

(2000) 246 ITR 677

High Court Of Kerala

Case No: Income-tax Appeal No. 44 of 1999

Income Tax Officer

APPELLANT

Vs

Balubhai Hemchand
Shah

RESPONDENT

Date of Decision: Aug. 2, 2000

Acts Referred:

- Income Tax Act, 1961 - Section 132, 132(5), 271, 271(1)

Citation: (2000) 246 ITR 677

Hon'ble Judges: S. Sankarasubban, J; D. Sreedevi, J

Bench: Division Bench

Advocate: P.K.R. Menon and George K. George, for the Appellant; P. Sreehari and P. Vani, for the Respondent

Judgement

S. Sankarasubban, J.

The Income Tax Officer, Ward-1, Mattancherry, is the Appellant. The assessee is the Respondent, The assessment year is 1979-80. The assessee's residential premises were searched u/s 132 of the Income Tax Act, 1961 (hereinafter referred to as "the Act") on January 23, 1979. A sum of Rs. 73,118.50 was found in the house of the assessee at the time of search. A statement was recorded. The assessee stated that no part of the said sum of Rs. 73,118.50 was reflected in any books of account maintained either by the assessee or his employer, Gandhi Sons. The amount of Rs. 73,118.50 was found in a steel almira found in the assessee's bedroom. There were two items. The first item of Rs. 9,500 kept in a paper packet, according to the assessee, is out of the sale proceeds of Rs. 12,000 received from his native place, Simar in Gujarat representing the sales proceeds of household articles sold there in November, 1978. He stated that out of this, Rs. 2,500 was spent and the balance was kept in a paper packet. Regarding the balance amount of Rs. 63,618.50, the assessee represented that it was unaccounted income of Gandhi Sons, of which he is the manager. The assessee also did not have anything to show that the amount of Rs. 12,000 represented the sale proceeds. Regarding Rs.

63,118.50, he represented that it was the consideration by the sale of old empty chests, old gunny bags and old empty drums of Gandhi Sons. He also stated that it was not included in the account of Gandhi Sons. Thus, the assessee did not have any proof to show that the unaccounted money did not belong to him.

2. Subsequently, in response to a notice u/s 132(5) of the Act, the assessee stated that a sum of Rs. 60,000 belongs to Kerala Produce Dealers, of which his son was a partner. It was also stated that his son stays with him and the amount belonging to Kerala Produce Dealers was kept in the cupboard on January 22, 1979. A sum of Rs. 3,600 was stated to be the sale proceeds of old empty cases of Gandhi Sons. He put forward the same contention with regard to Rs. 12,000. The assessment was finalised on November 23, 1981, on a total income of Rs. 1,36,070. While making the assessment, the amount of Rs. 73,000 was also assessed under the head "Other sources". Thereafter, the Assessing Officer initiated penalty proceedings u/s 271(1)(c) of the Act.

3. In reply to the penalty notice, the assessee filed replies on December 17, 1981, and on November 14, 1987. The replies were identical with regard to the amount of Rs. 73,000. He only reiterated what had been stated at the time of assessment. With regard to the amount of Rs. 60,000, he stated that it belonged to Kerala Produce Dealers. The Assessing Officer did not accept the explanation and held that the amount represented the unaccounted income of the assessee and an amount of Rs. 80,000 was levied as penalty u/s 271(1)(c) of the Act.

4. Against the order levying penalty, an appeal was taken before the Commissioner of Income Tax (Appeals) as I.T.A. No. 2M/CIT of 1988-89, which was disposed of by order dated November 22, 1990. Before the Commissioner of Income Tax (Appeals), the assessee relied on the judgment of this court in [Commissioner of Income Tax Vs. Shri Pawan Kumar Dalmia](#). The appellate authority took the view that "a change in the Appellant's explanation might, at the worst, be a factor for not considering the Appellant's explanation for the cash as satisfactory and thus to invoke the deeming provisions of Section 69A of the Income Tax Act to make an addition of the sum to the Appellant's income. It does not, in any way, show that any part of the cash found at the time of search represented the Appellant's concealed income." The Commissioner of Income Tax (Appeals) cancelled the penalty. Against that an appeal was preferred before the Income Tax Appellate Tribunal as I.T.A. Nos. 125 and 126 (Coch) of 1991. The Tribunal held as follows : "I cannot agree with the learned departmental representative that the change in the assessee's explanation might render him liable for penal action. At the worst it might be a factor for not considering the assessee's explanation satisfactory but it cannot render him liable for penalty. Any part of the cash found at the time of search cannot represent the concealed income of the assessee. Therefore, I am unable to agree with the Department that the Assessing Officer had established concealment . . ." It is against the above order of the Tribunal that this appeal is preferred.

5. Shri P. K. Raveendranatha Menon, learned senior counsel appearing for the Department, contended that the Tribunal as well as the Commissioner of Income Tax (Appeals) went wrong in relying on the decision in [Commissioner of Income Tax Vs. Shri Pawan Kumar Dalmia](#), . According to him, under Explanation I to Section 271(1)(c) of the Act, the burden was on the assessee to show that there was no concealment of income. There was a presumption under Explanation 1 to Section 271(1)(c) of the Act that the income represented concealed income and hence penalty was leviable. Shri Raveendranatha Menon also brought to my notice the following observations of the Tribunal: "At the worst it might be a factor for not considering the assessee's explanation satisfactory but it cannot render him liable for penalty". Shri Raveendranatha Menon contended that the burden of proof was placed on the Revenue. It should have been placed on the assessee.

6. Smt. P. Vani, counsel appearing for the assessee, contended that throughout, the assessee has been taking the stand that the amount did not belong to him, the mere fact that the above amount was treated as the income of the assessee does not mean that the same can be treated as the income for the purpose of imposing penalty. She relied on the decision of this court in [Commissioner of Income Tax Vs. Shri Pawan Kumar Dalmia](#), .

7. After hearing counsel on both sides, according to us, the following questions of law arise for consideration :

"1. Whether, on the facts and in the circumstances of the case and also in the light of Explanation 1 to Section 271(1)(c) of the Income Tax Act, the Tribunal is right in law 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 and in the light of Explanation 1 to Section 271(1)(c) of the Income Tax Act, 1961, the Tribunal is right in law and fact--

(a) in holding that the Assessing Officer had not adduced any evidence either in the assessment order or in the impugned penalty order to show that any part of the amount of Rs. 73,000 represented the income for the assessment year under appeal ?"

8. Section 271 of the Act deals with penalty. Section 271(1)(c) says as follows :

"If the Assessing Officer or the Deputy Commissioner (Appeals) or the Commissioner (Appeals) in the course of any proceedings under this Act, is satisfied that any person. . .

(c) has concealed the particulars of his income or furnished inaccurate particulars of such income,

he may direct that such person shall pay by way of penalty."

9. Thus, u/s 271(1)(c) of the Act, if during the course of assessment proceedings, the Assessing Officer finds that the particulars of the income have been concealed, then the Assessing Officer may take action for the penalty against the assessee. The next relevant provision is Explanation 1, which is as follows :

"Where in respect of any facts material to the computation of the total income of any person under this Act,--

(A) such person fails to offer an explanation or offers an explanation which is found by the Assessing Officer or the Deputy Commissioner (Appeals), or the Commissioner (Appeals) to be false, or

(B) such person offers an explanation which he is not able to substantiate and fails to prove that such explanation is bona fide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him,

then, the amount added or disallowed in computing the total income of such person as a result thereof shall, for the purposes of Clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed."

10. As per this Explanation, there is a presumption that the amount added or disallowed in computing the total income of a person shall be deemed to be the income in respect of which particulars were concealed so far as Clause (c) of Section 271(1) of the Act is concerned.

11. Learned counsel for the Appellant, Shri Raveendranatha Menon, contended on the basis of Explanation 1 to Section 271(1)(c) of the Act that once it is found during the course of the assessment proceeding"s that the explanation given with regard to the particulars of income is not accepted and it is added towards the income, then that will be deemed to be the income in respect of which particulars have been concealed. Counsel so submits because, so far as the amount of Rs. 73,000 is concerned, the explanation offered by the assessee was not accepted. Thus, it is deemed to be an amount, particulars of which were concealed, Then the burden is on the assessee to prove that it is not so.

12. Section 271(1)(c) of the Act underwent many changes. The decision reported in [Commissioner of Income Tax Vs. Mussadilal Ram Bharose](#), was dealing with the Explanation at that relevant time. The Explanation was to the following effect (page 19) :

"Explanation.--Where the total income returned by any person is less than 80 per cent. of the total income (hereafter in this Explanation referred to as the correct income) as assessed u/s 143 or Section 144 or Section 147 (reduced by the expenditure incurred bona fide by him for the purpose of making or earning any income included in the total income but which has been disallowed as a deduction), such person shall, unless he proves that the failure to return the correct income did not arise from any fraud or any

gross or wilful neglect on his part, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income for the purposes of Clause (c) of this sub-section."

13. Dealing with the Explanation, the Supreme Court has held as follows (headnote):

"Where the total income returned by the assessee is less than 80 per cent. of the total income as assessed, the Explanation to Section 271(1)(c) of the Income Tax Act, 1961, shifts the burden to the assessee to show that the difference was not owing to fraud or gross or wilful neglect on his part. This onus is rebuttable. If, in an appropriate case, the Tribunal or the fact-finding body is satisfied on relevant and cogent material on record and draws an inference thereupon that the assessee was not guilty of gross or wilful neglect or fraud, then, in such a case, the assessee cannot come within the mischief of the Section and suffer penalty." The decision reported in [Commissioner of Income Tax \(Additional\), Lucknow Vs. Jeevan Lal Sah](#), is a decision concerning the burden of proof u/s 271. The assessment years concerned herein are 1962-63 to 1967-68. The same Explanation as was given in [Commissioner of Income Tax Vs. Mussadilal Ram Bharose](#), came up for consideration. The Supreme Court held as follows (page 248) : "Evidently, with a view to making the task of the Revenue in such matters less difficult, Parliament effected the said amendments by the Finance Act, 1964. Not only the word "deliberately" was omitted in Clause (c), but the Explanation aforesaid was added. The Explanation creates a presumption of law--which is no doubt rebuttable. The presumption of law created by the Explanation is to the following effect: where the total income returned by any person is less than 80 per cent. of his total assessed income, such person shall be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income for the purposes of Clause (c) unless he proves that the failure to return the correct income did not arise from any fraud or any gross or wilful neglect on his part. The Explanation, thus, shifts the burden of proof to the assessee in the situation covered by it. Once the returned income is shown to be less than 80 per cent, of the total income assessed, the presumption comes into play and then the burden shifts to the assessee to establish that his failure to return the correct income was not on account of any fraud or gross or wilful neglect on his part. If he fails to establish the same, the presumption will become a finding--and it would be open to the authority to levy the penalty. But, if the assessee establishes that his failure to return the correct income was not on account of any fraud or any gross or wilful neglect on his part, it is evident, no penalty can be levied."

14. Thus, going by the language in which Explanation 1 is couched, there will be a presumption in favour of the Department and against the assessee. Of course, it is only a rebuttable presumption. Learned counsel for the Respondent placed reliance on the decision in [Commissioner of Income Tax Vs. Shri Pawan Kumar Dalmia](#), . There, the court took the view that there was no concealment of income. The question of application of the presumption under the Explanation was considered. But the court held that it is a question of fact. In that case, the Division Bench held as follows (page 9) : "The Appellate

Tribunal, on the facts, has found that the assessee has not concealed any particulars of income or furnished inaccurate particulars of such income. It was also found that as regards Rs. 1,50,000, it is only a case of unsatisfactory explanation of the nature and source of the amount and that there is nothing to show that the plea of the assessee is false or inherently impossible, or that the failure to return the correct income did arise from any fraud or gross or wilful neglect on his part". The above decision does not hold that the Explanation does not create a presumption in favour of the Department. On the basis of this, the court held that there was a finding of fact by the Tribunal that there was no concealment. Further, the court was of the view that the Departmental authorities were in possession of the materials regarding the concealment of the income long before the returns have been filed. But, so far as the present case is concerned, at the time of search, the answer given by the assessee was that an amount of Rs. 60,000 belonged to Gandhi Sons, as their unaccounted income. Subsequently, it was changed by stating that it belonged to Kerala Produce Dealers. This explanation was not accepted by the Assessing Officer. The Tribunal took the view that even though the change in the assessee's explanation was not satisfactory, the Assessing Officer cannot render him liable for penalty. We are afraid this is stretching the law too much. According to us, once the onus of proof is on the assessee, the Tribunal should have found out whether that onus has been discharged by the assessee. As has been held in [Parimisetti Seetharamamma Vs. Commissioner of Income Tax, Hyderabad](#), the finding arrived at by the Tribunal by placing a burden wrongly is not a legal finding. The explanation offered by the assessee has not been accepted by the Assessing Officer and he rightly held that the burden of proof is on the assessee.

15. On going through the order of the Tribunal, we are of the view that the Tribunal has exercised the power wrongly and we hold that, on the facts and circumstances of the case, the burden was on the assessee to show that there was no concealment of income and hence not liable for penalty.

16. In the above view of the matter, we set aside the order passed by the Tribunal in I. T. A. No. 125 (Coch.) of 1991 and direct the Tribunal to reconsider the matter in accordance with the above directions.