

**income-tax Officer Vs. Ambica Agencies**

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**Court :** Income Tax Appellate Tribunal ITAT Hyderabad

**Decided On :** Dec-31-1993

**Reported in :** (1994)50ITD31(Hyd.)

**Judge :** T R Rao

**Appellant :** income-tax Officer

**Respondent :** Ambica Agencies

**Judgement :**

1. This is a departmental appeal for assessment year 1986-87 directed against the order of the Commissioner of Income-tax (Appeals), Vijayawada dated 7-9-1990 cancelling penalty under Section 271(1)(c) of the Income-tax Act, 1961 and allowing the appeal filed before him.

2. According to the Revenue, the Commissioner (Appeals) is not correct in holding that the Amnesty Scheme will apply to the facts of the case, he was not correct in holding that no detection was made by the Department prior to its filing of revised return and also in holding that the assessee did not conceal the particulars of its income.

3. So the first point to be decided is whether the revised return filed by the assessee on 2-3-1987 returning the income of Rs. 60,000 as against Rs. 45,900 originally returned can be taken to be a return filed under the Amnesty Scheme or not. The assessee filed return on 18-9-1986 for assessment year 1986-87 declaring an income of Rs. 45,900. The assessee is a partnership firm carrying on business in purchase and sale of fibre bushes and polishing cakes. On 15-11-1985 there was inspection in the business premises of the assessee by sales-tax authorities. They have detected suppression of stocks of Rs. 3,746. The Commercial Tax Officer, on the basis of material found during inspection determined the value of suppressed stock, which must have been sold by the assessee at Rs. 41,140 and he determined the gross turnover at Rs. 4,23,358 as against the recorded turnover of Rs. 3,82,218. For suppressed turnover he levied and collected C-fees of Rs. 1,259 from the assessee-firm. It is clear that by the date of filing of the income-tax return, inspection by the sales-tax authorities was already conducted. L.F. 159 of Ledger contained the personal account of Shri P. Rama Rao, in whose account there was a credit balance of Rs. 30,880.43. The assessee was questioned about the nature of the credit for which the assessee came forthwith the explanation that the correct name of this person was Shri P. Raghava Rao who is employed with the assessee-firm as a clerk. His account started with the credit balance of Rs. 340 as on 31-3-1981 after crediting the account with salary, interest, etc., it swelled to Rs. 30,880.43 by the end of the accounting year relevant to assessment year 1986-87. The assessee, however, could not prove that Shri P. Raghava Rao was working as a clerk in the firm. So the salary amount of Rs. 5,400 as well as the interest credited to the said account of Rs. 4,504 were both disallowed and added to the income of the assessee.

4. On the basis that the sales-tax authorities had estimated the unaccounted for sale to the extent of Rs. 41,140 the profit on the unaccounted for sale was estimated at 25.6% and a sum of Rs. 10,532 was added. The Income-tax Officer also held that the assessee was involved in clandestine business and he estimated the

source of funds for such clandestine business at Rs.25,000 and added it to the returned income under Section 69C of the Income-tax Act. So also the compounding fee paid by the assessee to the sales-tax department of Rs. 2,518 was added. Thus as against the originally returned income of Rs. 45,900, the gross income of the assessee was determined at Rs. 94,815. However, the assessment was made on 31-3-1987. On 2-3-1987, the assessee filed a revised return disclosing an income of Rs. 60,000 which was higher by Rs. 14,100 than the originally returned income. The assessee-firm sought for the benefits of Amnesty Scheme as per its covering letter dated 2-3-1987 sent along with the revised return. However, the Income-tax Officer refused to recognise the said return as Amnesty return on the ground that it was filed only after detection by the Department of the omission and, therefore, he held that the assessee is not entitled to immunity under Amnesty Scheme. Penalty proceedings under Section 271(1)(c) were initiated. The assessee filed a written explanation which was extracted in the Income-tax Officer's penalty order dated 23-3-1989. The Income-tax Officer in his penalty order stated that the assessee's denial that it had not concealed any particulars of income wilfully is far from truth. He held that the inspection by the sales-tax authorities on 15-11-1985 was done before the close of the accounts on 31-3-1986. The Commercial Tax Officer passed the assessment order dated 8-8-1986 determining the assessee's turnover at Rs. 4,23,358 as against Rs. 3,76,574 declared in the accounts-extracts appended to the income-tax return filed on 18-9-1986.

In fact by the date of income-tax return on 18-9-1986 all the above facts are fully known to the assessee. However, the assessee concealed particulars of its income or furnished inaccurate particulars of income. The docket sheets of the assessment proceedings maintained by the Income-tax Officer right from 5-9-1986 i.e., the date on which notice under Section 139(2) was given was provided to this Tribunal.

After the return was filed notices under Sections 143(2) and 142(1) were issued on 18-11-1986 and the case was posted to 2-12-1986.

Subsequently the matter was taken up for hearing for the first time only on 11-2-1987. On that date on behalf of the assessee its I.T.P. appeared, books produced by the assessee were examined partly and the enquiry was reposted to 13-2-1987. On 13-2-1987 the following is the docket: The assessee's A.R. present. Books partly examined. No stock accounts maintained. There is no explanation for the credit given to the account of P. Ramarao (correct name is P. Raghava Rao). The person is stated to be employee of the assessee. The sales tax authorities found stock discrepancies and additions have been made to assessee's disclosed turnover. The turnover disclosed in this year was only Rs. 3,76,575 as against Rs. 4,85,537 of last year.

Books partly examined.

The above only were the type of investigation made up to the filing of the revised return. For instance up to the date of revised return, the assessee was not called upon to produce Shri P. Rama Rao or P. Raghava Rao, the erstwhile clerk of the firm. The Income-tax Officer did not propose to make any addition regarding the estimated sales outside the account books of the assessee and asked for the explanation of the assessee there for. The turnover estimated by the sales-tax Department was only on estimate taking into consideration the extent of discrepancy found in the stock position of only Rs. 3,750 and with regard to such estimate it cannot be said that it is a formidable fact which the assessee ought to have disclosed as part of the income. At least the Income-tax Officer did not make up his mind by 28-2-1987 that he is going to estimate the G.P. at 26.2% on the turnover which was not entered in the books of accounts of the assessee and the explanation of the assessee was not called for. So as soon as the Income-tax Officer found that some suppressed turnover was estimated by the CTO on which the C-fees were paid, the assessee thought, in order to purchase peace, it is better to surrender some of this income and without any considerable further investigation made by the Income-tax Officer, the assessee came forth with the revised return on 28-2-1987.

5. After having perused the investigations made up to 13-2-1987 it is difficult for this Tribunal to agree with the learned Departmental Representative that detection of suppressed income was already made from which the assessee cannot escape his liability. All investigations cannot be said to amount to detection. Enquiry and

investigation may lead to revealing of suppressed income and the nature of income suppressed so revealed must be such that the assessee cannot escape his liability. In my opinion, there is no such material found out as a result of enquiries and investigations made till the filing of revised return. In this set up I will have to examine the covering letter dated 28-2-1987. Firstly in the covering letter, the detection of stock variation to the extent of Rs. 3,750 by the sales-tax department in its inspection on 15-11-1985 was dealt with. It is stated as under : ...it is found that the sales-tax authorities, consequent to inspection made on 15-11-1985, a variations in stocks were noticed to an extent of Rs. 3,750 which is due to the fact that the Commercial Taxes Department Officers have taken the physical stock on hand in the shop premises at the time of inspection and arrived at the stock ought to have been available in the shop on the date of inspection on the basis of the opening stock and the purchases made by us till the date by deducting the proportionate purchase value on the basis of the sales effected till the date of inspection less by estimating the gross profit.

It is stated that the sales-tax authorities did not consider the assessee's objection and made the assessment to the best of their judgment basing upon the variation found in the stock account to the extent of Rs. 3,750. Therefore, the estimate of Rs. 40,000 as additional sales turnover not found in the books was only a probability or an estimate and according to the assessee it was highly excessive arbitrary and unreasonable. In the covering letter, it is stated that being a petty dealer, the assessee cannot fight with the Department by preferring appeals, etc. and, therefore, it had paid the tax as levied by the Department. Now on the basis of the sales-tax order, it is stated that results should be disturbed by making proportionate addition to the income returned by them. In order to appreciate whether there was detection made by the Department, I will have to see how far the above said explanation offered by the assessee is tenable. To my mind, the only basis for estimating the sales turnover at Rs. 40,000 outside the books was only a probability based on the estimate made by the Sales-tax Department on the basis of stock variation to the extent of Rs. 3,750 on the date of inspection i.e., 15-11-1985. In my opinion, this cannot lead to the inescapable conclusion that there is a clear suppression of income made by the assessee, since in penalty proceedings the assessee had got ample scope to argue that the said addition proposed to be made is not at all tenable and there is likelihood of his explanation being accepted. Therefore, I hold that there is no detection of the failure of the assessee to return Rs. 10,532 which represents the gross profit on the suppressed turnover of Rs. 40,000 by the date of revised return. With regard to the credit appearing in the name of Shri P. Rama Rao (correct name is P. Raghava Rao), the explanation of the assessee in the covering letter dated 28-2-87 is as follows : In addition to the above you are pleased to point out that there is a salary of Rs. 5,400 to P. Raghava Rao which is being credited without any payment.

It is stated in the said letter that Shri P. Raghava Rao was working as a clerk in their firm and he was an unmarried boy residing with his parents. Therefore, he had not withdrawn moneys but kept the monies for marriage purposes as requested by his mother. Thus the credit in his account only represents accumulated balance of salary amounts as well as the interest credited to the same account. It is a genuine and bona fide amount which is payable to him as he is working in the firm, looking after the business affairs for the last five years. I am of the opinion that simply because some defects were pointed out in the accounts, every such defect cannot be taken to be detection of the suppressed income to hold that there is real detection. The material examined, the persons examined and the books examined should reveal clinchingly the suppressed income for which the assessee cannot have any plausible explanation. In other words, in my opinion, the quality of the material examined and the scope of such material giving clinching evidence about suppressed income or concealed income should be examined before it is found that there is real detection. Every material found in enquiry cannot reveal or result in detection. No doubt examination of material leads to certain conclusions. Some of the conclusions may be in the nature of probabilities and some conclusions which give rise may be of conclusive nature. If on examination of material, conclusions are reached which are of conclusive nature from which the assessee cannot wriggle out, cannot explain away and cannot but admit the concealed income, then only it can be said to be detection. Amnesty scheme is found out in a series of circulars. One such circular is Circular No. 441 [F. 225/86/85-IT(A. II)] dated 15th November, 1985 [see [1985] 156 ITR (St.) 165 [1986] 158 ITR (St.) 135].

The crucial question and answer relevant for our purpose are as follows : Question No. 19 : Kindly clarify the expression 'before detection by the Department' Answer: If the Income-tax Officer has already found material to show that there has been concealment, that, would mean the Department has detected the concealment. If the Income-tax Officer only had prima facie belief that would not mean that concealment has been detected.

So a distinction is clearly drawn between material which shows clear concealment and material which gives rise only to a prima facie belief about concealment. It is only the first category which comes under the detection by the department not the second one. I hold that in this case, the material gathered up to the filing of the revised return was at the most of the second category but definitely not of the first category mentioned above. The learned Departmental Representative heavily relied upon the Third Member decision of the ITAT, D-Bench, Bombay in *B.Tex Corpn. v. ITO* [1993] 202 ITR (A.T.) 17. However, I went through the said decision and I am unable to agree with the contention of the learned Departmental Representative. In the facts of that case revised returns were filed thrice and there was a definite finding that revised returns were not filed voluntarily and there was material on record to show which clinchingly proves concealment. Therefore, the Judicial Member with whom the Third Member agreed held that the revised returns were not filed before detection of concealment by the Department and, therefore, they held that the assessee is not entitled to benefits of Amnesty Scheme. However, that is not the case here. The learned Commissioner (Appeals) had stated the following in his impugned orders : It was stated that the revised return was filed after detection of omissions. It is mentioned in the order that suppression of turnover as found by the sales-tax authorities was put to the appellant and after it was made known to the appellant that the salary paid to Shri P. Raghavarao was a fake claim and so also the interest on the credit balance appearing on his name, the revised return was filed.

The counsel, on the other hand, pleaded that on 13-2-1987, the Assessing Officer has only asked for the Sales-tax assessment order.

This was asked orally but not through any letter. The assessment was completed under Section 143(3) though no notice under Section 143(2) was issued and no opportunity was given to the appellant in contesting the proposed additions.

Though it is asserted in the penalty order that there was detection as on 13-2-1987 regarding credit as well as suppression of stock, no material is found to justify the claim. I agree with the conclusion of the learned Commissioner (Appeals), though I do not find much reason and discussion in his orders about the kind of material and propensity of such material to establish concealment. I, therefore, hold that the assessee is entitled to the benefits of Amnesty Scheme since he had filed revised return on 28-2-1987 even before detection of any concealed income by the Department.

6. The second point on which the order of the Commissioner (Appeals) was based is that the penalty was levied on the basis of observation made in the assessment order. He held that the penalty was levied on the basis of the provisions of the main section and the Explanations under Section 271(1)(c) were never tried to be invoked nor the penalty justified on their basis. In such an event, the Commissioner (Appeals) held that the burden to prove concealment entirely lay upon the Department as held by the A.P. High Court in *Lakshmi Jewellery v. CIT* [1988] 171 ITR 649. In that decision, the A.P. High Court held as per the headnote that the finding given in the assessment proceedings for determining or computing the tax is not conclusive. It may be good evidence and it is open to the assessee to establish his case during the course of penalty proceedings. Even though the assessment as such as has been accepted, the burden is far more greater on the Revenue where penalty is sought to be justified not with reference to the substantive provisions contained in the section itself. I am entirely in agreement with the order of Commissioner (Appeals) on this aspect and I hold that the penalty is entirely based upon the observation made in the assessment order for determination of income. The burden which lay upon the Department was not discharged in order to prove the penalty under the main provisions of Section 271(1)(c). Therefore, the appeal is found to be without merit and hence it is dismissed.

