

(1990) 12 MAD CK 0072

In the Madras High Court

Case No : Tax Cases No"s. 439 to 441 of 1980 (References No. 208 to 210 of 1980)

Commissioner of Income Tax

APPELLANT

Vs

V. Ramakrishna Sons (P.) Ltd.

RESPONDENT

Date of Decision : 18-12-1990

Acts Referred:

Income Tax Act, 1961 — Section 254(4), 271(1), 271(1)(C)

Citation : (1991) 92 CTR 178 : (1991) 192 ITR 282

Hon'ble Judges : V. Ratnam, J;T. Somasundaram, J

Bench : Division Bench

Advocate : N.V. Balasubramaniam, for the Appellant; Uttam Reddy, for the Respondent

Judgement

Somasundaram, J.—In these tax case references u/s 256(2) of the Income Tax Act, 1961, (hereinafter referred to as "the Act"), the following question of law has been referred to this court for its opinion :

"Whether, on the facts and circumstances of the case and having regard to the fact that the Tribunal has sent back for de novo consideration by the Appellate Assistant Commissioner the question of the genuineness of the hundi loans, the Tribunal was justified in cancelling the entire penalty u/s 271(1)(c) of the Act for the assessment years 1964-65, 1965-66 and 1966-67 ?"

2. The assessee is a company deriving its income mainly from managing agency and dividends. For the assessment years 1964-65, 1965-66 and 1966-67, the assessee filed returns of income disclosing Rs. 4,32,517, Rs. 5,79,918 and Rs. 9,13,836, respectively. In the course of the assessment proceedings, it was found that the assessee had claimed loss of Rs. 70,350 and Rs. 1,00,006 respectively for the assessment years 1964-65 and 1965-66 in the spun pipe plant. Likewise, excess remuneration paid to a financial adviser in a sum of Rs. 24,000 for the assessment years 1964-65 and 1965-66 was also claimed by the assessee as an allowable item of expenditure. The Income Tax Officer rejected

these claims and it was also further found that the assessee had introduced bogus hundi credits and by debiting the hundi credits, there was a resulting diminution of the profits of the business carried on by the assessee and the Income Tax Officer included the hundi amounts with interest and completed the assessment. The hundi credits together with interest so added were as shown below :

Rs. For the assessment year 1964-65 : 62,547 For the assessment year 1965-66 : 4,49,090 For the assessment year 1966-67 : 1,48,083

3. Penalty proceedings were initiated u/s 271(1)(c) of the Act. On appeal by the assessee against the assessment orders before the Appellate Assistant Commissioner and the Tribunal, the disallowance of the loss in the spun pipe plant claimed by the assessee and the excess remuneration paid were set aside and the proceedings were remitted to the Appellate Assistant Commissioner for fresh consideration in so far as the unexplained hundi credits and interest disallowed were concerned. It is not now in dispute that the assessment proceedings so remitted await finalisation.

4. In the course of the penalty proceedings, it was found that the assessee had concealed particulars of its income. In doing so, the Inspecting Assistant Commissioner took into account the loss claimed in the spun pipe plant for the assessment years 1964-65 and 1965-66, the remuneration claimed to have been paid to the financial adviser of the assessment years 1964-65 and 1965-66 and the hundi loans with interest and brokerage for all the assessment years and by invoking the Explanation to section 271(1)(c) of the Act, the Inspecting Assistant Commissioner levied penalty as shown below :

Rs. For the assessment year 1964-65 : 1,15,000 For the assessment year 1965-66 : 72,000 For the assessment year 1966-67 : 28,112

5. On appeal by the assessee before the Tribunal, it took the view that no penalty was leviable in respect of the disallowance of the loss in the spun pipe plant in view of its earlier order in I.T.A.No. 628/MDS/69-70, dated May 31, 1967. Considering the additions on account of the hundi credits, the Tribunal concluded that the assessee had produced the discharged hundi khokas before the authorities in proof of the genuineness of the loans and, in the absence of materials to establish that the claim made by the assessee was bogus, concealment of income was not made out and the levy of penalty for all the assessment years in question could not be sustained. In that view, the penalty levied was deleted.

6. Learned counsel for the Revenue contended that, when the assessment proceedings for the relevant assessment years had been remitted to the Appellate Assistant Commissioner for de novo consideration of the genuineness of the hundi loans, it was not open to the Tribunal to go into the merits of the case for the levy of penalty. In support of this contention, learned counsel for the Revenue placed reliance upon the decisions in Commissioner of Income Tax Vs.

K.R. Chinnikrishna Chetty, and Commissioner of Income Tax Vs. Hind Mercantile Corporation (In Liquidation), . We are of the view that this contention of learned counsel for the Revenue is well-founded. There is no dispute that the orders of assessment passed against the assessee for the assessment years 1964-65, 1965-66 and 1966-67 have been set aside by the Tribunal and the matter had been remitted to the Appellate Assistant Commissioner for de novo consideration of the genuineness of the hundi loans. Under those circumstances, when the assessment orders are yet to be finalised by the Appellate Assistant Commissioner, pursuant to the remit order made by the Tribunal, the Tribunal was not justified in examining the question of levy of penalty on merits and in cancelling the same. As pointed out by a Division Bench of this court in Commissioner of Income Tax Vs. Hind Mercantile Corporation (In Liquidation), , in order to enable the penalty proceedings to survive, the assessment proceedings should be alive and, inasmuch as the assessment in this case had been set aside in part and the matter had been remitted to the Appellate Assistant Commissioner for de novo consideration, the penalty proceedings could not have been terminated in the manner done by the Tribunal by the cancellation of the penalty levied. The question whether penalty was leviable or not, has to be considered in the light of the conclusions to be arrived at in the course of the assessments to be made as a result of the directions given by the Tribunal while setting aside the original assessment orders and remitting the matter. In Commissioner of Income Tax Vs. K.R. Chinnikrishna Chetty, , another Division Bench of this court to which one of us (Ratnam J.) was a party, while dealing with the question whether the Tribunal can examine the question of levy of penalty on merits on the basis of the assessment to be made by the Appellate Assistant Commissioner pursuant to the remit orders passed by the Tribunal, held as follows (pp. 147, 148) :

"Inasmuch as the order of assessment passed against the assessee had been set aside by the Tribunal by its order in I.T.A.No. 1097/ (Mds) of 1970-71 dated June 25, 1973, which has also been noticed in paragraph 6 of its order, the question of levy of penalty cannot be considered to be available for adjudication by the Tribunal. When, even according to the Tribunal, the order of assessment had been set aside and the matter had been remitted to the Appellate Assistant Commissioner to consider the affidavit of R. Parandamiah, it follows that the issue relating to the levy of penalty cannot have any independent existence. In order to consider the question whether the levy of penalty is justified or not, the assessment should be in existence. Since the assessment order had been set aside and the matter remitted, the question of levy of penalty can be considered only in the light of the assessment to be made on the assessee pursuant to the directions given by the Tribunal while setting aside the assessment order. As the Tribunal was fully aware of the circumstance that it had set aside the assessment order in an appeal preferred by the assessee, it follows that the question of levy of penalty remained to be considered on the basis of the assessment to be made pursuant to the directions given by the Tribunal after setting aside the

assessment already made and remitting the matter to the Appellate Assistant Commissioner. In other words, when the assessment pursuant to the directions of the Tribunal remained to be completed, there is no question of either levy of penalty or of cancellation of penalty already levied."

7. Learned counsel for the assessee, however, submitted that it was open to the Tribunal to consider the merits of the case regarding the levy of penalty independently, even though the orders of assessment have been set aside and the matter remitted to the Appellate Assistant Commissioner for de novo consideration. Learned counsel further pointed out that, notwithstanding the order of the Tribunal dated August 23, 1976, cancelling the penalty levied, as and when the Appellate Assistant Commissioner passed the orders of assessment, pursuant to the directions given by the Tribunal in its earlier order, it was open to the Appellate Assistant Commissioner to initiate penalty proceedings u/s 271(1)(c) of the Act afresh, if the merits of the case warranted initiation of such proceedings. We are unable to accept this contention of learned counsel for the assessee, for, by the order dated August 23, 1976, which is the subject-matter of these references, the Tribunal had cancelled the penalty levied for the assessment years 1964-65, 1965-66 and 1966-67, and if the order of the Tribunal is allowed to stand, that would become final in view of section 254(4) of the Act. That would also enable the assessee to contend that no penalty at all is leviable in respect of the assessment years in question, despite the result of the assessments that may be finalised pursuant to the remit order passed by the Tribunal. We may observe in this connection that in *Seshasayee Paper and Boards Ltd. Vs. Inspecting Assistant Commissioner of Income Tax*, it has been pointed out that even a wrong order has a finality and, unless that finality is disturbed by a process known to law or by a process authorised by law, the right of the assessee and the Revenue will continue to be governed by the order.

8. We are, therefore, of the view that, on the facts and circumstances of the case, the Tribunal was in error in having cancelled the penalty levied for the assessment years 1964-65, 1965-66 and 1966-67. We, therefore, answer the questions referred to us in the negative and in favour of the Revenue. We may also observe that, depending upon the outcome of the pending assessment proceedings, it would be open to the Revenue to initiate proceedings for levy of penalty, if so warranted. The Revenue will be entitled to its costs in these references. Counsel's fee Rs. 500 (one set).