

Cit Vs. Issac John and Co.

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Court : Kerala

Decided On : Nov-13-2002

Reported in : [2003]130TAXMAN760(Ker)

Appeal No. : ITR No. 42 of 1999 13 November 2002

Appellant : Cit

Respondent : issac John and Co.

Advocate for Pet/Ap. : P.K.R. Menon and George K. George, *for the Revenue*
Reji Paul, Anil Xavier and N. Manoj Kumar, *for the Assessee*

Judgement :

G. Sivarajan, J.

The following question of law has been referred to this court under section 256(1) of the Income Tax Act at the instance of the revenue :

'Whether, on the facts and in the circumstances of the case and also in the light of Explanation 1 to section 271(1)(c), the Tribunal is right in law and fact in cancelling the penalty levied on the assessee ?'

2. The respondent assessee is a partnership firm carrying on abkari business. For the assessment year 1985-86, the assessee filed a return disclosing a total income of Rs. 1,91,800. In the course of the assessment proceedings, the

assessing officer verified the cash credit accounts appearing in the assessee's Books of Account. The assessing authority called for explanation from the assessee regarding the said cash credits. Pursuant to the said notice, the assessee furnished the details of the persons in whose name the credits are appearing in the Books. The assessing authority thereupon issued summons to some such creditors which were returned. Some of the creditors who appeared before the assessing authority had denied such credits and some of them admitted the credits against certain cases only. At that stage, the assessee filed a letter agreeing to make an addition of a sum of Rs. 5,87,438 representing the peak credit in the said Accounts on 30-3-1984. The assessing authority had entered a finding in the assessment order that in the circumstances explained, a sum of Rs. 5,87,438 being the principal credit in the said Accounts on 30-3-1984 is treated as the assessee's income under section 68 of the Act. In the assessment order, it is further stated that penalty proceedings under section 271(1)(c) are initiated separately. The assessing authority thereafter issued a notice under section 271(1)(c) of the Act. The assessee filed detailed objection to the said notice. However, the assessing authority by order dated 22-3-1990 imposed a penalty of Rs. 3,65,000 under section 271(1)(c) of the Act. The assessee took up the matter in appeal before the Commissioner (Appeals), Thiruvananthapuram, who by his order dated 16-1-1991 allowed the said Appeal. In appeal by the department, the Income Tax Appellate Tribunal affirmed the order of the first appellate authority.

3. Shri P.K.R. Menon, learned senior standing counsel for the revenue appearing for the applicant submitted that both the appellate authorities had wrongly cast the burden of establishing concealment on the department. The senior counsel further submitted that in view of the provision of Explanation 1 of section 271(1)(c) of the Act and the decisions of the Supreme Court in Addl. CIT v. Jeevan Lal Sah : [1994]205ITR244(SC) and other decisions, the burden is on the assessee to establish that the income which is added in the assessment is not the unaccounted income of the assessee. He further submits that the decision of the Supreme Court in Sir Shadilal Sugar & General Mills Ltd. v. CIT : [1987]168ITR705(SC) has not been followed by the Supreme Court in the latter decision in K.P Madhusudhanan v. CIT (2001) 251 ITR 992 . Learned counsel appearing for the respondent-assessee submits that the assessing officer has not

established in the assessment order that the assessee had either concealed the particulars of income or furnished inaccurate particulars of such income which was assessed, and that the assessee had furnished confirmatory letter obtained from many of the creditors whose names are found in the accounts. In those circumstances, the burden was on the assessing officer to rebut the presumption flowing from the said letters. The counsel further submits that the assessing officer did not consider any of the explanations offered by the assessee before him in the penalty proceedings. Counsel further submitted that both the appellate authorities have considered the explanation offered by the assessee and had come to the conclusion that the assessing authority was not justified in imposing penalty under section 271(1)(c) of the Act.

4. Section 271(1)(c) of the Act provides that if the assessing officer or the Deputy Commissioner (Appeals) or the Commissioner (Appeals) during the course of the proceedings under this Act is satisfied that the person has concealed the particulars of his income or furnished inaccurate particulars of income, he may direct that such person shall pay by way of penalty in the cases referred to in clause (c) in addition to the tax payable by him, which shall not exceed three times the amount of the tax sought to be evaded by reason of the concealment of his income. Explanation 1 to the said sub-section provides that,

'Explanation 1. 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 Commissioner (Appeals) to be false, or

(B) such person offers an explanation which 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.'

5. In the assessment proceedings, when the assessing officer sought clarification with regard to the credits found in the Books of Account, the assessee had furnished the names of the persons in whose favour the credits are found in the accounts and the assessing authority had issued summons to a few of them. However, pursuant to the said summons, only some of the creditors appeared who had either denied the credit or had stated that the credit is only to the extent of a particular amount. The assessing officer thereafter did not offer any further opportunity to the assessee to substantiate the credits by producing all the creditors and obtaining their sworn statement. It is at that stage, the assessee had come forward with a letter agreeing to the addition of a sum of Rs. 5,87,432 representing the peak credit in the accounts on 30-3-1984. The assessing authority had accepted the said amount and completed the assessment without going further into the matter. Of course, the assessing officer had entered a finding that the peak credit represents undisclosed income of the assessee under section 68 of the Act. However, in the penalty order, the assessing officer had simply relied on the details obtained in the assessment order and came to the conclusion that the assessee had conceded his income to the extent of Rs. 5,87,438 and imposed penalty. The first appellate authority had clearly noted the contentions taken by the assessee before the assessing authority and repeated before the first appellate authority which reads :

'The appellants were abkari contractors. The appellant had maintained books of account and they have been audited under section 44AB of the Income Tax Act. The appellant had raised temporary loans from friends and well wishers for the purpose of the business. Noticing the cash credits, the learned officer by his letter dated 28-12-1987 directed the appellant to file confirmation letters from the creditors on or before 11-1-1988. The appellant filed about 12 confirmation letters of creditors resident in Kerala, covering about Rs. 2,50,000. Two of the major creditors were resident outside Kerala and as such the appellant was unable to contact them immediately. The learned officer issued summons to the abovesaid two persons and also to the other 12 creditors asking them to appear before him on 23-3-1988 at Trivandrum and on 24-3-1988 at Kottayam. Some of the creditors did not appear and sought adjournment for one reason or another. Shri G. Sivaramakrishnan, Madras, one of the creditors did not appear on 16-3-1988 when

he was to have been examined. His examination was postponed to 23-3-1988. The assessment was completed on 28-3-1988, by adding Rs. 5,87,000 being the peak credit which was offered by the appellant. It is stated that the abovesaid offer was made in good faith and no penal action should have been initiated. The appellant further points out that they were not aware of the denial of credits by Shri A. Krishnadas and G. Sivaramakrishnan since the statements taken from them have not been put to the appellant and the appellant was not given any opportunity to rebut the assertions therein. Shri G. Sivaramakrishnan has particularly confirmed having given loan of Rs. 45,000. Referring to the assessing officer's version in the penalty order that the appellant was left with no alternative but to agree for the assessment, the appellant has contended that the credits were not established as bogus. For such an establishment certain procedures to be followed. The creditors should have been confronted with the confirmation filed by them and thereafter the appellant should have been given an opportunity to cross-examine them. Evidence obtained behind the back of the appellant cannot be used against him especially in penalty matters. Reference is made to affidavit filed by Shri S. Gopalakrishnan Nair which was filed before by the Income Tax Officer. The Income Tax Officer does not provide for any compelling provision that an assessee should voluntarily offer such cash credits which are not genuine. The appellant is free to contest the addition in appeal before the appellate authorities. Merely because an assessee concedes an amount for assessment it does not automatically mean that there was deliberate concealment of income. Reference is made to the Hon'ble Supreme Court's decision in : [1987]168ITR705(SC) (supra) wherein the Supreme Court has held that from the assessee agreeing for addition to his income it does not follow that the amount agreed to be added was concealed income. There may be hundred and one reasons for such admission and an offer and agreeing for addition does not absolve the revenue from providing the mens rea in a quasi criminal offence. Reliance is also placed on the decision of the Calcutta High Court in : [1989]179ITR111(Cal) and the decision of the Bombay High Court in : [1988]169ITR33(Bom) . Further relying on the Hon'ble Kerala High Court's decision in the case of CIT v. V. T Govindankutty Menon : [1989]178ITR509(Ker) , the appellant pleads that the facts of the case and the context in which the offer was made should be appreciated. It is argued that the penalty proceedings are

distinct and different from assessment proceedings and the finding in assessment proceedings are not conclusive but are relevant. The entire material available should be considered afresh by the authorities before imposing the penalty. Referring to the Hon'ble Allahabad High Court's decision in : [1987]167ITR578(All) , the appellant's representative has contended that even after the addition of Explanation to section 271(1)(c) of the Income Tax Act, conscious concealment is necessary. The amendment of the Explanation 1 by the Taxation Amendment Act that there should be a finding by the Income Tax Officer that the explanation given by the appellant was false or that the explanation given is not substantiated. The appellant's representative further reported that he had filed confirmation letters from almost all the creditors except Shri A. Krishnadas of Bangalore. Shri Sivaramakrishnan has partly confirmed having given loan of Rs. 45,000. The examination of both Shri A. Krishnadas and Shri G. Sivaramakrishnan was conducted behind the back of the appellant and no opportunity was given to the appellant to rebut the assertions made therein. While concluding the argument it is stated that the explanation given by the appellant was not wrong and that the department had not discharged the onus. There was no mens rea involved in this case. There was no deliberate or conscious concealment of income and that the appellant had offered by the income in good faith hoping that no penalty would be levied.'

It is with reference to the said contentions that the first appellate authority has taken the view that the assessing authority has not established the charge of concealment. The Tribunal has also endorsed the said view.

6. According to us, as per the provisions of Explanation 1(B) of section 271 of the Act, the burden is on the assessee to substantiate the matters stated in the Explanation. In the instant case, the assessing officer while completing the assessment did not afford any further opportunity to the assessee to substantiate his explanation regarding the credits because the assessee had offered the peak credit for assessment. However, when the assessee had explained the credit in its explanation, certainly the assessing officer was bound to afford an opportunity to the assessee to substantiate the same by producing the creditors before the assessing authority for taking the sworn statement etc. This according to us, was

required to be done by the assessing officer. In fact, a Division Bench of this court in CIT v. D.K.B. & Co. : [2000]243ITR618(Ker) had observed so. In that case, certain incriminating materials were found at a search conducted in February 1984 at the business premises of the assessee-firm and the residence of its partners. Further investigation revealed suppressions by the assessee. The partners in the firm wrote a letter to the assessing officer undertaking that they were agreeable for an addition of Rs. 41 lakhs. The Income Tax Officer wrote a letter to the assessing officer to suggest that it may file return. The assessee accordingly filed revised return adding Rs. 41 lakhs to the income already disclosed. The assessment was accordingly completed. Subsequently, penalty proceedings were initiated. In appeal arising out of the assessment and penalty proceedings, the Tribunal upheld the addition of Rs. 41 lakhs in the quantum appeal. But, without going into the merits of the penalty proceedings, the Tribunal held that after having agreed not to initiate penalty proceedings, it was open to the revenue to initiate penalty proceedings. In that context, this court observed that it is settled position in law that there cannot be an estoppel against a statute. It is for the department to consider the explanation offered by the assessee in respect of an amount which was offered as tax. It is not automatic that whenever an amount was offered by the assessee, penalty is not to be levied. Therefore, in the penal proceedings which conceptually differ from assessment proceedings, the assessee can file an explanation justifying its action in not including a particular item of income in its return, though it may have offered the amount to be taxed subsequently. It was further observed that if such an explanation is offered, the department has to examine its acceptability and record a finding as to whether the explanation is acceptable or not. Only if the explanation is not found acceptable, the question of penalty will arise. In other words, the explanation of the assessee has to be considered on the merits. In the instant case, as already noted, the assessing officer has not considered the explanation of the assessee which we have extracted earlier, while passing the penalty order. When the first appellate authority and the Tribunal have found that the said explanation was not considered by the assessing officer in the penalty order, the appropriate course for them would have been to set aside the penalty order and to remit the matter to the assessing officer to consider the matter keeping in mind the Explanation 1

particularly clause (B) thereof of section 271(1) and to pass a fresh order after affording a reasonable opportunity to the assessee to substantiate its case. The two appellate authorities without adverting to the provisions of clause (B) of Explanation 1 of section 271(1) had observed that the assessing officer has not established that the assessee had concealed the particulars of the Account or had furnished inaccurate particulars of its income. This is wrong. The assessee has to substantiate the explanation offered and the assessing officer has to enter a finding. In these circumstances, we are of the view that the assessing officer must be directed to consider the question of imposition of penalty afresh and in accordance with law in the light of the observations made in this judgment. We accordingly set aside the orders of the assessing officer as well as two appellate authorities and remit the matter to the assessing officer for fresh disposal in accordance with law in the light of the principles laid down by the Supreme Court. It is open to the assessee to adduce all evidence to substantiate its contentions taken before the assessing officer which we have extracted earlier.

7. In view of the above, we decline to answer the question referred to us.

The income-tax referred case is disposed of as above.

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