
(2010) 12 KL CK 0027
In the High Court Of Kerala
Case No : Writ Petition No. 1889 of 2005

N.S. Babu

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 02-12-2010

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 143(1), 143(3), 271(1), 276C, 277
Penal Code, 1860 (IPC) — Section 193, 196, 420

Citation : (2010) 12 KL CK 0027

Hon'ble Judges : M. Sasidharan Nambiar, J

Bench : Single Bench

Final Decision : Allowed

Judgement

M. Sasidharan Nambiar, J.—Petitioner is the proprietor of M/s Bharathy Clays, Thiruvananthapuram and M/s Bharathy Earth Engg. Contractors, Trivandrum. For the assessment year 1989-90 he filed a return on 31-10-1989 declaring loss of Rs. 4,685. From the total income of Rs. 2,19,375 unabsorbed depreciation of Rs. 2,24,060 was deducted resulting in a loss of Rs. 4,685 Along with the return computation statement and annual account were submitted. Accepting the loss, the return of income was processed u/s 143(1)(a) of Income Tax Act on 23-3-1990. Investigating Wing of the department conducted a survey in the premises of the Petitioner on 6-3-1990. He sent several letters calling the Petitioner to furnish the details to scrutinise the accounts. As he did not respond, assessing officer proposed to do an ex parte assessment of an income of Rs. 40,00,000. Petitioner submitted a reply and in that reply he offered to add two items to the income originally declared namely, Rs. 40,413 being the interest received from M/s Kalpaka Finance, Trivandrum on its winding up and Rs. 1,28,335 received from M/s Tranvancore Cements Ltd., Kottayam in full against the advance made. Assessment was done u/s 143(3) disallowing business expenses of Rs. 43,499. Petitioner filed an appeal before Commissioner (Appeals). Appeal was allowed and expenses of Rs. 43,499 were allowed. The

assessing officer was directed adjustment of property income against the income from other sources and to allow deduction u/s 80C, which Petitioner had not claimed in his return. As a result when originally no tax was payable on regular assessment, Petitioner has to pay Rs. 1,64,266. Penalty of Rs. 1,20,000 was also imposed. Petitioner filed an appeal u/s 271(1)(c). In the appeal, Commissioner (Appeals) directed the assessing officer to treat Rs. 1,68,748 as concealed income and levy the minimum penalty as provided u/s 271(1)(c). It was contended that the said levy of penalty was not contested before the Tribunal and the penalty payable was Rs. 66,805. Department filed an appeal against the said order before Tribunal, Cochin Bench. It was subsequently disposed by Ext. P4 order whereunder the penalty imposed was set aside allowing the cross-objection filed by the Assessee. Department filed Ext. PI complaint before Addl. Chief Judicial Magistrate (Economic Offences), Ernakulam, contending that Petitioner deliberately concealed the income with the intention of evading tax and also made a statement on verification under the Income Tax Act and delivered an account or statement which he knew or believed to be false and therefore he committed offences u/s 276C and Section 277 of Income Tax Act and also offences under Sections 193, 196 and 420 of IPC. Learned Magistrate has taken cognizance of the offences. Petition is filed under Article 226 of the Constitution of India to quash Ext. PI complaint.

2. Learned Counsel appearing for the Petitioner and standing counsel for the first Respondent were heard.

3. Section 276C of the Income Tax Act provides that if a person wilfully attempts in any manner whatsoever to evade any tax, penalty or interest chargeable or imposable under the Act, he shall, without prejudice to any penalty that may be imposable on him under any other provision of the Act shall be punishable as provided under the section. Section 277 provides that if a person makes a statement in any verification under the Act or under any rule made thereunder, or delivers an account or statement which is false, and which he either knows or believes to be false, or does not believe to be true, shall be punishable as provided thereunder.

4. Therefore to attract an offence u/s 276C, Petitioner should have either wilfully attempted in any manner whatsoever to evade any tax, penalty or interest chargeable or imposable under the Act. So also to attract an offence u/s 277, Petitioner should have made a statement in any verification under the Act or under any rule or delivered an account or statement which is false or which he either knew or believed to be false, or did not believe to be true. The allegation against Petitioner is that he wilfully attempted to evade tax by not disclosing the two income namely, Rs. 40,413 received as interest from M/s Kalpaka Finance, Trivandrum on its winding up and Rs. 1,28,335 from M/s Travancore Cements Ltd. The question is whether there was any wilful attempt to evade tax, penalty or interest by suppressing the said income or whether Petitioner omitted to show this income in the statement on verification with the knowledge that the

statement so furnished is false or he believed it to be false.

5. As rightly argued by the learned Counsel appearing for the Petitioner, in the light of the decision of the Tribunal, Cochin Bench, in CO. No. 41 of 1999 filed against the order for assessment year 1989-90, in ITA No. 682/Coch/1995, it cannot be said that Petitioner either made a wilful attempt to evade tax, penalty or interest or made a false statement by not disclosing the said income. The appellate authority on the materials held that the non-disclosure of the two income was purely a mistake on the part of the Assessee and it was not conscious concealment. The relevant portion of the findings in the order in the appeal reads:

We are of the opinion that the failure on the part of the Assessee to declare those two items in his original return of income cannot be said to be the conscious concealment. Moreover, though the assessing officer had sent the proposal for the best judgment assessment for assessing the Assessee's income at Rs. 40 lakhs, but the assessment is completed u/s 143(3) accepting the additional income declared by the Assessee which as per the Assessee was an accounting mistake. We also find force on the facts of this case in the contention of the Assessee that when the accounts are audited by a chartered accountant, certainly the Assessee will be relying on the audited accounts and he filed the return of income based on the said audited accounts. Another aspect we would like to clear here is that the word concealment appearing in the section contemplates some deliberate act and not a mistake. There is no second opinion in respect of the impact of the Explanation to Section 271(1)(c) of the Act, but at the same time, we find that the Assessee has offered his explanation for not declaring the said two sums in his original return but only offered at the time of assessment is sufficient to relieve him from Explanation 1(B) to Section 271(1)(c) of the Act. In our further opinion the different decisions relied on by the revenue are distinguishable on facts. There is no fixed scale or any device to decide whether a particular Assessee is liable for penalty u/s 271(1)(c) but each case is to be determined on the basis of the facts. In this case, another aspect to be considered is that no books of accounts were impounded nor any other enquiries were made by the assessing officer and in our opinion, it was purely a mistake on the part of the Assessee and not any conscious concealment.

Though the Department challenged the order before this Court in IT Appeal No. 219 of 2009, by Ext. P3 judgment the appeal was dismissed. In such circumstances, it can only be found that there was no wilful attempt to evade tax as provided u/s 276C. In the light of the said finding, it can only be found that Petitioner did not make any false statement, which is false or which he either knew or believed to be false. If that be so, Petitioner cannot be prosecuted for either an offence u/s 276C or 277. The question has been settled by this Court in Edayanal Constructions and Another Vs. Income Tax Officer, where it was held that when the appellate authority as well as the Tribunal in unambiguous terms found that the explanation of the Assessee for not showing the concealed income

is accepted, an offence u/s 276C or 277 is not attracted. So also none of the offences u/s 193, 196 or 420 of IPC is attracted. Hence the cognizance taken and the proceedings pending before the learned Addl. Chief Judicial Magistrate can only be quashed.

Petition is allowed. Exhibit PI complaint and the further proceedings in C.C. No. 38 of 1997 on the file of Addl. Chief Judicial Magistrate Court (Economic Offences), Ernakulam are quashed.