

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE C.N.RAMACHANDRAN NAIR
&
THE HONOURABLE MR. JUSTICE T.R.RAMACHANDRAN NAIR

MONDAY, THE 21ST JANUARY 2008 / 1ST MAGHA 1929

ITA.No. 83 of 2001()

AGAINST THE ORDER IN ITA.472/1993 of I.T.A.TRIBUNAL,COCHIN BENCH
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APPELLANT :

THE COMMISSIONER OF INCOME TAX,
COCHIN.

BY ADV. SRI.P.K.R.MENON(SR.),SR.COUNSEL FOR IT
SRI.GEORGE K. GEORGE, SC FOR IT

RESPONDENTS:

M/S.GURUVIJAYA KURI CO. LTD.,
TRICHUR.

BY ADV. SRI.ARIKKAT VIJAYAN MENON
SRI.HARISANKAR V. MENON
SMT.MEERA V.MENON

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD
ON 21/01/2008, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

C.N.RAMACHANDRAN NAIR & T.R.RAMACHANDRAN NAIR, JJ.

I.T.A. No. 83 of 2001

Dated, this the 21st day of January, 2008

J U D G M E N T

C.N.Ramachandran Nair

This is an appeal filed by the revenue under Section 260A of the Income Tax Act challenging the order of the Income Tax Appellate Tribunal confirming cancellation of penalty levied under Section 271 (1)(c) of the IT Act. Respondent assessee is a private limited company deriving income from chitty business. During the verification of accounts in the course of assessment for the assessment year 1990-91, the Assessing Officer noticed an outstanding credit balance of Rs.4,55,863/-, shown as liability in the balance sheet for curies that were terminated during 1977 to 1983. The Assessing Officer was of the opinion that the credit balance represents the auction discounts, which were foregone by defaulting subscribers and therefore there was no subsisting liability for payment of these amounts to the said subscribers. Therefore, the Assessing Officer found that these amounts were the income of the year, which was carried over as liability by the assessee in the balance sheet. Even though specific notice was issued asking assessee to explain the nature of liability shown in the accounts, the

assessee did not offer any explanation but just stated that the amount represents liability. Even though, the amount was offered for assessment and assessee remitted the tax, assessee reserved the right to file appeal against the assessment. The Assessment Order produced as Annexure A got confirmed by two level appellate authorities including the Tribunal. The assessee admittedly accepted the Tribunal's order confirming the assessment.

2. Since assessee did not offer any explanation about the credit shown in the balance sheet as liability, the Assessing Officer levied penalty under Section 271 (1) (c) of the IT Act. In the appeal filed by the assessee against the penalty order, the first appellate authority cancelled the penalty against which 2nd appeal filed by the Department was unsuccessful. The Tribunal's order in 2nd appeal is under challenge in this appeal filed under Section 260A of the IT Act. Even though four questions are raised for decision by us as arising from Tribunal's order, we find in substance the only question that arises from Tribunal's order is whether the Tribunal in the absence of any bonfide explanation offered or established by the assessee was justified in casting burden of proof on the revenue to prove concealment and to cancel the penalty on the ground that the Assessing Officer has not established the nature of concealed income assessed by him in respect of which penalty is levied.

3. The undisputed fact in the case is that the assessee, who has been engaged in chitty business, showed a credit balance of Rs.4,55,863/- in the balance sheet in respect of kuries terminated during 1977 to 1983. During the accounting year relevant for the assessment year 1990-91, the assessee from the same account transferred an amount of Rs.2,41,328/- to the profit & loss account and offered the same to tax. However, the balance for Rs.4,55,863/- was still retained as credit balance in the liability side of the balance sheet. In the course of assessment, the Assessing Officer requested explanation from the assessee but the assessee described that the amount was business liability but offered no details. The Assessing Officer was of the view that having regard to the nature of business, the amount of auction discounts foregone by subscribers on account of their default in payment of instalments is the income of the assessee as already found in the assessment. The additions made in the assessment is sustained in two round of appeals and assessee has accepted the same. Since explanation was not bonafide, penalty was levied. However, the appeal was decided by the Tribunal relying upon the decision of the Tribunal in the case of M/s.Trichur Kuri Syndicate Ltd, where the entries in the accounts represented excess payment actually made by subscribers. As in assessment, in penalty proceedings also,

assessee did not offer any explanation for the credit entries shown in the balance sheet. Therefore, the Assessing Officer found that there is concealed income by virtue of explanation 1 to Section 271(1)(c). Since assessee failed to give any bonafide explanation for the show cause notice, the Assessing Officer by virtue of Explanation 1 contained in Section 271(1)(c) levied penalty for concealment of income. The first appeal filed by the assessee is allowed following the order of the Tribunal in another Kury case.

4. Learned standing counsel appearing for the revenue contended that explanation (1) to Section 271(1)(c) is clearly applicable in this case because assessee admittedly did not offer any explanation except by stating that the credits in the balance sheet represent liabilities. On the appellant side the decision of the Supreme Court in **K.P.Madhusudhanan Vs. Commissioner of Income Tax**, reported in 251 ITR 99, the decisions of this Court in **Deputy Commissioner of Income Tax Vs. K.Suresh Kumar**, reported in 253 ITR 640 and in **Income Tax Officer Vs. C.D.Joseph (Late)**, reported in 266 ITR 609 are relied on. Learned counsel appearing for the assessee contended that even though assessee did not offer any explanation, the assessee offered the amount as income and as per the assessment remitted the tax, though assessment was under contest. It is not a case where the

assessee did not offer any explanation but assessee explained the credit shown in the balance sheet as liability to subscribers of Kuri though assessee could not prove the same. He further contended that the assessee has offered to pay the tax and in fact remitted the tax on assessment though the assessment was contested in appeals. According to learned counsel for respondent, no penalty can be levied if explanation offered is bonafide and the bonafides of which is evident from payment of tax without further contest after Tribunal decided the appeal.

5. We are unable to uphold the order of the Tribunal for the reason that the Tribunal has wrongly cast the burden on the department to prove the entry in assessee's accounts. Explanation 1 to Section 271 (1)(c) says that if the assessee fails to offer any explanation in respect of any factual material for the computation of its total income or if the explanation offered is found to be not bonafide, it will be presumed that the amount added or disallowed in computing the total income of the assessee as a result thereof shall be the income in respect of which assessee has concealed particulars as already stated. This is a case where the additions proposed or credit shown in the balance sheet as liability pertaining to kuries terminated during 1977 to 1983. It was for the assessee to explain how the entries represent liability for the assessee. Even

though Tribunal has already accepted this position in assessment appeal, Tribunal cancelled the penalty for the reason that the Assessing Officer failed to explain the nature of concealed income. We are of the view that the Tribunal wrongly cast the burden on the Department and against the statutory provision. Only the assessee can explain the entries in the balance sheet and in the absence of any explanation, the Assessing Officer is free to draw reasonable inference. Having regard to the nature of business, there is nothing wrong in Assessing Officer treating the income as auction discount foregone by defaulter-subscribers. In fact on this specific query raised by the Assessing Officer in the course of assessment, the assessee kept silent. Besides this, the assessee itself transferred part of the amount credited under the liability side towards income and offered tax in the year also. Therefore, there is virtual admission by the assessee that at least part of the amount shown as liability represents income. No claim by subscribers is maintainable under law as the chitties, to which credits pertain were terminated nearly 6 to 16 years prior to the relevant accounting period. Therefore, we do not find any bonafides in assessee retaining the amount in the liability side of the balance sheet. The assessee was very much aware that the credit shown in the balance sheet does not represent liability that assessee itself was

conveniently transferring amounts to profit and loss account. Therefore, we find that explanation offered by assessee is not only not proved but was made without any bonafides. We are, therefore, of the view that the Tribunal's order casting burden wrongly on Department is against the statutory provisions. We, therefore, decide the question above stated in favour of the revenue and against the assessee and consequently allow the appeal by canceling the order of the Tribunal and restoring the penalty order. There is no scope for interference with the quantum of penalty levied because the penalty levied is minimum amount payable under the Act.

(C.N.RAMACHANDRAN NAIR, JUDGE)

(T.R.RAMACHANDRAN NAIR, JUDGE)