

(2006) 07 KL CK 0065

High Court Of Kerala

Case No: IT Appeal No. 24 of 2000

Commissioner of Income Tax

APPELLANT

Vs

R. Kesavan Nair

RESPONDENT

Date of Decision: July 7, 2006**Acts Referred:**

- Income Tax Act, 1961 - Section 132, 271(1), 274

Citation: (2006) 205 CTR 10 : (2006) 287 ITR 276**Hon'ble Judges:** V. Ramkumar, J; K.S. Radhakrishnan, J**Bench:** Division Bench**Advocate:** P.K.R. Menon and George K. George, for the Appellant; Anil D. Nair, for the Respondent

Judgement

K.S. Radhakrishnan, J.

CIT has come up with this appeal aggrieved by the order of the Tribunal, Cochin Bench in ITA No. 650/Coch/1995. Three questions of law have been raised for our consideration, which we have redrafted and consolidated as follows:

Whether, on the facts and in the circumstances of the case, the Tribunal was justified in interfering with the imposition of penalty by the Asstt. CIT u/s 271(1)(c) of the IT Act in the light of the decision of the apex Court in [Sir Shadi Lal Sugar and General Mills Ltd. and Another Vs. Commissioner of Income Tax, Delhi, ?](#)

Assessee filed his return of income on 13th Nov., 1991 showing loss of Rs. 2,43,440 after adjusting depreciation of Rs. 3,30,538. Search was conducted in the residential and business premises of the assessee on 21st Aug., 1999 u/s 132 of the Act. During the course of search certain books of account were seized. Assessee was maintaining accounts in respect of the business of liquor of which the income declared was only Rs. 40,000 on estimate basis. Assessee's main source of income was from restaurant and lodging complex, income from Kesuram Wines and incentive from M/s Star Agencies, Ernakulam. AO after verifying the seized books of

account; had sent a proposal on 20th Nov., 1992 requiring the assessee to file objection, if any, in adopting the income of Rs. 3,45,643. Assessee filed reply on 24th Feb., 1993 wherein it was stated that there were some mistakes in the P&L a/c prepared by the AO and hence the net profit should be recomputed. However, the assessee withdrew the various objections and agreed for the adoption of Rs. 3,45,643 as income from liquor business as seen from the letter dt. 22nd March, 1993. Assessee also requested that no penalty be levied.

2. The AO however completed the assessment by assessment order dt. 31st March, 1993 and also initiated penalty proceedings u/s 271(1)(c) of the Act. Penalty proceedings were later completed by proceedings dt. 10th Sept., 1993 whereby penalty of Rs. 1,38,675 was imposed. Aggrieved by the same, assessee took up the matter in appeal before the CIT(A) and the appeal was dismissed holding that the assessee had deliberately concealed the details of income from liquor business and therefore levy of penalty was confirmed.

3. Assessee then took up the matter before the Tribunal, Placing reliance on the decision of the Madras High Court in [Commissioner of Income Tax Vs. Adamkhan](#), and also the decision of the Supreme Court in [Sir Shadi Lal Sugar and General Mills Ltd. and Another Vs. Commissioner of Income Tax, Delhi](#), . Tribunal took the view that there was no reason to initiate penalty proceedings and interfered with the penalty proceedings holding that in the absence of any reasonable ground penalty proceedings could not be initiated. Aggrieved by the same this appeal has been preferred by the Revenue.

4. Sri P.K. Ravindranatha Menon, senior standing counsel for the IT Department submitted that the Tribunal has not properly appreciated the scope and ambit of Section 271(1)(c) of the Act. Counsel submitted that the reasoning of the Tribunal is against the well settled legal position. Counsel referred to the decision of This court in [Commissioner of Income Tax Vs. K.P. Madhusudanan](#), which was affirmed by the apex Court in [M/s. K.P. Madhusudhanan Vs. Commissioner of Income Tax, Cochin](#), . Reference was also made to the decisions of This court in [Deputy Commissioner of Income Tax Vs. K. Suresh Kumar](#), and [Commissioner of Income Tax Vs. A. Sreenivasa Pai](#), and other connected cases.

5. Counsel appearing for the assessee on the other hand contended that there is no reason to interfere with the order passed by the Tribunal. Counsel submitted that the assessing authority has not properly appreciated the letter dt. 5th April, 1993 as well as the lawyer's notice dt. 22nd March, 1993. Counsel submitted that the assessee sought for waiver of the penalty so as to make good the several loss. Later assessee agreed to the proposal to estimate the income from liquor business at Rs. 3,45,643 subject to the conditions mentioned in the said letter. Counsel placed reliance on the decision of the Madras High Court in Adamkhan's case (supra) and also the decision of the Supreme Court in Sir Shadilal Sugar & General Mills' case (supra). Reference was also made to the decision of the Calcutta High Court in

Commissioner of Income Tax Vs. Sarda Rice and Oil Mills, .

6. The scope of Section 271(1)(c) was considered by This court in K.P. Madhusudhanan's case (supra) and the said decision was affirmed by "the apex Court in K.P. Madhusudhanan's case (supra). We may examine the facts of this case in the light of the settled legal position and decide as to whether the Tribunal was justified in interfering with the order of penalty. This is a case where the proceeding was initiated against the assessee after conducting a search in his residential and business premises u/s 132 of the IT Act and also verifying the books of account. After verifying the seized documents a pre-assessment proposal was sent on 20th Nov., 1992 requiring the assessee to furnish his objection, if any, in determining the business income of Kesuram Wines at Rs. 3,45,643. Assessee was also requested to produce evidence in support of the various receipts shown therein. The assessee submitted a reply on 24th Feb., 1993. It is stated therein that the additional income estimated from liquor business should be treated as utilised for meeting the difference in the cost of construction of the new building. Subsequently, it is seen that the assessee withdrew those objections and agreed to estimate the income from liquor business as evident from the letter dt. 22nd March, 1993 sent by the assessee's advocate. The letter is extracted below for easy reference.

The Asstt. CIT,

22nd March, 1993

Investigation Circle, Trivandrum

Sir,

Sub: Income Tax assessment of Shri R. Kesavan Nair, Kesuram Buildings,

Pongummoodu, Trivandrum; asst. yr. 1989-90

Ref.: File No. PX-2369/AC. Inv./TVM

This has reference to the discussion the undersigned had with you today.

In order to make a final settlement with regard to the tax liability of my client Shri R. Kesavan Nair and to purchase peace for him, I agree to your proposal to estimate the income from liquor business at Rs. 3,45,643 and to treat the loan of Rs. 1,20,000 from his wife T. Saraswathy Amma as unexplained income, subject to the following:

(i) The additional income estimated from liquor business as above is treated as utilised for meeting the difference in cost of construction of the new building as found by the valuation officer and as declared by the assessee.

(ii) No penalty is levied.

Thanking you.

Yours faithfully,
Sd/-
(K.K. Aiyappan Pillai)

Abovementioned letter would show that the assessee was agreeable to the proposal to estimate the income from liquor business at Rs. 3,45,643 and to treat the loan of Rs. 1,20,000 from his wife as unexplained income. It was also requested that the additional income estimated from the liquor business be utilised for meeting the difference in cost of construction of the new building as found by the Valuation Officer and that no penalty be imposed, AO however completed the assessment determining the income at Rs. 1,34,220 after adjusting the depreciation of Rs. 3,78,522 and penalty proceedings u/s 271(1)(c) were initiated and in response to the notice issued u/s 274 r/w Section 271(1)(c) and the minimum penalty fixed at Rs. 1,38,675 was imposed u/s 271(1)(c) of the Act.

7. Counsel appearing for the assessee placed considerable reliance on the assessment order and submitted that the assessing authority has accepted the explanation submitted by the assessee and after having accepted the explanation there is no justification in imposing the penalty. We have gone through the assessment order and the letter submitted by the assessee and his advocate. We are not prepared to say that the assessing authority had accepted the explanation given by the assessee. True, the assessee had made a request to drop the penalty, but that was not accepted by the assessing authority. Going by the letter of the assessee as well as that of his counsel it is clear that the assessee had conceded concealment of income. Imposition of penalty is not dependent upon consent or otherwise of the assessee and not on the basis of agreement or concession. Penalty proceedings are penal in nature. Penalty can be imposed once concealment of income is noticed and unearthed, This legal position is well settled. Reference was made to the decision of the Madras High Court in [Rathnam and Co. Vs. Inspecting Assistant Commissioner and Another](#), . The Tribunal proceeded as if the assessee's offer was conditional if the assessee accepts certain additions with the belief that what was offered would be accepted with the condition and that the offer should be accepted either fully or rejected, which cannot be sustained. Tribunal in fact held that there should be positive evidence that the assessee had consciously concealed the particulars of income. The facts of the case, in our view, would lead to the conclusion that the assessee had consciously concealed the particulars of income,

8. The AO has proceeded on the basis of the materials unearthed during the search. Reply given by the assessee as well as by the lawyer would clearly show that there was no objection regarding the estimation of the assessment made by the AO. The only request was to make some adjustment and to waive the penalty which was not acceptable to the AO. We are of the view that the Tribunal has committed grave error in holding that there is no positive finding that assessee had concealed income. The facts would show otherwise. In such circumstances, we find it difficult

to sustain the order of the Tribunal. Order of the Tribunal is set aside and the order of the Asstt. CIT is restored.