(2004) 06 KL CK 0027

In the High Court Of Kerala

Case No : IT Ref. No. 263 of 1997

Commissioner of Income Tax APPELLANT

Vs

T.J. Mathai RESPONDENT

Date of Decision : 03-06-2004

Acts Referred:
Income Tax Act, 1961 — Section 271(1)

Citation : (2004) 190 CTR 201 : (2004) 269 ITR 492

Hon'ble Judges : S. Sankarasubban, J;A.K. Basheer, J

Bench : Division Bench

Advocate : P.K.R. Menon and George K. George, for the Appellant; C. Kochunny Nair and Dale P. Kurien, for the Respondent

Judgement

S. Sankarasubban, J.—The above IT Reference has been referred to this Court by the Tribunal, Cochin Bench in R.A. No, 194/Coch/1996. As per the reference, three questions of law are referred to this Court; they are :

"(1) Whether, on the facts and in the circumstances of the case, the Tribunal should have decided the appeal in the light of the Explanation to Section 271(1)(c)(3) or remitted the case back to the assessing authority to be considered in the light of the Explanation?

(2) Whether, on the facts and in the circumstances of the case, the Explanation being part of the main provisions of Section 271(1)(c), the Tribunal is right in holding that a separate notice should have been given by the AO before invoking the Explanation?

(3) Whether, on the facts and in the circumstances of the case, the Tribunal is right in holding that the assessee was not deliberately showing a low estimate of income with a view to conceal his income?"

The facts of the case are as follows :

2. The assessee is an individual deriving income from contract works. For the

assessment year under consideration, the assessee filed the return on 6th Dec., 1988 declaring nil income and claiming carry forward of unabsorbed investment allowance to the extent of Rs. 1,95,703. On 9th July, 1987, the Department conducted a search in the assessee''s premises and seized various documents. The assessment was completed on 29th March, 1990 on a total income of Rs. 12,58,350. The enhancement of income was on account of additions under income from contract-works and income from hiring out of machinery estimated. The AO also considered a sum of Rs. 7,86,475 as unexplained investment but in view of the substantial additions made on account of machinery hire charges, he telescoped the unexplained investment with the above income and did not make a separate addition. In appeal, the CIT(A) upheld the addition of Rs. 85,995 in the contract account. As regards the income from hiring out of machinery, he reduced the income to Rs. 4,25,250 and on second appeal, the Tribunal reduced the same to Rs. 3,85,725. Thereafter, the AO initiated penalty proceedings under, Section 271(1)(c) and after considering the assessee''s explanation, he came to the conclusion that penalty was livable. A penalty of Rs. 2,50,000 was thus levied on the assessee.

3. In the appeal against the levy of penalty, the CIT(A) analysed the additions under various heads and held that there was no case for levying penalty and accordingly he cancelled the penalty levied on the assessee. The Revenue took up the matter in appeal before the Tribunal. The Tribunal held on facts that no penalty was livable and it further held that since no notice was issued under the Explanation, penalty proceedings cannot be passed. It is against that this reference has come.

4. After hearing both sides, we are of the view that the Tribunal was not correct in holding that the facts of this case do not give rise to penalty. In para 7, it held that the AO has not invoked the Explanation to Section 271(1)(c) and it also was of the view that the finding of the AO that the assessee has deliberately concealed the particulars of income and penalty was livable was not correct.

5. We heard learned counsel Sri Ravindranatha Menon for the Revenue and learned counsel Sri Dale P. Kurian for the assessee.

6. After hearing both sides, we are satisfied that the order of the Tribunal is not correct. After coming into force of the Explanation to Section 271(1)(c) of the IT Act, the burden is on the assessee to show that there was no concealment of any particulars of any income. In M/s. K.P. Madhusudhanan Vs. Commissioner of Income Tax, Cochin, , it was held as follows : "The Explanation to Section 271(1)(c) is a part of Section 271. When the AO or the AAC issues a notice u/s 271, he makes the assessee aware that the provisions thereof are to be used against him. These provisions include the Explanation. By virtue of the notice u/s 271 the assessee is put to notice that, if he does not prove, in the circumstances stated in the Explanation, that his failure to return his correct income was not due to fraud or neglect, he shall be deemed to have concealed the particulars of his income or furnished inaccurate particulars..." In CIT v. Warsat Hussain (1988)

171 ITR 405 , the Patna High Court held thus: "Assessment by estimate is one of the known processes in the taxation world. Where the assessee conceals relevant material evidence, the Revenue has no option but to make a best judgment assessment by estimate. An assessment by estimate is as much legal as any other assessment. Once an assessment has been done, whether it is a best judgment assessment or otherwise, the figure assessed must be held to be the income of the assessee. Such an assessment would not affect the levy of penalty."

7. Thus, we find in this case that the Tribunal was not correct in holding that the Explanation does not come into play. As per Explanation, the burden is on the assessee. Hence, we hold that the Tribunal should have decided the appeal in the light of the Explanation to Section 271(1)(c) of the IT Act. Regarding questions 1 and 2 we answer it in the negative and in favour of the Department. In the light of the above answer, it is not necessary for us to decide question No. 3. Since the Tribunal has not considered it in the proper perspective, the Tribunal is directed to consider the matter in the light of our decision on the questions of law. IT Reference is disposed of as above.