

(1963) 09 PAT CK 0003

In the Patna High Court

COMMISSIONER OF Income Tax, BIHAR and ORISSA

APPELLANT

Vs

MOHAN MALLAH.

RESPONDENT

Date of Decision : 12-09-1963

Acts Referred:

Income Tax Act, 1961 — Section 28(1)(c), 28(3), 66(1)

Citation : (1964) 54 ITR 499

Judgement

In this case the assessee who was a contractor in Lodna Colliery filed his return for the assessment year 1953-54 declaring an income of Rs. 9,771. In the course of assessment it was discovered that the assessee had invested a sum of Rs. 68,000 in Parikh Stores in the relevant accounting year in the name of his wife. On being asked to explain the source of this investment, the assessee alleged that he had taken a loan of Rs. 38,000 from three parties and had also invested Rs. 30,000 out of his own savings. The three alleged creditors were examined. One of these creditors, Sri Satnarain Kundu, totally denied having advanced a loan of Rs. 10,000 to the assessee. The other two creditors, Sri Jogendra Nath Sen and Sri Binod Kumar Sen, admitted that they had advanced a loan of Rs. 10,000 to the assessee. The other two creditors, Sri Jogendra Nath Sen and Sri Binod Kumar Sen, admitted that they had advanced loans to the assessee, but ? the Income Tax Officer disbelieved their statements. The Income Tax Officer, however, accepted the version of the assessee that he had withdrawn a sum of Rs. 25,000 from the bank for investment. As regards the balance of Rs. 43,000, the Income Tax Officer held that it represented the secret income of the assessee and added that amount to the taxable income of the assessee. The assessee took the matter in appeal to the Appellate Assistant Commissioner, but the appeal was dismissed. The Income Tax Appellate Tribunal also affirmed the view taken by the Appellate Assistant Commissioner and upheld the addition of Rs. 43,000 to the taxable income of the assessee. Thereafter the Income Tax Officer issued a notice to the assessee u/s 28(3) of the Income Tax Act to show cause why a penalty should not be imposed upon him. After hearing the assessee the Income Tax Officer held that there was willful concealment of the income on the part of

the assessee and, therefore, imposed the penalty of Rs. 11,000. The order of the Income Tax Officer was upheld in appeal by the Appellate Assistant Commissioner. The assessee took the matter in appeal to the Income Tax Appellate Tribunal which allowed the appeal and set aside the imposition of penalty on the ground that the department had not proved that the assessee had committed the offence of suppressing the true income.

Under section 66(1) of the Income Tax Act the Income Tax Appellate Tribunal has stated a case on the following question of law for the determination of the High Court :

"Whether, on the facts and circumstances of the case, penalty was impossible upon the assessee u/s 28(1)(c) ?"

On behalf of the Commissioner of Income Tax, Mr. Tarkeshwar Prasad put forward the argument that upon the materials produced in this case the Income Tax Appellate Tribunal ought to have reached the finding that there was deliberate concealment of income on the part of the assessee and, therefore, a penalty u/s 28(1)(c) of the Income Tax Act ought to have been imposed upon the assessee. It was pointed out by learned counsel that in the assessment proceeding the explanation of the assessee as regards the source of his income had not been believed by the Income Tax authorities. The case of the assessee was that he had taken a loan of Rs. 38,000 from three parties and had invested Rs. 30,000 from his own savings. Three persons were examined on behalf of the assessee, namely, Sri Satnarain Kundu, Sri Jogendra Nath Sen and Sri Binod Kumar Sen, out of whom Sri Satnarain Kundu denied that he advanced any loan to the assessee, but Sri Jogendra Nath Sen and Sri Binod Kumar Sen admitted that they had advanced Rs. 18,000 and Rs. 10,000 respectively, to the assessee. The Income Tax Officer disbelieved the evidence given by Sri Jogendra Nath Sen and Sri Binod Kumar Sen on the ground that they were employed on a very small salary and had large families and so it was not possible for them to save the amounts which they alleged they had given on loan to the assessee. It was, therefore, submitted by Mr. Tarkeshwar Prasad that there had been concealment of particulars of his income by the assessee within the meaning of section 28(1)(c) of the Income Tax Act and the view taken by the Income Tax Appellate Tribunal is not correct in law. We are unable to accept the argument put forward by Mr. Tarkeshwar Prasad as correct. It is now well established that a proceeding u/s 28(1) of the Income Tax Act is a penal proceeding and the onus lies upon the Income Tax department in such a proceeding to show that the assessee is guilty of concealment of the particulars of his income or deliberate furnishing of inaccurate particulars of such income.

This view has been expressed by the House of Lords in *Fattorini (Thomas) (Lancashire) Limited v. Inland Revenue Commissioners*. It was pointed out by Lord Wright at page 65 of the report that the onus in such a proceeding was not of an ambulatory or shifting character but the onus was finally upon the Crown to prove its right to impose what was a severe penalty. The same view has been

expressed in a recent decision of this High Court in *Khemraj Chagganlal v. Commissioner of Income Tax* and a subsequent decision of this High Court in *Lakshmi Narain Shambhuran v. Commissioner of Income Tax*. In our opinion, the present case falls within the principle laid down in these two authorities, and the Income Tax department has not in this case discharge the onus of showing that the assessee is guilty of concealment of the particulars of his income or deliberate furnishing of accurate particulars of such income. On behalf of the Income Tax department, Mr. Tarkeshwar Prasad invited us to look at the order of the Income Tax Appellate Tribunal in the assessment proceeding. But there is no finding of the Income Tax Appellate Tribunal even in the order of the assessment appeal that there was willful suppression of income on the part of the assessee. The only finding of the Income Tax Appellate Tribunal in that order is that the assessee had not satisfactorily explained the source from which he said he derived the additional income. On behalf of the Income Tax department reliance was placed on a decision of this High Court in *Murlidhar Tejpal v. Commissioner of Income Tax* and also in *Bhagwandas Shyamsundar v. Commissioner of Income Tax*, but, in our opinion, the material facts of the present case are different and the principle laid down in those cases cannot govern the present case.

For the reasons we have attempted to state we are of opinion that there is not sufficient material in the present case to hold that there was willful suppression by the assessee of the particulars of his income within the meaning of section 28(1)(c) of the Income Tax Act. We accordingly hold that in the facts and circumstances of this case no penalty can be imposed upon the assessee u/s 28(1)(c) of the Act and the question of law referred to the High Court must be answered in favour of the assessee and against the Income Tax department. In the circumstances of this case we do not propose to order any costs of this reference.

Question answered in favour of the assessee.