

(1998) 07 KL CK 0025

In the High Court Of Kerala

Case No : Income-tax Reference No's. 56 and 57 of 1996

Commissioner of Income Tax

APPELLANT

Vs

P.K. Narayanan

RESPONDENT

Date of Decision : 27-07-1998

Acts Referred:

Income Tax Act, 1961 — Section 132, 183, 271(1)

Citation : (1999) 152 CTR 115 : (1999) 238 ITR 905 : (1999) 106 TAXMAN 567

Hon'ble Judges : Om Prakash, C.J.;J.B. Koshy, J

Bench : Division Bench

Advocate : P.K.R. Menon and N.R.K. Nair, for the Appellant; S. Ananthakrishnan, for the Respondent

Judgement

Om Prakash, C.J.—Pursuant to the direction of this court u/s 256(2) of the Income Tax Act, 1961 (briefly "the Act"), the income tax Appellate Tribunal referred the following common questions relating to the assessment years 1979-80 and 1980-81 for the opinion of this court :

"(1) Whether, on the facts and in the circumstances of the case and also in the light of Explanation 1 to section 271(1)(c) relied on by the assessing authority, the Tribunal is right in law and fact in casting the burden of proof on the Revenue ?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal is right in law in deleting the penalty levied in relation to the alleged income from (a) toddy shop, (b) Shilpy Theatres, (c) Archana Jewellery, and (d) minors' income, by proper application of law of onus and burden of proof and its discharge ?

(3) Whether, on the facts and in the circumstances of the case, is not the order of the Tribunal vitiated for not considering the case in the light of Explanation 1 to Section 271(1)(c) ?"

2. For these assessment years, certain additions were made by the Assessing

Officer on the basis of the materials seized on January 29, 1982, when a search u/s 132 of the Act was carried out at the residence of the assessee. The additions finally upheld by the Appellate Tribunal are as follows :

"Assessment years

1979-80 1980-81

Rs. Rs.

Income from toddy business in Alwaye range 2,27,609 1,00,822

Income from benami business in the name of Archana Jewellery 20,580 1,38,348

Share income of minor children from Shilpi Movies 13,333 13,333."

3. The facts as briefly stated are that during the search operation on January 29, 1982, documents marked as items Nos. 20/29 to 20/34 were seized. These documents purported to have related to toddy business in Alwaye range for the consecutive accounting years 1977-78 to 1979-80.

4. Item No. 20/29 revealed the following entries :

Rs.

1977-78 a/c Profit 1,98,694.87

1978-79 a/c Profit 4,55,219.29

1979-80 a/c Profit 2,01,643.58

Total

8,55,557.74

50% of profit

4,27,778.87

5. On the basis of these details, the assessee was called upon to explain by the Assessing Officer why 50 per cent. of the profit relating to the years in question, be not treated as his income. The assessee denied having owned the toddy business. The assessee also stated that toddy being an excise item, abkari business could not be carried on by any person without a valid licence and that no excise licence was granted in favour of the assessee for the years in question. The assessee urged that the Revenue should have enquired as to who carried on the abkari business and that if abkari business was carried on by a firm then the assessment could have been made only on the firm as per the procedure and that 50 per cent. profits from the toddy business could not be straightaway included in the hands of the assessee for either of the assessment years. The Assessing Officer rejected the contention of the assessee and found that 50 per cent. income from the toddy business was of the assessee.

6. Coming to Archana Jewellery business, it was the case of the assessee that the said business was owned by one Shri A.N. Chellappan. The Assessing Officer, however, held that A.N. Chellappan was a man of straw and since documents relating to Archana Jewellery business were found from the bedroom of the assessee, the Assessing Officer inferred that the said business was owned by the assessee and that A.N. Chellappan was only his benamidar. The Assessing Officer found that the closing stock was undervalued. He, therefore, valued the closing stock applying the rate shown by another assessee, who carried on business in the same area. Addition was, therefore, made on the ground of undervaluation of the closing stock. Additions made were sustained by the Appellate Tribunal in second appeal.

7. The last addition for the purposes of these cases relate to income from Shilpi Theatre. It is the case of the assessee that the Silpi Theatre was owned by the firm : Shilpi Movies, in which the assessee's minor children were admitted to the benefits of the firm. Minors' income from the firm was not shown by the assessee in his return. The assessee contended that the minors had their independent sources of income and, therefore, their share income from the firm was not disclosed by him. The Assessing Officer, however, in view of Section 64(1) (iii) of the Act held that the assessee was under legal obligation to disclose the minors' income. Income of the firm was estimated at Rs. 24,000 for the assessment year 1979-80. 5/9ths share of the minors was taken at Rs. 13,333 and the same was included in the assessee's income. For the assessment year 1980-81 also, the same income was assessed and the same share income of the minors was included in the assessee's hands.

8. The Assessing Officer while making the assessments also initiated penalty proceedings for concealment u/s 271(1)(c) of the Act and found that the incomes from toddy business, from Archana Jewellery and from Shilpi Movies represented concealed income of the assessee. Penalty was accordingly levied. As already pointed out, the additions in respect of such incomes were upheld by the Appellate Tribunal in second appeal. The submission of learned senior standing counsel is that Explanation 1 to Section 271(1)(c) of the Act is applicable and that the explanation given by the assessee being false and not being substantiated by the assessee, the presumption would be that the additions upheld by the Appellate Tribunal, represented the concealed incomes of the assessee. He also submits that the assessee failed to rebut the presumption by any cogent material and, therefore, the Appellate Tribunal erred in law in deleting the penalties for both the assessment years. It is also submitted by him that the Appellate Tribunal was in error in holding that the onus was on the Revenue to prove that the additions represented the concealed income of the assessee. He submits that under Explanation 1 to Section 271(1)(c), concealment to the extent of additions, sustained by the Appellate Tribunal, was to be presumed and, therefore, the onus was on the assessee to rebut the presumption. The submission, therefore, is that the common order of the Tribunal relating to both the assessment years, is vitiated.

9. So far as the legal proposition is concerned, there cannot be two opinions that under Explanation 1, a presumption will arise that if any addition made by the Assessing Officer is sustained by the appellate authority, then that will represent the concealed income of an assessee and the onus will be on the assessee to rebut the presumption. A presumption under Explanation 1 is obviously available, when an assessee fails to offer an explanation or offers an explanation which is found by the Assessing Officer to be false or if the assessee offers an explanation which he is not able to substantiate and fails to prove that such explanation is bona fide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him. The cases at hand are not the ones where no explanation was furnished by the assessee. Admittedly, the assessee furnished explanation for all incomes, which were included by the Assessing Officer and sustained by the Appellate Tribunal in the hands of the assessee. There is no positive material on record to come to the conclusion that the Assessing Officer successfully established that the explanation furnished by the assessee is false. The onus to establish that the explanation furnished by the assessee in respect of the incomes included in his hands, is false, is on the Revenue.

10. Let us look into the explanation furnished by the assessee in respect of each of the three incomes relevant herein, which are included in his hands for both the years. So far as the toddy business income is concerned, the assessee contended that he had no connection with the business. The abkari business, no doubt, cannot be carried on by any one without a valid licence. Since the place of business was clear from the documents seized and since the seized documents revealed the names of K.S. Chathunny, K.S. Ramakrishnan and K.P. Sreedharan whose names were found in the balance-sheet, it was for the Revenue to make enquiry from the Excise Department as to whom the licence to carry on the toddy business was granted during the relevant years and also some enquiry should have been made from the persons, whose names appeared in the balance-sheet. It has come on the record that the assessee participated in the excise auction only on March 6, 1980, that is, during the accounting year 1980-81, relevant to the assessment year 1981-82. The Tribunal observed that "the certificate now produced before us also indicated that K.S. Chathunny, K.S. Ramakrishnan and K.P. Sreedharan were the persons who had taken the auction in the impugned years". They were not examined, though their names appeared in the balance-sheet (item No. 20/ 31). Under Explanation 1, the Revenue could prima facie presume that the toddy business in respect of which documents were seized, involved the assessee as well. But in view of the denial of the assessee, it was for the Revenue to prove nexus between the toddy business for which no licence is said to have been obtained by the assessee for the impugned years, and the assessee. Explanation 1, no doubt, raised an initial presumption that the additions represented concealed income of the assessee, but that is not an absolute presumption and depending on the facts and circumstances of the case, the onus might shift to the Revenue by mere denial of the assessee. In the case

of abkari business which could not be carried on by every person freely, it was for the Revenue to make necessary investigation from the Excise Department as to who obtained the licence to carry on the business in the relevant area and what was the relationship between such licensee and the assessee, in so far as the abkari business is concerned. The assessee totally denied having owned the abkari business. No clear case has been set up by the Revenue as to who obtained the licence to carry on such abkari business and whether that business was carried on by the licensee in partnership with the assessee. The explanation of the assessee cannot be said to be false nor has that been so held by the Revenue ; nor can it be said that the assessee failed to substantiate his denial or that his explanation is not bona fide. On these facts, the Appellate Tribunal was right in deleting the penalty.

11. Then comes the penalty imposed in respect of the income from Archana Jewellery. It is the case of the assessee that his nephew, namely, Sathyan, was an employee of Archana Jewellery, which was owned by Chellappan Achari ; that the papers relating to Archana Jewellery were brought by Sathyan with him and that he left them in the bed room of the assessee, which were recovered therefrom during the search. A lease agreement purporting to have been executed in the name of Shri A.N. Chellappan Achari, the assessee and one A.G. Ramesh was recovered from the assessee's premises, besides other papers revealing purchase of 15134.40 grams of gold and certain receipts and disbursement of Rs. 6,11,293.97 by cheques. It is noteworthy that an assessment in regard to the business of Archana Jewellery had been completed by the Income Tax Officer, B-Ward, Ernakulam, on September 18, 1981. The contention of the assessee was that Chellappan Achari who carried on business of Archana Jewellery, desired to take the premises of Ramesh--a neighbour of the assessee--on rent and that since the latter wavered in relying on the former, the good offices of the assessee was utilised. The assessee contended that he being a neighbour intervened in the matter and got the lease-agreement settled. Sathyan, the nephew of the assessee, was not examined by the Revenue. The Tribunal held that no adverse inference could be drawn simply on account of the monetary transactions, the assessee, admittedly, had with Chellappan Achari. The Tribunal took note of the fact that Chellappan Achari was assessed in respect of Archana Jewellery business and, therefore, the Revenue could not turn around now and say that Chellappan Achari was benamidar of the assessee. The licence to run the jewellery business was in the name of Chellappan Achari. No account books relating to this business were seized from the house of the assessee. On these facts, the Tribunal was right that the explanation of the assessee could not be said to be false or mala fide. Nor could it be said that the assessee failed to substantiate his explanation. The Tribunal clearly held that in view of the facts that Chellappan Achari was already assessed in respect of Archana Jewellery business and, therefore, the presumption arising u/s 132(4A) of the Act in favour of the Revenue, stood rebutted. Since the assessment was already made in this behalf on Chellappan Achari and since the case of the assessee that the seized

documents were brought with him by Sathyan who was not examined by the Revenue, remains uncontroverted, the explanation of the assessee cannot be said to be false nor has it been so established by the Revenue ; nor can it be said that the assessee was not able to substantiate his explanation, no penalty could be sustained under Explanation 1.

12. Lastly comes the income falling to the share of the minors from Shilpi Movies. Indisputably, the five minor children Of the assessee received their share income from the firm ; Shilpi Movies. The said firm did not apply for registration. This being so, the unregistered firm could have been assessed either in that status u/s 183(a) or u/s 183(b) treating it as a registered firm, provided the conditions to invoke Clause (b) are satisfied. No such course was adopted and the Assessing Officer simply included the income purportedly falling to the share of the minors, in the hands of the assessee. The Appellate Tribunal was of the view that unless the Assessing Officer proceeds to make assessment on the firm, income falling to the share of the minors, could not be straightaway included in the hands of the assessee. The Tribunal, therefore, concluded that "the inclusion itself is bad in law and it is immaterial whether the assessee had agitated the issue in the quantum. In penalty proceedings such a stand is taken before us and in our opinion it is validly taken". Legally speaking, it is correct that first, such income should have been assessed in the hands of the firm--unregistered or registered--and thereafter only income falling to the share of the minors, could be assessed in the hands of the assessee. No assessment having been made on the firm, we feel persuaded by the view, taken by the Appellate Tribunal. Penalty in this regard was, therefore, rightly cancelled by the Tribunal on this count, other considerations apart.

13. So far as the onus is concerned, we have already pointed out that under Explanation 1, additions/disallowances made by the Assessing Officer and sustained by the appellate authorities, will represent the concealed income of the assessee, provided no explanation is furnished or the explanation furnished is found to be false or the assessee is not able to substantiate the explanation or the explanation is not bona fide. It is not a case of "no explanation"; also it is not a case where the explanation filed by the assessee, can be said to be false nor has it been so established by the Revenue. The explanation furnished is not per se mala fide or untenable. On these facts, no penalty can be sustained simply on the strength of Explanation 1.

14. No doubt, the Appellate Tribunal has not referred to Explanation 1 to Section 271(1)(c) in this case. But considering the explanation of the assessee and the facts and circumstances of the case in its entirety, the Tribunal was of the view that the presumption initially available to the Revenue, was successfully rebutted. It is vehemently argued before us for the Revenue that the Tribunal wrongly placed the burden of proof on the Revenue and hence the common order is vitiated. The order of the Tribunal has to be seen in entirety and not in a truncated fashion. The Tribunal discussed the explanation of the assessee

threadbare and other facts and circumstances and found that the explanation was satisfactory. This is how it held that the explanation was neither proved to be false (this onus is on the Revenue) nor could it be said that it was not bona fide or that the assessee was not able to substantiate the same. This being so, no penalty could be sustained under Explanation 1 on the facts and in the circumstances of the case. The Tribunal did not delete the penalty on the ground that the Revenue failed to discharge its initial onus. The common order of the Tribunal cannot, therefore, be said to be vitiated on the ground of onus.

15. In the result, question No. 2 is answered in the affirmative, that is, in favour of the assessee and against the Revenue. Question No. 1 is misconceived and question No. 3 is answered in the negative, that is, in favour of the assessee and against the Revenue.