(1990) 90 CTR 210 : (1991) 190 ITR 679

Bombay High Court

Case No: Income-tax Reference No. 579 of 1976

Madras Bangalore Transport Co.		APPELLANT
	Vs	
Commissioner of Income Tax		RESPONDENT

Date of Decision: Aug. 13, 1990

Acts Referred:

- Income Tax Act, 1961 - Section 271(1), 278, 279

Citation: (1990) 90 CTR 210 : (1991) 190 ITR 679

Hon'ble Judges: T.D. Sugla, J; Sujata V. Manohar, J

Bench: Division Bench

Advocate: G.S. Pikale, for the Appellant; G.S. Jetley, for the Respondent

Judgement

T.D. Sugla, J.
In this reference, the Tribunal has, u/s 256(1) of the Income Tax Act, 1961, referred to this court four questions of law at the instant of the assessee. The questions are :

"1. Whether, on the facts and in the circumstances of the case, the Appellant Assistant Commissioner retained the very income at a reduced figure which had been added by the Income Tax Officer ?

2. Whether, the Inspecting Assistant Commissioner was entitled to base his conclusion on the evidence and material which came to light after the assessment for the assessment year 1962-63 was completed ?

3. Whether on the facts and in the circumstances of the case, the order of the Inspecting Assistant Commissioner was vitiated and was liable to be cancelled on the ground that it was partly based on inadmissible evidence ?

4. Whether, on the facts and in the circumstances of the case, the assessee-firm was liable to be penalised for concealment of income by the managing partner, P. V. S. Mani ?"

2. The assessee is a partnership. It carries on transport business on a large scale which is evident from the fact that, during the material period, it had as many as 83 branches all over the country. The assessment year involved is 1962-63 for which the previous year is from July 1, 1960 to June 30, 1961.

3. The return of income for the year was filed on August 31, 1962. Income disclosed was Rs. 4,00,487, though the profit and loss account accompanying the return disclosed a profit of Rs. 3,69,325.

4. On the first date of hearing on September 7, 1962, the assessee produced its books of account including cash book, ledger, etc., before the Income Tax Officer. During the pendency of the assessment proceedings, it was claimed on behalf of the assessee that a fire had taken place on March 8, 1965, in one of its premises where all the books of account for the year and other years were stored. The fire, it was further claimed, destroyed all the books and documents. On October 11, 1965, the Income Tax authorities searched the business premises of the assessee as well as the residential premises of its partners and those of its then chief accountant. Several accounts, documents and papers were seized. The seized documents included two sheets of paper containing the tentative profit and loss account for the assessment year 1962-63. As against the profit and loss account statement accompanying the return which disclosed a profit of Rs. 3,69,325, the tentative profit and loss account so seized disclosed profit of Rs. 8,46,107. Details of examination and investigation by the Income Tax Officer in this behalf are briefly stated by the Tribunal in paragraphs 8 to 13 of the statement of the case and are not referred to in detail herein for the sake of brevity. Suffice it to say that, on the basis of a detailed examination and investigation and after giving the assessee reasonable opportunity to meet the Department''s case whenever it was necessary, the Income Tax Officer completed the assessment for the year on March 30, 1967, computing the total income at Rs. 11,82,326. The assessment order runs into 70 foolscap typed pages. The main additions made were :

5. The Income Tax Officer was satisfied during the course of the assessment proceedings that the penal provisions of section 271(1)(c) of the Income Tax Act, 1961, were attracted in this case. He recorded a finding to that effect and referred the proceedings to the Inspecting Assistant Commissioner as the minimum of penalty imposable under that section exceeded Rs. 1,000. After allowing opportunity of being heard, the Inspecting Assistant Commissioner imposed a penalty Rs. 9,79,960 by his order dated August 16, 1968, observing that the assessee had concealed an income of Rs. 7,96,276.

6. It is pertinent to mention that, after the search on October 11, 1965, during which a number of incriminating documents were seized, but before the assessment for the year

was completed on March 30, 1967, i.e., in November, 1966, the assessee filed its first petition for settlement before the Income Tax authorities. A second settlement petition was filed on November 22, 1967, by which income of Rs. 18,99,239 was offered to be spread over ten years ending June 30, 1965. This was at a stage when the assessment for the year had already been completed and the appeal there against was pending before the Appellate Assistant Commissioner. On February 19, 1968, the Income Tax Officer filed a criminal complaint against the assessee-firm, its managing partner, Shri P. V. S. Mani, and the financial controller, Shri E. K. Balkrishnan, under sections 278 and 279 of the Income Tax Act, 1961. Thereafter, the assessee filed a third settlement petition before the Central Board Direct Taxes on June 28, 1968. This was seriously pursued and a lot of correspondence was exchanged between the assessee and the Department thereafter. Eventually, on December 31, 1968, the assessee wrote a letter to the Commissioner agreeing to the addition of the additional income of Rs. 18,10,000 to be spread over nine years from the assessment year 1958-59 to the assessment year 1966-67 as per the details given in the letter.

7. On February 8, 1969, the Income Tax Officer addressed a letter to the assessee-firm recording the terms and conditions on which the settlement was made. It recited : "the aggregate amount of concealed income to be assessed for the assessment year 1958-59 to 1966-67 (both inclusive) as proposed by the Commissioner of Income Tax, Madras, i.e., Rs. 18,10,000, has been accepted." One of the terms of the settlement was to charge penalty equal to 25 per cent. of the penalty chargeable under the Act for all the years from 1958-59 to 1966-67 barring the assessment year 1962-63. It was left open to the assessee-firm to contest in appeal the penalty imposed in respect of the assessment year 1962-63. The assessee-firm was required to file separate letters or a joint letter signed by the partners accepting the settlement terms contained in that letter. The assessee-firm complied with this request by filing two letters dated February 24, 1969, and February 27, 1969.

8. As a result of the settlement, the assessee''s income from the transport business of the year was taken at Rs. 8,00,487 meaning thereby that an addition of Rs. 4 lakhs was agreed to be made to the returned income from transport business and all other additions were deleted. It is common ground that, on the basis of the settlement arrived at between the parties, the Appellate Assistant Commissioner, by his order dated March 12, 1969, reduced the addition of income from transport business from Rs. 5,00,000 to Rs. 4,00,000 and deleted all other additions.

9. As stated earlier, one of the terms of the settlement was to charge penalty equal to 25 per cent. of the penalty chargeable under the Income Tax Act for all the years from 1958-59 to 1966-67 except the assessment year 1962-63. In respect of the assessment year 1962-63, the penalty having already been imposed by the Inspecting Assistant Commissioner, it was left open to the assessee to challenge the imposition of penalty in appeal.

10. The Tribunal accepted the assessee''s contention to the extent that penalty was leviable with reference to the addition finally sustained. It also accepted that, in the circumstances, the addition was maintained, it was not a case where imposition of maximum penalty would be justified. The Tribunal, however, did not accept the contention that the addition finally maintained was altogether different. It held that the identity and content of the addition of Rs. 4,00,000 was in no way different from the addition of Rs. 5,00,000 made by the Income Tax Officer as suppressed income from the transport business. The Tribunal also found a lot of material independent of the terms of the settlement which was brought on record by the Income Tax Officer and, in its view, the said material justified a finding that the assessee had concealed its income. However, taking into account all relevant aspects, the Tribunal considered it fair and reasonable to maintain the minimum penalty imposable under the Act.

11. The Department has accepted the Tribunal''s order and the assessee alone has come up by way of reference. In the circumstances, the first and the only material question which we have to consider in this reference is whether the Tribunal was justified in giving a finding that the assessee had concealed its income from transport business to the extent of Rs. 4,00,000 an addition finally maintained (sic). Once such a finding is found to be justified, the minimum penalty only having been imposed, no other question will arise for consideration. Ordinarily, the conclusion that an assessee has concealed its income is a conclusion of fact and does not give rise to a referable question of law. Since, however, the Tribunal has referred to this court four questions of law and the addition of Rs. 4,00,000 is finally maintained in terms of the settlement arrived at between the assessee and the Department, we propose to answer the question as referred to us.

12. The first question referred to this court in this reference is :

"Whether, on the facts and in the circumstances of the case, the Appellate Assistant Commissioner retained the very income at a reduced figure which had been added by the Income Tax Officer.

Shri Pikale, learned counsel for the assessee, strenuously argued that the quality, content and the identity of the addition of Rs. 4,00,000 maintained by the Appellate Assistant Commissioner was not the same as the quality, content and identity of the addition of Rs. 5,00,000 made by the Income Tax Officer. It was pointed out that, as a result of the settlement, the assessee had agreed to an addition of Rs. 18,10,000 as income outside the books for a period of 9 years, i.e., from the assessment years 1958-59 to 1966-67. No doubt, it was under the terms of the settlement that the addition of Rs. 4,00,000 as suppressed income from the transport business was retained for the year under reference. However, this fact by itself does not justify the finding that the amount of addition so retained represented the assessee''s concealed income of the year so as to attract the penal provisions of section 271(1)(c). In any event, this was not the addition on the basis of which the Income Tax Officer had recorded his satisfaction as required u/s 271(1)(c). Shri Jeltey, learned counsel for the Department, on the other hand, strongly

relied on the order of the Appellate Tribunal. He reiterated that the addition of Rs. 4,00,000 maintained by the Appellate Assistant Commissioner was a part of the addition of Rs. 5,00,000 made by the Income Tax Officer in respect of which the Income Tax Officer had recorded his satisfaction u/s 271(1).

13. The condition precedent for applying the provisions of section 271(1)(c) is, admittedly, the satisfaction of the Income Tax Officer or the Appellate Assistant Commissioner, as the case may be, in the course of any proceedings under the Income Tax Act that the assessee concealed the particulars of his income or furnished inaccurate particulars thereof. The assessment for the year 1962-63 was completed on March 30, 1967, i.e., long before the settlement between the assessee and the Department. The total addition to the income disclosed was of a sum of Rs. 7,96,276 which included an addition of Rs. 5,00,000 as suppressed profits in the goods transport business. This addition was on the basis of material on record including tentative profit and loss statement found in the assessee''s business premises at the time of search in October, 1966. Income from the transport business was, according to that statement, Rs. 8,46,107 as against the returned income of Rs. 4,00,487. The Income Tax Officer had recorded his satisfaction u/s 271(1)(c) in the following words :

"In view of what has been stated in the preceding paragraphs, I am satisfied that :

(i) there has been a deliberate and intentional attempt on the part of the assessee to reduce the liability to tax of the firm and the partners thereof by wilfully omitting by understating income and overs-tanding the expenditure and by suppression of material evidence.

(ii) The profit and loss statement for the year ended June 30, 1961, and the balance-sheet as on June 30, 1961, relied upon in support of their return of income have been got up in pursuance of the above object and they are fabricated. As discussed in paras Nos. 72 and 73, there is evidence to show that the profit and loss statement for the year and ended June 30, 1961, and the balance-sheet as on June 30, 1961, filed by the assessee and relied upon in support of their return of income in several material respects were false documents made with intent to support their return.

(iii) The assessee were required under the Income Tax Act to furnish information of their true income and there is evidence to show that the statement made in the verification in the return delivered under the Act which was false to their knowledge and that they have furnished as true income which they knew or have reason to believe to be false.

(iv) Further, the assessee have used or attempted to use as true and genuine evidence which they knew to be false or fabricated.

(v) The assessee having thus concealed the particulars of its income and having furnished inaccurate particulars of its income, penalty proceedings have separately been initiated u/s 271(1)(c) of the Income Tax Act, 1961, and the case will be referred to the

Inspecting Assistant Commissioner of Income Tax, Central Range, Madras, for the imposition of penalty."

14. Admittedly, the Appellate Assistant Commissioner maintained the addition of Rs. 4,00,000. He passed a short order as, by the time the appeal came up before him. The assessee had already reached a settlement with the Department. The Appellate Assistant Commissioner observed :

"The representative present states that a settlement has been arrived with the Department which has also been confirmed by the Income Tax Officer. The Income Tax Officer concedes that it has been accepted that there is no case for the addition of the income of Rs. 71,744 representing the incomes from the business in the names of Anantharajiah, Subhaprakash Automobiles and Premkumar, and the addition of Rs. 1,97,000 representing hundi borrowings and the disallowance of interest thereon amounting to Rs. 27,532. As regards the addition in respect of lorry business, the parties present agree that the addition may be restricted to Rs. 4,00,000 in the place of Rs. 5,00,000."

15. It is true that the addition as suppressed income from the transport business was restricted to Rs. 4,00,000 on the basis of the settlement. On that basis, it may be possible to argue that the mere fact that an addition is made in a particular year as a result of the settlement will not necessarily justify the conclusion that the amount added represented the income of the assessee for the year, far less the concealment of the income for that year. The facts in the present case are, however, different. The Income Tax Officer has made an addition of Rs. 5,00,000 as suppressed profits from transport business on the basis of independent material referred to in great detail in the order of the assessment. He recorded his satisfaction u/s 271(1) that the assessee had concealed income on the basis of that material. The addition was suppressed income from the transport business was restricted to Rs. 4,00,000 for the year on the basis of the material. The addition was not made by just equally or in some other way distributing the total amount of addition agreed upon to be assessed in nine years. The addition maintained for the year had a direct nexus with the material brought on record during the course of the assessment proceedings. Under the circumstances, we find it difficult to agree with Shri Pikale that the quality, content and identity of the addition of Rs. 4,00,000 maintained by the Appellate Assistant Commissioner is different from the quality, content and identity of the addition of Rs. 5,00,000 made by the Income Tax Officer.

16. The first question is, accordingly, answered in the affirmative and in favour of the Revenue.

17. Question No. 2 is :

"Whether the Inspecting Assistant Commissioner was entitled to base his conclusion on the evidence and material which came to light after the assessment of the assessment

year 1962-63 was completed ?"

18. In order to appreciate the controversy involved in the question, we have gone through the order of the Inspecting Assistant Commissioner dated August 16, 1968, imposing penalty, carefully. In our view, the question is misconceived. As a fact, the Inspecting Assistant Commissioner has not based his conclusion on any evidence or material which came to his notice after the completion of the assessment. There is, of course, a reference to recovery of account books and documents which were alleged to have been burnt but were found dug up on January 10, 1968, in paragraph 3 of his order. That is, however, by way of narration of facts. The penalty order is certainly not based on that fact. In this context, it is to be kept in mind that the assessment was completed on March 30, 1967. Penalty was imposed by the Inspecting Assistant Commissioner u/s 271(1)(c) on August 16, 1968. The settlement was reached between the parties on December 31, 1968, and the Appellate Assistant Commissioner had disposed of the appeal against the order of assessment on March 12, 1969. The Inspecting Assistant Commissioner could not have obviously taken into account for the purpose of imposing penalty either the fact of settlement or the order of the Appellate Assistant Commissioner reducing the addition from Rs. 7,96,276 to Rs. 4,00,000. Moreover, penalty proceedings are separate and independent from assessment proceedings. Penalty proceedings must of necessity start after the completion of the assessment. In fact. show-cause notice may be issued some time after the completion of the assessment and penalty can be imposed within two years after the end of the year in which the assessment is completed. If, in response to show-cause notice, the assessee produces material in support of the claim that it had not concealed any income nor particulars thereof or some evidence or material relevant in this behalf has come on record, it is not merely desirable but also necessary for the Inspecting Assistant Commissioner to consider all such evidence and material that has come on record during or after the completion of the assessment while considering the imposition of penalty u/s 271(1)(c). The only condition will be that the assessee should have an opportunity to have his say on each and every such evidence or material. In this view of the matter, we are not able to appreciate the grievance of the assessee. Therefore, we answer the second question in the negative and in favour of the Revenue.

19. The third question is :

"Whether, on the facts and in the circumstances of the case, the order of the Inspecting Assistant Commissioner was vitiated and was liable to be cancelled on the ground that it was partly based on inadmissible evidence ?"

20. Beyond stating that the order of the Inspecting Assistant Commissioner was vitiated as it was partly based on inadmissible evidence, Shri Pikale was not able to point to any evidence or material, which was not admissible and yet considered by the Inspecting Assistant Commissioner for the purposes of imposing penalty. In fact, this question is very much a part of another aspect of the second question.

21. For reason given for answering the second question in the negative, the third question is also answered in the negative and in favour of the Revenue.

22. This takes us to the last question which reads thus :

"Whether, on the facts and in the circumstances of the case, the assessee-firm was liable to be penalised for concealment of income by the managing partner, P. V. S. Mani ?"

23. The argument is that Shri P. V. S. Mani was the managing partner of the assessee-firm. Other partners were sleeping partners. If at all any income was concealed, it would be the concealed income of Shri P. V. S. Mani and not that of the assessee-firm. It was pointed out that in all correspondence with the Department, it is only Shri P. V. S. Mani who had participated. The mere fact that certain additions were agreed upon to be made to the income of the assessee-firm cannot be, it was argued, the reasons for holding that the amounts so agreed to be added represented the assessee"s concealed income.

24. In our judgment, this argument is equally fallacious. It appears to be true that Shri P. V. S. Mani was the partner of the assessee-firm. It also appears to be true that the other partners were not taking active part in the conduct of the business. However, there is no dispute that Shri P. V. S. Mani was a partner and that the other persons shows as partners were also partners of the assess-firm. u/s 4 of the Indian Partnership Act, "partnership" is the relation between persons who have agreed to share the profit of a business carried on by all or any of them acting for all. Persons who have entered in to partnerships with one another are called individually "partners" and collectively "a firm", and the name under which their business is carried on is called the "firm name". In the circumstances, it will have to be held that the concealed income even thought it might have been earned by all the partners or by Shri P. V. S. Mani for all the partners, had to be income of the firm and the assessee-firm alone is liable both to assessment and penalty. In any event. Having agreed to this arrangement even under the settlement, it does not lie in the mouth of the assessee to say that the sum of Rs. 4,00,000 added as suppressed income from the transport business was the income of Shri P. V. S. Mani and not that of the assessee-firm.

25. Accordingly, the fourth question does not require an answer inasmuch as there is no finding that the concealment of income was by the managing partner. Shri P. V. S. Mani, for himself and not for and on behalf of the assessee-firm.

26. As stated earlier, the minimum penalty imposable u/s 271(1)(c) alone was sustained by the Tribunal. For other years covered by the settlement, the agreement was that penalty equal to 25% of the penalty imposable under the Act would be imposable. In any event, once it is held that the assessee is guilty of concealment u/s 271(1)(c), penalty less than the minimum imposable cannot be imposed.

27. No order as to costs.