in relation to the imposition of penalty based on the alleged concealed income of Rs. 1,68,748.

7. Here, we note that question Nos. 9 and 10 raised by the appellant on which notice was issued relates to the justification for admitting the cross-objection filed by the assessee beyond the time prescribed in the statute. We find that the Tribunal has considered the said question in para 5 of the appellate order with reference to the principles laid down by the Supreme Court. We do not find any reason to interfere with the said finding of fact arrived at by the Tribunal. Question Nos. 9 and 10 stand answered in favour of the assessee. We make it clear that the only question to be considered is with regard to the levy of penalty on the alleged concealed income of Rs. 1,68,748. In these circumstances we decline to answer question Nos. 1 to 8. This IT appeal is disposed of as above.