

(2001) 11 KL CK 0042

In the High Court Of Kerala

Case No : Income Tax A. No. 106 of 1999

Commissioner of Income Tax

APPELLANT

Vs

Sree Krishna Trading Co.

RESPONDENT

Date of Decision : 27-11-2001

Acts Referred:

Income Tax Act, 1961 — Section 271(1)

Citation : (2002) 253 ITR 645

Hon'ble Judges : P.K. Balasubramanyan, J;C.N. Ramachandran Nair, J

Bench : Division Bench

Advocate : P.K. Ravindranatha Menon and George K. George, for the Appellant;
B.S. Krishnan and Latha Krishnan, for the Respondent

Judgement

P. K. Balasubramanyan, J.—This appeal, at the instance of the Revenue, was admitted on the following substantial questions of law :

"1. Whether, on the facts and in the circumstances of the case, the Tribunal is right in law and fact in cancelling the penalty, and in/by confirming the order of the Commissioner of Income Tax (Appeals) ?

2. Whether, on the facts and in the circumstances of the case, did the assessee discharge the burden that lay on it ?

3. Whether, on the facts and in the circumstances of the case and in the light of Explanation 1 to Section 271(1)(c) and also in the light of its own finding in the quantum appeal that "true, the Tribunal did not accept the plea that it was because of the reduction in the sale price that the assessee could make a significant increase in the quantity of arrack sold in the second half of the year", the Tribunal is right in law and fact in holding that "the assessee's explanation substantiated with the increase in the turnover" and is not the latter finding inconsistent with/militating against the former finding" ?

4. Whether, on the facts and in the circumstances of the case and in the light of the fact found by the Tribunal that the Tribunal did not accept the plea that it was

because of the reduction in the sale price that the assessee could make a significant quantity of arrack sold in the second half of the year does not the case come under Clause (B) of Explanation 1 to Section 271(1)(c) and is not the order of the Tribunal accordingly vitiated ?

5. Whether, on the facts and in the circumstances of the case and in the light of Clause (B) to Explanation 1 to Section 271(1)(c) and in the light of the finding in the quantum appeal (taken note of in this order) is not the penalty order valid and in accordance with law and the Tribunal is justified in interfering with the same ?

6. Whether, on the facts and in the circumstances of the case, the Tribunal is right in law and fact in introducing the concept of conscious concealment in a case where Explanation is applicable and does not the concept of conscious concealment have application at all to the case ?"

2. On receipt of notice, the assessee appeared and both sides were heard.

3. For the assessment year 1983-84, the assessee, an abkari licensee running 11 arrack shops, 23 toddy shops and two foreign liquor shops in Karunagapally Range returned an income of Rs. 55,920. The Assessing Officer rejected the return and completed the assessment on a total income of Rs. 20,76,130. In appeal by the assessee, the same was reduced to Rs. 2,68,180. The Assessing Officer had assessed the sale price of arrack at Rs. 35 per litre as against Rs. 31 per litre as shown by the assessee for the period from April 1, 1982, to September 30, 1982, and at Rs. 30 per litre for the period from October 1, 1982 to March 31, 1983. But, the Commissioner of Income Tax (Appeals) held that the sale price of arrack should be taken as Rs. 31 per litre throughout the year and that was the reason for reduction of the income from Rs. 20,76,130 to Rs. 2,68,180. Thus, the Commissioner of Income Tax (Appeals) sustained the addition made by the Assessing Officer to the extent of Rs. 1,92,188. On appeal by the assessee, the Tribunal confirmed the order of the Commissioner of Income Tax (Appeals).

4. The Assessing Officer initiated proceedings for imposition of penalty u/s 271(1)(c) of the Act. The Assessing Officer held that the assessee has concealed particulars of his income and has, thereby, incurred the liability for penalty. The Assessing Officer also relied on the Explanation to Section 271(1)(c) of the Act in support of his conclusion that this is a fit case for levying penalty. Applying his mind to the quantum of penalty to be imposed, the Assessing Officer levied a sum of Rs. 1,50,000 as penalty u/s 271(1)(c) of the Act.

5. The assessee appealed. The Commissioner of Income Tax (Appeals) took the view that there was no conscious concealment of income by the assessee and that Explanation 1 to Section 271(1)(c) of the Act was not applicable. The Commissioner of Income Tax (Appeals) is not seen to have explained why Explanation 1 was not attracted. Thus, the Commissioner of Income Tax (Appeals) reversed the order of the Assessing Officer and cancelled the order

levying penalty. The Revenue went up in appeal before the Tribunal. The Tribunal relied on the decision of this court in Commissioner of Income Tax Vs. India Sea Foods, and held that for imposition of penalty u/s 271(1)(c) of the Act, there should be a conscious concealment of income on the part of the assessee. The Tribunal proceeded to say that even though the explanation offered by the assessee for allegedly selling liquor at a reduced price was found to be not satisfactory while completing the assessment and an addition was made, it could not be said that there was a conscious concealment on the part of the assessee proved in this case. Therefore, the Tribunal confirmed the decision of the Commissioner of Income Tax (Appeals). It is this decision of the Tribunal that is challenged before us in this further appeal filed u/s 260A of the Income Tax Act.

6. Learned counsel for the Revenue brought to our notice that the decision of the Full Bench of this court relied on by the Tribunal in Commissioner of Income Tax Vs. India Sea Foods, cannot any more be considered to be good law in the light of the decision of the Supreme Court in M/s. K.P. Madhusudhanan Vs. Commissioner of Income Tax, Cochin, . The Supreme Court was confirming the decision of this court in Commissioner of Income Tax Vs. K.P. Madhusudhanan, , wherein this court had scrutinised the history of the legislation and had defined the scope and ambit of the relevant provisions, including Explanation 1 to Section 271(1)(c) of the Act. While affirming the approach and conclusion of this court, the Supreme Court also noted that the decision of the Supreme Court in Sir Shadi Lal Sugar and General Mills Ltd. and Another Vs. Commissioner of Income Tax, Delhi, , was not good law after the addition of Explanation to Section 271(1) of the Act. The basis of the decision of this court in Commissioner of Income Tax Vs. India Sea Foods, relied on by the Tribunal was the decision in Sir Shadi Lal Sugar and General Mills Ltd. and Another Vs. Commissioner of Income Tax, Delhi, found to be not good law by the Supreme Court in M/s. K.P. Madhusudhanan Vs. Commissioner of Income Tax, Cochin, . Thus, the very basis on which the Tribunal proceeded to confirm the decision of the Commissioner of income tax (Appeals) is seen to be erroneous. In fact, in our judgment in 1999 I.T.A. 40 1999 Deputy Commissioner of Income Tax Vs. K. Suresh Kumar, , we have discussed these aspects and we have indicated that the burden was on the assessee to explain the concealment in the proceeding initiated u/s 271(1)(c) of the Act. We may also notice here that the Tribunal has placed the burden wrongly on the Revenue in this regard.

7. The assessee had concealed the particulars of his income when he made the return. This stand is established by the fact that there was an addition made by the Commissioner of Income Tax (Appeals) and by the Tribunal. The assessee's explanation that he had reduced the price of liquor so as to enhance the sales was disbelieved by all the assessing authorities when an addition was made to the income returned by the assessee. Clearly, therefore, it is a case that comes u/s 271(1)(c) of the Act. Explanation 1 thereof provides that in a case where the explanation is offered which is found by the Assessing Officer to be false or no explanation is offered or an explanation is offered which could not be

substantiated and that the explanation was bona fide and all the relevant facts had been disclosed, the amount added in computing the total income of such person shall be deemed to represent the income in respect of which particulars have been concealed. In this case, the Assessing Officer proceeded to take note of the addition of Rs. 1,92,188 by the Commissioner of Income Tax (Appeals) and proceeded to impose the penalty on that basis after due application of mind. The assessee's explanation had also been found against and in view of the fact that no mens rea need be shown and in view of the further fact that conscious concealment need not be established as earlier understood, it is clear that the Assessing Officer was justified in imposing the penalty in the case on hand. Both the Commissioner of Income Tax (Appeals) and the Appellate Tribunal had substantially erred in law in interfering with the levy of penalty by the Assessing Officer and that too, on an erroneous basis and on the basis of a wrong approach to the question. The finding by the Tribunal that Explanation 1 has no application to the case on hand is clearly unsustainable in law.

8. In the light of our conclusions as above, it is clear that the Commissioner of Income Tax (Appeals) and the Appellate Tribunal were substantially in error in interfering with the order of the Assessing Officer imposing penalty. In that situation, we answer the substantial questions of law formulated for decision in favour of the Revenue and against the assessee. As a consequence of our conclusion, we allow this appeal and setting aside the orders of the Income Tax Appellate Tribunal and that of the Commissioner of Income Tax (Appeals), restore the order of the Assessing Officer dated March 2, 1993, imposing the penalty. We make no order as to costs.