

(1978) 08 KL CK 0030

In the High Court Of Kerala

Case No : IT Referred Case No. 50 of 1976 & Income-tax Referred Case No. 50 of 1976

Commissioner of Income Tax

APPELLANT

Vs

Rowther Brothers

RESPONDENT

Date of Decision : 16-08-1978

Acts Referred:

Income Tax Act, 1961 — Section 271(1)

Citation : (1979) 1 ILR (Ker) 253 : (1979) 119 ITR 353

Hon'ble Judges : V.P. Gopalan Nambiyar, C.J.; S.K. Kader, J

Bench : Division Bench

Advocate : P.A. Francis and P.K.R. Menon, for the Appellant; V.S. Moothathu, N.R.K. Nair, K.J. Joseph and T.K.M. Unnithan, for the Respondent

Judgement

Gopalan Nambiyar, C.J.—The Income Tax Appellate Tribunal, Cochin Bench, has sent up a statement of the case and referred the following question of law for our opinion, viz. :

" Whether, on the facts and in the circumstances of the case, and particularly in view of the finding that the assessee consciously and deliberately concealed particulars of its income and deliberately furnished inaccurate particulars thereof and further that the Explanation to Section 271(1)(c) applied to this case, the Income Tax Appellate Tribunal is right in law in cancelling the penalty imposed u/s 271(1)(c) of the Income Tax Act, 1961?"

2. The assessee was doing business in foodgrains, tobacco and rubber. The assessment year with which we are concerned is 1969-70, the accounting year being the financial year 1968-69 ending with 31st March, 1969. On an examination of the accounts, the ITO found two credits in the folio opened for M/s. Kottayam Rubber Company to the following effect :

Rs.

(1) 9-12-1968

3,129

(2) 12-12-1968

2,500

Total

5,629

3. These credits were wiped off by debit entries on December 25, 1968, for Rs. 3,000 and on March 31, 1969, for Rs. 2,629. The officer grew suspicious in regard to the debit entries, and called upon the assessee to explain the cash credits and how they were squared up. It was then admitted before the officer that the credits represented the income of the assessee and that the debits were fictitious. The plea was that it, was so done by the clerk without the knowledge of the assessee, and on account of the laxity on the part of the managing partner to check up the cash balance as per accounts. The Explanation was rejected by the ITO, and the amount of Rs. 5,629 was added back. There was no appeal against the assessment. Penalty proceedings were initiated for concealment of income, and the case was referred to the IAC who found concealment of income and imposed the penalty of Rs. 8,500. The assessee appealed to the Tribunal. The Tribunal took the view that even after the addition of Rs. 5,629, and the disallowance of certain amounts, the total income assessed was only Rs. 21,384, viz., below the assessable limit for a registered firm ; and that, being a registered firm With income of less than Rs. 25,000, the assessment was a "nil" assessment, which would result in no demand against the firm. It was of opinion that there was no evidence of any concealment of any other item of income. The Tribunal hence came to the conclusion that there was no material to show that there was any intention or desire to hide or to conceal the income so as to attract a penalty. It allowed the appeal, and held that no penalty was imposable. The question has been referred to us u/s 256(2) of the Act.

4. Section 271(1) of the I.T. Act, as it stood at the relevant time, read :

"271. Failure to furnish returns, comply with notices, concealment of income, etc.--(1) If the Income Tax Officer or the Appellate Assistant Commissioner, 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 total income which he was required to furnish under Sub-section (1) of Section 139 or by notice given under Sub-section (2) of Section 139 or Section 148 or has without reasonable cause failed to furnish it within the time allowed and in the manner required by Sub-section (1) of Section 139 or by such notice, as the case may be, or

(b) has without reasonable cause failed to comply with a notice under Sub-section (1) of Section 142 or Sub-section (2) of Section 143, or

(c) has concealed the particulars of his income or furnished inaccurate particulars

of such income,

he may direct" that such person shall pay by way of penalty,--

(i) in the cases referred to in clause (a), in addition to the amount of the tax, if any, payable by him, a sum equal to two per cent, of the tax for every month during which the default continued, but not exceeding in the aggregate fifty per cent, of the tax ;

(ii) in the cases referred to in clause (b), in addition to any tax payable by him, a sum which shall not be less than ten per cent, but which shall not exceed fifty per cent, of the amount of the tax, if any, which would have been avoided if the income returned by such person had been accepted as the correct income :

(iii) in the cases referred to in clause (c), in addition to any tax payable by him, a sum which shall not be less than, but which shall not exceed twice, the amount of the income in respect of which the particulars have been concealed or inaccurate particulars have been furnished.

Explanation,--Where the total income returned by any person is less than eighty per cent, of the total income (hereinafter in this Explanation referred to as the correct income) as assessed u/s 143 or Section 144 or Section 147 (reduced by the expenditure incurred bona fide by him for the purpose of making or earning any income included in the total income but which has been disallowed as a deduction), such person shall, unless he proves that the failure to return the correct income did not arise from any fraud or any gross or wilful neglect on his part, be deemed to have concealed the particulars of his income or furnished, inaccurate particulars of such income for the purposes of clause (c) of this sub section."

5. The section has been amended with effect from April 1, 1976. But as the amendment is immaterial for the purposes of this case, we are leaving it out. The order of imposition of the penalty with which we are concerned is dated November 15, 1973. It would be noticed that under the section all that is required for the imposition of a penalty under Clause (c) of Sub-section (1) of the section is that the officer concerned must be satisfied that any person has concealed the particulars of his income, or has furnished inaccurate particulars of such income. In other words, for the purposes of Clause (c), there is no need to find any failure to furnish a return or failure to comply with a notice, etc., which are the necessary ingredients under Clauses (a) and (b). Again in the matter of computation of penalty under Clauses (a) and (b) it would be seen that under the Sub-clauses, (i) and (ii) after Clause (c), the penalty imposed is geared to the tax payable or avoided; whereas in the case referred to under Clause (c), it is not necessarily geared to the tax payable, but is in addition to any tax payable (if no tax is payable this will not enter the reckoning), an amount not more than twice the amount of the income concealed or the inaccurate particulars furnished. With this analysis of the section and its ingredients, it seems to us that the Tribunal was wrong in its reasoning that even if the concealed income

were to be added, the resultant figure would "only fall below the assessable limit for a registered firm and things of the kind. These are immaterial for the purpose of Clause (c). Counsel for the revenue cited the decision of a Division Bench of this court in Commissioner of Income Tax Vs. India Sea Foods, . The Division Bench observed (p. 716):

" The second part of the question does really arise in the case and that concerns the quantum of the penalty leviable against the assessee who had been found guilty of concealment of income u/s 271(1)(c). sub-clause (iii) of the section lays down the principle to be applied in respect of the said matter. As per that sub-clause an assessee whose case falls within clause (c) may be directed to pay by way of penalty a sum which shall not be less than, but which shall not exceed twice, the amount of the income in respect of which the particulars have been concealed or inaccurate particulars have been furnished. It was contended by the assessee's learned advocate that the " income" referred to in this sub-clause should be taken to mean the " total income " of the assessee as determined by the Income Tax Officer in the order of assessment, that the minimum penalty prescribed by the said sub clause is the amount of such "total income" and that the maximum penalty prescribed is twice that amount. In support of this contention counsel for the assessee relied strongly on certain observations of a Division Bench of the Lahore High Court in (1938) 6 ITR 534 . In our opinion, that decision is of no assistance at all to the assessee. The question that fell to be considered by the Lahore High Court in that case was whether u/s 28 of the Indian Income Tax Act, 1922, a penalty could be imposed against an assessee who had deliberately put forward certain false claims for deductions. Rejecting the contention put forward by the assessee that the word " income" was used in Section 28 (Indian Income Tax Act, 1922) in its popular sense as meaning only money received by the assessee and that it did not refer to any deduction or exemption claimed by him, the Division Bench stated as follows :

" If the interpretation put upon the word by the assessee be adopted it would lead to absurd and anomalous results. An assessee would in those circumstances be at liberty to forge his return with impunity in any manner that he likes so far as the expenditure, deduction or exemptions are concerned and would escape the consequences of the law so long as he furnishes true particulars of his income in the narrower sense of the term. This, however, could never be the intention of the legislature. We are fortified in our conclusion by the remarks made by their Lordships of the Privy Council in AIR 1932 178 (Privy Council) That case is on all fours with the present case inasmuch as it particularly relates to bad debts. Those remarks are :

" Although the Act nowhere in terms authorises the deduction of bad debts of a business, such a deduction is necessarily allowable. What are chargeable to Income Tax in respect of a business or the profits and gains of a year ; and in assessing the amount of the profits and gains of a year account must necessarily be taken of all losses incurred, otherwise you would not arrive at the true profits

and gains.

" Falsehood in accounts can take only two forms: either an item may be suppressed dishonestly or an item may be claimed fraudulently, and in penalising concealment of the particulars of one's income as well as deliberate furnishing of inaccurate particulars, Section 28 penalises both forms of falsehood. In the case before us it has been found as a fact that the assessee deliberately claimed a false deduction and in the light of the remarks made above, we are disposed to hold that the case of the assessee fell within the ambit of Section 28. We accordingly dismiss this petition with costs."

What this decision has laid down is only that the liability for penalty u/s 28 of the Indian Income Tax Act, 1922 (corresponding to Section 271(1)(c) of the Act), will be attracted if there has been a concealment or furnishing of false particulars by the assessee either in respect of monies received by the assessee or in respect of any expenditure or claims for deductions and exemptions. It was in this context that the court observed that the word " income " was used in Section 28 not in the narrower popular sense as meaning only " money received" but in a much wider technical sense so as to take in all items including expenditure and deductions, etc., that are to be taken into account before the assessable figure is arrived at. We fail to see how the said observation made by the learned judges of the Lahore High Court is of any assistance to the assessee in this case.

In the present case, the liability of the assessee for being subjected to the imposition of a penalty u/s 271(1)(c) stands concluded by the finding recorded in that behalf by the Tribunal and the question raised before us relates only to the quantum of the penalty that may be levied under sub-clause (iii) of the said section. The answer to the said question depends on the interpretation to be placed on the said sub-clause. "

6. There are decisions which recognise that for purposes of the I.T. Act even a " nil" assessment has to be regarded as an assessment in the eye of law. See *Esthuri Aswathiah Vs. The Income Tax Officer, Mysore State, and Commissioner of Income Tax, Calcutta* Vs. *Bidhu Bhushan Sarkar (Dead) through his Legal Representative Mihir Kumar Sarkar*, , both decisions of the Supreme Court. See also *V.S. Sivalingam Chettiar Vs. Commissioner of Income Tax, Madras*, , *COMMISSIONER OF Income Tax, BIHAR AND ORISSA Vs. BANKIPUR CLUB LTD.*, , etc. In the circumstances, it seems to us to make little difference that although there is a concealment within the meaning of Section 271(1) the said concealment, would not, even if the concealed income be taken into account, bring the assessee within the assessable fold. This is immaterial, and the Tribunal was, in our view, wrong in relying on this circumstance and in holding on this ground that the penalty was not imposable in law.

7. Counsel for the assessee relied upon the decision of a Division Bench of this court in *Commissioner of Income Tax Vs. Malangadan Timber Traders*, . But that decision was concerned with Section 28(1)(a) of the, 1922 Act corresponding to

Section 271(1)(a) of the present Act, which, as noticed, is based on totally different considerations and the ingredients of which are materially different. The decision has, therefore, no application.

8. Counsel for the assessee submitted that even if penalty be imposable in law, there has been no advertence to, or consideration by, the Tribunal, of the quantum of the penalty, and as to whether the penalty imposed was excessive or not. Indeed, in the order of the Tribunal it is stated]

" So, we are not considering the other question as to whether if penalty is imposable the quantum imposed was excessive. "

9. This is an aspect of the matter which requires consideration by the Tribunal. In our advisory jurisdiction u/s 256(2) we are concerned only with answering of the question of law sent up for our opinion and should leave it to the Tribunal to pass consequential orders where necessary.

10. In the result, we answer the question of law in the negative, that is, in favour of the revenue and against the assessee. There will be no order as to costs.

11 We make it clear that nothing said herein will preclude the Tribunal from passing appropriate consequential orders in accordance with law.

12. A copy of this judgment, under the signature of the Registrar and the seal of this court, will be forwarded to the Income Tax Appellate Tribunal, Cochin Bench, as required by law.