

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN
&
THE HONOURABLE MR. JUSTICE ASHOK MENON

FRIDAY, THE 12TH DAY OF JANUARY 2018 / 22ND POUSHA, 1939

ITA.No. 78 of 2008

AGAINST THE ORDER/JUDGMENT IN ITA 140/COCH/1999 of I.T.A.TRIBUNAL,COCHIN BENCH
DATED 06-11-2003

APPELLANT(S)/APPELLANT

THE COMMISSIONER OF INCOME TAX,
THIRUVANANTHAPURAM.

BY ADVS.SRI.P.K.R.MENON, SR.COUNSEL, GOI (TAXES)

RESPONDENT(S)/RESPONDENT:

SMT. VASANTHA ANIRUDHAN,
L/R OF LATE G. ANIRUDHAN, VASANTHAM, KOWDIAR,
THIRUVANANTHAPURAM.

BY ADV. SRI.E.K.NANDAKUMAR (SR.)
SRI.P.GOPINATH

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 12-01-2018,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

APPELLANT'S ANNEXURES

ANNEXURE-A : COPY OF ORDER OF THE ASSESSING OFFICER DATED 17.5.1995.

ANNEXURE-B : COPY OF ORDER OF THE COMMISSIONER OF INCOME TAX (APPEALS) DATED 29.12.1995.

ANNEXURE-C : COPY OF ORDER OF THE SETTLEMENT COMMISSION.

ANNEXURE-D : COPY OF ORDER OF THE INCOME TAX APPELLATE TRIBUNAL DATED 24.7.1997.

ANNEXURE-E : COPY OF ORDER OF THE INCOME TAX APPELLATE TRIBUNAL DATED 23.12.1997 DISMISSING REFERENCE APPLICATION BY THE ASSESSEE.

ANNEXURE-F : COPY OF PENALTY ORDER UNDER SECTION 271(1)(c) DATED 6.2.1998.

ANNEXURE-G : COPY OF ORDER OF THE COMMISSIONER OF INCOME TAX (APPEALS) DATED 28.1.1999.

ANNEXURE-H : COPY OF ORDER OF THE INCOME TAX APPELLATE TRIBUNAL DATED 6.11.2003.

ANNEXURE-I : COPY OF ASSESSEE'S LETTER DATED 20.10.1997.

//TRUE COPY//

PS TO JUDGE.

K.VINOD CHANDRAN & ASHOK MENON, JJ.

ITA No.78 of 2008

Dated this the 12th day of January, 2018

J U D G M E N T

Vinod Chandran, J.

The Revenue is in appeal raising questions of law from the order of the Income Tax Appellate Tribunal produced as Annexure-H. The questions of law framed at the time of admission as raised in the memorandum of appeal, are as follows:-

- “1. Whether, on the facts and in the circumstances of the case and also in the light of the decision of the Kerala High Court in K.P.Madhusudhanan v. CIT and affirmed by the Supreme Court (251 ITR 99) the Tribunal is right in law in holding that “as no notice was issued by the Assessing Officer intimating his intention to invoke the explanation to Section 271(1)(1)(c) the appellant had no opportunity of meeting the case under the explanation. Hence, levy of penalty under the explanation, therefore, is not sustainable”?
2. Whether, on the facts and in the circumstances of the case and in the light of sub clause (B) to Explanation 1 and in the absence of a positive finding by the Tribunal that the explanation is bonafide, the Tribunal is right in law and fact and with jurisdiction in canceling the penalty?
3. Whether, on the facts and in the circumstances of the case, the assessee discharged the burden that lay on

him?

4. Whether, on the facts and in the circumstances of the case and also in the light of the finding of the CIT (A) at para 11 that “the gist of that explanation contains an element of bonafides about which there is no allegation in the order” is not the order of the CIT (A) and the order of the Tribunal which had only confirmed the order of CIT (A) wrongly placed the burden on the Revenue wrong and vitiated?

(5) Whether, on the facts and in the circumstances of the case and in the light of Explanation 1(B) to Section 271(1)(c), the order of the Tribunal canceling the penalty justified and vitiated, and wrong?”

2. The present respondent is the wife and legal heir of the assessee. The assessee, now deceased was an individual, who filed return of income for the assessment year 1990–91 on 4.4.1991 declaring an income of Rs.97,430/- comprising of share income from M/s.Anirudhan Associates and profit from the proprietary concern, M/s.Car Care Centre. Original assessment was completed. Appeal was taken in which there was a remand made and eventually an addition of Rs.20,65,000/-was made towards unexplained investment in a shopping-cum-office complex constructed at Peroorkkada, Thiruvananthapuram.

3. Unexplained investment was deduced as follows. The

assessee had taken a loan from Life Insurance Corporation of India. The loan was sanctioned on the premise that the assessee had already invested Rs.22,00,000/- in the construction. A certificate to that effect was also produced before the LIC. In the earlier assessment year, the assessee had made an investment of Rs.90,000/- which was deducted from the admitted investment. A withdrawal of Rs.45,000/- from M/s.Anirudhan Associates was also adjusted. The Assessing Officer thus computed the total unexplained income at Rs.20,65,000/-. In the second appeal, the ITAT allowed a further reduction of Rs.3,25,000/-. The unexplained income, hence, was worked out at Rs.17,40,000/-, on which component penalty was imposed at 100% of the tax sought to be evaded. It comes to Rs.9,28,964/-.

4. The first Appellate Authority allowed the appeal setting aside the penalty on two grounds. The first ground was that there was no specific mention of the proceedings taken under Explanation 1(B) to Section 271(1) of the Income Tax Act, 1961 ('Act' for short) which is an imperative mandate, as held by the High Court of

Bombay in the decision in *Commissioner of Income Tax v. P.M.Shah*, [(1993) 203 ITR 792]. The other ground was that the Tribunal, in the original assessment, had accepted the contention of the assessee that there were some diversion of materials, which the assessee had retained, out of the Government contracts which had been abandoned. Though the Tribunal did not grant the entire relief, it was held by the Commissioner that there could be no allegation of concealment of income sustained, with respect to the unexplained income, as there was a possibility of the diversion having taken care of the entire investments. The Tribunal, without an independent consideration, found that the reasoning of the Commissioner (Appeals) is proper and sustainable.

5. We have heard the learned Senior Counsel for the Department and the learned Counsel appearing for the respondent, who represents the assessee's estate.

6. The learned Senior Counsel has relied on the decision of the Hon'ble Supreme Court of India in *M/s.K.P.Madhusudhanan v. Commissioner of Income Tax, Cochin* [(2001) 251 ITR 99 (SC)]

which overruled the decision in *P.M.Shah* (supra). The Court held that when a notice is issued under Section 271, the Explanation also being included under the provision, the assessee is sufficiently put to notice of the entire provision as available under Section 271(1). In such circumstances, we cannot sustain the order in appeal, as confirmed by the Tribunal, on that ground.

7. The further ground taken by the CIT (Appeals) is that though there may be a justification for making an addition in the computation of income, it does not necessarily follow that the said amount is concealed income or that the explanations offered are not *bona fide*. We have to notice that if the explanations offered were *bona fide*, the Tribunal would have allowed the same in the appeal from the assessment itself. The Tribunal, obviously had considered the claim raised by the assessee as to diversion of materials as retained with the assessee from the abandoned Government contracts, and refused to allow the entire claim. The Tribunal relied on a certificate issued for making a deletion from the unexplained investment as assessed by the Assessing Officer, and allowed to

that extent the explanation offered and deleted it from the unexplained income. The CIT (Appeals), according to us, has virtually sat in appeal over the orders of the Tribunal in the assessment proceedings. There could, hence, be no ground of *bona fides* to set aside the penalty when the Tribunal considering the assessment proceedings has refused to allow the claim to make deletion in the computation of income as made by the Assessing Officer.

8. We are also not impressed with the finding of the Commissioner that though there would be justification for making an addition in computation of income, it does not necessarily follow that the said income is concealed income. This is a wrong understanding of the explanation. The Explanation 1(B) to Section 271(1) of the Act is extracted hereunder:—

“Explanation 1: Where in respect of any facts material to the computation of the total income of any person under this Act,—

xxx xxx xxx

(B) Such person offers an explanation which is not available 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.”

9. Admittedly, there was an unexplained income as discernible from the records maintained by the assessee. The assessee had a duty to explain and substantiate the source of such income. The assessee has an explanation of diversion of materials as retained from an abandoned Government contract, which was not fully accepted by the Tribunal. When the explanation has not been accepted by the Tribunal in the assessment proceedings, there is no reason why in the penalty proceedings the same should be considered as a *bona fide* explanation, especially when there is nothing more available with the Appellate Authority considering the penalty proceedings, to substantiate such diversion. Admittedly, there was no such substantiating material produced by the assessee and available with the Tribunal at the earlier stage when the assessment proceedings were considered. In such circumstances, we are of the opinion that the addition made of computation of income as available definitely comes under Explanation 1(B) of Section 271(1) of the Act. As we noticed earlier, the Tribunal had

merely adopted the reasoning of the Appellate Authority and we, hence, answer the questions of law in favour of the Revenue and against the assessee.

10. At this stage, the learned counsel for the respondent had two arguments; insofar as the Tribunal having not considered the issue independently and hence there should be a remand made. It was also submitted that the litigation Policy of the Central Government mandated that no appeal is filed if the tax effect is less than Rs.20,00,000/-.

11. As to the Tribunal having not independently considered, it is to be noticed that the Tribunal found that the CIT (Appeals) has dealt with the matter elaborately and they were in full agreement with the reasoning of the CIT (Appeals). Hence, the order of the CIT (Appeals) merges with the order of the Tribunal and the reasoning of the Tribunal is that available in the CIT (Appeal)'s order. We are not convinced that there is any cause for remand for an independent consideration.

12. As to the litigation policy, admittedly, it is of the year 2015 and there is retrospective effect given. The learned Senior Counsel for the Revenue pointed out the decisions in *Commissioner of Income Tax Central-III v. Surya Herbal Limited [(2013) 350 ITR 300 (SC)]* and that in *Commissioner of Income Tax v. Alapatt Jewellery [(2016) 386 ITR 338 (Kerl)]*. The Hon'ble Supreme Court has specifically found that the circular can be departed from in cases where there is a cascading effect and it is for the Department to urge before Court that a decision on the principle would be expedient. The Division Bench of the High Court in the decision in *Alapatt Jewellery*, reiterates the principle following the Supreme Court. It is also submitted by the learned Senior Counsel for the Revenue, that based on the circular, in Kerala Circle, two Commissioners went through the entire appeal files and withdrew 51 cases, based on the circular. The instant appeal pending from 2008 was not specifically withdrawn, since the Department was of the opinion that a decision on principle was expedient. We do not

see any reason to non-suit the Revenue on the litigation Policy as seen from the circular.

13. The questions framed having been answered in favour of the Revenue, the orders of the Tribunal and the C.I.T. (Appeals) are set aside and the original order restored. It is made clear that the present respondent being a legal heir of the assessee, recovery would be made only to the extent of the estate of the assessee capable of meeting the liability as provided in Section 159(6) of the Act.

This Income Tax Appeal is allowed. No costs.

**K.VINOD CHANDRAN
JUDGE**

**ASHOK MENON
JUDGE**

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