(2001) 09 KL CK 0003

In the High Court Of Kerala

Case No : IT Appeal No. 40 of 1999 19 September 2001

DY. Commissioner of Income Tax APPELLANT

Vs

K. SURESH KUMAR RESPONDENT

Date of Decision : 19-09-2001

Acts Referred:
Income Tax Act, 1961 — Section 143, 260, 260A, 271, 69

Citation : (2002) 172 CTR 375

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

Bench : Full Bench

Advocate : P.K.R. MenonGeorge K. George, for the Revenue C. Kochunni NairDale P. Kurian, for the Assessee, for the Appellant;

Judgement

P.K. Balasurbamanyan, J.

This appeal u/s 260A of the Income Tax Act is by the Deputy Commissioner, Circle I, Trivandrum. The appeal arose from the proceeding for imposition of penalty u/s 271(1)(c) of the Income Tax Act. For the year 1987-88, the assessee, an individual deriving income from abkari business, filed a return admitting a total income of Rs. 82,000 including the income of Rs. 75,000 as estimated from abkari business. The assessment was completed u/s 143(3) of the Act on a total income of Rs. 1,52,950 including an addition of Rs. 94,000 as income from other sources on the basis of the increase in the net wealth as could be gathered from wealth-tax statements furnished by the assessee. The assessing officer treated this Rs. 94,000 as income and completed the assessment on that basis. The assessee did not challenge the addition. The assessing officer during the course of the assessment, initiated penalty proceedings u/s 271(1)(c) of the Act and issued a notice to the assessee to show cause why a penalty u/s 271(1)(c) of the Act should not be levied. In response to the notice and the explanation called for from the assessee, the assessee submitted an explanation to the effect that during the year he had received from his father-in-law, who was working outside India, a sum of Rs. 70,000 for which documentary evidence was not available. He stated that this amount was received through his mother-in-law. He also pointed out that even though the addition was made under the deeming provisions of section 69 of the Income Tax Act, the amount did not really represent the income earned by him. He had not consciously or deliberately concealed any income. The amount assessed as his income was an amount which belonged to others and it was obtained by him as loan. The assessing officer, after considering the objection, came to the conclusion that the explanation of the assessee was unacceptable. He found that if a sum of Rs. 70,000 had been received from his father-in-law, who was working outside the country, was true, the assessee would have been able to produce definite evidence to show such payment. The assessing officer took the view that simply because the assessee''s father-in-law was employed outside India, that would not by itself support the explanation put forward by the assessee. The assessing officer thereupon held that on the materials he was convinced that the assessee has concealed his income to the extent of Rs. 70,000 and penal provisions u/s 271(1)(c) of the Act are attracted. The assessing officer imposed a penalty of Rs. 33,295, the minimum prescribed under the Act. The assessee appealed before the Commissioner (Appeals), Trivandrum. His explanation that he had received the money from his father-in-law, was found unsubstantiated. The Commissioner (Appeals) noticed that the assessee did not have any evidence in support of his claim that the amount was received by him from his father-in-law. He also noticed that the assessee was not able to show that the amount was actually received by him through legal channel. In that situation, the Commissioner (Appeals) agreed with the order imposing penalty and dismissed the appeal noticing that the penalty levied was also the minimum. The assessee appealed before the Appellate Tribunal. According to the assessee, the assessing officer has not shown any material to support the case of concealment by the assessee. The assessee submitted that in view of his explanation, unless the revenue showed that there was concealment within the meaning of section 271(1)(c) of the Act, no penalty could be imposed.

2. On behalf of the revenue, it was pointed out that the assessee had accepted the order of assessment relating to the addition made by the assessing officer and had not appealed against the same. At the time of assessment when the amount was treated as income in terms of section 69 of the Act, the assessee did not have such an explanation or any other proper explanation for the amount. It was only during the stage of the penalty proceedings that the assessee had put forward the case that the amount was given to him by his father-in-law and in the absence of any acceptable legal evidence in support of that plea, the imposition of penalty was justified and called for no interference. The Tribunal, it appears to us, has simply accepted the statement of the assessee without any supporting material that the amount was given to him by his father-in-law, who was working abroad. Stating that the assessing officer has not adduced any evidence to discredit the story of the assessee, and hence the imposition of

penalty was not justified, the Tribunal set aside the order of the Commissioner (Appeals) and that of the assessing officer. It is this decision of the Tribunal that is challenged in this appeal at the instance of the revenue.

3. In the memorandum of appeal the following substantial questions of law are suggested as arising in this appeal :

(1) Whether, on the facts and in the circumstances of the case, the Tribunal is right in law and fact in deleting the penalty levied u/s 271(1)(c) of the Income Tax Act ?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal is right in law and fact in holding that "the assessing officer has not established conscious concealment of income by the assessee", "No material has been brought on record to show that it was a false claim of the assessee....." and are not the above findings wrong and casting the burden of proof wrongly on the revenue ?

(3) Whether, on the facts and in the circumstances of the case, and in the light of the relevant explanation to section 271(1)(c) read with the decision of the Supreme Court in Commissioner of Income Tax (Additional), Lucknow Vs. Jeevan Lal Sah, and other Supreme Court decisions, the decision in Commissioner of Income Tax Vs. India Sea Foods, has application to the facts of the case ?

(4) Whether, on the facts and in the circumstances of the case should not the Tribunal have considered the case under the relevant Explanation to section 271(1)(c) and is not the order vitiated accordingly ?"

Accepting that these substantial questions of law arise for decision, this court Issued notice on those questions. The respondent has appeared and the appeal was heard on the substantial questions of law as formulated at the time of admission.

4. Learned counsel for the revenue submitted that the assessment year being 1987-88, section 271 of the Income Tax Act, as amended by the Taxation Laws (Amendment) Act, 1975 with effect from 1-4-1976 applied. Learned counsel submitted that explanation 1 to section 271(1)(c) of the Act clearly shifted the burden on to the assessee to substantiate his explanation and enables a presumption of concealment to be drawn and the Tribunal was totally in error in not adverting to the relevant provision and in proceeding on the basis that the burden was on the assessing officer. Learned counsel for the assessee, on the other hand, contended that explanation had no application at all in this case because no explanation from the assessee was sought regarding concealment at the time of completing the assessment and this was put to the assessee only at the stage of the penalty proceedings. We may straightaway say that this argument cannot be accepted on the basis of section 69 of the Income Tax Act under which the addition is made while completing the assessment. It is also a fact that the assessee accepted the addition made u/s 69 of the Act and did not

challenge it in any appeal. It is, therefore, clear that the circumstances were put to the assessee even while completing the assessment or must be deemed to have been put to the assessee while completing the assessment in terms of section 69 of the Act. Therefore, the argument that it was only at the time of the imposition of penalty that explanation of the assessee was sought for, cannot be accepted.

5. The scope of section 271(1)(c) of the Act as amended with effect from 1-4-1976 is clearly explained by the Division Bench of this court in Commissioner of Income Tax Vs. K.P. Madhusudanan, . Their Lordships 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. The said decision of this court was affirmed in appeal by the Supreme Court in M/s. K.P. Madhusudhanan Vs. Commissioner of Income Tax, Cochin, . In that decision, in addition to overruling the decisions of the Bombay High Court in Commissioner of Income Tax Vs. P.M. Shah, and Commissioner of Income Tax Vs. Dharamchand L. Shah, and affirming the decision of this court in CIT v. K.P. Madhusudhanan (supra), the Supreme Court also found that the decision 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 of the Act. In the light of this position, it is clear that the burden to explain the alleged concealment is on the assessee.

6. Here, the assessee attempted to say that he had received money from his father-in-law who was employed in a foreign country. Obviously no money from a foreign country could come into his hand legally except through a bank. The amount could be paid over to the assessee by the father-in-law only by way of a cheque or only after withdrawing the same from the bank. The assessee did not produce any material in support of his case that the amount was something received from his father-in-law, who was employed abroad. In fact in his explanation before the assessing officer dated 29-8-1999, he had clearly stated that no documentary evidence was available in respect of the receipt of Rs. 70,000 from his father-in-law. In that situation, it is clear that he has failed to substantiate his explanation and hence in terms of explanation 1 to section 271(1)(c) of the Act, it must be taken that there is concealment of income by the assessee making him liable to penalty u/s 271(1)(c) of the Act.

7. Learned counsel for the assessee contended that the law as expounded by this court in Commissioner of Income Tax Vs. India Sea Foods, must be applied in this case since explanation 1 of section 271(1)(c) has no application to this case. We have already overruled the contention that explanation 1 to section 271(1)(c) of the Act does not have application to the case on hand. After the amendment of section 271(1)(c) of the Act with effect from 1-4-1976, we find that the position is as expounded by this court in CIT v. K.P. Madhusudhanan (supra) as affirmed by the Supreme Court. Moreover, it is seen that the Full Bench of this court essentially relied on the decision of the Supreme Court in Sir Shadilal

Sugar & General Mills Ltd. v. CIT (supra) in support of its conclusion. In the light of the decision of the Supreme Court in K.P. Madhusudhanan v. CIT (supra) holding that the decision in Sir Shadilal Sugar & General Mills Ltd. v. CIT (supra) cannot be considered to be good law after the addition of the explanation to section 271(1)(c) of the Act, the very foundation of the decision of the Full Bench is shaken. We have no hesitation in overruling the contention raised in that behalf.

8. In view of our conclusions as above, we answer the substantial questions of law formulated in this appeal in favour of the revenue and against the assessee. The consequence of our answering the questions in favour of the revenue is that the decision of the Tribunal is to be set aside and that of the Commissioner (Appeals) restored. We, therefore, set aside the order of the Tribunal and restore that of the Commissioner (Appeals), Trivandrum. If necessary, appropriate consequential orders should be passed by the assessing officer in terms of section 260(1A) of the Act.

The appeal is thus allowed. We make no order as to costs.

