

(2000) 07 KL CK 0042

High Court Of Kerala

Case No: Income-tax Reference No's. 135, 136, 157, 158, 304, 305, 306 and 307 of 1997

Commissioner of Income Tax APPELLANT
Vs
Santhosh Financiers, Santhosh
Thomas and Co. and Santhosh
Family Trust RESPONDENT

Date of Decision: July 26, 2000

Acts Referred:

- Income Tax Act, 1961 - Section 132(5), 148, 271(1)
- Kerala Money Lenders Act, 1958 - Section 18D

Citation: (2001) 166 CTR 542 : (2001) 247 ITR 742

Hon'ble Judges: S. Sankarasubban, J; A. Lekshmikutty, J

Bench: Division Bench

Advocate: P.K.R. Menon, N.R.K. Nair and George K. George, for the Appellant; C. Kochunni Nair and M.C. Madhavan, for the Respondent

Judgement

S. Sankarasubban J.

1. These references are at the instance of the Revenue and are against a common order passed by the Income Tax Appellate Tribunal. The questions of law referred for our consideration are as follows :

"1. Whether, on the facts and in the circumstances of the case, the Tribunal is right in law and fact in deleting the levy of penalty ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal is right in law and fact in holding that it cannot be said that "the assessees have concealed the income or the particulars of income" ; "mens rea cannot be attributed" and are not the findings wrong, unreasonable militating and the conduct calculated and motivated if viewed in the light of the fact that the returns with "noting" were filed only after the search and seizure and the returns for all the years were filed

together and at the same time ?"

2. The assessment years are 1991-92 and 1992-93. The questions are regarding the imposition of penalty u/s 271(1)(c) of the Income Tax Act, 1961 (hereinafter referred to as "the Act").

3. The assessees are different persons. They are engaged in the business of money-lending. A search was conducted in the business and residential premises of the assessees and certain documents and valuables were found. In the course of the search, it was found that the assessees were charging interest on loans and advances at 30 per cent, against 18 per cent, accounted for in the books. The seized materials also indicated the practice of charging 30 per cent, interest as against 18 per cent, accounted for in the books. On that basis, the proceedings u/s 132(5) of the Act were completed. Thereafter, notice was issued u/s 148 of the Act and the assessees filed the returns of income for the impugned assessment years admitting only 18 per cent, interest on the loans and advances given by them and 12 per cent, interest on the borrowings made by them. However, a note was appended to the returns filed in response to the notice u/s 148 of the Act that the extra interest collected by them would not constitute their income in view of the provisions of section 18D of the Kerala Money Lenders Act. It was pleaded before the Assessing Officer that the assessees were paying interest at 18 per cent, on their borrowings even though only 12 per cent, was recorded in the books of account on such borrowings. The Assessing Officer accepted the plea regarding the payment of interest at 18 per cent, but regarding the plea that the extra interest collected did not constitute the income of the assessees it was not accepted. But the assessees agreed for fixing the interest at 30 per cent, instead of 18 per cent, recorded in the books of account. Thus, the assessments were completed taking the interest collections at 30 per cent, as against 18 per cent, recorded in the books of account and taking the interest on borrowings at 18 per cent, as against 12 per cent, recorded in the books. The Assessing Officer initiated penalty proceedings u/s 271(1)(c) of the Act and levied the minimum amount of penalty in all these cases.

4. The matter was taken in appeal before the Commissioner of Income Tax (Appeals). The first appellate authority concurred with the Assessing Officer and held that the extra interest collected was income. Therefore, the appellate authority held that the Assessing Officer was justified in making the addition to the income admitted by the assessees. Against that appeals were preferred before the Income Tax Appellate Tribunal. The Tribunal held that there was no concealment of income attracted u/s 271(1)(c) of the Act and cancelled the penalty. It is against the above order that these references are made.

5. From the facts, it is clear that in the returns filed by the assessees, the assessees have mentioned about the charging of interest at 30 per cent. But the assessees took up the contention that only 18 per cent, interest will form part of the income as the excess income levied by them cannot form part of the income u/s 18D of the

Kerala Money Lenders Act. When it was found that this contention will not be accepted by the Assessing Officer, the assessees agreed to treat the interest at 30 per cent, as the income. While considering the question whether there has been any concealment of income, the Tribunal held as follows : "The documents recovered in the course of the search also supported such admission. Thus, it was within the knowledge of the Assessing Officer that the assessees were collecting extra interest over and above what has been recorded in the books of account. Similarly, it was also within the knowledge of the Assessing Officer by way of information proved by the assessees in the course of the search that they were paying higher rate of interest on their borrowings than what has been recorded in the books of account. Thus, the charging of extra interest and paying of extra interest are known to the assessing authority before the assessees furnished the returns of income in these cases for all the assessment years under appeal. Concealment of income or concealment of the particulars of income, or furnishing of inaccurate particulars of income must be found in the returns so as to attract the penalty u/s 271(1)(c) and the Explanation thereunder. In the returns also the assessees have appended a note regarding the practice of collection of extra interest, etc., but had contended that the extra interest collected would not constitute their income in terms of section 18D of the Kerala Money Lenders Act".

6. Learned counsel for the Revenue argued that when once the explanation given by the assessees was not accepted, and the entire 30 per cent, interest was accepted as the income as per the Explanation to section 271(1)(c) of the Act, there is a presumption that this income was concealed. He also brought to our notice certain decisions, which show that merely because there was an admission on the part of the assessees that does not take the matter out of the purview of concealment. We do not dispute the above proposition. But the question is whether there has been concealment. It was only when the search was conducted that it was noticed that the assessees were collecting interest at 30 per cent. In the returns filed by the assessees, they have revealed that they were collecting interest at 30 per cent. What they contended was that u/s 18D of the Kerala Money Lenders Act, interest above 18 per cent, cannot be collected and such amounts have to be refunded. Hence, they took up the contention that there was no concealment.

7. It is true that in the decisions reported in Commissioner of Income Tax (Additional), Lucknow Vs. Jeevan Lal Sah, and Sir Shadi Lal Sugar and General Mills Ltd. and Another Vs. Commissioner of Income Tax, Delhi, it has been held that the burden was on the assessee to prove that there has been no concealment. But as stated in various decisions, it depends upon the facts of each case. The burden will be discharged unless the explanation is fantastic or without any basis. Paripoornan J., speaking for the Division Bench in the decision reported in Commissioner of Income Tax Vs. Shri Pawan Kumar Dalmia, held as follows (headnote) : "Penalty proceedings are distinct and different from assessment proceedings. Findings in the assessment proceedings are not conclusive but are relevant. The entire material

available should be considered afresh by the authorities before imposing penalty. Even after the addition of the Explanation to section 271(1)(c), conscious concealment is necessary. The Explanation provides only a rule of evidence raising a rebuttable presumption in certain circumstances. No substantive right is created or annulled thereby . . . The initial burden of proof is cast on the assessee to displace the presumption arising in certain cases. The assessee can discharge the onus either by direct evidence or circumstantial evidence, or both. The cumulative effect of all facts should be taken into consideration". Regarding the question whether there has been concealment, his Lordship observed as follows (page 8) : "The word "conceal" is derived from the Latin *concelare* which implies *con + celare* to hide. Webster in his New International Dictionary equates its meaning "to hide or withdraw from observation ; to cover or keep from sight ; to prevent the discovery of ; to withhold knowledge of. The offence of concealment is thus a direct attempt to hide an item of income or a portion thereof from the knowledge of the Income Tax authorities".

8. Whether there is concealment to make the penalty exigible is normally a question of fact and also as to whether the burden of proof in a given case had been discharged on a set of facts is also a question of fact. The Appellate Tribunal, on the facts, found that the asscssees have not concealed any particulars of income or furnishing of inaccurate particulars of income. The assessees took up the contention that the interest over and above what is allowable under the Kerala Money Lenders Act cannot be treated as income. This is only an explanation not to treat a particular amount as income. It cannot be said that the income has been concealed.

9. In the above view of the matter, we are of the view that the Tribunal was right in cancelling the penalty. The questions of law are answered in the affirmative and against the Department.