(1957) 03 KL CK 0019

In the High Court Of Kerala

Case No : O. P. No. 60 of 1956-K

Jos Chacko Poothokaran	APPELLANT
Vs	
Income Tax Officer, Ernakulam Circle	RESPONDENT

Date of Decision : 12-03-1957

Acts Referred:
Income Tax Act, 1922 — Section 28, 28(1)(c), 31, 31(3)(f), 33

Citation : (1957) 32 ITR 648 : (1957) 1 KLJ 494

Hon'ble Judges : M.S. Menon, J

Bench : Single Bench

Judgement

M.S. Menon, J.—M. S. Menon, J. - Exhibit B dated 13th September, 1954, an order of the Income Tax Officer, Ernakulam Circle, Ernakulam, u/s 28(1)(c) of the Indian Income Tax Act, 1922, concluded as follow:

It is evident therefore that the assessee was guilty of suppression of income. Thus, considering all aspects of the case, a penalty of Rs. 750 is imposed after obtaining the Inspecting Assistant Commissioners previous sanction. This will be adjusted from the refund of Rs. 6,417-10-0 in respect of 1952-53 assessment.

2. The petitioner took up the matter in appeal before the Appellate Assistant Commissioner of Income Tax. Trivandrum. Exhibit C dated 29th November, 1956, is the order in appeal.

This is an appeal against the levy of penalty u/s 28(1)(c) for concealment of income by the appellant. The penalty had originally been contested on merits but at the hearing Mr. Chummar questioned the legal validity of the penalty order itself. He pointed out that no hearing had been given to the appellant before the passing of the order and that, in any case, no opportunity of being heard had been allowed to the appellant. He contends, therefore, that the penalty order is illegal. In support of his contention he quotes the recent decision of the Orissa High Court in the case if Shrilal Sagarmull. Records show a hearing or an opportunity of being heard had not been given to the appellant before the passing of the penalty order. The order has been passed merely after considering the written explanation offered by the appellant in regard to the alleged concealment. In the circumstances, I hold that the penalty order is illegal. The penalty levied is accordingly cancelled. It should be refunded, if already paid. The appeal succeeds.

3. After the appellate order, the Income Tax Officer, Ernakulam Circle, Ernakulam, took up the matter again and passed Exhibit F, an order dated 27th November, 195:

This is a case where penalty proceedings were initiated u/s 28(1)(c) for concealment of income and deliberately furnishing of inaccurate particulars.

The assessment for 1952-53 was completed on 31st March, 1953, on a total income of Rs. 37,598 as against Rs. 16,910-7-7 returned by the assessee. A lump sum addition of Rs. 5,000 was made to the gross profits to make up the proved deficiency in the same and Rs. 15,000 was added back as unaccounted for investment in building. The Tribunal held that as the assessee was able to prove the cost of the building at Rs. 34,000 and as Rs. 28,200 had already been debited as expenditure for the same, the addition need be limited to the difference, viz., Rs. 5,791, and Rs. 5,000 has already been added back there is no need for a further addition of Rs. 15,000. In any event there is concealment at least to the tune of Rs. 5,000. The assessee was requested to appear in person at my office on 7th November, 1956, for a hearing, but he did not avail of the opportunity, but simply sent a letter wherein he stated that as the penalty originally imposed had been cancelled in appeal it is not open to me to resurrect the proceedings already closed. The Appellate Assistant Commissioner has in his appeal cancelled the penalty on the technical ground that no personal hearing was given to the assessee. That does not make the proceedings rightly instituted ab initio illegal, as such I am competent to pursue the proceedings and impose penalty afresh after giving an opportunity for personal hearing. As deliberate concealment has been conclusively established in this case, I impose a penalty of Rs. 750 u/s 28(1)(c) of the Income Tax Act, with the prior approval of the Inspecting Assistant Commissioner of Income Tax Ernakulam.

The penalty should be paid on or before 25th December, 1956.

4. The question that arises for decision is whether Exhibit F can be sustained in view of Exhibit C. Section 31(3)(f) of the Indian Income Tax Act, 1922, provides that the Appellate Assistant Commissioner may, in the case of an order u/s 28, "confirm or cancel such order or vary it so as either to enhance or reduce the penalty," and section 33(2) : "The Commissioner may, if he objects to any order passed by an Appellate Assistant Commissioner u/s 31, direct the Income Tax Officer to appeal to the Appellate Tribunal against such order, and such appeal made within sixty days of the date on which the order is communicated to the Commissioner by the Appellate Assistant Commissioner."

No action has been taken under sub-section (2) of section 33 and I must hold that the Income Tax Officer, Ernakulam Circle, Ernakulam, is not entitled to ignore Exhibit C and proceed to impose a penalty as he has done by Exhibit F.

5. The petition is allowed. No costs.

